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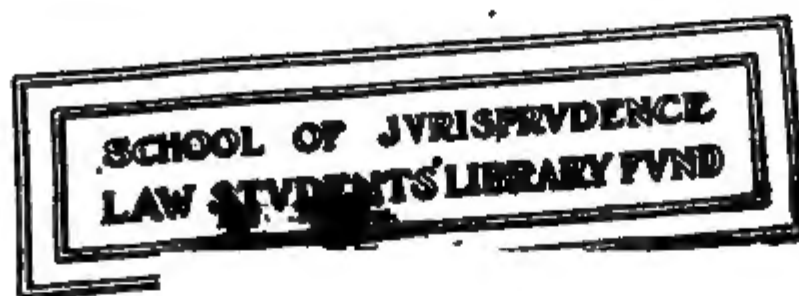
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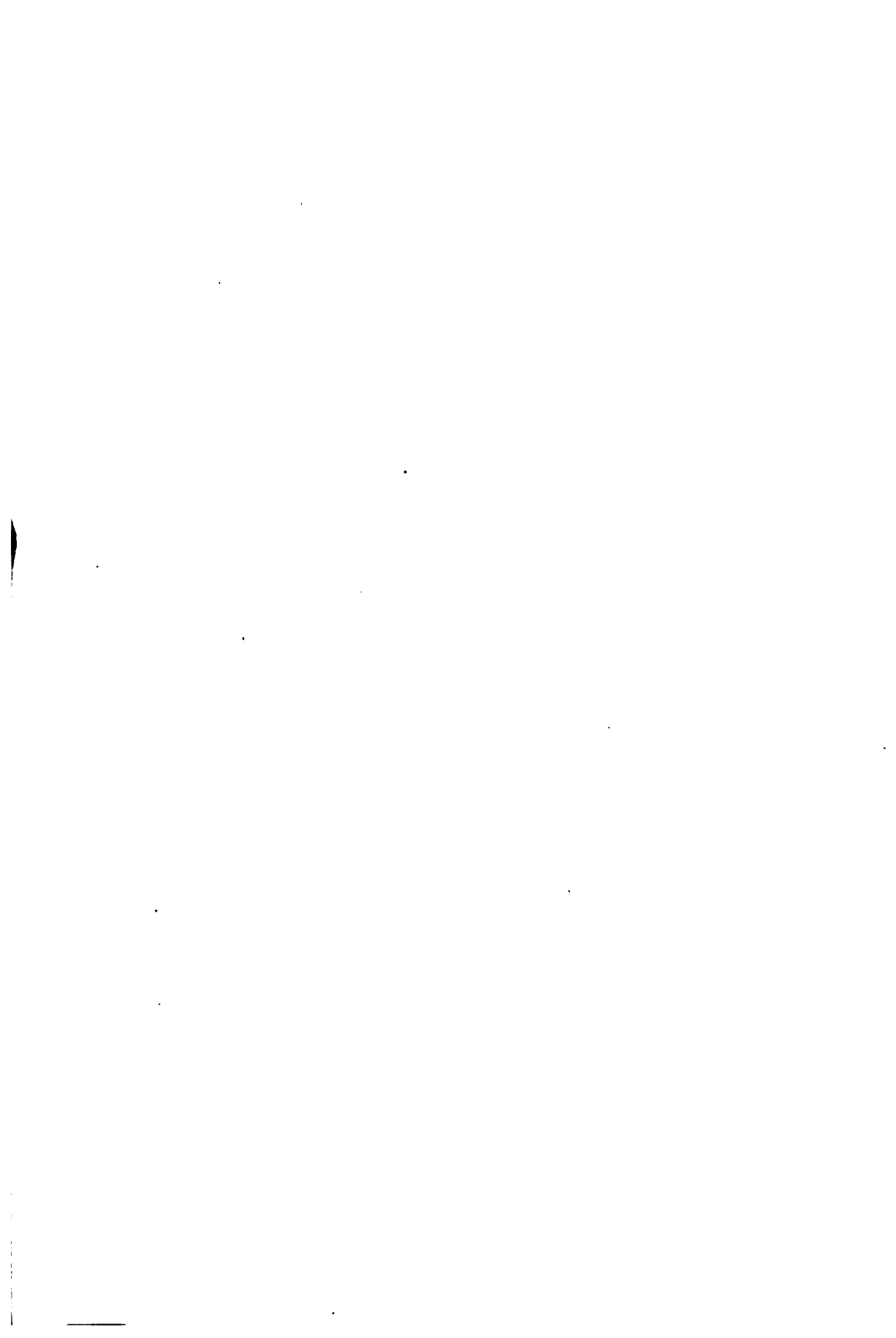
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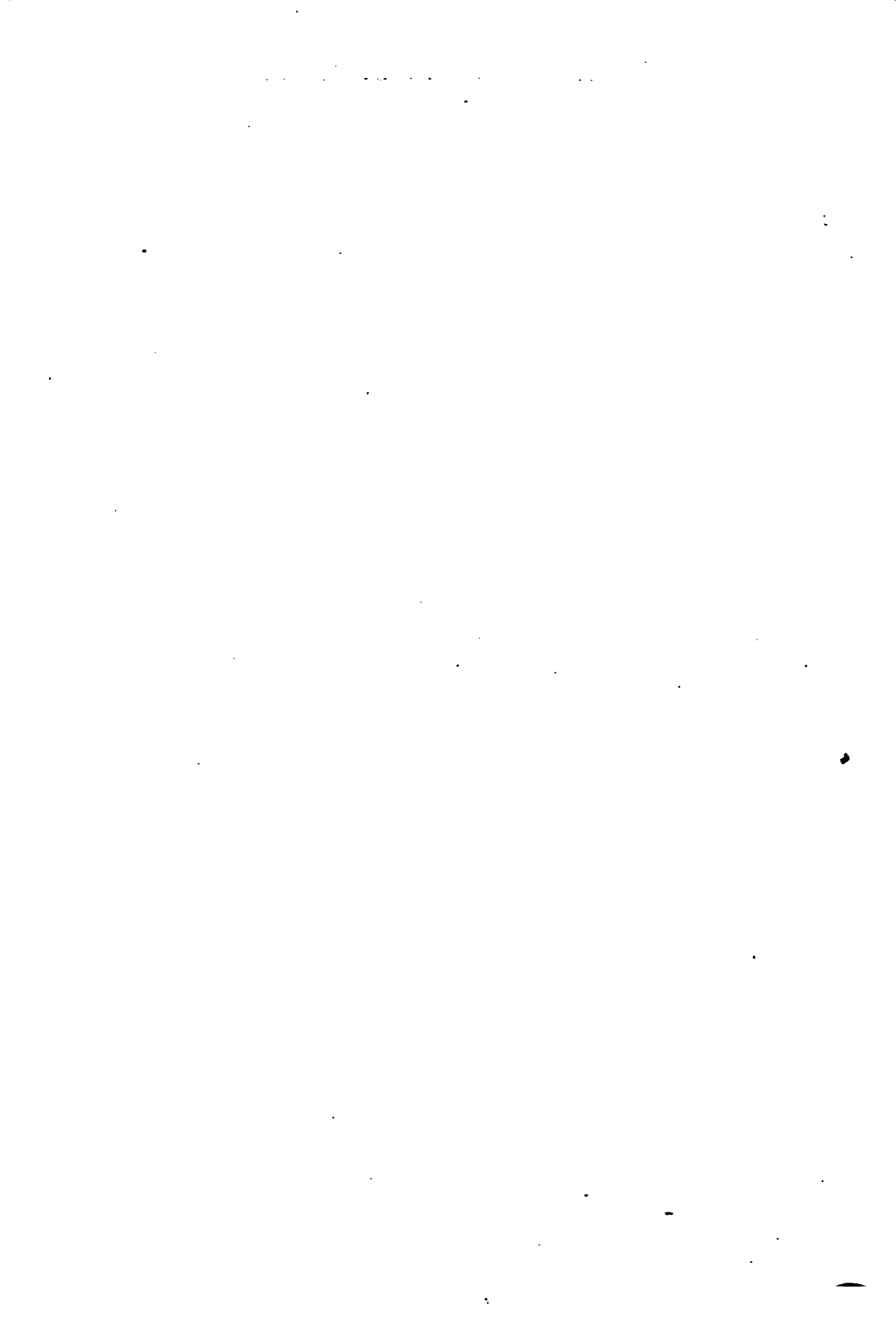












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# AMERICAN LAW REPORTS

## ANNOTATED

VOL. 7

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S. C. ALDRED, Plff. in Err.,  
v.  
CLAUD RAY.

*Oklahoma Supreme Court — September 14, 1915.*

(54 Okla. 154, 153 Pac. 664.)

### **Pleading — verification by agent — reasons.**

1. The verification of a pleading, when made by an attorney or agent of the party, must, under the provisions of § 5654 of Snyder's Compiled Laws, set forth why it is not made by the party himself; that is, some showing must be made that the facts are within the personal knowledge of the agent or attorney, or that, if the party is a plaintiff, he is an infant, or of unsound mind, or imprisoned, or that the pleading to be verified is founded upon a written instrument for the payment of money only, and that such instrument is in the possession of the agent or attorney, or that the party is not a resident of or is absent from the state.

[See note on this question beginning on page 4.]

### **Evidence — adverse statements.**

2. Any statement made by a party to an action which is against his own interest, and which, in its nature, tends to establish or disprove any material fact, or alleged material fact, in the case, is competent to be put in evidence against him in the trial of that action.

[See 1 R. C. L. 468.]

### **Appeal — misstatement of fact by witness.**

3. An assignment of error that the judgment of a court is not sustained by the evidence cannot properly be predicated on a manifestly inadvertent misstatement of fact by a witness, if, from the whole of the witness's testimony, the error is patent, and the true meaning of the witness's statement can be correctly determined, and the testimony, correctly interpreted, will sustain the judgment.

---

Headnotes by WILSON, C.

7 A.L.R.—1.

**ERROR** to the Woodward County Court (Wyand, J.) to review a judgment in favor of plaintiff, and overruling a motion for new trial, in an action of forcible entry and detainer. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. Charles Swindall for plaintiff in error.

Mr. C. W. Herod for defendant in error.

Wilson, C., filed the following opinion:

This action was commenced in a justice of the peace court in Woodward county by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, by filing with the justice of the peace a complaint which was verified as follows, omitting the jurat:

State of Oklahoma, }  
Woodward County } ss.:

E. M. McCune, being first duly sworn, on oath says that he is the agent of said plaintiff, that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true.

E. M. McCune.

Upon the complaint being filed summons was issued and served, whereupon the defendant, in due course of time, appeared specially, and moved the court to quash and hold for naught the pretended summons, for the reasons, among others: First, "that at the time said alleged and pretended summons was issued in said cause the same was void, for the reason that no complaint or bill of particulars had been filed under oath as required by law;" and, second, "that no sufficient showing was made by the plaintiff for having said complaint verified by agent instead of personally by plaintiff, as required by law."

This motion was overruled, and an exception saved, and a demurrer to the complaint filed for the same reasons, among others, which demurrer was overruled and an exception to the ruling of the court saved by the defendant, whereupon an answer was filed and a trial had in due course of time, which resulted in a judgment for the defendant, and the case was appealed to the county

court, where the motion and demurrer were refiled by leave of court, in their proper order, and overruled and exceptions saved. Upon defendant's motion to quash and demurrer being overruled by the court he refiled his answer, and in due course of time a trial was had, over his objection to the introduction of evidence, and, a judgment being rendered against him and his motion for a new trial being overruled, he appealed to this court by filing herein a petition in error, with a case made attached.

Plaintiff in error, in his brief, submits his case on two propositions: First, that the court erred in not sustaining his motion to quash the summons in the case because the complaint was not properly verified, alleging that there was no reason shown in the affidavit why the complaint was not verified by the plaintiff instead of his agent; and, second, he challenges the competency and sufficiency of the evidence submitted on behalf of the plaintiff.

The first contention of the plaintiff in error raises the question whether the verification of the complaint conformed to the statute governing the verification of pleadings by attorneys and agents, a question which seems to have been fully settled in this jurisdiction adversely to plaintiff in error's contention. Section 6433 of the Forcible Entry and Detainer Statute (Snyder's), under which this action was commenced in the justice court, provides that "the summons shall not issue herein until the plaintiff shall have filed his complaint in writing under oath, with the justice. . . ."

Section 5654, Snyder's Compiled Laws, provides that "where the affidavit [verifying a pleading] is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: (1) When the facts are

within the personal knowledge of the agent or attorney. (2) When the plaintiff is an infant, or of unsound mind, or imprisoned. (3) When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. (4) When the party is not a resident of, or is absent from the county."

**Pleading—  
verification by  
agent—reasons.**

The section last quoted was one of the provisions of the Code of Civil Procedure at the time of the commencement of this section, but § 6455 of Snyder's Compiled Laws, in force at the time, provides: "The provisions of an act entitled 'An Act to Establish a Code of Civil Procedure,' which are, in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace."

Keeping in mind the above-quoted provisions of the statute, the question for determination is: Was the pleading in question properly verified? We think it was. Section 5654 of Snyder's Compiled Laws was adopted by our state from the Kansas statute, and the court of appeals of that state, passing on a question similar to the one involved here, in the case of Johnson v. Woodbury Trust Co. 8 Kan. App. 860, 57 Pac. 134, held that an affidavit very similar to the one in this case sufficiently complied with the statute. In that case the affidavit read as follows: "John W. Roberts, of lawful age, being first duly sworn, deposes and says that he is one of the attorneys and agent for the defendant herein; that he is familiar with all the facts set out in the above and foregoing answer, and knows the contents thereof; . . . and all the facts and allegations and matters in said answer contained and alleged are true and correct, as I verily believe."

See also Gibson v. Shorb, 7 Kan. App. 732, 52 Pac. 579.

In the case of Garfield County v. Isenberg, 10 Okla. 378, 61 Pac. 1067, the supreme court of the then territory of Oklahoma, in an opinion by Mr. Justice Irwin, after quoting § 3992 of the Statutes of 1893, that being the same as § 5654 of Snyder's Compiled Laws, said: "Now it seems to us that a fair construction of this section would mean that some reason must be given by said affidavit why it was not signed by the party or the proper officer; that is, some showing should be made that this affidavit falls within one or the other of the four classes set forth in the section, because, unless it does, the agent or attorney has no authority to verify such an affidavit."

Again, in the case of the Chicago, R. I. & P. R. Co. v. Mitchell, 19 Okla. 579, 101 Pac. 850, the supreme court of the territory expressed the same opinion by quoting its formerly expressed language in the Isenberg Case.

The language used by both the Kansas and Oklahoma courts in construing the section of the statute here under consideration clearly contemplates that, where an affidavit of an attorney or agent, verifying a pleading of his principal, sets forth facts which show that his authority to do so is warranted by either of the four classes set forth in said section, a sufficient reason is thereby set forth why the party himself did not verify the pleading.

The verifying affidavit in this case recited that E. M. McCune was the agent of the plaintiff, that he had read the petition and knew the contents thereof, and that the facts herein stated were true. This, we believe, brought the allegations of the affidavit sufficiently within the first class of cases in which an agent is authorized to verify a pleading for his principal by § 5654 of Snyder's Compiled Laws to justify the verification being made by such agent, and such verification was, on authority of the cases above cited, a suffi-



cient verification of the complaint in question.

On the trial of the case the only proof of the service of the three days' notice required by the Forcible Entry and Detainer Statute was the testimony of one Werline, to the effect that he was present at the trial of the case before the justice of the peace and heard the defendant testify that on the 3d day of January, 1911, he was served with a notice to vacate the premises. The plaintiff in error contends that this evidence was not competent, but in that contention he is mistaken, because any statement made by a party to an action which is against his own interest in the case is always competent to be put in evidence against him in that action.

Evidence—  
adverse state-  
ments.

Plaintiff in error also contends that such evidence was insufficient to establish the fact of notice, for the reason that it fixed the date of service more than a year before the commencement of the action, but the testimony of the witness about that matter, taken as a whole, was such that it is apparent that "1911" was inadvertently spoken, and that what he intended to say was "1912," and it can be determined from his entire testimony that he meant 1912.

Appeal—mis-  
statement of  
fact by witness.

Finding no substantial error in the case, we recommend that the judgment of the trial court be affirmed.

Petition for rehearing denied, December 21, 1915.

## ANNOTATION.

### Sufficiency of verification of pleading by person other than party to action.

#### I. Scope of note, 4.

#### II. Person entitled to verify:

##### a. Agent or attorney:

1. In general, 5.
2. Action on instrument for payment of money only, 11.
3. Action for injunction, 12.
4. Action to enforce mechanic's lien, 13.
5. Plea of non est factum, 13.
6. Affidavit for attachment, 14.
7. Plea in abatement, 14.

##### b. Public officer, 16.

##### c. Officer of corporation:

1. Domestic corporation:
  - (a) In general, 17.
  - (b) Verification held authorized, 20.
  - (c) Verification held not authorized, 25.
2. Foreign corporation, 28.

##### d. Coparty:

1. In general, 30.
2. Joint interest, 38.
3. Several interest, 37.

#### I. Scope of note.

This note discusses the sufficiency of the verification of a pleading by any person other than the party, including, therefore, the right of a cor-

#### II. d—continued.

##### 4. Husband and wife:

- (a) Several interest, 38.
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#### III. Formal sufficiency of verification:

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1. Generally, 41.
2. In action for injunction, 49.

##### b. Facts within knowledge of affiant:

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porate officer to verify for the corporation, and the right of a public officer to verify for a public body. In considering the sufficiency of a verification, both the right of an agent or

other representative to verify, and the manner in which the facts giving him that right are to be stated, are included. Matters relating to the form and sufficiency of a verification which are not peculiar to verification by a representative are, of course, excluded.

## *II. Person entitled to verify.*

### *a. Agent or attorney.*

#### *1. In general.*

The right of an agent or attorney to verify pleadings is generally given by statute, and exists to the extent and under the conditions which the statutes of each jurisdiction prescribe.

**United States.**—Marion Phosphate Co. v. Cummer (1894) 9 C. C. A. 279, 13 U. S. App. 604, 60 Fed. 873; Re Glass, 119 Fed. 509.

**Alabama.**—Guyton v. Terrell (1901) 132 Ala. 66, 31 So. 83.

**Georgia.**—Sirmans v. Folsom & T. Hardware Co. (1916) 18 Ga. App. 586, 89 S. E. 1103; Poullain v. Pigg (1878) 60 Ga. 263; Fort v. West (1875) 53 Ga. 584; Coffee v. McCaskey Register Co. (1909) 7 Ga. App. 425, 66 S. E. 1032; Plant v. Mutual L. Ins. Co. (1893) 92 Ga. 636, 19 S. E. 719; Misenheimer v. Gainey (1912) 11 Ga. App. 509, 75 S. E. 844.

**Iowa.**—Wright v. Parks (1860) 10 Iowa, 342; Kerr v. Hedge. (1861) 12 Iowa, 426.

**Kansas.**—Mercer v. Ringer (1888) 40 Kan. 189, 19 Pac. 670. See also Kauter v. Fritz (1897) 5 Kan. App. 756.

**Michigan.**—Bergh v. Poupard (1842) Walk. Ch. 5.

**Mississippi.**—Matthews v. Sontheimer (1860) 39 Miss. 174.

**Missouri.**—Knapp, S. & Co. v. Standley (1891) 45 Mo. App. 264; Taylor v. White (1901) 86 Mo. App. 526; O'Brien v. Yare (1901) 88 Mo. App. 489.

**Nevada.**—Heintzelman v. L'Amoroux (1867) 3 Nev. 377.

**New Jersey.**—Lyons v. Allen (1908) 76 N. J. L. 391, 69 Atl. 642.

**New York.**—Imlay v. New York & H. R. Co. (1848) 1 N. Y. Code Rep. 94, 1 Sandf. 782; Treadwell v. Fassett

(1854) 10 How. Pr. 184; Smith v. Rosenthal (1858) 11 How. Pr. 442; Betts v. Kridell (1887) 20 Abb. N. C. 1.

**Ohio.**—Jirava v. Brieska (1878) 4 Ohio Dec. Reprint, 296.

**Oklahoma.**—ALFRED v. RAY (reported herewith) ante, 1.

**Pennsylvania.**—Reid v. Christy (1856) 2 Phila. 144; Kinografen v. Henius (1914) 23 Pa. Dist. R. 980.

**South Carolina.**—Hecht v. Friesleben (1887) 28 S. C. 181, 5 S. E. 475; Armstrong, C. & Co. v. Friesleben (1888) 28 S. C. 605, 5 S. E. 479.

**Tennessee.**—Klepper v. Powell (1871) 6 Heisk. 503. See also Carter v. Vaulx (1853) 2 Swan, 639.

**Texas.**—Dyer v. Winston (1903) 33 Tex. Civ. App. 412, 77 S. W. 227.

**Virginia.**—See Merriman Co. v. Thomas (1904) 103 Va. 24, 48 S. E. 490.

**Washington.**—Cady v. Case (1895) 11 Wash. 124, 39 Pac. 375.

Thus, in *Klepper v. Powell* (Tenn.) supra, it was held that a plea in abatement may be verified by the party or by his agent or attorney, and that when the plea is verified by an agent, the fact of agency need not be stated in the affidavit, the court saying: "While pleas may be sworn to by the party himself, his agent or attorney, we do not know of any rule requiring the fact of agency to be stated in the affidavit. We see the fact that the party has done that for another that an agent might well do, and as he has assumed to act as agent in the stead of that other, we can see no good reason why the complainant shall object, while the party for whom the act was done does not repudiate, but, on the contrary, adopts it. The essential requirement of the law is that the truth of the plea shall be verified by someone who is willing to swear that it is true."

In *Heintzelman v. L'Amoroux* (1867) 3 Nev. 377, it was stated that, by direct provision of statute (Practice Act, § 55), a pleading may be verified by an attorney where the party is absent from the county in which the attorney resides, or is, from some cause, unable to verify it, or where

the facts are within the knowledge of the attorney.

So in *Imlay v. New York & H. R. Co.* (1848) 1 N. Y. Code Rep. 94, 1 Sandf. 732, the objection was that the complaint was verified by the attorney, without any reason or excuse being shown why it was not done by the party. The Code allowed it to be verified by the party, or his agent or attorney, and made no distinction between the three. It was held that the verification was not irregular.

In *Betts v. Kridell* (1887) 20 Abb. N. C. (N. Y.) 1, the verification of the answer objected to was that the deponent, an agent of the defendant, "says that he is the agent of the defendant in this action; that the foregoing answer is true to the knowledge of the deponent, and that the reason that this verification is not made by the party is that all the material allegations of said answer are within the personal knowledge of this deponent." The provisions of the statute (Code Civ. Proc. § 525) were that "the verification must be made by the affidavit of the party," except, among other cases, "where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent or the attorney for the party." The following section (526) provided that, where the affidavit "is made by a person other than the party, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party." It was held that the verification was correct, since the agent swore that all the material allegations of the answer were within his personal knowledge, and this is sufficient, without assigning any reason why the verification was not made by the party.

In *Wright v. Parks* (1860) 10 Iowa, 342, it was held that under the statute (Code, § 2177) a petition in scire facias may be verified by the affidavit of the attorney for the plaintiff, the court saying: "It is objected that the petition is not sworn to by the plaintiff, or someone who shows himself

authorized to state on oath that the judgment was not satisfied. The judgment is for the possession of the land. It is averred in the petition that the defendant was in possession of the same, and this is not denied, but is admitted by the demurrer. The party making the affidavit could have had ample means of knowing the judgment was not satisfied. But it is admitted that the party making the affidavit was an attorney for plaintiff. Section 2177 of the Code also provides that this affidavit may be made by an agent or an attorney as well as by the plaintiff."

In an action on a contract wherein the defendant has filed his plea, his agent or attorney may make the necessary affidavit to a proposed amendment of the plea at the trial term, if the defendant then resides out of the county. *Poullain v. Pigg* (1878) 60 Ga. 263, wherein it was said: "It appears from the bill of exceptions in this case that the defendant filed a plea to the plaintiff's action, which was demurred to as being insufficient in law as a defense thereto, and, before the judgment of the court was rendered thereon, the defendant offered to amend said plea by inserting therein what the court seemed to think was lacking, and proposed to show that the defendant then resided out of the county, and was sick, when the court held that no person but the defendant himself could make the necessary affidavit to the amended plea, and struck the original plea, and entered judgment for the plaintiff. Whereupon the defendant excepted. The question made in this case is whether, when a defendant who has filed his plea in a civil case founded on contract under the provisions of § 3449 of the Code, and afterwards resides out of the county, his agent or attorney at law can make the necessary affidavit to an amended plea. In our judgment he may do so—the amended plea is as much within the reason and spirit of the statute as the original plea, especially when the original plea is so defective as to authorize the court to strike it."

In the reported case (*ALDRED v. RAY*,

ante, 1) the complaint was verified by an agent of the plaintiff by a signed affidavit reading in part: "[Affiant], being first duly sworn, on oath says that he is the agent of said plaintiff, that he has read the foregoing petition, and knows the contents thereof, and that the facts therein stated are true." Section 5654, Snyder's Compiled Laws, provides as follows: "Where the affidavit [verifying a pleading] is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: (1) When the facts are within the personal knowledge of the agent or attorney. (2) When the plaintiff is an infant, or of unsound mind, or imprisoned. (3) When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. (4) When the party is not a resident of, or is absent from the county." The section last quoted was one of the provisions of the Code of Civil Procedure at the time of the commencement of the action, but another act (Snyder's Comp. Laws, § 6455) in force at that time, provided as follows: "The provisions of an act entitled 'An Act to Establish a Code of Civil Procedure,' which are, in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace." It was held that the pleading was properly verified, since where the affidavit of an agent or attorney, verifying a pleading of his principal, sets forth facts which show that his authority to do so is warranted by either of the four classes specified in the statute, a sufficient reason is thereby set forth why the party himself did not verify the pleading.

In *Dyer v. Winston* (1903) 33 Tex. Civ. App. 412, 77 S. W. 227, an action for commissions alleged to be due for the sale of land, it was held that under a statute (Rev. Stat. art. 5) the

affidavit of the defendant's answer might be made by an attorney.

In *Bergh v. Poupard* (1842) Walk. Ch. (Mich.) 5, a motion for the appointment of a receiver on a creditor's bill, the motion was opposed on the ground that the jurat did not state the person verifying the bill to be the agent or attorney of the complainants. The 110th rule of the court required bills of this description to be verified by the oath of the complainant, or, in case of his absence from the state, or other sufficient cause shown, by the oath of his agent or attorney. It was held that the verification was sufficient, since the bill was verified by the oath of the complainant's solicitor (as opposed to agent), the court saying: "Where the bill is verified by the complainant's agent, who is not also the solicitor of the complainant, the jurat should state the person verifying to be the agent of the complainant; but where, as in the present case, it is verified by the oath of the complainant's solicitor, the court will take notice of that fact from the record and proceedings in the cause."

In *Knapp, S. & Co. v. Standley* (1891) 45 Mo. App. 264, an attachment suit, it was held that verification of an interplea by the attorneys for the interpleaders was sufficient.

In *Treadwell v. Fassett* (1854) 10 How. Pr. (N. Y.) 184, it was held that, while the rule adopted by the Code with respect to the verification of pleadings is that it shall be made by the party, it may be made by an agent or attorney where all the material allegations of the pleading are within the personal knowledge of the agent or attorney, or where the party is incapable of making the affidavit.

And in *Kinografen v. Henius* (1914) 23 Pa. Dist. R. 980, it appeared that under a rule of court the verification of a statement of claim could be made by an agent of the party in a proper case, and especially where the affiant was the agent of a foreign client.

In *Reid v. Christy* (1856) 2 Phila. (Pa.) 144, on certiorari to remove a proceeding before two aldermen to obtain possession of demised premises,

oath to be taken by an attorney for reasons appearing in the order and on the face of the oath itself. *Re Glass* (1902) 119 Fed. 509.

But where the statute requires the affidavit of verification to be made by the party, it cannot be made by an agent or attorney. *Walker v. Byers* (1853) 14 Ark. 247; *Wilson v. Menagh* (1916) 201 Ill. App. 437; *Warman v. First Nat. Bank* (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 60; *DeAtley v. Senior* (1880) 55 Md. 483.

Thus in *Wilson v. Menagh* (1916) 201 Ill. App. 437, an action on a promissory note signed by the defendant, it was held that the affidavit of merits which puts in issue the indorsement of a note must be signed by a party to the action, as provided by statute (Practice Act, § 52) and that the signature of the defendant's agent was not sufficient.

And in *Walker v. Byers* (Ark.) *supra*, although the pleading in question was not verified either by the party or attorney, the court stated that every claim or demand against a decedent's estate, in whatever manner asserted, must be authenticated by the affidavit of the claimant as provided by the statute, because in no other way can a claim be exhibited in accordance with the statute to prevent its being forever barred, from which it would appear that an agent or attorney of the party could not verify such claim.

In *Warman v. First Nat. Bank* (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6, suit brought by the indorsee bank against the makers of two promissory notes, indorsed by the payee and discounted with the indorsee, a plea of the general issue was verified by an agent of the defendants by a signed affidavit stating that the affiant, "being first duly sworn, on oath says that he is agent of the above-named defendants in this behalf; that said defendants have a just and meritorious defense to the whole of plaintiff's demand; that he has read the foregoing plea and knows the contents thereof, and verily believes the same to be true." The statute (Practice Act, § 34) required that the affidavit necessary to put a party upon proof

of the execution of an instrument sued on, if to a plea, be the affidavit of the defendant. Under the proviso of the statute the party making such affidavit must still be a party to the suit. It was held that the agent's verification was insufficient, because the defendants alone could, within the meaning of the statute, make an affidavit that they did not so execute them, and that the proviso did not support the contention that under it the affidavit was sufficient.

In *DeAtley v. Senior* (1880) 55 Md. 483, an affidavit filed with the declaration, and made by a person stated to be the plaintiff's bookkeeper, was held to be insufficient and not in compliance with the act (Act 1864) which provides a special proceeding by which a plaintiff, by taking certain prescribed steps, is allowed to get a judgment against his debtor sooner than by the usual mode. The 7th section of that act provides: "In any action brought for any of the causes mentioned in the last preceding section, the plaintiff, if he make affidavit or affirmation as hereinafter stated, shall be entitled to judgment on the first day of the term of the court in which said action is pending, or at the return day next succeeding the appearance of the defendant, whichever shall first happen or occur, although the defendant may have pleaded; unless such plea contains a good defense, and unless the defendant or someone in his behalf shall make oath or affirmation that said plea is true, and that he verily believes that he will be able at the trial of the cause to produce evidence in support of said plea." By the 8th section of the act, this affidavit of the plaintiff must be made at the time of bringing the suit; and the contention of the appellant's counsel is that, by the express language of these 7th and 8th sections, this affidavit is to be made by the plaintiff, and can be made by no one else. It was so held.

See also *Squires v. Chillicothe* (1886) 89 Mo. 226, 1 S. W. 23, wherein it was held that an application for change of venue must be verified by the plaintiff, and that a verification

by the plaintiff's father was insufficient.

*2. Action on instrument for payment of money only.*

It is generally provided by the statutes governing the verification of pleadings that an agent or attorney may verify a pleading founded on a written instrument for the payment of money only when the instrument is in the possession of the attorney or agent. *Cropsey v. Wiggernhorn* (1873) 3 Neb. 108; *Wheeler v. Chesley* (1862) 14 Abb. Pr. (N. Y.) 441; *Lefevre v. Latson* (1852) 4 Sandf. (N. Y.) 650; *Treadwell v. Fassett* (1854) 10 How. Pr. (N. Y.) 184; *Rose v. Creutz* (1859) 3 Ohio Dec. Reprint, 109; *Purdon v. Carrington* (1877) 31 Ohio St. 168; *Bates v. Pike* (1859) 9 Wis. 224; *Halfhill v. Malick* (1911) 145 Wis. 200, 129 N. W. 1086. See post, III. d, as to the sufficiency of the statement in the verification of the existence of the facts authorizing verification by attorney.

In *Rose v. Creutz* (1859) 3 Ohio Dec. Reprint, 109, it was held that a petition in an action to recover money rent under a written lease which is in the possession of the plaintiff's attorney may be verified by the attorney, since such an instrument, when sued on for money rent only, is a written instrument for the payment of money only, within the terms of the statute (Code, § 113).

An attorney or agent may, under the Ohio statute (2 Bates's Anno. Stat. § 5109), verify a complaint founded upon a written instrument for the payment of money, which is in the possession of the agent or attorney. *Halfhill v. Malick* (Wis.) supra.

In *Bates v. Pike* (1859) 9 Wis. 224, the verification was made by one of the attorneys of the appellants, who stated that he had read the complaint, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on information and belief, and that, as to those matters, he believed it to be true; and that the knowledge of the deponent, and the grounds of his belief of the truth of the complaint, were founded upon the fact that the bill of exchange was in

the possession of Johnson & Cameron, the attorneys of the appellants, of which firm he was one; and that the reason that the affidavit of verification was not made by the appellants, or one of them, was that the appellants were nonresidents of the state, and without the county of La Crosse, and that their affidavits could not be procured." The verification was held sufficient, and in compliance with the requirements of the existing statute (Rev. Stat. chap. 125, § 19).

In *Cropsey v. Wiggernhorn* (Neb.) supra, a suit on a promissory note and mortgage, the petition was verified by one of the plaintiff's attorneys, his signed affidavit reading as follows: [Affiant], "being sworn, says he is one of the attorneys of the above-named . . . plaintiff herein, duly authorized in the premises; that the above pleading of [plaintiff] is founded upon a written instrument, for the payment of money only, and is now in the possession of this affiant, and that the facts and allegations in the foregoing pleading of [plaintiff] are true as affiant believes." The Code (§ 120) provided "that when the affidavit is made by the agent or attorney it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney, only: First. Where the facts are within the personal knowledge of the agent or attorney. Second. Where the plaintiff is an infant or of unsound mind. Third. Where the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in possession of the agent or attorney. Fourth. Where the party is not a resident of, or is absent from the county." Gen. Stat. § 543). And by another provision it was declared: "The distinction between actions at law, and suits in equity, and the form of all such actions and suits heretofore existing, are abolished, and in their place shall be but one form of action to be called a civil action." Gen. Stat. § 524. It was contended that an attorney holding an instrument for the payment of money cannot verify the pleading where relief is sought in equity. It

was held that the verification was sufficient, since in all cases, either in law or equity, an agent or attorney, having in his possession, as such agent or attorney, an instrument for the payment of money only, may verify a pleading where such instrument causes the substantive cause of action, the court saying: "The object of requiring pleadings to be verified by oath of the party, his agent or attorney, is to secure, as far as possible, a correct statement of the cause of action or defense, and no greater proof is required of either party in consequence thereof. All fictitious issues are abolished. A party is required to set forth, in ordinary and concise language, his cause of action or defense, and his prayer for such relief as he thinks himself entitled to. In this case we are asked to hold that an attorney holding an instrument for the payment of money, where relief is sought in equity, cannot verify the pleading. We cannot give so narrow a construction to the Code, and must hold that in all cases an agent or attorney, having in his possession as such agent or attorney such instrument for the payment of money, may verify a pleading, where such instrument constitutes the substantive cause of action, and this is true whether the relief is sought at law or in equity."

But in *Purdon v. Carrington* (1877) 31 Ohio St. 168, it was held that a mortgage given to secure the payment of a promissory note was not a "written instrument for the payment of money only," within the meaning of the statute (Code, § 13), and that in an action based on a mortgage a pleading could not be verified by an agent or attorney of the party, though the instrument was in his possession.

### 3. Action for injunction.

A bill for injunction may be verified by an agent or attorney or third person acquainted with the facts, or who gives a reason therefor. *Woodworth v. Edwards* (1847) 3 Woodb. & M. 120, Fed. Cas. No. 18,014; *Orme v. McPherson* (1867) 36 Ga. 571; *Boston Mercantile Co. v. Ould-Carter Co.* (1905) 123 Ga. 458, 51 S. E. 466; *Salmon v. Claggett* (1828) 3 Bland, Ch.

(Md.) 125; *Binney's Case* (1829) 2 Bland, Ch. (Md.) 100; *Nusbaum v. Stein* (1858) 12 Md. 315; *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721; *Youngblood v. Schamp* (1862) 15 N. J. Eq. 42; *Hatch v. Eustaphie* (1839) Clarke, Ch. (N. Y.) 63; *Edrington v. Allsbrooks* (1858) 21 Tex. 186. See also *Coale v. Chase* (1827) 1 Bland, Ch. (Md.) 137; *Bank of Orleans v. Skinner* (1841) 9 Paige (N. Y.) 305.

In *Woodworth v. Edwards* (Fed.) supra, a bill in chancery praying for an injunction, it was held that if the principal was not in a situation to swear to it the oath, if required, might be made by an attorney.

It would seem that a bill for injunction may be verified by an agent of the plaintiff who was privy to the transaction, the plaintiff being a foreigner and resident abroad. *Salmon v. Claggett* (1828) 3 Bland, Ch. (Md.) 125.

The bill in an action for an injunction is usually sworn to by the complainants, or one of them; but if complainant is absent, or his affidavit for any reason cannot be procured, it may be sworn to by his attorney, or by any person acquainted with the facts. *Youngblood v. Schamp* (1862) 15 N. J. Eq. 42.

In *Edrington v. Allsbrooks* (1858) 21 Tex. 186, a petition for injunction was verified by the attorney for the petitioners. A statute (Hart. Dig. 1846, art. 1597) declared that the petition shall be verified by the oath of the party. Another statute (Act of January 11, 1856) gives to the affidavit made by the attorney the same force and effect as if made by the principal. It was held that while under the first provision it might have been doubted whether the attorney, though fully cognizant of the facts, could by his oath have satisfied the law, the latter act was substantially an addition to the provision cited from the earlier act.

An affidavit verifying a petition for injunction made by the general manager of the plaintiff's business, and which explicitly stated "that the matters and things set forth in the foregoing petition are within his knowledge, and are true as therein stated,"

was a sufficient verification, as against the objection that it was made by a person other than the plaintiff himself. *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 68 L.R.A. 752, 59 Atl. 721.

A bill for an injunction may be verified by the affidavit of plaintiff's agent, if the plaintiff is not a resident of the state. *Binney's Case* (1829) 2 Bland, Ch. (Md.) 100.

In *Hatch v. Eustaphie* (1839) Clarke, Ch. (N. Y.) 68, the court stated that an oath to the complainant's bill is held to be well made by his solicitor, or other agent, if he gives a sufficient reason in his jurat why the complainant is not himself sworn, as is the every-day practice in allowing injunctions upon creditors' bills.

Although the court, in its discretion, may require the verification of an application for a ne exeat, an agent may verify if he can of his own knowledge state the facts as positively and distinctly as is required of the complainant. *Orme v. McPherson* (1867) 36 Ga. 571.

In *Nusbaum v. Stein* (1858) 12 Md. 315, a suit for injunction, it was suggested that the affidavit of a clerk might be sufficient.

In *Boston Mercantile Co. v. Ould-Carter Co.* (1905) 123 Ga. 458, 51 S. E. 466, it was held that a petition for injunction and for the appointment of a receiver was sufficiently verified by the attorney for the plaintiff by an affidavit to the effect that he knew the recitals of fact to be true, the statute (Civ. Code, § 4966) requiring that "petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief should be verified positively by the petitioner, or supported by other satisfactory proofs."

However, in *Bank of Orleans v. Skinner* (1841) 9 Paige (N. Y.) 305, a bill filed before the vice chancellor to call certain trustees to account, and for an injunction, and for the appointment of a receiver, was verified by the attorney for the plaintiff corporation, who stated therein "that he has read the bill and knows the contents thereof; that he has information as to all the matters stated therein; that a num-

ber of the material and important facts stated in the bill, and the principal part thereof, he knows of his own knowledge to be true; and that he believes all the statements in the bill are true." It was held that counsel for the bank, if better acquainted with the facts, was a proper person to verify the bill if he could swear to the material allegations therein as matters of his own knowledge, but that his affidavit annexed to the bill was defective in not stating what matters in the bill were within his own knowledge, and what were founded on his belief only, derived from the information of others. And in *Coale v. Chase* (1827) 1 Bland, Ch. (Md.) 137, it was held that when the affidavit is made by a third party, if any material allegation or charge in the bill for injunction which is necessary to be sworn to positively is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information.

#### 4. *Action to enforce mechanic's lien.*

By direct provisions of a Minnesota statute (Gen. Stat. 1894, § 6236) a statement of claim for a mechanic's lien may be verified by the oath of the person claiming the lien, or by his agent, or by one having knowledge of the facts. *Nordine v. Knutson* (1895) 62 Minn. 264, 64 N. W. 565.

#### 5. *Plea of non est factum.*

It has been held that a plea of non est factum may be verified by an agent or attorney. *Brown v. Ferrell* (1912) — Tex. Civ. App. —, 144 S. W. 687; *Eborn v. Zimpelman* (1877) 47 Tex. 503, 26 Am. Rep. 315.

Thus, in *Brown v. Ferrell* (Tex.) supra, a plea of non est factum as to certain receipts for money was verified by the affidavit of an agent, who transacted all the business in question, and in the plea of non est factum the affiant swore to all the matters therein set out. It was held that the verification was sufficient and that the agent might have verified the plea even if she had not attended to all the busi-



ness, if it did not appear that the principal objected.

The affidavit which must accompany a plea of non est factum by an administrator may be made by the agent or attorney of the administrator in a proper case. *Eborn v. Zimpelman* (Tex.) supra.

In *Adamson v. Reagin* (1915) 143 Ga. 306, 84 S. E. 965, in response to certified questions, it was said in the official headnote that an attorney at law of a defendant who does not reside in the county in which the suit is pending may make the required oath to a plea of non est factum to the best of his knowledge and belief, under the statute (Act of March 4, 1869, Civ. Code, § 5642) which provided: "In all civil cases founded on contract where there is an issuable defense, and where the defendant does not reside in the county in which suit is pending, it shall and may be lawful for the agent or attorney at law of such defendant to make oath to the plea, and the same shall be as good and sufficient as if made by the defendant himself." The second section provided that "when the plea is filed on the oath of the agent or attorney at law of the defendant, he may swear that what is contained in such plea is true, according to the best of his knowledge and belief." In *Adamson v. Reagin* (1915) 17 Ga. App. 126, 86 S. E. 455, it was accordingly said in the official headnote that, under the ruling of the supreme court as stated in the preceding paragraph, the trial court properly allowed the attorney of the defendant who did not live in the county in which the suit was pending to verify a plea of non est factum on her knowledge and belief.

However, in *Fowler v. Gate City Nat. Bank* (1891) 88 Ga. 29, 13 S. E. 831, it is stated in the official headnote that the verification of a plea of non est factum must be by the affidavit of the defendant, and not an agent, and that the exception to this rule, if any, was to be found in § 3449 of the Code.

#### 6. Affidavit for attachment.

It is held that an affidavit for attachment may be made by an agent or attorney of the plaintiff. *National*

*Park Bank v. Whitmore* (1886) 104 N. Y. 297, 10 N. E. 524, wherein an affidavit of attachment by the assistant cashier of the plaintiff corporation, positive in its statement that the plaintiff was entitled to recover the sum mentioned, was held to be sufficient.

See also *Bates v. Robinson* (1859) 8 Iowa, 318, wherein one of the attorneys of the plaintiff verified the petition although he did not sign it, the clerk certifying that the attorney had made oath that the matter and things stated in the petition were true. It was held that while there was no clear ground on which it could be held to be essential that the affiant in an affidavit for attachment should state his means of knowledge, it was the better practice and desirable in all cases where the oath was made by one not a party, or one not presumed to have the information, to state his means of knowledge.

#### 7. Plea in abatement.

By the weight of authority an agent or attorney may verify a plea in abatement. *Prim v. Davis* (1841) 2 Ala. 24; *Atwood v. Higgins* (1884) 76 Me. 423; *Geck v. Shepherd* (1859) 1 N. M. 346; *Bank of Tennessee v. Anderson* (1856) 3 Sneed (Tenn.) 669; *Bank of Tennessee v. Jones* (1852) 1 Swan (Tenn.) 391; *Carter v. Vaulx* (1853) 2 Swan (Tenn.) 639; *Carlisle v. Cowan* (1886) 85 Tenn. 165, 2 S. W. 26; *Cheatham v. Pearce* (1890) 89 Tenn. 668, 15 S. W. 1080.

In *Prim v. Davis* (Ala.) supra, an action of debt on a bail bond executed by the defendant to a sheriff, there was a plea in abatement which commenced and concluded as a plea to the jurisdiction. The plea was signed by counsel and verified by another person. The statute which required pleas in abatement to be verified by oath did not specify by whom the verification should be made. It was held that the verification by one who was not the defendant was not irregular, and that the court could not say that by such a practice an undue facility was given to pleas of this description.

In *Atwood v. Higgins* (1884) 76 Me. 423, an action of tort wherein the de-

fendant filed a plea of coverture in abatement, the plea was verified by the attorney and agent, who signed it on his own responsibility with the purpose of binding his own conscience, and there were no facts stated in the plea which might not be within his own knowledge. It was held that the verification was good.

In *Geck v. Shepherd* (1859) 1 N. M. 346, an action of trespass and false imprisonment, it was objected that it was not competent for the attorney of the defendant to make the oath required to a plea in abatement. A statute (Rev. Code, p. 178) declared that all pleas in abatement, except pleas to the jurisdiction as to the subject-matter, should be under oath. It was held that the plea might be regarded as a plea to the local jurisdiction, and not as to the subject-matter, and as such was required to be sworn to, but as the act did not say that the oath could be made only by the party, and as all acts of this kind are to be construed liberally, it followed that the oath could be made by a third person.

In *Bank of Tennessee v. Anderson* (1856) 3 Sneed (Tenn.) 669, an action of debt against the maker and indorsees of a promissory note, it was held that a plea in abatement may be verified by an agent.

In *Bank of Tennessee v. Jones* (1852) 1 Swan (Tenn.) 391, an action of assumpsit against the defendants as drawers and indorsers of a bill of exchange, the defendant's plea in abatement was verified by a third person, his affidavit stating "that he is informed and believes that the above plea is true in substance and matter of fact." The statute (Act of 1794, chap. 1, § 26) declared that no plea in abatement shall be received, unless the party offering the same shall prove the truth of such plea. It was held, under this provision of the statute, the affidavit could be made by the attorney or agent of the defendant, if the facts constituting the foundation of the plea were within his personal knowledge, but that the affidavit verifying such plea must be positive as to the truth of every fact contained in

the plea, and should leave nothing to be collected by inference.

A plea in abatement may be verified by an agent or attorney, if the facts stated within the plea are within his personal knowledge. *Carter v. Vaulx* (1858) 2 Swan (Tenn.) 639.

In *Carlisle v. Cowan* (1886) 85 Tenn. 165, 2 S. W. 26, an action on an attachment bond, it was held that a plea in abatement could be verified by the agent or attorney of the defendant and before any other persons within the state authorized to administer oaths, it not being necessary that the pleas should be verified before the court where the suit was pending.

In *Cheatham v. Pearce* (1890) 89 Tenn. 668, 15 S. W. 1080, it was held that the verification of a plea in abatement by the solicitor of the defendants was sufficient where the affidavit was that the facts in the plea are true "in substance and in fact," and that the affiant is acquainted with the facts, the court saying: "It was held in *Bank of Tennessee v. Jones* (Tenn.) supra, that a plea in abatement may be sworn to by an attorney or agent of the defendant, if the facts constituting the foundation of the plea be within his personal knowledge. See also *Carter v. Vaulx* (1858) 2 Swan (Tenn.) 641; *Bank of Tennessee v. Anderson* (1856) 3 Sneed (Tenn.) 672; *Carlisle v. Cowan* (1886) 85 Tenn. 170, 2 S. W. 26; *Klepper v. Powell* (1871) 6 Heisk (Tenn.) 508. In the case last cited it was said that it was not necessary that the fact of agency should be stated in the affidavit, and that the essential requirement is that the truth of the plea shall be verified by someone who is willing to swear that it is true. Mr. Dickinson [the solicitor] swears that the facts in the plea are true 'in substance and in fact,' which complies with the rule that the affidavit must be positive in form. *Wrompelmair v. Moses* (1874) 3 Baxt. (Tenn.) 470; *Trabue v. Higden* (1867) 4 Coldw. (Tenn.) 623; *Bank of Tennessee v. Jones* (1851) 1 Swan (Tenn.) 392; *Seifreid v. People's Bank* (1873) 2 Tenn. Ch. 18. He furthermore swears that he is acquainted

with the facts. We think that his verification of the plea was sufficient."

In *Huthsing v. Maus* (1865) 36 Mo. 101, it was held that the affidavit of truth in support of a plea in abatement made by an agent of the party was defective, and should have been made by the party under the statute concerning change of venue in civil cases, which evidently contemplates that the application should be made by the party himself and expressly requires that he "shall annex thereto an affidavit to the truth of the petition," and makes no provision for this oath being taken by an agent, especially in view of the fact that it is expressly provided in criminal cases that the affidavit may be made by an agent.

However, in *Norvell v. Porter* (1876) 62 Mo. 309, an attachment suit, it was held that the affidavit of the attorney was a sufficient verification plea in abatement under the statute providing that "all pleadings and other proceedings in attachment causes shall conform to, and be governed as near as may be by, the law regulating the practice in courts of justice in civil cases." The court said: "Under this provision it was clearly competent for the attorney to make the necessary affidavit, as it would certainly be in matters arising during the progress of any other civil case."

In at least two jurisdictions it appears that a plea in abatement must be verified by the party. *Colquitt v. Mercer* (1871) 44 Ga. 432; *Bancroft v. Eastman* (1845) 7 Ill. 259.

In *Colquitt v. Mercer* (Ga.) *supra*, an action on an open account, a plea to the jurisdiction verified by the defendant's counsel was struck out because it was not verified by the defendant. The statute (Code, § 3410) provided that a plea to the jurisdiction must be pleaded in person and (§ 3412) must be sworn to. By a later statute (of 1869) it was provided that in suits upon contracts, if the defendant is not a resident of the county, "issuable" pleas may be sworn to by the attorney. But it was held that a plea to the jurisdiction was not an issuable plea under this Act of 1869, nor under the provision of the Con-

stitution of 1868; that in suits upon contracts the court shall give judgment without the intervention of a jury, where an issuable defense is not filed under oath (Const. art. 5, II. 3).

In *Bancroft v. Eastman* (Ill.) *supra*, an action of assumpsit commenced by *capias*, under a statute (Rev. Laws 59, § 1) providing that the party offering a dilatory plea "shall file an affidavit of the truth thereof," it was held that the plea in abatement must be offered by the defendant himself and cannot be made by a third person, and that this was the intention of the legislature is shown by an essential change in the language made in a subsequent statute (Rev. Stat. chap. 5, § 1), providing "that no plea in abatement shall be received in any court in this state, unless the party offering the same, or some other person for him, file an affidavit of the truth thereof."

#### *b. Public officer.*

It would seem that a public officer may at times verify a pleading on information and belief only, and that the public officer best acquainted with the facts will be allowed to verify the pleadings. *Estill County v. Richmond, N. I. & B. R. Co.* (1891) 91 Ky. 349, 15 S. W. 862; *Corpenny v. Sedalia* (1874) 57 Mo. 88; *Atty. Gen. v. Bank of Columbia* (1829) 1 Paige (N. Y.) 511; *State v. Port Royal & A. R. Co.* (1895) 45 S. C. 470, 23 S. E. 383.

In the case last cited, an action by stockholders asking that their corporation should be required to resume the exercise of its duty, etc., the complaint was verified by the attorney general who stated that the complaint and information were "true of his own knowledge, except as to those matters therein stated on information, and as to those matters he believes [them] to be true." The verification was held to be sufficient.

In *Corpenny v. Sedalia* (1874) 57 Mo. 88, an action for damages by a property owner against a municipal corporation, it was held that an application for change of venue was sufficient if sworn to by the city attorney rather than by the mayor or other chief officers, since, while the service of a writ of summons must be had on

the chief officer of the corporation, this resulted from express statutory provisions, and it did not follow that he was the proper person to make an affidavit for change of venue.

*Atty. Gen. v. Bank of Columbia* (1829) 1 Paige (N. Y.) 511, was an action by the attorney general against an insolvent bank. By a statute (Act of April, 1825 [Sess. Laws 1825, chap. 325, § 17]) it was made the duty of the attorney general, whenever any incorporated bank is insolvent and unable to pay its debts, to apply to this court for an injunction, restraining the officers of the institution from exercising any of the privileges and franchises granted by their charter, and from collecting or receiving any debts, and from paying out or in any way transferring any of the moneys or effects of such company; and to appoint a receiver of its property, moneys, and effects, and to distribute the same among its fair and honest creditors. The information was verified by the attorney general and the comptroller, who stated their belief that the bank was insolvent and unable to pay its debts, and thereupon an injunction was granted, which was in force at time of hearing in appellate court. The court held that the attorney general had done all that could be done by him in any case to satisfy the court that the bank was insolvent, since no one could swear positively to the insolvency of the institution except its officers, against whom the proceeding was instituted, and the statement of the foregoing facts was all that could reasonably be called for under this part of the statute.

In *Estill County v. Richmond, N. I. & B. R. Co.* (1891) 91 Ky. 349, 15 S. W. 862, an action brought by a county to enjoin the delivery of certain bonds, it appeared that the county judge refused to verify the petition. It was held that, although the statute (Civ. Code, § 117, subsec. 2) provided that the petition of a county must be verified by its chief officer residing in the county, or, if there is no such officer residing in the county, it may be verified by its attorney, if the county judge refused to verify, the county attorney

had the right to verify, and if he should refuse, some person authorized to order the action instituted should be permitted to verify the petition, to prevent a failure of justice.

In *Combs v. Breathitt County* (1896) 18 Ky. L. Rep. 809, 38 S. W. 138, 39 S. W. 33, an action by a county against the sheriff and his sureties on the sheriff's bond, for revenue alleged to have been collected by that officer and not paid over, it was held that the county judge was the proper person to verify the petition, under the rule requiring the verification of a pleading.

#### *c. Officer of corporation.*

##### *1. Domestic corporation.*

###### *(a) In general.*

Since a corporation itself cannot make an oath, its pleadings must of necessity be verified by a natural person who is a representative of the corporation, and the right of a person to verify a pleading for a domestic corporation depends on whether he is within one of the particular classes of persons named in the statute as proper parties to verify for a corporation.

*United States.*—*Re Glass* (1902) 119 Fed. 509; *Consumers' Trust Gas Co. v. Quinby* (1905) 70 C. C. A. 220, 137 Fed. 882.

*Alabama.*—*Gainesville Female Academy v. Brown* (1842) 3 Ala. 326.

*Arkansas.*—*Beirne v. Imboden* (1853) 14 Ark. 237.

*California.*—*Re Close* (1895) 106 Cal. 574, 39 Pac. 1067; *H. G. Bittleston Law & Collection Agency v. Howard* (1916) 172 Cal. 357, 156 Pac. 515; *Stockton Lumber Co. v. Blodgett* (1906) 3 Cal. App. 94, 84 Pac. 441.

*Colorado.*—*Tulloch v. Belleville Pump & S. Works* (1892) 17 Colo. 579, 31 Pac. 229.

*Florida.*—*Seaboard Air Line R. Co. v. Southern Invest. Co.* (1907) 53 Fla. 832, 44 So. 351, 13 Ann. Cas. 18.

*Iowa.*—*Marshall Field Co. v. Oren Ruffcorn Co.* (1902) 117 Iowa, 159, 90 N. W. 618.

*Kansas.*—*Hornick v. Union P. R. Co.* (1911) 85 Kan. 568, 38 L.R.A. (N.S.) 826, 118 Pac. 60, Ann. Cas. 1913A, 207.

**Kentucky.**—First Nat. Bank v. Sanders Bros. (1915) 162 Ky. 374, 172 S. W. 689; Kentucky Jeans Clothing Co. v. Bohn (1898) 104 Ky. 387, 47 S. W. 250; Mandel v. Fidelity Trust Co. (1908) 128 Ky. 239, 107 S. W. 775; Combs v. Breathitt County (1896) 18 Ky. L. Rep. 809, 38 S. W. 138, 39 S. W. 33.

**Maryland.**—Knickerbocker L. Ins. Co. v. Hoeske (1869) 32 Md. 317; Salmon v. Clagett (1828) 3 Bland, Ch. 125; Fowble v. Kemp (1901) 92 Md. 630, 48 Atl. 379; Georges Creek Coal & I. Co. v. Detmold (1826) 1 Md. Ch. 371.

**Michigan.**—Forbes Lithograph Mfg. Co. v. Winter (1895) 107 Mich. 116, 64 N. W. 1053.

**Minnesota.**—La Plant v. Pratt-Ford Greenhouse Co. (1907) 102 Minn. 93, 112 N. W. 889; National City Bank v. Zimmer Vacuum Renovator Co. (1916) 132 Minn. 211, 156 N. W. 265; John T. Noye Mfg. Co. v. Wheaton Roller-Mill Co. (1895) 60 Minn. 117, 61 N. W. 910.

**Mississippi.**—Masonic Ben. Asso. v. Simmons (1905) 86 Miss. 470, 38 So. 791.

**Missouri.**—St. Louis, O. H. & C. R. Co. v. Fowler (1892) 113 Mo. 458, 20 S. W. 1069.

**Nebraska.**—Moline, M. & S. Co. v. Curtis (1893) 38 Neb. 520, 57 N. W. 161; Beatrice Rapid Transit & Power Co. v. German Nat. Bank (1895) 45 Neb. 147, 63 N. W. 374.

**Nevada.**—Heintzelman v. L'Amoureux (1867) 3 Nev. 377.

**New Jersey.**—Trenton Bkg. Co. v. Haverstick (1829) 11 N. J. L. 171; North Penn Iron Co. v. Boyce (1904) 71 N. J. L. 434, 58 Atl. 1094; Youngblood v. Schamp (1862) 15 N. J. Eq. 42.

**New York.**—Van Horne v. Montgomery (1851) 5 How. Pr. 238; Meton v. Isham Wagon Co. (1888) 15 N. Y. Civ. Proc. Rep. 259, 4 N. Y. Supp. 215; Kelly v. Woman Pub. Co. (1888) 15 N. Y. Civ. Proc. Rep. 259, note, 4 N. Y. Supp. 99; Shaft v. Phoenix Mut. L. Ins. Co. (1876) 67 N. Y. 544, 23 Am. Rep. 138, reversing (1876) 8 Hun, 632; Bigelow v. Whitehall Mfg. Co. (1879) 1 City Ct. Rep. 138; Eastham v. New York State Teleph. Co. (1903) 86 App.

Div. 562, 83 N. Y. Supp. 1019; Climax Specialty Co. v. Smith (1900) 31 Misc. 275, 64 N. Y. Supp. 42, 7 N. Y. Anno. Cas. 375; High Rock Knitting Co. v. Bronner (1896) 18 Misc. 627, 43 N. Y. Supp. 725; American Insulator Co. v. Bankers & M. Teleg. Co. (1885) 7 N. Y. Civ. Proc. Rep. 443, 2 How. Pr. N. S. 120, 13 Daly, 200; Martin v. Erie Preserving Co. (1888) 14 N. Y. Civ. Proc. Rep. 224; Duryea, W. & Co. v. Rayner (1895) 11 Misc. 294, 32 N. Y. Supp. 247; Henry v. Brooklyn Heights R. Co. (1904) 43 Misc. 589, 89 N. Y. Supp. 525, affirmed without opinion in (1904) 97 App. Div. 631, 89 N. Y. Supp. 1106.

**North Carolina.**—Phifer v. Travelers Ins. Co. (1898) 123 N. C. 405, 31 S. E. 715; Banks v. Gay Mfg. Co. (1891) 108 N. C. 282, 12 S. E. 741; Commercial Nat. Bank v. Hutchison (1882) 87 N. C. 22; Godwin v. Carolina Teleph. & Teleg. Co. (1904) 136 N. C. 258, 67 L.R.A. 251, 103 Am. St. Rep. 941, 48 S. E. 636, 1 Ann. Cas. 203.

**Ohio.**—Bulloch Beersford Mfg. Co. v. Hedges (1905) 29 Ohio C. C. 388, affirmed in (1907) 76 Ohio St. 91, 81 N. E. 171; Standard Fashion Co. v. Dean (1898) 8 Ohio C. & C. P. Dec. 389.

**Pennsylvania.**—Andrews v. Blue Ridge Packing Co. (1903) 206 Pa. 370, 55 Atl. 1059; Erie Boot & Shoe Co. v. Eichenlaub (1889) 127 Pa. 164, 17 Atl. 889.

**South Carolina.**—Bray Clothing Co. v. Shealy (1898) 53 S. C. 12, 30 S. E. 620; Southern Cotton Oil Co. v. Lightsey (1915) 100 S. C. 41, 84 S. E. 301.

**Virginia.**—Taylor v. Sutherlin-Mead Tobacco Co. (1908) 107 Va. 787, 14 L.R.A. (N.S.) 1135, 60 S. E. 132.

**West Virginia.**—Quesenberry v. People's Bldg. Loan & Sav. Asso. (1898) 44 W. Va. 512, 30 S. E. 73.

Where a bill for an injunction is filed by a corporation, the officer or other person who has the principal personal knowledge of the facts should swear to them. Youngblood v. Schamp (1862) 15 N. J. Eq. 42.

An answer may be verified by the president, or the secretary, or by the attorney of a corporation. John T.

*Noye Mfg. Co. v. Wheaton Roller-Mill Co.* (1895) 60 Minn. 117, 61 N. W. 910.

By direct provision of a Kansas statute (Civ. Code, § 112) when a municipal or other corporation is a party the verification may be made by an officer thereof, its agent or attorney. *Hornick v. Union P. R. Co.* (1911) 85 Kan. 568, 38 L.R.A. (N.S.) 826, 118 Pac. 60, Ann. Cas. 1913A, 208.

In *Forbes Lithograph Co. v. Winter* (1895) 107 Mich. 116, 64 N. W. 1053, it was held that the affidavit of account which stated that the affiant was the treasurer of the company sufficiently showed his authority to verify.

When a bill for injunction is filed by a corporation, an officer thereof or other person who has personal knowledge of the facts should swear to them. *Fowble v. Kemp* (1901) 92 Md. 630, 48 Atl. 379.

When a corporation is a party the verification of a pleading under the statute (Practice Act, § 55) may be made by an officer thereof. *Heintzelman v. L'Amoureux* (1867) 3 Nev. 377.

Under the Maryland statute (Act of 1864) the pleas of a corporation must be verified by the oath of some natural person capable of making an affidavit, as a corporation is incapable of making an oath. *Knickerbocker L. Ins. Co. v. Hoeske* (1870) 32 Md. 317.

In *First Nat. Bank v. Sanders Bros.* (1915) 162 Ky. 374, 172 S. W. 689, it was held that an affidavit for a warning order, as well as the affidavit for an attachment, must be made by the chief officer or agent of the corporation if such officer is in the county at the time, and that, if made by any other person, it is invalid, unless it shows the connection which the party making it has with the corporation, and that the officer whose duty it is to make it is then absent from the county. The court, in construing the various Code provisions on which its decision was based, said: "The affidavit for the warning order in these cases, as well as the affidavit upon which the order of attachment seems to have been obtained, were embraced in the petition filed, and which were sworn to by the cashier of the appellant bank, and this seems to be the

only affidavit in the case. Section 117 of the Civil Code, subsec. 2, provides 'that the pleadings of a private corporation must be verified by its chief officer, or agent, upon whom a summons in an action is or might be lawfully served if the corporation were a defendant, or, if it has no such officer or agent residing in the county in which the action is brought or is pending, it may be verified by its attorney.' Section 550 of the Civil Code provides 'that any affidavit which this Code requires and authorizes a party to make may, unless otherwise expressed, be made by its attorney or agent, if he be absent from the county,' and subsection 5 of § 550 provides that the affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney. In *Northern Lake Ice Co. v. Orr* (1898) 102 Ky. 586, 44 S. W. 216, this court held 'that, when an agent or attorney makes an affidavit for a corporation, it must be stated that the officer of the corporation, who, if in the county, should verify the pleadings, is absent.' Section 732 of the Civil Code, subsec. 33, defines the chief officer of a corporation which has any of the officers or agents therein mentioned: First, its president; second, its vice president; third, its secretary and librarian; fourth, its cashier and treasurer; fifth, its clerk; sixth, its managing agent. . . . The affidavit in this case shows the connection which the affiant had with the appellant-plaintiff, but it fails to show that the president of the corporation, who is its chief officer, was absent from the county."

A statute requiring a written instrument sued on to be questioned by a plea verified by affidavit applies to those cases where the instrument has been executed by one professing to be the agent of a corporation, and who would be competent to take the oath which the statute requires. *Gainesville Female Academy v. Brown* (1842) 3 Ala. 326.

By express provision of the Arkansas statute which, in general, requires

one who has a claim against the estate of a deceased person to authenticate his claim by his own affidavit, when authentication is made in behalf of a corporation, or by an executor, administrator, or assignee, a special affidavit is declared to be sufficient, and when a debt is due a corporation the cashier or treasurer is to make the affidavit. *Beirne v. Imboden* (1853) 14 Ark. 237.

*(b) Verification held authorized.*

**Agent.**

In *H. G. Bittleston Law & Collection Agency v. Howard* (1916) 172 Cal. 357, 156 Pac. 515, the complaint was verified by the plaintiff corporation's assignor, who was not an officer of the corporation. It was held that the clause in the statute (Code Civ. Proc. § 446) providing for verification of a pleading by an officer when the corporation is a party is not exclusive, but is permissive only, and does not exclude an attorney or other person from making the verification in a proper case, since the clause is qualified by the preceding part of the section, and is not to be construed as meaning that only the officers of a corporation can verify the pleadings thereof.

In *Moline, M. & S. Co. v. Curtis* (1893) 38 Neb. 520, 57 N. W. 161, an action aided by an attachment, the original affidavit on which the attachment was issued was verified by the plaintiff's agent. The signed affidavit read as follows: "The said plaintiff, the Moline, Milburn, & Stoddard Company, makes oath that the claim in this action is for a recovery of a judgment for money in the sum of \$975 and 36/100, and the said S. W. Croy, agent of the Moline, Milburn, & Stoddard Company, also makes oath that said claim is just, and that the Moline, Milburn, & Stoddard Company ought, as affiant believes, to recover thereon \$975 and 36/100. He also makes oath that the said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis, parties composing the firm of H. J. Curtis & Company, defendants, are about to convert their property, or a part thereof, into money, for the

purpose of placing it beyond the reach of their creditors; that said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis have property and rights in action which they conceal; that the said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis have assigned, removed, and disposed of, and they are about to dispose of, their property, or a part thereof, with intent to defraud their creditors. S. W. Croy, agent for Moline, Milburn, & Stoddard Company." It was held that although the affidavit in the opening clause relating to the nature of the plaintiff's claim, standing alone, purported to be that of the corporation, yet when read in connection with what follows, and necessarily construing the paper as a whole, it sufficiently appeared that an agent of the corporation makes oath to each averment contained in the affidavit, and that he is the plaintiff's agent, and that the amendment to the original affidavit, by inserting "affiant, secretary and treasurer of," after the word "plaintiffs," was permissible and cured the alleged defect.

Under the direct provisions of the North Carolina statute (Code, § 258, as amended by Acts 1901, chap. 610), where a corporation is a party, verification of any pleading may be made by a "managing or local agent thereof," as well as by an officer, who alone was authorized formerly to make verification in such cases. *Godwin v. Carolina Teleph. & Teleg. Co.* (1904) 136 N. C. 258, 67 L.R.A. 251, 103 Am. St. Rep. 941, 48 S. E. 636, 1 Ann. Cas. 203.

**Attorney.**

In *Seaboard Air Line R. Co. v. Southern Invest. Co.* (1907) 53 Fla. 832, 44 So. 351, 13 Ann. Cas. 18, it appeared that an affidavit verifying a bill of injunction was positive and direct to all the allegations of the bill, which were sworn to be true by the solicitor of the complainant. It was contended that "the bill is not sworn to by any authorized officer or proper representative of complainant." It was held that such an affidavit by counsel for defendant was sufficient.

In *Tulloch v. Belleville Pump & S. Works* (1892) 17 Colo. 579, 31 Pac.

229, an action on a promissory note, the verification of the complaint was by an attorney for the plaintiff, his signed affidavit reading as follows: "[Affiant] on his oath doth depose and say that he is the attorney for the plaintiff in the above-entitled action; that each and every person authorized by the statute to make this verification is absent from the state and county, and therefore deponent makes the same; that he has read the foregoing and annexed complaint and knows the contents of the same, and that it is true to the best of his knowledge and belief." It was contended that the verification was imperfect under the statute (Code, § 61), which provides, in substance, that where a pleading is verified it must be by the affidavit of a party, unless the party is absent from the county where the attorney resides, or from some cause is unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same, and that when a pleading is verified by the attorney, or any other person except one of the parties, the affidavit must state the reasons why it is not made by one of the parties. It was held that while the verification was not in accordance with this section of the Code, it was sufficient under another statute (Code, § 62), which determines the manner in which a pleading by a corporation may be verified, providing that, when a corporation is a party, the pleading may be verified by any officer, stockholder, agent, superintendent or attorney thereof, and shall state that the facts stated in the pleadings are true to the best knowledge and belief of such affiant, the court saying: "This action having been brought by a corporation, the verification is to be determined by the last section mentioned. An examination of the verification will show that, while it is not a model, it contains everything required in such cases by the Code as amended, and must therefore be held sufficient. In fact the provision with reference to verification by a corporation is not to be found in the original Code, it having been inserted by

amendment after its adoption to cover cases like the one at bar."

In *Trenton Bkg. Co. v. Haverstick* (1829) 11 N. J. L. 171, a writ of foreign attachment was verified by the plaintiff's attorney by an affidavit reading as follows: "[Affiant] . . . saith that he is the attorney of the Trenton Banking Company, and that William Haverstick, the person against whom an attachment is about to issue at the suit of the Trenton Banking Company, is not, to the knowledge or belief of this deponent, resident at this time in the state of New Jersey; and that the said William Haverstick owes to the said Trenton Banking Company, the sum of \$475.82½." The 1st section of the statute for the relief of creditors against absconding and absent debtors (Rev. Laws, p. 355) prescribed the form of the oath or affirmation in respect to an absconding debtor; and directed the same to be made by the creditor himself, before any judge of any court of record of this state, or justice of the peace of any county in the same. The 2d section provided that if the creditor be absent or reside out of this state, then his agent or attorney may make oath or affirmation to the same effect, and deliver it to the clerk to be filed, who shall thereupon issue such writ of attachment. The 26th section of the statute, which authorized the writ of foreign attachment, required a uniformity of procedure in all respects, except where the statute otherwise provided, or the nature of the thing compelled a diversity; enacting that "the rights and credits, moneys and effects, goods and chattels, lands and tenements of every debtor who may reside out of this state shall be liable to be attached, taken, proceeded against, sold, assigned, transferred, and conveyed for the payment of his debts, in the like manner as nearly as may be, as the rights and credits, moneys and effects, goods and chattels, lands and tenements, of other debtors are made liable by this act." In the 26th section of the statute it was also provided as follows: "If the creditor is present or resides in the state, he is regarded



as the applicant for the writ. If he is absent or resides out of the state his agent or attorney may be the applicant." It was held that the affidavit of the plaintiff's attorney was sufficient, since the law which gives existence to the corporation, which allows it to sue and be sued, necessarily confers on it the authority to perform by its agents, by whom alone it can act.

In *Beatrice Rapid Transit & Power Co. v. German Nat. Bank* (1895) 45 Neb. 147, 63 N. W. 374, the affidavit verifying the petition read as follows: "[Affiant], being first duly sworn, on oath deposes and says that he is the attorney for the plaintiff, which is a corporation; that he has read the foregoing petition and knows the contents thereof, and that the facts therein contained are true, as he verily believes." The statute (Code Civ. Proc. § 120) provided that the affidavit of verification "can be made by agent or attorney only" (subd. 5), except "when a party is a corporation, in which case it may be made by the attorney, or any officer or agent upon whom a summons could be legally served." It was held that the obvious meaning of the 5th section of the Code was that verification of a pleading on behalf of corporations may be made by attorneys at law, or by any officer or agent on whom summons could be legally served, which latter class includes such agents for the above purpose as are so constituted by power of attorney, and are therefore called attorneys.

In *Climax Specialty Co. v. Smith* (1900) 31 Misc. 275, 64 N. Y. Supp. 42, the complaint was verified by a domestic corporation's attorney. The defendant's contention was that the pleading of a domestic corporation must be verified by an officer, and that the statute (Code Civ. Proc. § 525, subd. 3) had no application to pleadings interposed on behalf of domestic corporations. It also appeared from the attorney's verification that all the officers were absent from the county where the attorney resided. It was held that the verification was sufficient, since an entire reading of the

entire statute (section of Code) seemed to warrant the conclusion that subd. 3 applies to all parties, whether domestic corporations or not, and, where it appeared from the attorney's verification that all the officers were absent from the county where the attorney resided, the verification should be held to be a proper one.

In *Robertson v. Robertson* (1919) — Ky. —, 214 S. W. 972, an action by a bank as administrator, it was held that a pleading denying the genuineness of a receipt could be verified by the bank's attorneys and by persons beneficially interested in the litigation, notwithstanding, as the court said, that the president of the bank, being in the county, was by the Code provision the only person authorized to verify a pleading for the bank, he being in fact unable to verify the pleading in question because he believed the receipt genuine.

#### **Manager.**

In *Stockton Lumber Co. v. Blodgett* (1906) 3 Cal. App. 94, 84 Pac. 441, a suit on a promissory note made by the defendant to the plaintiff, the complaint was verified by one stated in the affidavit to be the "manager" of the corporation plaintiff. The defendant filed an unverified answer. It was urged as a ground for reversal that the complaint was not verified "by an officer" of the corporation plaintiff. It was held that the "manager" of a corporation is an "officer" thereof.

In *Southern Cotton Oil Co. v. Lightsey* (1915) 100 S. C. 41, 84 S. E. 301, an action brought by a corporation on a promissory note, the complaint was verified by the plaintiff's assistant district manager. The objection was that the proposed affidavit of verification was insufficient, in that it was made by another person than the party plaintiff, and failed to set forth therein his knowledge or grounds of belief on the subject. The statute (Code Civ. Proc. § 207) provided that "when a corporation is a party, the verification may be made by any officer thereof." The assistant district manager swore that he was an officer of the plaintiff corporation. It was held that the verification was sufficient.

In an action on a promissory note, an affidavit of defense on its face set forth a prima facie defense, and was made by the business manager of the firm. It was held that the affidavit was sufficient, since the affiant, as business manager, was an officer who must be presumed to be acquainted with the facts, and as he undertook the responsibility of swearing positively of his own knowledge, it was unnecessary for him to set forth his information and belief. *Andrews v. Blue Ridge Packing Co.* (1903) 206 Pa. 370, 55 Atl. 1059.

#### Director.

In *Bigelow v. Whitehall Mfg. Co.* (1879) 1 N. Y. City Ct. Rep. 138, it was held that a verification was properly made by one of the trustees and directors of the defendant domestic corporation, since he was an "officer" of the corporation within the meaning of the statute (Code Civ. Proc. § 525), which must be read with another statute (Code, § 431, subd. 3) in which a director is designated as a suitable officer on whom process may be served to bring his corporation into court.

In *Eastham v. New York State Teleph. Co.* (1903) 86 App. Div. 562, 83 N. Y. Supp. 1019, the answer of the defendant domestic corporation was verified by one of its directors. By virtue of the statute (Code Civ. Proc. § 525) the verification of a pleading of a domestic corporation must be made by one of its officers. It was held that the verification was sufficient.

#### Secretary.

In *Shaft v. Phoenix Mut. L. Ins. Co.* (1876) 67 N. Y. 544, 23 Am. Rep. 138, reversing (1876) 8 Hun, 632, the petition was verified by the agent of the defendants, being its secretary. It was held that the affidavit was, in form and substance, sufficient, since it was made by the general and managing agent of the defendant, and that fact was averred in it.

In *Marshall Field Co. v. Oren Ruffcorn Co.* (1902) 117 Iowa, 159, 90 N. W. 116, an action seeking recovery on three promissory notes, it appeared that the statute (Code, § 3581) expressly authorized a corporation, when

a party, to verify its pleadings by agent or officer, and it was held that a verification of the answer by the secretary of the company was proper.

In *Masonic Ben. Assn. v. Simmons* (1905) 86 Miss. 470, 38 So. 791, a suit by an administrator against heirs and a beneficial association, the answer was verified by one of the defendant's officers as secretary. The statute (Code 1892, § 534) provided that "the answer of a corporation need not be under its seal, but shall be sworn to by its president, general manager, or superintendent, or other general officer, unless an answer under oath shall . . . be waived in the bill." It was held that the affiant was a "general officer" within the contemplation of the statute, being the custodian of the records and vouchers so far as money is concerned.

In *American Insulator Co. v. Bankers & M. Teleg. Co.* (1885) 7 N. Y. Civ. Proc. Rep. 443, 2 How. Pr. N. S. 120, 13 Daly, 200, the verification was made by the secretary of the defendant, a domestic corporation, and was in the usual form as required by the Code where the pleading is verified by a party. It was contended that the verification did not state why the same was not made by a party defendant, and that it did not state the ground of the belief of the person making such verification as to the matters not stated upon his knowledge. The statute (§ 525, Code of Civil Procedure) reads as follows: "The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them who is acquainted with the facts, except as follows: (1) Where the party is a domestic corporation the verification must be made by an officer thereof. (2) Where the people of the state are, or a public officer in their behalf is a party, the verification may be made by any person acquainted with the facts. (3) Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or, if the latter is not a resident of the state, the county where he has an office, and capable

of making the affidavit, or, if there are two or more parties united in interest and pleading together, where neither of them acquainted with the facts is within the county and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent or the attorney for the party." And § 526 provides as follows: "The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth in the affidavit the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party." The section of the Code in force when the case above referred to was decided is, in part, as follows: "When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof." While subd. 1 of § 525 applies to domestic corporations, and provides that the verification must be made by an officer thereof, it was held that the 2d paragraph of § 526 unquestionably refers to subd. 3 of § 525, and that the verification was sufficient, since, as a corporation cannot take an oath, the statute points out the way in which it must verify a pleading, and such verification is a verification by the corporation and by a party, and it is only agents or attorneys that are required, when verifying pleadings, to set forth the grounds of their belief as to all matters not stated on their knowledge, and the reason why the verification was not made by the party.

#### **Treasurer.**

In *Georges Creek Coal & I. Co. v. Detmold* (1848) 1 Md. Ch. 371, it was held that the truth of facts set forth in a bill of injunction was sufficiently verified by the affidavit of the treasurer of the company.

#### **Vice president.**

In *Re Close* (1895) 106 Cal. 574, 39 Pac. 1067, an insolvency case, it was held that under the statute (Code Civ. Proc. § 446) which provided that, when a corporation is a party, verification of a pleading may be made by any officer thereof, a vice president of a corporation is such an officer.

In *Mandel v. Fidelity Trust Co.* (1908) 128 Ky. 239, 107 S. W. 775, a suit brought by a corporation to settle an estate, it appeared that the affidavit for a warning order was made by a vice president of the corporation, who, by the by-laws, made one of the chief officers of the company. The statute (Code, § 58) which regulated the practice provided that the clerk shall not make the warning order until the plaintiff, or, if he be absent from the county, his agent or attorney, has made the necessary affidavit, and, if the affidavit is made by the agent or attorney, it must show the affiant's connection with the plaintiff and his absence from the county. It appeared that the vice president who verified the order was the only officer of the company who was familiar with the affairs of the trust estate of which he was seeking a settlement, and was the only one qualified to make the affidavit in question, and was in fact the chief officer of the company so far as the settlement of the estate was concerned. It was held that the affidavit made by him conformed fully to the requirements of the statute (Code, § 58).

In *Kentucky Jeans Clothing Co. v. Bohn* (1898) 104 Ky. 387, 47 S. W. 250, a suit by a corporation upon an account in which attachment was obtained, it appeared that the petition which contained the necessary allegations to authorize an attachment was verified by the secretary and treasurer of the corporation, and that the affidavit for attachment was sworn to by the vice president of the corporation.

It was held that the affidavit of the vice president was prima facie sufficient, there being no averment by the defendant that he was not at the time the chief officer in the county.

**President.**

In *Commercial Nat. Bank v. Hutchison* (1882) 87 N. C. 22, the verification was by the president of the plaintiff corporation and read that the affiant "maketh oath that the plaintiff is a corporation duly organized under the laws of the United States; that he is an officer thereof, to wit, the president; and that the facts herein set forth of his own knowledge are true; those otherwise stated he believes to be true." It was objected that the verification was by an officer of the corporation, and that it should go further and set forth the source of his knowledge or the grounds of his belief on the subject, as required by § 117 of the Code. It was held that the verification was the verification of the corporation itself, since, as a corporation cannot take an oath, as an officer, he has knowledge of the facts set forth in the complaint, and has done all that can be done, as the statute imposes no such condition upon those who verify as the officers of a corporation, only agents and attorneys being required, when swearing to the pleadings for their principals or clients to disclose their knowledge and its sources, and to explain why the verification is not made by the party.

**(c) Verification held not authorized.**

**Agent.**

In *Phifer v. Travellers Ins. Co.* (1898) 123 N. C. 405, 31 S. E. 715, the action was on a policy of insurance. The answer was verified by a general agent of the defendant. The statute (Code, § 258) required all pleadings of a corporation to be verified by an officer thereof whenever their verification was necessary. It was admitted that the verification was invalid, the question being whether the defendant could avoid the effect of this defect in the verification.

**Attorney.**

In *La Plant v. Pratt-Ford Greenhouse Co.* (1907) 102 Minn. 98, 112

N. W. 889, an action on a promissory note alleged to have been executed by a corporation, the answer denying the execution and delivery of the note was verified by the attorneys of the corporation on information and belief. It was held that as the statute (Gen. Stat. 1894, § 5751) applied to instruments purporting to be executed by a corporation, as well as to those executed by natural persons, the verification did not constitute a denial under oath or affidavit, as contemplated by the statute, which required the defendant's signature or the execution of the note to be denied by his oath or affidavit.

In *Bray Clothing Co. v. Shealy* (1898) 53 S. C. 12, 30 S. E. 620, an action on account and to set aside certain mortgages, attachment was issued on plaintiff's ex parte application, and the defendants thereafter moved to dissolve the attachment. It appeared that the plaintiff resided in another state and one of its attorneys undertook to verify the complaint. The Code did not allow an attorney or agent to verify a complaint, but it was provided by the statute (§ 178) that "the affidavit may be also made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleadings be within the personal knowledge of the agent or attorney." It was held that the complaint was not verified as to the account sued on, since, although the account for goods sold was verified by an officer of the plaintiff corporation, yet the affiant could not be said, as attorney for the plaintiff, to be able to verify the complaint when this account was set up.

In *Bullock Beresford Mfg. Co. v. Hedges* (1907) 76 Ohio St. 91, 81 N. E. 171, the question presented was whether the petition in an action instituted by a corporation having its place of business in the county should have been stricken from the files because it was not verified by an officer of the corporation. The verification complained of was by the corporation's

attorney, no reason being given why it was not verified by an officer, and no statement being made that the facts were within the personal knowledge of the attorney. This question involved the construction of two statutory provisions. The first (Rev. Stat. § 5102) read as follows: "When a corporation is the party, the verification may be made by an officer thereof, its agent or attorney." Another (§ 5109) provided that a pleading can be verified by "the agent or attorney" only, in certain cases therein named. It was held that the attorney was not authorized to verify.

In *Heintzelman v. L'Amoroux* (1867) 3 Nev. 377, an action on a promissory note, the answer was verified by the defendant's attorney. The signed affidavit read as follows: "[Affiant], being duly sworn, says he is one of the attorneys for the defendant the Trinity & Sacramento Silver Mining Company, one of the defendants in above action; that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. Deponent further says the reason why this verification is not made by the defendant the Trinity & Sacramento Silver Mining Company is that said defendant is a corporation under the laws of the state of New York, and, further, that said defendant is absent from the county where the attorneys of said defendants reside." The statute (Practice Act, § 55) provided as follows: "In all cases of the verification of a pleading the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides; or from some cause unable to verify it; or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney or any other person

except the party, he shall set forth in the affidavit the reason why it is not made by the party. When a corporation is a party the verification may be made by an officer thereof; or when the territory, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts; except that in actions prosecuted by the attorney general or district attorney in behalf of the territory, the pleadings need not, in any case, be verified." The respondent contended and it was held that when a corporation is a party to an action it is not sufficient to show that the corporation is absent to entitle its attorney to verify a pleading, but it must be shown that all officers of the corporation are absent before the attorney can verify on the sole ground of the absence of the party whom he represents.

#### **Stockholder.**

In *National City Bank v. Zimmer Vacuum Renovator Co.* (1916) 132 Minn. 211, 156 N. W. 265, an action on a promissory note and a guaranty thereof, the answer of the defendant corporation was verified by a codefendant and stockholder, who stated in the verification that he was one of the defendants, that he had read the answer, and "that the facts therein set forth are true except as to those matters stated on information and belief, and as to those matters he believes it to be true." The statute (Gen. Stat. 1913, § 8448) provided that "every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until such person shall deny the signature or execution of the same by his oath or affidavit." It was held that the answer and verification were not sufficient to devert the notes in controversy of the probative effect given them by statute.

#### **Cashier.**

In *Van Horne v. Montgomery* (1851) 5 How. Pr. (N. Y.) 238, the complaint was sworn to by the cashier of the bank, the affidavit stating that "he had read the complaint, and that the same was true according to the best of his knowledge and belief." It was held

that if the cashier was to be regarded as a party the verification was insufficient under the statute (Code, § 157).

**Manager.**

In *Meton v. Isham Wagon Co.* (1888) 15 N. Y. Civ. Proc. Rep. 259, 4 N. Y. Supp. 215, there was a motion to set aside a judgment as by default, on the ground that the answer was not properly verified. The defendant was a domestic corporation, and the answer was verified by one who, in the affidavit of verification, swore that he was the general manager of the defendant, and that the reason of his making the affidavit of verification was that the defendant was a corporation. The statute (§ 525, subd. 1) provided that when the party was a domestic corporation the verification must be made by an officer thereof. It was held that the verification was defective in not stating that the affiant was an officer of the defendant, either expressly, or by stating the duties he performed from which it might be inferred that he was an officer of the corporation and that, while an agent qualified as provided in subd. 3 of that section may verify a pleading, setting forth his qualifications in his affidavit, none but an officer can verify a pleading in behalf of a domestic corporation. The court said it did not find the word "manager" in any definition or synonym of the word "officer" nor any statute which uses the word manager to designate an officer of a corporation, but that the nearest approach to it is found in § 431, subd. 3, authorizing service upon the president or other head of a corporation, the secretary or clerk of the corporation, the cashier, the treasurer, or a director or managing agent. In respect to this the court remarked that it was plain from this provision that the managing agent was deemed to be an officer.

**Secretary.**

In *North Penn Iron Co. v. Boyce* (1904) 71 N. J. L. 434, 58 Atl. 1094, a motion to quash a writ of attachment, the writ was verified by the secretary of the plaintiff corporation, and it did not appear that he was the plaintiff's agent or attorney. The statute (Pamph. Laws 1901, p. 158) auth-

orized an attachment to issue "where the plaintiff, his agent, or attorney, shall make affidavit," etc. The authority of the secretary of a corporation as defined by the statute (Pamph. Laws 1896, p. 277) concerning corporations was "to record all the votes of the corporation and directors . . . and perform such other duties as shall be assigned to him." It was held that the verification by the secretary was not sufficient, since it did not appear that the secretary was the plaintiff's agent or attorney, and plainly, in the absence of a special assignment, the authority defined by the statute did not extend to the making of an affidavit on which litigation is to be instituted.

In *Taylor v. Sutherlin-Meade Tobacco Co.* (1908) 107 Va. 787, 14 L.R.A. (N.S.) 1135, 60 S. E. 132, an attachment in equity brought by a domestic corporation against a foreign corporation, the affidavit was made by the secretary and treasurer of the attaching company, and the question was whether the words "secretary and treasurer" ex vi termini import that such officer is the agent of the corporation, it being contended that the affidavit on which the attachment was issued did not show that it was made by the plaintiff, his agent, or attorney, as required by statute (Va. Code 1904, §§ 2959, 2964). It was held that the verification was insufficient because it could not be said as a matter of law, in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation, and correct practice requires the affidavit to aver that the affiant is "the plaintiff, his agent, or attorney."

**Ex-president.**

In *Kelly v. Woman Pub. Co.* (1888; City Ct. Spec. T.) 15 N. Y. Civ. Proc. Rep. 259, note, 4 N. Y. Supp. 99, the defendant, a domestic corporation, was sued for a balance of rent. The verification was by a former president of the corporation and, omitting the formal parts, read as follows: [Affiant], "being duly sworn, says that he is the former president of the defend-

ant; that all the officers of the defendant, including deponent, tendered their resignations from office in said defendant prior to the commencement of this action, and no other officers have yet been elected or chosen in their place; that the foregoing answer is true," etc. The statute (Code, § 525) required that a verification of a pleading by a domestic corporation must be made "by an officer thereof." It was held that a verification by an ex-officer is unauthorized and insufficient.

## 2. Foreign corporation.

Under the various statutes it is generally held that the pleadings of a foreign corporation may be verified by its officer, agent or attorney. *West v. Home Ins. Co.* (1883) 9 Sawy. 412, 18 Fed. 622; *Robinson v. Ecuador Development Co.* (1900) 32 Misc. 106, 65 N. Y. Supp. 427; *Clark's Cove Fertilizer Co. v. Stever* (1899) 29 Misc. 571, 6 N. Y. Supp. 241; *Phonoharp Co. v. Stobbe* (1897) 20 Misc. 698, 46 N. Y. Supp. 678; *Bank of Wooster v. Spencer* (1840) Clarke, Ch. (N. Y.) 386; *Treen Motors Corp. v. Van Pelt* (1919) 106 Misc. 357, 174 N. Y. Supp. 500; *Glaubenskle v. Hamburg & A. Packet Co.* (1859) 9 Abb. Pr. (N. Y.) 104; *American Audit Co. v. Industrial Federation* (1903) 84 App. Div. 304, 82 N. Y. Supp. 642; *High Rock Knitting Co. v. Bronner* (1896) 18 Misc. 627, 43 N. Y. Supp. 725; *St. Paul F. & M. Ins. Co. v. Earl* (1915) 54 Okla. 305, 153 Pac. 867; *De Witt Wire Cloth Co. v. Griffith* (1911) 45 Pa. Super. Ct. 273; *Western Bank v. Tallman* (1862) 15 Wis. 92. See also *Heintzelman v. L'Amoureux* (1867) 3 Nev. 377.

Where a complaint is verified by the president of a foreign corporation, the affidavit need not allege why the verification is not by the party. *Treen Motors Corp. v. Van Pelt* (1919) 106 Misc. 357, 174 N. Y. Supp. 500.

In *De Witt Wire Cloth Co. v. Griffith* (1911) 45 Pa. Super. Ct. 273, an action of assumpsit for goods sold and delivered, it was held that the plaintiff, being a foreign corporation duly registered and authorized to do business in the state, and having a store and salesroom within the state, the verification of the statement by the manager

of that store through which the sale was made, who was entirely familiar with the transaction, was sufficient.

In *West v. Home Ins. Co.* (1883) 9 Sawy. 412, 18 Fed. 622, an action on a fire insurance policy, the answer was verified by the local agent of the defendant corporation, who stated therein that he made the affidavit because he knew the facts contained in the answer "of his own knowledge," and that none of the "officers" of the defendant are within the state. The statute (Code Civ. Proc. § 79) required that an answer shall "be verified by the party, his agent or attorney, to the effect that he believes it to be true." The verification must be made by the affidavit of the party; but, if he is absent or incapable of making it, his agent or attorney may make it; and such agent or attorney may make it in any case, "if all the material allegations" of the answer are within his "personal knowledge." In the case of a corporation "the verification may be made by any officer thereof, upon whom service of a summons might be made." It was held that the agent was a proper person to make such affidavit.

In *Phonoharp Co. v. Stobbe* (1897) 20 Misc. 698, 46 N. Y. Supp. 678, an action to recover for goods sold and delivered, the complaint described the plaintiff as a foreign corporation. The signed affidavit verifying the complaint was by a person who described himself as plaintiff, and did not show any connection with the corporation. It was held that the verification was clearly defective, since a foreign corporation can act only by its representative or agent.

In *American Audit Co. v. Industrial Federation* (1903) 84 App. Div. 304, 82 N. Y. Supp. 642, it was held that the answer of a foreign corporation was sufficiently verified by its attorney.

The fact that the complainant is a foreign corporation, which appears from the bill itself, is sufficient cause to justify the verification of a bill by an agent. *Bank of Wooster v. Spencer* (1840) Clarke, Ch. (N. Y.) 386.

In *St. Paul F. & M. Ins. Co. v. Earl*

(1915) 54 Okla. 305, 153 Pac. 867, an action on a fire insurance policy, an answer was filed denying under oath that the company had executed the policy. No proof was made by the plaintiff of its execution, but it was contended that, inasmuch as the affidavit attached to the answer was sworn to by an attorney, the same was insufficient, because it did not comply with the statute (Rev. Laws 1910, § 4765) by showing that the defendant was a foreign corporation, and it was insisted that a showing in the affidavit that the general agents of the said company were not residents of the state of Oklahoma, and were not then within the state, was insufficient on which to base an affidavit under that section, and thereby allow the attorney to verify such affidavit. It was held that the verification was a sufficient compliance with the statute in view of the admitted fact, a statement that the affiant was attorney for the defendant, and that the general agents were not residents of the state, and not then within the state.

In *Glaubenskle v. Hamburgh & A. Packet Co.* (1859) 9 Abb. Pr. (N. Y.) 104, an action for damages for personal injuries received by a vessel, the defendant's answer was verified by its agent by an affidavit stating that deponent was one of the managing agents of the defendants, and that the complaint was served upon him, and that he had charge of all the business of the defendant in the United States. The answer was returned on the ground that the verification was insufficient, in that it did not set forth affiant's grounds of belief and source of knowledge as to the matter stated in the answer. The statute (Code, § 157) provided that where a corporation is a party the verification of the pleading might be made by any officer thereof, and (by § 134) a summons might be served on the managing agent of a corporation. It was held that the verification was sufficient, since, by the last-named section, the service of summons on a managing agent makes him an officer for the purpose of the action.

In *Clark's Cove Fertilizer Co. v.*

*Stever* (1899) 29 Misc. 571, 62 N. Y. Supp. 249, it was argued that the verification of the complaint by the plaintiff's attorney gave none of the reasons which, under the statute (Code, § 925), authorize a pleading to be verified by a person other than a party. The statement in this respect was as follows: "That the reason why this verification is not made by the plaintiff is because it does not reside in the county of Columbia, and is a corporation." It was held that the affidavit of verification was sufficient in this respect, especially as the complaint which the affiant by his affidavit said was true contained the statement that the plaintiff was a foreign corporation.

In *Western Bank v. Tallman* (1862) 15 Wis. 92, an action to foreclose a farm mortgage brought by a foreign corporation, an application for change of venue, based upon alleged prejudice of the judge, was verified by the affidavit of the attorney of the plaintiff. The statute provided that such applications must be verified by the oath or affidavit of the party, without provision as to what officers of a corporation could make the affidavit. Other provisions ordinarily confined the right of verification to the officers of the corporation. Another provision prescribed that on certain facts a pleading may be verified by an ordinary agent or attorney, but made no such provision with respect to an application to change the venue because of the prejudice of the judge. It was held that the affidavit was insufficient.

In *Bank of Wooster v. Spencer* (1840) Clarke, Ch. (N. Y.) 386, a motion for the appointment of a receiver on a creditors' bill was verified by a clerk in the office of complainants' solicitors. The bill was sworn to by a person describing himself as agent for the complainants, duly authorized thereto by the complainants' solicitors, who swears that he has read the bill, and that the same is true of his own knowledge, except as to the complainants' having been informed of certain facts, and that in those cases he (the deponent) has been informed of those facts, with the remaining part of the usual jurat. He



added: "And further, during the proceedings in the action in which the said judgment was obtained, he was, and still is, a clerk in the office of the attorneys of the said plaintiffs therein, had personal knowledge of the facts of the obtaining of the said judgment, and of the return indorsed upon, and the filing in the clerk's office of, the said execution." The defendants objected that the bill was not properly sworn to under the rules and practice of the court. The (17th) rule required the bill to be verified by the oath of the complainant, or in case of his absence from the state, or other sufficient cause shown, by the oath of his agent, attorney, or solicitor. It was held that the bill was sufficiently verified, since a clerk who had been sent to transact the business would perhaps be as competent and as good a witness to the truth of these averments as the attorney, except as to the last averment; and if the bill was exhibited by collusion with the defendants, they would not have been present to oppose the motion.

In *Treen Motors Corp. v. Van Pelt* (1919) 106 Misc. 357, 174 N. Y. Supp. 500, the complaint of the plaintiff, a foreign corporation, was verified by its president. It stated that he was its president, and the form of verification was that usually employed by a party. The grounds of the president's belief as to matters alleged on information were not stated. The verification was held sufficient.

In *Robinson v. Ecuador Development Co.* (1900) 32 Misc. 106, 65 N. Y. Supp. 427, the answer of the defendant foreign corporation, verified by the defendant's secretary, was returned on the ground that the secretary did not set forth in his affidavit of verification the grounds of his belief as to the matters stated on information and belief in the answer. The statute provided that "the verification of a pleading 'must' be made by a 'party,' 'except' (only what is applicable being here cited) that, where the 'party' is a domestic corporation, it 'must' be made by an officer thereof, and that, where a foreign corporation, it 'may' be made by 'the agent of or

the attorney for the party.'" It was held that the secretary could not verify the answer as an agent, but to do so he must comply with the statute "and set forth in the affidavit the grounds of his belief as to all matters stated on his own knowledge;" but he need not set forth "the reason why it was not made by the party," as that would be senseless in the case of a corporation.

#### *d. Coparty.*

##### *1. In general.*

Without regard to whether the interests of the parties are joint or several, and in some instances by virtue of statute, it has been held that the verification of a pleading by one coparty for all is sufficient.

Alabama.—*Brown v. Jones* (1836) 3 Port. 420.

California.—*Patterson v. Ely* (1861) 19 Cal. 28; *Claiborne v. Castle* (1893) 98 Cal. 30, 32 Pac. 807.

Georgia.—*Hemphill v. Ruckersville Bank* (1847) 3 Ga. 435.

Indiana.—*Willett v. Porter* (1878) 42 Ind. 250; *Kinnaman v. Kinnaman* (1880) 71 Ind. 417.

Iowa.—*Kerr v. Hedge* (1861) 12 Iowa, 426.

Michigan.—*Williams v. International Grain & S. Bd.* (1894) 99 Mich. 80, 57 N. W. 1090.

Texas. — *Cherryhomes v. Carter* (1886) 66 Tex. 167, 19 S. W. 443; *Jones v. Austin* (1894) 6 Tex. Civ. App. 505, 26 S. W. 14; *Dodson v. Warren Hardware Co.* (1914) — Tex. Civ. App. —, 162 S. W. 952; *Queen Ins. Co. v. Keller* (1916) — Tex. Civ. App. —, 186 S. W. 359.

In *Brown v. Jones* (1836) 3 Port. (Ala.) 420, an action of assumpsit on a promissory note, it was objected that inasmuch as both of the defendants joined in their pleas they should be verified by both, and that the oath of one of them was insufficient verification. The statute under which the pleas were made declared that any writing (the foundation of an action), whether the same be under seal or not, shall be received as evidence of the debt or duty for which it is given; and that it shall not be lawful to deny

its execution, unless by plea, supported by the affidavit of the party pleading it. The court held that while a literal interpretation of the statute would doubtless render necessary the affidavit of all parties uniting in the plea, to deny the execution of a promissory note it was not believed that the intention or language of the statute required all parties to plead, but that, as the statute was enacted to require an affidavit to show *prima facie* that execution is not carelessly denied, and this being quite as apparent where the plea is verified by one, as when it is verified by all the defendants pleading it, the verification of the plea by one was in compliance with the spirit of the statute.

In *Kerr v. Hedge* (1861) 12 Iowa, 426, one of the plaintiffs verified the replication by an affidavit in which it was stated that the affiant was not personally acquainted with the matters set up in the replication, but from the information of his codefendant, he believed the facts stated were true in substance and in fact. The statute (Code, § 1745) provided that "a replication not sworn to could not be regarded as evidence for the plaintiff, but it could be considered as a pleading, putting in issue the allegations to which it responds." But another section (1749) provided that such replication must be sworn to by the party himself, "or some one of the parties, when there are several, or by someone showing himself to be possessed of equal information with the party," etc. It was held that the verification was sufficient, coming fully within the requirements of the statutes, as it was made by one of several parties under oath.

In *Willett v. Porter* (1873) 42 Ind. 250, a proceeding to contest and set aside a will, the complaint and amendments thereof were verified by one of the plaintiffs only, and the defendants moved to dismiss the action as to all plaintiffs who had not sworn to the complaint, and demurred on the ground, among others, that the complaint was not verified by the affidavits of the plaintiffs. It appeared that the statute governing proceedings to con-

test a will provided as follows: "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the proper court his allegation in writing, verified by his affidavit, setting forth," etc. "The allegation of the party contesting must be verified by his affidavit." It was held that the statutory requirement that the allegations of the party contesting must be verified by affidavit is complied with when the complaint has been sworn to by any one or more of the plaintiffs.

In *Claiborne v. Castle* (1898) 98 Cal. 30, 32 Pac. 807, an action to enforce a vendor's lien on realty, it was insisted that the default of one defendant should have been entered, for the reason that the answer was verified by the other defendant alone, he stating that he also made the affidavit on behalf of his codefendant. It was held that the necessity for verification of the pleading arose from statute alone, and that the solution of the question was dependent entirely on the statute (Code Civ. Proc. § 446) under which it was quite apparent that a verification of a pleading by one codefendant or coplaintiff was sufficient.

In *Kinnaman v. Kinnaman* (1880) 71 Ind. 417, an action brought by children and heirs at law of deceased to contest a will, the court remarked that the complaint was duly verified by one of the plaintiffs.

The verification of the statements in an injunction bill by the affidavit of any one of the complainants is sufficient. *Hemphill v. Ruckersville Bank* (1847) 3 Ga. 435.

In *Jones v. Austin* (1894) 6 Tex. Civ. App. 505, 26 S. W. 144, a suit brought on an account, two of the defendants did not reside in the county, but their codefendant did have a residence therein. The two nonresident defendants pleaded in abatement their privilege to be sued in the county of their residence. The plea was duly verified by one of them, who stated that he was cognizant of the facts. It was held that this was all that was

necessary to make the plea available to both defendants.

An affidavit verifying a writ of garnishment made by one of the plaintiffs is a sufficient verification. *Dodson v. Warren Hardware Co.* (1914) — *Tex. Civ. App.* —, 162 S. W. 852.

In *Patterson v. Ely* (1861) 19 Cal. 28, an action in ejectment, it was held that it was not necessary that the verification of the complaint should have been made by both of the plaintiffs, the affidavit of one being sufficient.

In *Queen Ins. Co. v. Keller* (1916) — *Tex. Civ. App.* —, 186 S. W. 859, a petition for temporary injunction, it was held that a plea of privilege, made in behalf of two defendants, was sufficiently verified by one of the defendants to make the plea available for both.

In *Williams v. International Grain & S. Bd.* (1894) 99 Mich. 80, 57 N. W. 1089, a garnishment proceeding, the affidavit in each case was made by one of the plaintiffs and stated all the requirements of the statute, and that the plaintiffs "are justly apprehensive of loss," etc., "unless a writ of garnishment issue." It was held that where the affidavit is made by one of the plaintiffs, and he swears that they both are justly apprehensive, it must be presumed that he has personal knowledge.

In *Queen Ins. Co. v. Keller* (Tex.) *supra*, a petition for temporary injunction, one of the trustees of a church made an application for a writ of garnishment on behalf of all the trustees. The applicant alone made the affidavit in support of the application. It was contended that the affidavit could be made only by the plaintiff in the main suit, to which the garnishment suit was only auxiliary, or by an agent or attorney, and if by an agent or attorney, the capacity of the affiant and his authority must appear in the application of the affidavit. It was held that, as the affiant was one of the trustees and one of the plaintiffs, he had full authority to make the application on behalf of all the plaintiffs for the writs of garnishment, and that he had authority to perform the ministerial act of verification.

However, in *Cherryhomes v. Carter* (1886) 66 Tex. 167, 18 S. W. 443, an answer setting up the defense of usury was verified by one of the defendants, who not only did not join in the plea, but refused to avail himself of it. The statute (Rev. Stat. art. 2981) was peremptory that "no evidence of usurious interest shall be received on the trial of any cause unless the same shall be specially pleaded, and verified by the affidavit of the party wishing to avail himself of such defense." It was held that the verification was not sufficient.

In *Stevenson v. Farnsworth* (1845) 7 Ill. 715, the declaration was in assumpsit on a note made payable to the plaintiffs. The defendants pleaded, first, nonassumpsit, and, second, that they did not make and execute the note declared on. A statute provided as follows: "No person shall be permitted to deny on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense, or set-off, unless the person so denying the same shall, if defendant, verify his plea by affidavit; and, if plaintiff, shall file his or her affidavit, denying the execution of such instrument." Another statute provided as follows: "On actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants, as partners or joint obligors or payors, proof of joint liability or partnership of the defendants, or their Christian or surnames, shall not in the first instance be required, to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or the filing of pleas denying the execution of such writing, as is required by the 'Act Concerning Practice in Courts of Law.'" It was held that, as it is the person and not the party who is to verify the plea, where there are several defendants, each must for himself verify the plea.

In *Harrison v. Lebanon Waterworks* (1891) 91 Ky. 255, 84 Am. St. Rep. 180, 15 S. W. 522, the statute involved (§ 117, subsec. 4) provided that on

motion of a party who files his affidavit, stating his belief that an adverse party, whose pleading has been verified by a person other than himself, knows that a statement thereof in the affidavit mentioned is untrue, and that the motion is not made for delay, the court, if such statement be material, shall require such adverse party to verify the pleading; and, if he fail to do so within a reasonable time, shall treat it, with regard to him, as if it had not been filed. It was held that, where one of the plaintiffs verified the petition, the failure of the other plaintiff to verify his pleading, and his refusal to obey a rule issued on a motion requiring him to do so, the court properly ordered that said pleadings be treated, with regard to him, as if they had not been filed.

In Maryland, there are three early cases decided at about the same time, which are apparently conflicting. Thus it was held that a bill praying for an injunction may be verified by one of the plaintiffs, where there are more than one. *Jones v. Magill* (1825) 1 Bland, Ch. (Md.) 177; *Salmon v. Clagett* (1828) 3 Bland, Ch. (Md.) 125.

But in *Binney's Case* (1828) 2 Bland, Ch. (Md.) 100, it was held that where there are a plurality of defendants, they may join in making answer to the bill, or they may answer separately, or they may make a joint and several answer as best suits their convenience or pleasure; but in whatever form the response may be it is essential, if not waived by the plaintiff, that each defendant should swear to his answer, and therefore, when the answer purports to be the answer of two or more, and is not sworn to by all, it may be taken off the file, or can only be received as the answer of him who has so sworn to it.

In *Mooney v. Ryerson* (1885; City Ct. Spec. T.) 8 N. Y. Civ. Proc. Rep. 435, the action was by a husband to recover damages for injuries alleged to have been received by the wife through the negligence of the servants of two defendants. The answer was verified by one defendant only, the verification being in the usual form of

a verification by a party pleading alone. It was held that it was sufficient.

But in an early case it was said that although an answer by joint and several defendants named in the title should have been sworn to by all instead of one, yet the oath and signature may be waived by the plaintiffs, by a reply. *Fulton Bank v. Beach* (1880) 6 Wend. (N. Y.) 86.

And see in *Jaillard v. Tones* (1877) 8 Abb. N. C. (N. Y.) 24, an action for goods sold and delivered, in which the answer was verified by one of the defendants' attorneys, who stated in the verification that the ground of his belief as to the truth of the answer was information derived from one of the defendants, who was a partner of another defendant at the time mentioned in the complaint. This statement in the verification was directly contradictory to the statement contained in the answer that the defendants were not copartners. It was held that the other partner must serve an answer verified by himself in the action.

### *B. Joint interest.*

Where the interest of coparties is joint, one of the parties may verify a pleading for all.

*United States.*—*Re Glass* (1902) 119 Fed. 509.

*Arkansas.*—*Ashley v. Gunton* (1855) 15 Ark. 415; *Reed v. Ryburn* (1861) 23 Ark. 47.

*California.*—*Butterfield v. Graves* (1902) 138 Cal. 155, 71 Pac. 510.

*Georgia.*—*Compare White v. North Georgia Electric Co.* (1911) 136 Ga. 21, 70 S. E. 639.

*Illinois.*—*Warren v. Chambers* (1856) 12 Ill. 124; *Compare Davis v. Scarritt* (1855) 17 Ill. 262.

*Indiana.*—*Swales v. Grubbs* (1890) 126 Ind. 106, 25 N. E. 877; *Compare Feeney v. Mazelin* (1882) 87 Ind. 226.

*Maryland.*—*Deved v. Carrington* (1904) 98 Md. 876, 56 Atl. 818.

*Missouri.*—*See Ruch v. Jones* (1868) 83 Mo. 393.

*New York.*—*Conolly v. Schroeder* (1907) 121 App. Div. 634, 106 N. Y. Supp. 803; *Mathis v. Ballard* (1911) 73 Misc. 274, 130 N. Y. Supp. 873;

**Alfred v. Watkins** (1852) N. Y. Code Rep. N. S. 343; **Ballard v. Lockwood** (1861) 1 Daly, 158; **Harley v. Ritter** (1859) 9 Abb. Pr. 400, 18 How. Pr. 147; **Paddock v. Palmer** (1900) 32 Misc. 426, 66 N. Y. Supp. 743.

**South Carolina.**—**Holmes v. Moore** (1902) 63 S. C. 182, 41 S. E. 90.

**Tennessee.**—**Moody v. Alter** (1873) 12 Heisk. 142.

Thus, where codefendants are jointly liable in an action on a note, it would appear that a verification by one is a verification for both. **Alfred v. Watkins** (1852) N. Y. Code Rep. N. S. 343.

In an action brought on a contract against the defendants as copartners, the answer was verified by only one of the codefendants. It was urged that: "it does not appear thereby that the defendant who makes or attempts to make the same is acquainted with the facts." It was held that the verification was sufficient in this respect, as it appeared from the pleadings, presumptively at least, that the defendant making the verification was "acquainted with the facts." **Paddock v. Palmer** (1900) 32 Misc. 426, 66 N. Y. Supp. 743.

In **Mathis v. Ballard** (1911) 73 Misc. 274, 130 N. Y. Supp. 873, an action by four defendants as next of kin of an intestate, to recover a balance alleged to be due, the answer was returned by the plaintiff's attorney on the ground that the verification was insufficient "in that the answer was made by four parties united in interest, and the verification was made by one who is not acquainted with the facts." It was held that the verification was sufficient.

In **Warren v. Chambers** (1850) 12 Ill. 124, a declaration in assumpsit against the defendants as partners, and containing the common count for money paid and advanced, it was said that when the joint liability of several, sued on a written instrument, is put in issue by a plea in abatement, it is sufficient to verify the plea by the affidavit of one of the defendants, or a third person.

In **Butterfield v. Graves** (1902) 138 Cal. 155, 71 Pac. 510, an action to

quiet title, it was held that, as the defendants were sued jointly, and it was alleged that they "claim an estate or interest therein adverse to the said plaintiff," the answer was sufficiently verified by the affidavit of one defendant, under a statute (Code Civ. Proc. § 446) providing that verification must be by the affidavit of one party.

Where the claim made by a bill is a joint claim, the affidavit of one of the joint claimants is a sufficient verification. **Reed v. Ryburn** (1861) 28 Ark. 47.

In **Holmes v. Moore** (1902) 63 S. C. 182, 41 S. E. 90, an action on two promissory notes and for goods sold and delivered, the verification of the complaint was by one of the members of the firm. It was contended that the verification was not sufficient, because the party who verified did not live in the same county with his attorney. The statute (Code Civ. Proc. § 178) provided as follows: "The verification . . . must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit," etc. The verification was held sufficient, since the provisions of the Code did not restrict a party to a suit in verifying his own pleadings, but merely provided that he must verify, leaving unaffected the general principle that a party may always verify his own pleadings.

By direct provision of an early New York statute (Code, § 157), it was provided that, if there are several parties united in interest and pleading together, "the verification to the pleading may be made by one of such parties acquainted with the facts." **Harley v. Ritter** (1859) 9 Abb. Pr. (N. Y.) 400, 18 How. Pr. 147.

In **Swales v. Grubbs** (1890) 126 Ind. 106, 25 N. E. 877, a suit against the heirs and legal representatives of a decedent for the purpose of obtaining a judgment against the estate on certain promissory notes, it was contended that as only one of the defendants had pleaded non est factum the ex-

execution of the notes was admitted. The answer was filed by all of the defendants except the administrator, and was verified by only one of the defendants. It was held that the notes, although referred to in the complaint, were not the foundation of the action, and while possibly it may have been necessary that the execution of the instruments therein referred to should have been denied under oath, it was not necessary that all the heirs should verify the answer denying that their ancestor and grantor executed the notes referred to in the complaint.

When the opposing creditor joining in specifications opposing a discharge in bankruptcy is a partnership, verification may be made by the signing member, or by another partner, if the facts are known to him and not to the member signing the pleading. *Re Glass* (1902) 119 Fed. 509.

In *Deved v. Carrington* (1904) 98 Md. 376, 56 Atl. 818, a suit against indorsers on two overdue promissory notes, it appeared that joint pleas of *nil debet* and *nonassumpsit* were verified by one of the defendants by an affidavit reading as follows: "On this 19th day of May, in the year 1903, before me, the subscriber, a notary public of the state of Maryland, in and for Baltimore city, personally appeared James Bartol (one of) the above-named defendants, and made oath in due form of law, that every plea so pleaded by the defendants is true, and they admit none of plaintiff's claim to be due and owing, and all is disputed; and further, that the affiant verily believes the defendants will be able at the trial of the cause to produce sufficient evidence to support the said pleas, and that he is advised by counsel to file the said pleas." It was held that the verification was sufficient under the requirement of the statute (Laws 1898, chap. 123, Baltimore City Charter, §§ 312, 313); that the affidavit itself should show that it was made on behalf of all of the defendants.

In *Moody v. Alter* (1873) 12 Heisk. (Tenn.) 142, wherein an attachment was issued, the affidavit of verification, on its face, purported to have been sworn to by one of the firm of "Moody

& Bigelow," but the name did not appear in the body of the instrument, which was signed "J. W. Moody & Bigelow," and the magistrate certified that it was subscribed and sworn to before him on a certain date. Objection to the sufficiency of this affidavit was taken, on the ground that the individual name of neither of the plaintiffs composing the firm of "Moody & Bigelow" was inserted in the body of the affidavit, nor subscribed thereto, in verification of its contents. The affidavit was held sufficient because the recital that one of the firm of Moody & Bigelow made oath, etc., and the fact that the affidavit was subscribed "J. W. Moody & Bigelow," and attested as subscribed and sworn to, sufficiently complied with the requirements of the statute, and as J. W. Moody's name was signed in full, the addition of the name of Bigelow did not vitiate the affidavit.

In *Ashley v. Gunton* (1855) 15 Ark. 415, a proceeding in the probate court for the allowance and classification of a claim against the estate of a deceased person, it was held that the claim was sufficiently authenticated under the provisions of the statute by the affidavit of one of the joint claimants.

In *Conolly v. Schroeder* (1907) 121 App. Div. 634, 106 N. Y. Supp. 308, the verification of the answer was by one of the defendants, stating that he was such, and that the answer was true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believed it to be true. It was contended that the verification was incomplete, in that it did not state that it was made by a defendant acquainted with the facts. The statute (Code Civ. Proc. § 525) provided as follows: "If there are two or more parties united in interest, and they plead together, the verification of a pleading must be made by at least one of them who is acquainted with the facts, except in certain instances, where it may be made by other individuals. Where the pleadings themselves show that the several defendants are united in interest, and

that presumptively the verifying defendant is acquainted with the facts, the verification need not so state." It was held that the verification was sufficient, since the pleadings on their face showed that the verifying defendant presumably had knowledge of the facts, and it was unnecessary so to state in the verification itself.

In *Paddock v. Palmer* (1900) 32 Misc. 426, 66 N. Y. Supp. 743, an action brought on a contract against the defendants as copartners, it was objected that the answer was verified by only one of the codefendants. The statute (Code, § 525) provided that with certain exceptions the verification of a pleading must be made by the affidavit of the party, or if there were two or more parties united in interest, and pleading together, by at least one of them who was acquainted with the facts. The complaint sought to charge the defendants solely as copartners. The defendants, while denying that they were copartners during all of the times alleged in the complaint, admitted their liability as copartners for part of the goods mentioned in the complaint, and denied that certain of the other goods were delivered to them as copartners, or at all, but claimed that they were delivered to some third person. It was held that the verification was sufficient.

In *Ballard v. Lockwood* (1861) 1 Daly (N. Y.) 158, the complaint was verified by one of the coplaintiffs as follows: "[Affiant], being duly sworn, says that he is one of the plaintiffs in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true." The verification was held to be sufficient as made by one of the plaintiffs, and for that reason was made by one of several parties united in interest, and who was acquainted with the facts.

See also *Ruch v. Jones* (1863) 33 Mo. 393, a suit on an account for painting and glazing, wherein the petition charged one defendant as the debtor and the other as the owner of the property sought to be charged with

the lien. The answer was made jointly by both defendants, and was verified by the defendant described as debtor. The court held that the joint answer of several codefendants was sufficiently verified by the affidavit of one of them.

However, in *White v. North Georgia Electric Co.* (1911) 136 Ga. 21, 70 S. E. 639, it was held that a joint plea to the jurisdiction, by several defendants, based on the ground that none of the defendants against whom substantial relief was prayed resided in the county where the suit was instituted, was not properly verified by one of the defendants, although the plea was sufficient as to the defendant who signed, since a plea to the jurisdiction on the ground that the defendant is not suable in the county where the suit was filed is a personal plea, and must be sworn to by the defendant who files it.

And in *Feeney v. Mazelin* (1882) 87 Ind. 226, an action on a promissory note, it was held that the court below did not err in refusing the plaintiff's motion to strike out the 2d paragraph of plaintiff's reply to the 2d paragraph of the appellant's answer, which was verified by one of two codefendants, since it had no other effect as to the defendant who did not verify than simply to require the production of the note, even if, as to the verifying defendant, it put in issue the execution of the note.

And compare *Davis v. Scarritt* (1855) 17 Ill. 202, an action on a promissory note, wherein it appeared that the defendants were sued as late partners, trading and doing business under a firm name stated. A statute provided that when two or more are sued as partners or joint obligors, the plaintiff need not prove the joint liability or partnership "unless such proof shall be rendered necessary by pleading in abatement, or the filing of pleas denying the execution of such writing, verified by affidavit as required by law." It was held that the defendants were sued both as partners and as joint obligors, in the sense in which these words are used in the statute, and that a plea verified by one

of the defendants was sufficient to put in issue the making of the note by him or the existence of the alleged firm, and he was entitled to make his defense under the sworn plea, although the implied admission created by statute still exists as to the other defendant, who was not entitled to any benefit from the oath of his codefendant, except the incidental benefit which would result from the plaintiff failing to maintain the issue as to one of the joint defendants.

### 3. *Several interest.*

Where the interest of coparties is several, the pleading must be verified by all, and if verified by one it will be considered as verified only as to him. *Re Glass* (1902) 119 Fed. 509; *Andrews v. Storms* (1852) 5 Sandf. (N. Y.) 609; *Wendt v. Peyser* (1878) 14 Hun (N. Y.) 114; *Hull v. Ball* (1856) 14 How. Pr. (N. Y.) 306; *Gray v. Kendall* (1859) 5 Bosw. (N. Y.) 606; *Alfred v. Watkins* (1852) N. Y. Code Rep. N. S. 343. See also *Ferguson v. State Bank* (1848) 8 Ark. 416.

Thus where codefendants are severally liable on a note, a verification by one is not a verification for the other codefendants. *Alfred v. Watkins* (1852) N. Y. Code Rep. N. S. 343.

And in *Gray v. Kendall* (1859) 5 Bosw. (N. Y.) 606, 10 Abb. Pr. 66, it appeared that a statute (Code, §§ 156, 157 [133, 134]) provided that, when any pleading is verified, "it must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by at least one of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit." It was provided by another statute that, whenever in any statute any "party or person is described or referred to by words importing the singular number," several persons shall be deemed to be included. 2 Rev. Stat. 1st ed. p. 778, § 11. It was held that when the Code required the verification to be made by the affidavit of the party, it required the affidavit to be made by every party who united in the pleading, whose interest was several, and if this be not done the adverse party

would not be required to treat it as a pleading verified as the Code required.

In *Wendt v. Peyser* (1878) 14 Hun (N. Y.) 114, an action brought for the construction of a will, the statute then in force (Code Civ. Proc. § 525) declared that the verification must be made by the affidavit of the party, or, if there should be two or more parties united in interest and verifying together, by at least one of them, who is acquainted with the facts, except in certain cases. It was held that the verification was defective. Since the Code required the verification to be made by the affidavit of the party, it required the affidavit to be made by every party who united in the pleading and whose interest was several.

In *Hull v. Ball* (1856) 14 How. Pr. (N. Y.) 306, an action on a promissory note against the maker and first and second indorsers, the defendant's answer was verified by one of the defendants. The court held that there were three distinct causes of action, and hence the verification by one defendant was not good for the rest, since, although the defendants may have one common defense, their interest is in no respect a joint or united interest, and each must verify his answer whether they answer separately or jointly.

If there is more than one creditor in specifications opposing a petition for discharge in bankruptcy, all must sign it and all must swear to it. *Re Glass* (1902) 119 Fed. 509.

In *Andrews v. Storms* (1852) 5 Sandf. (N. Y.) 609, an action on a note which was verified by only one of two codefendants, the plaintiff moved to strike out the answer of the defendant not verifying, on the ground that it was not verified by him. The defendants contended that they were "united in interest," and that a verification by one was a compliance with § 157 of the Code. It was held that this was not sufficient as to the defendant not verifying.

And see *Ferguson v. State Bank* (1848) 8 Ark. 416, an action of debt wherein it appeared that one defendant filed a verified plea of nil debet.



The statute (Rev. Code, chap. 116, § 104) provided that "the pleas of nil debet and non assumpsit may be filed in all actions of debt or assumpsit founded on any instrument of writing not under seal; but such pleas shall not put in issue the execution of such writing unless the same shall be verified by affidavit." It was held that the verification only put in issue the signature of the affiant to the note in question, and that the signatures of the other defendants were proved by the note itself, since they had taken no steps to impeach it.

#### 4. *Husband and wife.*

##### (a) *Several interest.*

Where husband and wife are co-parties, but with a several interest, their pleadings must be verified by both, the verification of one not being sufficient. *Harley v. Ritter* (1859) 9 Abb. Pr. (N. Y.) 400, 18 How. Pr. 147; *Reed v. Butler* (1860) 2 Hilt. (N. Y.) 589; *Youngs v. Seely* (1855) 12 How. Pr. (N. Y.) 395.

Thus, in *Youngs v. Seely* (N. Y.) supra, an action for the partition of certain premises, brought against husband and wife, the answer was verified by the husband only. The statute (Code, § 398) declared that if the pleading is required to be verified, it must be done by the affidavit of the party; or, if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. It appeared that the wife's interest was separate from that of her husband. It was held that the petition should have been verified by the wife as well as by the husband.

In *Reed v. Butler* (1860) 2 Hilt. (N. Y.) 589, a motion to strike out a joint answer of husband and wife for want of sufficient verification, the defendants answered jointly, denying that the property in question was purchased and paid for by the husband, and claiming that property as the separate estate of the wife, and the wife alone verified the answer. It was held that the answer was not sufficiently

verified, since, if it was relied on as the answer of both, it must be verified by both, because they were not united in interest.

In *Harley v. Ritter* (1859) 9 Abb. Pr. (N. Y.) 400, 18 How. Pr. 147, an action against husband and wife, the statute involved (Code, § 157) provided as follows: "If there be several parties united in interest, and pleading together, the verification to the pleading may be made by one of such parties acquainted with the facts." It was held that where the husband and wife are not united in interest, a verification by the husband of a joint answer would not be sufficient, the court saying: "By § 114 it is provided that when a married woman is a party her husband must be joined with her, except in cases where the action concerns her separate property, and where the action is between herself and her husband. It follows, therefore, that in actions against a married woman in reference to her separate estate, the husband must be joined, and that the husband is made a defendant in right of the wife. As we have seen, in such cases the wife may answer separately, as matter of course, on application. . . . It thus appears that the wife held her separate property as if she were a feme sole; that when sued in reference to it, although her husband must be joined with her, an answer put in by him for her would not be good without her verification, and that, in cases where the husband is joined as a defendant in right of his wife, she may answer separately as matter of course, if she apply for leave to do so. However harmonious with the old practice, which originated during the existence of the more severe legal doctrine in relation to a married woman, her estate, and her being, there seems to be no reason for the long continuance of the rule requiring her to ask leave of the court to answer, when the action concerns her separate estate, and, in my opinion, such a rule would not only impose the performance of an idle ceremony, but would impair her right to enjoy and protect her separate estate in the manner, and to the

extent and purpose, designated by the legislature. And I think, as well, that it would not be in accordance with the spirit of the Code, which was to 'simplify' as well as 'to abridge the practice, pleadings, and proceedings of the courts of this state.'"

(b) *Joint interest.*

In *Huntington v. House* (1856) 22 Mo. 365, an action for slander and malicious prosecution brought by husband and wife, the petition was verified by the affidavit of the husband. It was held that the affidavit of the husband was a sufficient verification of the petition.

In one New York case there was a similar holding. *Hartley v. James* (1864) 18 Abb. Pr. (N. Y.) 299. In that case, an action on a contract on the part of a husband and wife, the defendants answered jointly, claiming damages for both, and their answer was verified by the husband in the usual form. It was held that the verification was sufficient under the statute (Code, § 157), since the plaintiff brought his action on a joint contract by the defendants to recover for the breach of it.

But in an earlier case it was held that a joint answer of husband and wife must be sworn to by both, unless the complainant consents to receive the answer of both upon the oath of the husband only. *New York Chemical Co. v. Flowers* (1837) 6 Paige (N. Y.) 654.

This holding finds support in a New Jersey case, in which it was held that where husband and wife are made defendants in a bill in equity, and the husband must appear for both, the complainant is entitled to a joint answer which must be sworn to by the wife as well as by the husband, or it will be suppressed for irregularity. *Collard v. Smith* (1860) 13 N. J. Eq. 43.

See also *Hudgins v. Nix* (1846) 10 Ala. 575, wherein, under a statute providing that when the demand does not exceed \$100 "the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by the oath of the defendant," with an exception in the case of execu-

tors, administrators, trustees, and guardians, where a husband was sued for a debt due from his wife, when sole, it was held that the wife with whom the contract was alleged to have been made was the defendant indicated by the statute, to controvert the plaintiff's oath.

e. *Guardian ad litem.*

A guardian ad litem or next friend of an incompetent plaintiff may verify the petition or complaint. *Reed v. Ryburn* (1861) 23 Ark. 47; *Turner v. Cook* (1871) 36 Ind. 129; *Imlay v. New York & H. R. Co.* (1848) 1 N. Y. Code Rep. 94, 1 Sandf. 732; *Anable v. Anable* (1861) 24 How. Pr. (N. Y.) 92; *Clay v. Baker* (1886) 11 N. Y. Civ. Proc. Rep. 1; *Hill v. Thaxter* (1848) 3 How. Pr. (N. Y.) 407; *Leftwick v. Hamilton* (1872) 9 Heisk. (Tenn.) 310; *Phillips v. Portage Transit Co.* (1908) 137 Wis. 189, 118 N. W. 539.

Thus, in *Anable v. Anable* (1861) 24 How. Pr. (N. Y.) 92, an action for divorce by an infant plaintiff, it was held that the plaintiff was not required to verify, but that the complaint was properly verified by the guardian, on the theory that the guardian may be regarded as the plaintiff.

And in *Reed v. Ryburn* (1861) 23 Ark. 47, it was said that if the bill had been prosecuted by a minor alone, a proper affidavit of the next friend to the bill would have been a sufficient verification.

In *Phillips v. Portage Transit Co.* (1908) 137 Wis. 189, 118 N. W. 539, an action for damages for personal injuries, the complaint was verified by the guardian ad litem of the infant plaintiff positively and of his own knowledge. It was contended that this was not a good verification, but that the verification should have been made by the infant plaintiff, and it was urged that the guardian occupied the position of an agent of the plaintiff, and therefore it was necessary that he should have stated his knowledge. It was held that the verification was sufficient, since the guardian ad litem verifies as a party, and not as an agent of the infant plaintiff.

The next friend, suing in behalf of

a married woman, may properly make oath to the truth of the facts in the petition. *Leftwick v. Hamilton* (1872) 9 Heisk. (Tenn.) 810.

In *Clay v. Baker* (1886) 11 N. Y. Civ. Proc. Rep. 1, a motion to compel the plaintiff to receive an unverified answer, it appeared that the plaintiff was an infant, and the guardian ad litem verified the complaint by an affidavit, stating that he was such guardian and that the complaint was true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believed it to be true. The defendants served an answer without verification, which was returned because it was unverified. Thereupon the defendants moved to require its acceptance as an answer to the complaint, and from the denial of the motion this appeal was taken. The contention of the defendants was that as the affidavit was not made by the party plaintiff it was ineffectual as a verification, because it did not set forth the grounds of his belief and the reason why it was not made by such party. The statute provided that the verification must be made by the affidavit of the party, except that under certain prescribed circumstances it might be made by the agent or attorney (Code Civ. Proc. § 525), and that, when made by a person other than the party, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it was not made by the party (id. § 526). It was held that the affidavit was sufficient, since, although the guardian was not a party plaintiff, he prosecuted the action, and the complaint was his pleading in behalf of the infant plaintiff, and the latter could not be required to verify the pleading; nor was it any evidence against her, nor did it conclude the infant party.

In *Turner v. Cook* (1871) 36 Ind. 129, a suit to contest a will, it was held that the section of the statute requiring the claimant to verify his complaint by his affidavit must be construed to apply to adults, and not to infants, and that a verification by the

next friend of an infant complainant was sufficient.

However, in *Hill v. Thacter* (1848) 8 How. Pr. (N. Y.) 407, a civil action for speaking defamatory words of and concerning the plaintiff, it was held that while a complaint of an infant plaintiff could have been verified by his guardian ad litem or attorney, the verification of the complaint by a person described therein as guardian ad litem, but not then appointed as such, and who did not describe himself as agent or attorney, but simply as father of the plaintiff, was not sufficient under the statute (Code, § 132), which required that the complaint, answer, and reply must be verified by the party, his agent, or attorney.

#### 1. Third person.

Under various statutes a pleading may, in some instances, be verified by a third person who has knowledge of the facts. *Martin v. Dortch* (1888) 1 Stew. (Ala.) 479; *Jones v. Magill* (1825) 1 Bland, Ch. (Md.) 177; *Deved v. Carrington* (1904) 98 Md. 376, 56 Atl. 818; *Youngblood v. Schamp* (1862) 15 N. J. Eq. 42; *Campbell v. Morrison* (1888) 7 Paige (N. Y.) 157; *Alston v. Jones* (1848) 3 Barb. Ch. (N. Y.) 397; *Nelson v. Baruch* (1908) 60 Misc. 357, 113 N. Y. Supp. 449; *Friedlander v. Pollock* (1868) 5 Coldw. (Tenn.) 490.

In *Youngblood v. Schamp* (1862) 15 N. J. Eq. 42, a bill for injunction, it was held that the facts should be proved by the special affidavit of the complainant, but that where the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts.

A bill praying for an injunction may be verified by the affidavit of some third person, if the plaintiff is not a resident of the state, and the affiant especially shows how he happens to have knowledge of the facts set forth in the bill. *Jones v. Magill* (1825) 1 Bland, Ch. (Md.) 177.

In *Martin v. Dortch* (1828) 1 Stew. (Ala.) 479, in discussing the statute (Ala. Laws, 454) providing "that no plea of non est factum shall be admitted to be pleaded but when accom-

panied with an affidavit of its truth," the court remarked that the statute contained no qualification or exceptions as to the persons who might make the affidavit.

In *Deved v. Carrington* (1904) 98 Md. 376, 56 Atl. 818, a suit against indorsers on two overdue promissory notes, the statute (Laws 1898, § 812), by its express terms, permitted the affidavit to the defendant's pleas, in such cases, to be made by a third party on the defendant's behalf, doubtless for the reason that, in some instances, the defense might rest on grounds to which some other person could with more safety and knowledge swear.

The law is well settled that, where a particular allegation is inserted in a bill for the purpose of transferring the jurisdiction from a court of law to a court of equity, that particular allegation in the bill must be verified by the oath of the complainant, or by oath of some other person who knows the facts, on his behalf. *Alston v. Jones* (1848) 3 Barb. Ch. (N. Y.) 397.

And see *Campbell v. Morrison* (1838) 7 Paige (N. Y.) 157, an application for injunction, wherein it was held that on an application for a general injunction, ex parte, if the complainant has no personal knowledge of the facts on which the right to the injunction rests, he should state the facts on his information and belief, and should annex to the bill the affidavit of the person from whom he derived his information, and who can swear to the facts.

However, where a pleading was verified by a person other than the party, who stated simply "that the sources of deponent's belief as to the matters not stated upon his knowledge are facts obtained in an investigation made for and in behalf of the said defendant and the statements of a witness, in deponent's possession, relating to the matters referred to in the complaint, and letters and documents in deponent's possession relating to said matters," it was held that the affidavit was defective, since the disclosure of the grounds of belief in the verification amounted to nothing more than the affiant's statement of

his conclusion that the information possessed by him would justify his belief.

### III. Formal sufficiency of verification.

#### a. Allegation of right to verify.

##### 1. Generally.

When a person verifies a pleading in behalf of the party, he should, in his affidavit, state facts showing that he is entitled to verify as being within one of the classes of persons who are, by virtue of statute, authorized to verify for or instead of the party.

**Alabama.**—*Guyton v. Terrell* (1901) 132 Ala. 66, 31 So. 83.

**California.**—*Silcox v. Lang* (1889) 78 Cal. 118, 20 Pac. 297.

**Colorado.**—*Barrett Min. Co. v. Tappan* (1873) 2 Colo. 124. See also *Nichols v. Jones* (1890) 14 Colo. 61, 23 Pac. 89.

**Delaware.**—*St. Joseph's Polish Catholic Beneficial Soc. v. St. Hedwig's Church* (1901) 3 Penn. 229, 50 Atl. 535; *Wilmington Sash & Door Co. v. Taylor* (1911) 2 Boyce, 528, 82 Atl. 86.

**Iowa.**—*Turner v. Loomis* (1910) 146 Iowa, 655, 125 N. W. 662.

**Maryland.**—*Knickerbocker L. Ins. Co. v. Hoeske* (1870) 32 Md. 317.

**Massachusetts.**—See *Wright v. Coles* (1846) 11 Met. 293.

**Michigan.**—*Bergh v. Poupard* (1842) Walk. Ch. 5.

**Missouri.**—*Bridgeford v. The Elk* (1840) 6 Mo. 356; *Hamilton v. The Ironton* (1854) 19 Mo. 523.

**New York.**—*Van Horne v. Montgomery* (1851) 5 How. Pr. 238; *Re Mahoney* (1903) 88 App. Div. 140, 84 N. Y. Supp. 329; *Myers v. Garrits* (1861) 13 Abb. Pr. 106; *Rude v. Crandell* (1886) 11 N. Y. Civ. Proc. Rep. 11; *Re Howell* (1876) 2 Redf. 299; *People ex rel. Smith v. Allen* (1856) 14 How. Pr. 384; *Fitch v. Bigelow* (1851) 3 N. Y. Code Rep. 216, 5 How. Pr. 237; *Boston Locomotive Works v. Wright* (1857) 15 How. Pr. 253; *Newberger v. Webb* (1861) 24 Hun, 347.

**North Carolina.**—*Commercial Nat. Bank v. Hutchison* (1882) 87 N. C. 22.

**Ohio.**—*Bullock Beresford Mfg. Co. v. Hedges* (1907) 76 Ohio St. 91, 81 N. E. 171.

**Oklahoma.**—*Garfield County v. Isenberg* (1900) 10 Okla. 378, 61 Pac. 1067; *Chicago, R. I. & P. R. Co. v. Mitchell* (1907) 19 Okla. 579, 101 Pac. 850.

**Oregon.**—*The Senorita v. Simonds* (1859) 1 Or. 274.

**Pennsylvania.**—*Johnson v. Smith* (1893) 158 Pa. 568, 28 Atl. 144; *Kinograften v. Henius* (1914) 23 Pa. Dist. R. 980.

**South Carolina.**—*Carolina Grocery Co. v. Moore* (1902) 63 S. C. 184, 41 S. E. 88.

**Texas.**—*Willis v. Lyman* (1858) 22 Tex. 268.

**Wisconsin.**—*Blaikie v. Griswold* (1860) 10 Wis. 294; *Morley v. Guild* (1861) 13 Wis. 577; *Kirst v. Wells* (1879) 47 Wis. 56, 1 N. W. 357; *Reichert v. Lonsberg* (1894) 87 Wis. 543, 58 N. W. 1030.

Thus, in *Hamilton v. The Ironton* (1854) 19 Mo. 523, it was held that, when not made by the plaintiff himself, the verification of the complaint should show what means the affiant had of knowing the truth of the particulars specified in the complaint.

In *Guyton v. Terrell* (1901) 132 Ala. 66, 31 So. 83, a bill brought by a judgment creditor, seeking assets alleged to have been fraudulently conveyed and property concealed, the verification of the bill was by the affidavit of a person who affirmed that he was the agent of the complainant and duly authorized to act as such agent in the matter in question, and that the complainant was a nonresident, residing in the state of Texas, and that the affiant of his own knowledge knew that the facts in the original bill and amendment thereto were true, as therein stated. Some of the facts alleged in the bill were stated as on the knowledge of the complainant. The affidavit positively affirmed the truth of such facts as on the affiant's knowledge. Other facts were alleged on information and belief. It was held that the affidavit was an affirmation that the affiant knew that the complainant was informed and believed as alleged, and that as to both classes of allegations the verification was sufficient.

In *Bridgeford v. The Elk* (1840) 6

Mo. 356, a suit instituted according to the provisions of the act to provide for the collection of demands against boats and vessels, the affidavit annexed to the complaint stated that "[the affiant], being duly sworn by me, the subscriber, on his oath declareth and saith that the above complaint is true, to the best of his knowledge and belief." It was held that the court below did not err in quashing the complaint, since the affiant, not being the party complaining, did not show what means he had of knowing the truth of any of the particulars specified in the complaint, whether he was clerk, bookkeeper, or agent.

In *St. Joseph's Polish Catholic Beneficial Soc. v. St. Hedwig's Church* (1901) 3 Penn. (Del.) 229, 50 Atl. 535, an action on a note, the plaintiff filed an affidavit of demand which was signed by its treasurer. The verification was by the treasurer, and read in part as follows: "And said deponent further says that he verily believes that the same is justly and truly due from the said defendant to the said plaintiff." It was held that the affidavit was not sufficient, since the affiant did not swear that he was the treasurer of the corporation.

And to the same effect see *Wilmington Sash & Door Co. v. Taylor* (1911) 2 Boyce (Del.) 528, 82 Atl. 86, an action by a corporation against a copartnership, wherein there was an affidavit of demand signed by a person as "treasurer," and it was held that the affidavit was defective because the affiant did not swear that he was treasurer.

In *Fitch v. Bigelow* (1851) 3 N. Y. Code Rep. 216, 5 How. Pr. 237, an action on a promissory note, the complaint was verified by the plaintiff's attorney by a signed affidavit, stating that the "[affiant], attorney for the plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true." The statute (Code, § 157) required that where the pleading was verified by the attorney, he should set forth in

his affidavit his knowledge, and the reasons why it was not made by the party. It was held that the verification was defective for failure to show the existence of facts authorizing the attorney to verify.

In *Garfield County v. Isenberg* (1900) 10 Okla. 378, 61 Pac. 1067, the answer was verified by plaintiff's attorney. The statute applicable (Stat. 1893, p. 70, § 3986) among other provisions declared that "the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney," and (§ 3992) that "when the affidavit is made by the agent or attorney it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only, first, when the facts are within the personal knowledge of the agent or attorney; second, when the plaintiff is an infant, or of unsound mind, or imprisoned; third, when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney; fourth, when the party is not a resident of, or is absent from, the county." It was held that the verification was defective since no reason was given why the plea denying the account was not signed and sworn to by the proper officer, and no attempt was made to bring it within any one of the four classes or subdivisions mentioned in the statute.

Where one who signed the petition to an affidavit of garnishment did not describe himself as agent or attorney, although his name is the same as the surname of one of the attorneys who signed the petition, it was held that the affidavit is not sufficient, as the court cannot know that the person who makes the affidavit, is one of the persons who signed the petition as attorneys for the plaintiff, nor will the court look to the records in the original suit to find information which ought to be contained in the affidavit itself. *Willis v. Lyman* (1858) 22 Tex. 268.

In *Kirst v. Wells* (1879) 47 Wis. 56, 1 N. W. 357, an action for goods sold and delivered, the complaint was verified by one of the plaintiff's attorneys. His affidavit was as follows: "[Affiant], being duly sworn, says that he is one of the attorneys for the plaintiffs in the foregoing entitled action, and that the foregoing complaint is true, as deponent verily believes; that such belief is founded upon the admissions of the defendant that said bill is correct, and the said amount due thereon, and from communications had from said plaintiffs in relation thereto; that the reason this verification is not made by said plaintiffs is because neither of them is within said county, and both reside long distances therefrom." The objection urged against the affidavit was "that the attorney who made it stated his grounds for believing that the complaint was true to be 'the admissions of the defendant that said bill is correct, and the said amount due thereon,' when no bill is mentioned in the complaint." It was held that while the verification was informal it complied substantially with the requirements of the statute (Rev. Stat. 1858, chap. 125, § 19), since obviously the bill referred to in the verification meant the account for goods upon which the action was brought.

In an action on two promissory notes, the declaration was verified by one of the attorneys for the plaintiff by an affidavit which read as follows: "[Affiant] says that he is one of the attorneys for the plaintiff in this action; that there is actually due the plaintiff, as such assignee, on the promissory notes hereto annexed, the sum of \$4,298.69." It was contended that the affidavit was not in conformity with the statute (Rev. Stat. chap. 140, § 14), because it did not state that it was made for and in behalf of the plaintiff to the action. It was held that the affidavit substantially conformed to the statute, since, although the attorney did not state in so many words that he made the affidavit on behalf of the plaintiff, yet he swore that he was one of the attorneys to the action, and this fact disclosed his

means of information as to the precise amount due on the notes, and also sufficiently showed his connection with the suit, and authority to make the affidavit. *Blaikie v. Griswold* (1860) 10 Wis. 294.

In *Bergh v. Poupard* (1842) Walk. Ch. (Mich.) 5, a motion for the appointment of a receiver on a judgment creditor's bill, it appeared that a rule of court (110) required bills of this description to be verified by the oath of the complainant, or, in case of his absence from the state, or other sufficient cause shown, by the oath of his agent or attorney. It was held that where the bill was verified by the complainant's agent, who was not also the solicitor of the complainant, the jurat must state the person verifying to be the agent of the complainant.

In *Ré Mahoney* (1908) 88 App. Div. 140, 84 N. Y. Supp. 329, it appeared that the verification was by the attorney for the plaintiff. The objection to the verification was that the attorney had not stated sufficient grounds why the affidavit was made by himself and not by the petitioner. It was held that the surrogate properly overruled this objection, since the affidavit of verification showed that all the other papers were in the hands of the attorneys, and that he was more familiar with the facts than the commissioner himself, and the facts recited in the petition showed that they were such as to have been almost entirely, if not wholly, within the knowledge of the attorney.

When an agent or attorney verifies a pleading on his personal knowledge of its material allegations, he must, besides saying that he knows it to be true, set forth his knowledge upon the subject, and when a pleading is verified upon information and belief the form of averments is not material. *Morley v. Guild* (1861) 13 Wis. 577.

In the *Senorita v. Simonds* (1859) 1 Or. 274, an action brought on the statute relating to liens on boats and vessels, the complaint was verified by an agent of the plaintiffs, the signed affidavit reading as follows: "[Affiant], being first duly sworn, says that the foregoing complaint is true

of his own knowledge; that all the facts therein alleged he has a personal knowledge of; that he has been and was the agent of said wharf-boat company, and had the management of said business during the time said indebtedness was incurred." One objection to the verification was that it did not appear that the affiant was the agent of the plaintiffs in the court below. It was held that, from what appeared on the face of the affidavit, his agency was sufficiently manifest, since he acted as agent in making the affidavit, and was recognized as such by those for whom he acted, and it appeared that he transacted the identical business out of which the alleged indebtedness grew.

In *Reichert v. Lonsberg* (1894) 87 Wis. 543, 58 N. W. 1030, a suit against two partners on an account stated for goods sold and delivered, the complaint was verified by an agent of the plaintiffs, who stated in the verification that the complaint was true of his own knowledge. It was held that the verification of the complaint was insufficient because the agent who attempted to verify it did not state what knowledge he had of the facts.

In *Van Horne v. Montgomery* (1851) 5 How. Pr. (N. Y.) 238, the complaint was sworn to by the cashier of the bank, the affidavit stating that "he had read the complaint and that the same was true according to the best of his knowledge and belief." It was held that, if the cashier was supposed to act as an agent or attorney, the verification was not sufficient, since the affidavit did not set forth his source of knowledge.

In *Turner v. Loomis* (1910) 146 Iowa, 655, 125 N. W. 662, it appeared that the answer was verified by the defendant's attorney. The statute (Code, § 3583) required the competency of an attorney to verify a pleading to appear from his affidavit. The affidavit recited that he was "familiar with all the statements made in the answer and was familiar with the facts in this case, as claimed by the defendant, and that such statements were true as he verily believed." And

this was held sufficient to establish his competency to verify the answer.

In *Commercial Nat. Bank v. Hutchison* (1882) 87 N. C. 22, the verification of a complaint filed by a corporation was by an officer thereof, and read as follows: "[Affiant] maketh oath that the plaintiff is a corporation duly organized under the laws of the United States; that he is an officer thereof, to wit, the president; and that the facts herein set forth of his own knowledge are true; those otherwise stated he believes to be true." It was claimed that the verification was by an officer, and that it should go further and set forth "his knowledge or the grounds of his belief on the subject, and the reasons why it was not made by the party," as required by statute (Code, § 117). It was held that the verification was sufficient, since a corporation cannot take an oath, and can, therefore, make no verification.

In *Silcox v. Lang* (1889) 78 Cal. 118, 20 Pac. 297, an action on an injunction bond, it appeared that when motion was made to strike out the answer because it was not verified, the attorney for the defendants asked leave to verify the same himself, and tendered the following verification: "[Affiant] deposes and says, in behalf of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that he is the attorney for defendants, and as such attorney the facts are more fully known to him than to said defendants, and therefore he makes this affidavit." Objection was made, on the ground that the affidavit stated no reason why the verification was not made by a party. The objection was overruled, and the answer permitted to be filed, to all of which the plaintiffs excepted. The statute (Code Civ. Proc. § 446) provided that "where a pleading is verified it must be by the affidavit of a party, unless the parties are absent from the county where

the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same." It was held that the affidavit did not bring the case within the first two conditions, and was insufficient under the third condition in that it did not show that the facts were within the knowledge of the attorney, but only that the facts were more fully known to him than to the defendants.

In *Re Howell* (1876) 2 Redf. (N. Y.) 299, a petition for leave to issue execution on a judgment obtained against the executors on the merits, a preliminary objection was made on behalf of the executors that the petition was neither signed nor verified by the petitioner. It was held that the statute (Code, § 157) clearly applied to the verification in surrogates' courts, and that the verification of the petition in question did not conform to the requirements of that section in that it did not set out in the affidavit the knowledge of the attorney, or the grounds of his belief on the subject, or the reason why it was not made by a party.

An affidavit verifying a plea made by a corporation, if made by a competent person, is insufficient if it does not contain the necessary averments required by the statute. *Knickerbocker L. Ins. Co. v. Hoeske* (1870) 32 Md. 317.

In *Johnson v. Smith* (1893) 158 Pa. 568, 28 Atl. 144, plaintiff's statement was verified by its agent and manager, and read as follows: "Personally appeared before me, the prothonotary in and for said county, H. W. Bostwick, agent and manager for above plaintiffs, who, being duly sworn, says that the sum of \$508.75, with interest from date, is the amount he verily believes to be due and owing from the above defendant to the above plaintiffs upon the instrument in writing recorded, etc., and upon which suit is brought in this case, and that the above statement is true to the best of his knowledge and belief." It appeared that the affidavit required in the rules of the court might be made by the agent or attorney of the party,



"where such agent or attorney is cognizant of the facts constituting the cause of action." And by another rule: "Plaintiff's statement shall contain a specific averment of facts sufficient to constitute a good cause of action. Such statements shall be supported by an affidavit of the truth of the matters alleged as the basis of the claim." It was held that the verification is defective in that the agent did not state that "he [was] cognizant of the facts" constituting the cause of action, and did not say that the statement was true, but that he believed it was true, and no reason was suggested for the failure of some one of the living plaintiffs to make the affidavit.

In *Kinografen v. Henius* (1914) 23 Pa. Dist. R. 980, the statement of claim of the plaintiff foreign corporation was verified by one of the plaintiff's attorneys by an affidavit as follows: "[Affiant], being duly sworn according to law, deposes and says that he is of counsel for plaintiff above named; that he has been furnished by plaintiff with all the facts and data set forth in the foregoing statement of claim; that he is the duly authorized agent of plaintiff for the purpose of making affidavit to said statement, and that the facts as therein set forth are, as he is informed and believes, true and correct." The rule of court (13) "provides for the making of such an affidavit by an agent of the party in a proper case, but it also requires that 'all facts and statements which are within the affiant's knowledge shall be sworn or affirmed to be true,' and all other facts and statements shall be sworn or affirmed to be true, as affiant is informed and believes and expects to be able to prove upon the trial of the cause." It was held that the affidavit was defective in not averring, in addition to the matters appearing therein, that he expected to be able to prove the said facts upon the trial of the case, and the approved form should not have been departed from when the affidavit was made by the agent or attorney of the agent.

In *Boston Locomotive Works v. Wright* (1857) 15 How. Pr. (N. Y.)

253, a motion to set aside a judgment in an action on a promissory note, the answer was verified by two of the defendants, and by one of the affiants for a third codefendant. The statute requiring the verification of pleadings (Code, § 157) provided that the verification might be made by an agent or attorney where the action or defense was founded upon a written instrument for the payment of money only, and such instrument was in the possession of the agent or attorney of the party. It also provided that "when the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reason why it is not made by the party." It was said that an attorney verifying a pleading founded on a written instrument must state that he has possession of the written instrument described in the pleading, that it is inconvenient, for any or some reason, to procure the verification of the party, also what knowledge he has, if any or grounds to believe that the written instrument is genuine, or that he knows the signature of the party, or that he had admitted it or any other appropriate fact on the subject.

In *Newberger v. Webb* (1881) 24 Hun (N. Y.) 347, an action to recover a demand for goods sold, the verification of a separate answer of one of the defendants was by his attorney, who stated that he resided in the county and that the answer was true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believed the same to be true, giving as a reason why the affidavit was not made by the defendant that the latter was not a resident or within the county, and stating the grounds of his belief. It was held that the verification of the attorney was justified by Code, § 525, which provided that where the party was not within the county of which the attorney was a resident nor capable of making the affidavit, the verification could be made by his agent or attorney, and that, when made by an attorney, by § 26 he should be required to state

the grounds of his belief upon all matters not stated of his knowledge, the reasons why it was not made by the party, and the reasons for his belief.

In *Myers v. Gerrits* (1861) 13 Abb. Pr. (N. Y.) 106, an action on two promissory notes, the complaint was verified as follows: "[Affiant] . . . doth depose and say that the above complaint is true to his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true. That the plaintiff is now absent from this state, which is the reason why this verification is not made by him; that deponent's knowledge is derived from possession of the notes in suit, and from other sources." Under the statute (Code, § 157), "the verification may be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material facts relating to such instrument, and embraced in the allegations of the pleading, be known to such agent or attorney." This verification was held sufficient by the court, although doubt was presented arising from the fact that the verification did not contain an averment that the person making it was the agent, but the deponent stated that the plaintiff was absent and that his knowledge was derived from the presence of notes in the suit, and the conclusion upon such notes fairly was that the affiant was the agent of the plaintiff, and the Code did not require the person who made the oath to state that he was an agent if the facts presented were such that the relation might be reasonably inferred.

In *Chicago, R. I. & P. R. Co. v. Mitchell* (1907) 19 Okla. 579, 101 Pac. 850, the answer was verified by one of defendant's attorneys by a signed affidavit reading: "[Affiant], being duly sworn, on oath states that he is attorney for the above-named defendant; that said defendant is a corporation, and that the statements contained in the foregoing answer are

true, as affiant is informed and verily believes." The statute was as follows: "Wilson's Revised Statutes, § 4312: 'In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correction of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney.' Section 4314: 'If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. When a municipal or other corporation is a party, the verification may be made by an officer thereof, its agent or attorney.' Section 4318: 'When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: First, when the facts are within the personal knowledge of the agent or attorney. Second, when the plaintiff is an infant, or of unsound mind, or imprisoned. Third, when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. Fourth, when the party is not a resident of, or is absent from, the county.'" It was held that the verification was defective in that it did not state why it was not made by the party.

In *People ex rel. Smith v. Allen* (1856) 14 How. Pr. (N. Y.) 384, the complaint was verified by the attorney of the relator, and the attorney of the defendant, deeming the verification defective, put in an answer without verification. The verification by the attorney of the relator stated that the action was founded on the official bond of a defendant named, as sheriff, etc.; that a certified copy thereof was in the possession of his attorney, together with the order of the supreme court, made in the action, and the affidavits on which such order was granted; that the said relator was not with-

in the county in which the deponent resides, but resided in the county of Madison, and was not capable of making the affidavit of verification of the complaint; that he, the deponent, had read the complaint, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters which were therein stated on his information and belief, and as to those matters he believed it to be true. The statute (Code, § 157) required, when a pleading was verified by any other person than the party, that the person making the verification set forth in the affidavit his knowledge or the grounds of his belief on the subject. It was held that the affidavit of verification was defective, since the attorney should have set forth in his affidavit, specifically, his knowledge of each of the "material" facts contained in the complaint, or the grounds of his belief on the subject, and he must state what knowledge he has, and the source of his information, as well as the grounds of his belief.

In *Carolina Grocery Co. v. Moore* (1902) 63 S. C. 184, 41 S. E. 88, two actions on promissory notes and open accounts for goods sold and delivered, the signed verification by an agent in the first case, being practically the same as that in the second, was as follows: "Personally appeared before me [affiant] and says that he is the lawful agent of the plaintiff in this action; that he has read the foregoing complaint, and the allegations therein are true of his own knowledge. The deponent's knowledge is derived from the fact that he was manager of the business carried on by the said plaintiff, Thomas Wilson, under the name and style of the 'Carolina Grocery Company,' and from the notes mentioned in said complaint which were in the possession of this deponent up to the time they were delivered to the plaintiff's attorney for the purposes of this suit, and from the admissions of the defendant to this deponent. Deponent further says that the reason why this verification is not made by the plaintiff is that the material allegations of the complaint are not

within the personal knowledge of the plaintiff." The statute (Code Civ. Proc. § 178) provided that "the verification must be to the effect that same is true, to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action is founded upon a written instrument for the payment of money only and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleadings be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on that subject, and the reason why it is not made by the party," etc. It was held that the complaint was properly verified, since the verification showed that the affiant was the agent of the plaintiff, not only by special allegation of that fact, but by the statement that he was the manager of the business carried on by the plaintiff, and had possession of the notes in question until they were given over to the attorney for suit, and the affidavit further showed that the notes in question were in the agent's possession until delivered to the attorney for suit.

In *Bullock Beresford Mfg. Co. v. Hedges* (1907) 76 Ohio St. 91, 81 N. E. 171, the petition was verified by the attorney of the plaintiff as follows: "[Affiant], being duly sworn, says that he is the attorney of the plaintiff, duly authorized in the premises; that the statements contained in the foregoing petition are true, as he verily believes." The petition was stricken from the files, because the verification did not show that the attorney who verified did not do so in conformity to the statute (Rev. Stat. § 5109). The

plaintiff contended that this was error; and its contention is that § 5109 does not apply to an agent or attorney of a corporation. By § 5102 it was provided that a pleading must be verified by "the party, his agent or attorney." By § 5109 it was provided that a pleading can be verified by "the agent or attorney" only in certain cases therein named. It was held that the affidavit was defective since the agent or attorney must still give the reason why he verified by stating in the affidavit that the case is included in one of the classes defined in § 5109, and that when the party is a corporation it must be verified by an officer thereof, or by its agent or attorney, and, as "officer" and "agent" are not equivalent terms, when the pleading is verified by an agent or attorney the affiant must in all cases state in the affidavit that the case is one included in one or more of the clauses of § 5109, and the judgment was affirmed.

In *Rude v. Crandell* (1886) 11 N. Y. Civ. Proc. Rep. 11, it was held that the verification of the answer by an agent of the defendant, which did not state the grounds of the affiant's belief nor the reason why it was not made by the defendant, the affidavit reading: "[Affiant], being sworn, says that he is the agent for the defendant in the above-entitled action; that the foregoing answer is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true, sworn," etc., was not in compliance with the statute (Code Civ. Proc. § 526), but for all practical purposes complied substantially with the requirements of the Code.

In *Barrett Min. Co. v. Tappan* (1873) 2 Colo. 124, the action was on an appeal bond. It was held that although the statute (Justices Act, Rev. Stat. p. 399, § 14) seemed to require a personal denial of the signature to an instrument, this being impossible to a corporation, to avoid denying a substantial right, the affidavit of someone acting for and in behalf of the corporation must be received, but the denial must nevertheless appear to be

the act of the corporation, and one who so acts for a corporation should show in the affidavit that he had authority from the corporation.

See also in *Nichols v. Jones* (1890) 14 Colo. 61, 23 Pac. 86, wherein it was contended on appeal that the verification of the complaint was defective, in that the reasons why it was made by an attorney, and not by one of the parties to the action, were not stated therein, as required by the Civil Code. It was held that if the verification was defective in the particular mentioned, such defect was waived by failure to properly object to the form of the affidavit in the court below, and in filing an answer duly verified as to certain defenses, and not verified as to others, so that, as the verification was equally applicable to all portions of the complaint, the defendants ought not to be permitted to treat it as sufficient for some counts in the complaint and insufficient as to others.

And see *Wright v. Coles* (1846) 11 Met. (Mass.) 293, an action under a statute (Stat. 1840, chap. 87, § 1) which gave to the supreme judicial court original jurisdiction in civil suits (except in Suffolk county) in which the damages demanded shall exceed \$300, "and in which the plaintiff, or someone in his behalf, shall, before service of the writ, make oath or affirmation, before some justice of the peace, that the matter sought to be recovered actually exceeds" that sum; "a certificate of which oath or affirmation shall be indorsed on or annexed to the writ." It was held that when an attorney of the court, known as such by the roll, makes an affidavit on a writ issued under his direction, for the collection of a debt, it is not necessary that it should appear by the affidavit itself, but the court is to infer that he does the act in behalf of the plaintiff, which satisfies the statute.

#### 2. In action for injunction.

Where a bill for injunction is verified by a person other than the party, it must be stated in the affidavit that the affiant has personal knowledge of the allegations of the bill, and in some instances the source of such knowl-

edge has been required. *Bowes v. Hoeg* (1875) 15 Fla. 403; *Orme v. McPherson* (1867) 36 Ga. 571; *Brunswick v. Finney* (1875) 54 Ga. 317; *Dunham v. Curtis* (1893) 92 Ga. 514, 17 S. E. 910; *King v. Partridge* (1895) 60 Ill. App. 475; *Jones v. Magill* (1825) 1 Bland, Ch. (Md.) 177; *Fowble v. Kemp* (1901) 92 Md. 630, 43 Atl. 379; *Bowie v. Smith* (1903) 97 Md. 326, 55 Atl. 625; *Moffat v. Calvert County* (1903) 97 Md. 266, 54 Atl. 960; *Justices of Pitt County v. Cosby* (1859) 58 N. C. (5 Jones, Eq.) 254; *Bowles v. Glasgow* (1871) 36 Tex. 94; *Hook v. Payne* (1916) — Tex. Civ. App. —, 185 S. W. 1014.

Thus, where a third person verifies a bill for injunction on the ground that the plaintiff is out of the state, the affiant must specially show in his affidavit how he happens to have knowledge of the facts set forth in the bill. *Jones v. Magill* (1825) 1 Bland, Ch. (Md.) 177.

In *Fowble v. Kemp* (1901) 92 Md. 630, 43 Atl. 379, a bill for injunction, the court held a verification by attorney to be insufficient, since it did not appear that the affiant's knowledge was personal, when the affidavit on its face showed that it was not made by a party to the cause, but by a person who could not be presumed to know the facts except by hearsay, unless his means of knowing them in such a way as to authorize him to testify be disclosed. The court said that if his knowledge were personal it ought to have appeared that it was, as the court had no right to assume that his knowledge was personal rather than hearsay, and that the verification must extend to all material facts and be direct and positive.

In *Bowie v. Smith* (1903) 97 Md. 326, 55 Atl. 625, a bill for a mandatory injunction, the affidavit to the bill was made by one of the attorneys of record for the appellant. The affiant stated "that the matters and things set forth in the above petition are true to the best of his knowledge and belief." It was held that the affidavit was defective, since such affidavit may be verified by the agent or attorney only if his knowledge be personal, but not if

it be hearsay, and it is well settled that the verification of the bill must extend to all the material facts upon which a right to injunction rests, and must be direct and positive.

In *Justices of Pitt County v. Cosby* (1859) 58 N. C. (5 Jones, Eq.) 254, a bill for an injunction, wherein the affidavit annexed was to the effect that "[affiant] makes oath that he believes the facts set forth in the foregoing bill are just and true," the court found it unnecessary to notice with much particularity the objection of the defendant to the insufficiency of the affidavit annexed to the bill, but said that it did not approve it, because, when an oath is made by an agent for a corporation, it should state that he has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on the information or belief of the complainants, and as to those matters the deponent believes it to be true.

In *Orme v. McPherson* (1867) 36 Ga. 571, it appeared that an application for ne exeat was verified by an agent who was not shown to have had any knowledge of the facts charged in the bill, and who only swore that what was contained in the bill, "so far as it concerns deponent's own act or deeds, or comes within his own knowledge, is true of his own knowledge, and that which relates to the act or deed of any other persons deponent believes to be true." It was held that this was not a sufficient verification to authorize the issuing of the writ, and that the affidavit must be positive, and not to the best of the knowledge and belief of deponent. It was further held that the allegations of the bill may be examined in connection with the affidavit to determine whether the charges are distinctly made and verified so as to warrant the issuance of the writ, since the allegations of the bill, if sworn to, become in effect a part of the affidavit.

In *King v. Partridge* (1895) 60 Ill. App. 475, a bill for an injunction, the verification of the bill was by one who stated that he was the agent of the

complainant therein named, that he had read the foregoing bill of complaint, and knew the contents thereof, and knew the same to be true of his own knowledge, except as to such matters and things as were therein stated to be upon his information and belief, and as to those things so stated he believed them to be true. It was held that as the charges in the bill were made by complainant, who therein "represented" that various matters existed, the affidavit in effect was that affiant knew that complainant represented certain things to be as set forth in the bill; so that, since nothing in the bill was stated on the information or belief of the agent, the affidavit was, in this regard, meaningless.

In *Moffat v. Calvert County* (1903) 97 Md. 266, 54 Atl. 960, a suit, among other things, praying for an injunction, the bill purported to have been sworn to by an agent and attorney in fact for the complainant, who made oath "that the matters and things stated in the foregoing bill of complaint are true, to the best of his knowledge and belief." It was held that the bill was defective, since a bill cannot be verified by a person not a party to the cause, who simply states that the matters in the bill are true to the best of his knowledge and belief, but does not inform the court as to the source of his information or what knowledge he has on the subject.

In *Bowes v. Hoeg* (1875) 15 Fla. 403, a bill for an injunction, the affidavit on which the injunction was based was made by plaintiff's counsel, and read as follows: "Personally appeared [affiant], one of the complainant's solicitors to the foregoing bill of complaint, who, being duly sworn, deposes and says that the statements made in the said bill, as far as the same are disclosed by the minutes and records of said gaslight company, and in so far as the same have come otherwise directly to deponent's knowledge, he knows to be true, and all else he believes to be true." It was held that the affidavit was not sufficient to justify the court in granting an injunction, because the affidavit was not positive and direct as to any single material

fact, and the truth of what is sworn to by the counsel was placed on two conditions; that it should appear by the records and minutes of the corporation, and that the facts must have come directly to his knowledge.

See also *Hook v. Payne* (1916) — Tex. Civ. App. —, 185 S. W. 1014, an action for an injunction wherein the petition was signed by the attorneys for the plaintiff, and the affidavit was made by one whose surname was the same as one of the attorneys for the plaintiff, but who did not in the affidavit describe himself either as the agent or attorney of the plaintiff. It was held that the affidavit was not sufficient because there was nothing in the petition or affidavit to show that the affiant was a member of the firm who signed the petition.

*Dunham v. Curtis* (1893) 92 Ga. 514, 17 S. E. 910, was a petition for injunction wherein the petition was verified by one of the plaintiff's attorneys "to the best of his knowledge and belief." On motion to dismiss the petition on the ground that the verification was insufficient, the plaintiff's attorneys offered additional affidavits which verified most of the material allegations of the petition. It was held that such additional verification was sufficient.

#### *b. Facts within knowledge of affiant.*

##### *1. In general.*

The statutes usually provide that an agent or attorney or third person may verify a pleading where all the material allegations thereof are within his knowledge, it being required in some cases that the affiant allege in his affidavit of verification the sources of his knowledge.

**Alabama.**—*Branch Bank v. Coleman* (1852) 20 Ala. 140; *Globe Iron Roofing & Corrugating Co. v. Thacher* (1888) 87 Ala. 458, 6 So. 866; *Pollard v. Southern Fertilizer Co.* (1898) 122 Ala. 409, 25 So. 169.

**California.**—*H. G. Bittleston Law & Collection Agency v. Howard* (1916) 172 Cal. 357, 156 Pac. 515; *Newman v. Bird* (1892) 60 Cal. 872.

**Colorado.**—*Colorado Springs Rapid*

**Transit R. Co. v. Albrecht** (1912) 22 Colo. App. 201, 123 Pac. 957.

**Idaho.**—**Pence v. Durbin** (1874) 1 Idaho, 550.

**Iowa.**—**Rausch v. Moore** (1878) 48 Iowa, 611, 30 Am. Rep. 412; **Brady v. Otis** (1874) 40 Iowa, 97; **First Nat. Bank v. Mason** (1881) 57 Iowa, 105, 10 N. W. 294; **Searle v. Richardson** (1885) 67 Iowa, 170, 25 N. W. 113; **Baldwin v. Moser** (1909) — Iowa, —, 123 N. W. 989. See also **Sioux Valley State Bank v. Kellog** (1890) 81 Iowa, 124, 46 N. W. 859.

**Kansas.**—**Hoopes v. Buford & G. Implement Co.** (1891) 45 Kan. 549, 26 Pac. 84; **Johnson v. Woodbury Trust Co.** (1901) 63 Kan. 880, 64 Pac. 1030; **Aiken v. Franz** (1895) 2 Kan. App. 75, 43 Pac. 306; **Johnsen v. Woodbury Trust Co.** (1899) 8 Kan. App. 860, 57 Pac. 184.

**Maryland.**—**Fowble v. Kemp** (1901) 92 Md. 630, 48 Atl. 379.

**Missouri.**—**Eldridge v. The William Campbell** (1859) 27 Mo. 595.

**Nevada.**—**Heintzelman v. L'Amoureux** (1867) 3 Nev. 377.

**New York.** — **Ross v. Longmuir** (1862) 15 Abb. Pr. 326; **Beyer v. Wilson** (1887) 46 Hun, 397; **Gourney v. Wersuland** (1854) 3 Duer, 613; **Boston Locomotive Works v. Wright** (1875) 15 How. Pr. 253; **Tallmadge v. Lounsbury** (1889) 23 Abb. N. C. 331, 10 N. Y. Supp. 129; **American Insulator Co. v. Bankers' & M. Telag. Co.** (1885) 13 Daly, 200, 7 N. Y. Civ. Proc. Rep. 443, 2 How. Pr. N. S. 120; **Treen Motors Corp. v. Van Pelt** (1919) 106 Misc. 357, 174 N. Y. Supp. 500; **Moran v. Helf** (1900) 52 App. Div. 481, 65 N. Y. Supp. 113; **Morris v. Fowler** (1900) 99 App. Div. 245, 90 N. Y. Supp. 918; **Hunt v. Meacham** (1852) 6 How. Pr. 400; **Tibballs v. Selfridge** (1856) 12 How. Pr. 64.

**North Carolina.**—**Hammerslaugh v. Farrior** (1886) 95 N. C. 135; **Banks v. Gay Mfg. Co.** (1891) 108 N. C. 232, 12 S. E. 741.

**Ohio.**—**Jirava v. Brieska** (1878) 4 Ohio Dec. Reprint, 296. Compare **Shawnee Commercial & Sav. Bank Co. v. Miller** (1902) 24 Ohio C. C. 198.

**Oregon.**—**The Senorita v. Simonds** (1859) 1 Or. 274.

**Pennsylvania.**—**Goldbeck v. Brady** (1887) 4 Pa. Co. Ct. 169.

**West Virginia.**—**Quessenberry v. People's Bldg. Loan & Sav. Assn.** (1898) 44 W. Va. 512, 30 S. E. 78.

In **Guyton v. Terrell** (1901) 182 Ala. 66, 21 So. 82, a bill was brought by a judgment creditor praying for the subjection of assets alleged to have been fraudulently conveyed, and for the discovery of property concealed, and its subjection to the complainant's judgment. The verification of the bill stated that the complainant was a non-resident of the state, and that the affiant knew the facts alleged to be true, and was duly authorized to act as agent. It was held that the verification set "forth a sufficient reason why" the verification was not made by the complainant, and was a sufficient verification under the statute (Code, p. 1205, rule 15).

In **Brady v. Otis** (1847) 40 Iowa, 97, it was held that the verification of a complaint by the plaintiff's attorney was sufficient, where the affidavit of verification showed the affiant's knowledge of the facts stated, and the source of his information, and especially where he could hardly have derived information from a different source, or possessed other or greater knowledge of the facts.

In **Eldridge v. The William Campbell** (1859) 27 Mo. 595, a process against a steamboat, brought under the act concerning boats and vessels, the signed verification of the complaint was as follows: "[Affiant], attorney for plaintiff, makes oath and says he believes the foregoing petition, and the matters therein as stated, are true." It was held that the verification was not sufficient, because the affidavit did not disclose the agent's means of knowing the facts stated in the complaint.

In **Gourney v. Wersuland** (1854) 3 Duer (N. Y.) 613, the complaint was verified by an agent who swore that the facts set forth were true of his own knowledge, and that his reason for making the affidavit was that the facts were fully known to him, and but partially to the plaintiff. It was held that this verification was sufficient, it not

being necessary to aver the absence of the party when the pleading is verified by an attorney having full knowledge of the facts, such an averment being necessary only when the affidavit is made by the attorney on information and belief.

In *Newman v. Bird* (1892) 60 Cal. 372, an action to recover possession of certain premises, the complaint, which was required by statute (Code Civ. Proc. § 1175) to be verified, was verified by a third person, who stated that he was the agent of the plaintiffs; that he had heard read the foregoing complaint; that he knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on his information or belief, etc.; that the facts stated were within the knowledge of the affiant, and therefore affiant swore that the facts stated in the complaint were within his own knowledge, and that they were true. The statute provided as follows: "When a pleading is verified it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or for some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties." It was held that the complaint was properly verified, since the reason given for the verification by the agent was that the facts were within his knowledge, and that brought the case within the language of the Code section quoted.

In *Baldwin v. Moser* (1909) — Iowa, —, 123 N. W. 989, an action brought by a partnership on a contract of sale, the plaintiff's amendment to its reply to a counterclaim was verified by a third party, who stated that his knowledge of the facts averred in said reply was better than any knowledge thereof that plaintiff could have, and that he knew the facts and statements of said reply to be true, and in this amendment to reply it was stated that

"in truth and in fact, prior to January 4, 1906, they [plaintiff] did sell twenty-five pianos in the town of Walnut, Iowa, to Koll & Son of that place, and the same were sold by Koll & Son by means of a word contest plan like that one proposed to the defendant in this action." Following this averment there was a list of twenty-five pianos, described by name, number, and style. In his verification of the reply, to which this was an amendment, affiant had stated that he had personal knowledge of all the facts growing out of the action and counterclaim in said case, and on his examination as a witness on the trial it appeared that he was plaintiff's traveling agent for the territory, including that in which defendant was conducting his business, and another town. There was a motion overruled to strike this amendment to the reply, on the ground that it was not properly verified. It was held that the verification was sufficient under the statute (Code, §§ 8584 and 8591).

In *Pence v. Durbin* (1874) 1 Idaho, 550, an action for damages sustained by reason of the issuing of an injunction, it appeared that the answer was verified by the affidavit of one not a party to the action, on the ground, as provided by statute (Civ. Prac. Act, § 55), that all the facts were within his own personal knowledge. This was held to be a sufficient verification, although the affidavit did not state the other statutory grounds that the defendants are absent from the county or that they are unable to verify the answer, the court saying: "We think the verification good. The affidavit is made by Freeman, against whom the injunction was issued, and who swears that the facts stated in the answer are within his personal knowledge, which is one of the cases in which the affidavit may be made by another person than the party. Freeman does not state that the defendants are absent from the county, or that they are unable to verify the answer, but upon the other ground, provided in § 55 of the Civil Practice Act, that all the facts are within his own personal knowledge. The reason he assigns for



making the affidavit is the very reason why the defendants do not make, or at least one of the reasons why they need not make, it. In the reason assigned by him for making the affidavit is embodied the very reason why the defendants do not make it."

In *Rausch v. Moore* (1878) 48 Iowa, 611, 30 Am. Rep. 412, an action on a judgment, wherein the petition averred that the defendant was a non-resident of the state, and an attachment was issued and levied on defendant's individual interest in certain real estate, the verification to the petition was made by the attorney of the plaintiff, and read as follows: "I (attorney's name), being duly sworn on oath, say that I am the agent of the plaintiff in the foregoing petition for the collection of the debt declared on in the above petition; that I have read the foregoing petition and know the contents thereof; that, as attorney for the late (person named), I obtained the judgment herein declared on, and am more conversant with the facts alleged in said petition than is plaintiff himself, and the facts therein stated are true as I believe. And I further depose and say that the facts alleged as grounds for the issuance of a writ of attachment are known to me, and said allegations are true." Section 2678 of the Code provided "that if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same." It was held that the verification was sufficient, since no further showing of competency was required than a personal knowledge of the facts as to the existence of the judgment, and the fact that it was unpaid, and the affidavit set forth that the facts which were the ground for the attachment were known to the affiant, and that they were true, and that the affiant was the attorney who obtained the judgment, and the agent for its collection, and was more conversant with the facts than the plaintiff.

In *Jirava v. Brieska* (1878) 4 Ohio Dec. Reprint, 296, an action on a note and mortgage, wherein the answer was

verified by one of the attorneys for the defendants, the affidavit was as follows: "[Affiant] . . . says he is one of the attorneys of the defendants in the above-entitled action, and that the matters and things in the above answer contained are true, as he verily believes; and that said matters and things are within the personal knowledge of affiant." It was contended that the affiant should have set out not only that the facts stated in the answer were within his personal knowledge, but also the reason why the answer was not sworn to by the real defendants in the case. It was held that the verification was sufficient, since, while the statute made the distinction and said that the reason must be set out why the affidavit is not made by the party himself, when the attorney in making the affidavit sets out that the matters and things are within his personal knowledge, that is a sufficient reason why the affidavit is not made by the party himself.

*Beyer v. Wilson* (1887) 46 Hun (N. Y.) 397, the answer was verified by an agent of defendant by an affidavit reading as follows: "That he has read the foregoing answer and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason that this affidavit is made by deponent, and not by said defendant, is that the said defendant is without the state, and is not within the county now; that the sources of deponent's knowledge and grounds of his belief as to the allegations of said answer are obtained from papers of said defendant, in his custody, relating to the matter in issue, and from conversations had with said defendant relating thereto." Under the statute (Code Civ. Proc. § 525), a pleading may be verified by the agent of the party "where the party is not within the county where the attorney resides." The Code did not prescribe in what respect the agency must exist, nor that the nature of it be stated in the

verification. The verification was held sufficient, because nothing was stated in the answer on information and belief, and hence the agent had sworn to every allegation as true of his own knowledge so that the letter and form of the Code were complied with; and while it was probable that the agent had sworn that to be true of his own knowledge which he could not have known to be true, as the Code permitted this certificate to the truth of the pleading, the court did not feel at liberty to set it aside.

In *H. G. Bittleston Law & Collection Agency v. Howard* (1916) 172 Cal. 357, 156 Pac. 515, an action for the alleged breach of two agreements, the verification of the complaint was by the affidavit of the plaintiff's assignor, and was as follows: "[Affiant], being duly sworn, deposes and says that he is the assignor of plaintiff in the above-entitled action, and, for that reason, is better informed as to the facts thereof than the said plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true." The statute (Code Civ. Proc. § 446) provided as follows: "Every pleading must be subscribed by the party or his attorney. . . . In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes it to be true, and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause are unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the

verification may be made by any officer thereof. . . ." It was held that although the affidavit contained the usual qualification of the statute, "except as to the matters which are therein stated as on his information or belief," as no fact was stated in the body of the complaint upon the information and belief of affiant, the verification must be regarded as a positive affirmation of the truth of the allegations of the complaint, notwithstanding the use of such usual form, so that the affidavit was the equivalent of an averment in the exact language of the section that "the facts are within the knowledge," of affiant, and considering the additional fact that the affiant was the assignor of the plaintiff, and agreements set out in the complaint established this fact, the requirements of this branch of the section were fully complied with.

In *The Senorita v. Simonds* (1859) 1 Or. 274, an action brought on the statute relating to liens on boats and vessels, the complaint was verified by an agent of the plaintiffs, the signed affidavit reading as follows: "[Affiant], being first duly sworn, says that the foregoing complaint is true of his own knowledge; that all the facts therein alleged he has a personal knowledge of; that he has been and was the agent of said wharf-boat company, and had the management of said business during the time said indebtedness was incurred." One objection to the verification was that it did not appear by the affidavit that the plaintiffs were absent from the county in which the suit was brought, at the time of making the affidavit, since otherwise, if either of the plaintiffs was in the county, the statute required that the verification should have been made by a party, and not by an agent. The second clause of the statute referred to (§ 54, p. 91) provided that the verification should be made by a party, if he be within the county in which the action is brought, unless the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent; or if all the material allegations of the pleadings

be within the personal knowledge of the agent, in which case the affidavit may also be made by such agent. It was contended that a third clause qualified the second clause. It was held this second clause was to be construed as standing by itself unqualified, and that under it the verification was sufficient.

In *Aiken v. Franz* (1895) 2 Kan. App. 75, 43 Pac. 306, an action on account, it was held that the verification of the reply by plaintiff's attorney was not sufficient under the statute (Code Civ. Proc. § 114), which provided as follows: "It can be made by the agent or attorney only: First, when the facts are within the personal knowledge of the agent or attorney. . . . Fourth, when the party is not a resident of, or is absent from, the county." The affidavit did not in any way show or attempt to show that the attorney had any personal knowledge of the facts set out or involved in the pleadings.

*Tallmadge v. Lounsbury* (1889) 23 Abb. N. C. (N. Y.) 331, 10 N. Y. Supp. 129, was a motion to compel the plaintiff to accept the defendant's answer, which was verified as follows: "[Affiant], being duly sworn, says 'that he is the secretary of the defendant herein; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information, and as to those matters he believes it to be true.'" The plaintiff returned the answer on the ground that a duly verified answer had not been interposed, the same not having been verified by the defendant's treasurer, or his agent or attorney. It was held that the cause shown by the plaintiff was sufficient.

In *Moran v. Helf* (1900) 52 App. Div. 481, 65 N. Y. Supp. 113, the averments contained in the complaint were positive, nothing being alleged on information and belief, and the verification was that the allegations were true. It was held that the verification was sufficient under the statute (Code Civ. Proc. § 526), but was defective because the affiant went too far in his

statement by immediately proceeding to show that the sources of his information as to the facts alleged in the complaint were conversations had with the plaintiff, and it appeared that he had no personal knowledge of the facts.

In *Hunt v. Meacham* (1852) 6 How. Pr. (N. Y.) 400, a motion to set aside or strike out an answer for defective verification, a signed affidavit made by the attorney for one of two defendants stated that both defendants were absent from the state and that the verification by either of the said defendants to the plea or answer could not be procured and that deponent further says he believes the facts set forth in the foregoing answer to be true; that he has no personal knowledge of the same other than that derived from the statements made by his client, part of which were made upon oath in the presence of the deponent, and part in an interview with the said client, and while deponent was acting as counsel for him, and which statement deponent believes to be true. The statute (Code, § 157) provided that if the defense be not founded on a written instrument for the payment of money only, in the possession of the attorney, he must have a personal knowledge of all the allegations of the answer to enable him to verify. It was held that the verification was defective, since no such instrument was the foundation of the defense, nor did the attorney possess the requisite knowledge.

In *First Nat. Bank v. Mason* (1881) 57 Iowa, 105, 10 N. W. 294, an action by an indorsee on a written acceptance of a draft, a motion was made to strike the reply because it was not properly verified. The verification was by a person describing himself as the secretary of the drawer company, and stating that, as such, he was familiar with all transactions between said company and the defendant therein, since the beginning of 1879 to the time of making affidavit. He further stated in the affidavit that he had read the foregoing reply of the plaintiff, and that the same was true as he verily believed. The statute (Code, § 2673)

provided that "if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same." It was urged by counsel that the verification was insufficient, because it did not show that the affiant knew the fact as to whether the draft was transferred before or after maturity. It was also insisted that although it appeared from the record that the affiant was the secretary of the drawer, and signed the draft and indorsed it, there was no showing that he knew when it was indorsed, because the statute requires the averment of knowledge of the facts to be made in the affidavit. It was held that the verification was sufficient, since the law does not require that the affidavit shall be to a certain intent in every particular, and it is sufficient if it shows that the affiant was possessed of the requisite knowledge of the facts to make the verification to the general denial contained in the reply.

In *Morris v. Fowler* (1900) 99 App. Div. 245, 90 N. Y. Supp. 918, an action for goods sold and delivered, an attempted verification of the complaint by an attorney for the plaintiff read, in part, as follows: "He says that he resides in the borough of Manhattan and that he is the plaintiff's attorney; that he has read the foregoing complaint, and that the same is true of his own knowledge and belief, except as to the matters therein alleged on information and belief, and as to these matters he believes it to be true." The affiant further said "that the grounds of his belief and the source of his information, as to the matters therein not stated on his knowledge, are as follows: . . . He has interviewed the defendant, and has received letters from the defendant, acknowledging his indebtedness to the plaintiffs and promising to pay same. Dependent further says that the reason this verification is not made by the plaintiffs, or either of them, is that the plaintiffs are without the state of New York, and have no personal knowledge of the facts herein stated."

This was held insufficient, since from the statements made in the affidavit of verification it appeared that the attorney had no personal knowledge of the facts stated in the complaint.

In *Hammerslaugh v. Farrior* (1886) 95 N. C. 135, a civil action in the nature of assumpsit for goods sold, the affidavit of the plaintiff's attorney written on the complaint as a verification thereof read as follows "[Affiant], being duly sworn, says that he is the attorney of the plaintiffs in this action, and that the facts set forth in this complaint are true, except as to those stated on information and belief, and as to those he believes it to be true, and that his knowledge and belief of the facts are derived from an affidavit of the plaintiff . . . and from admissions of the defendant . . . made in frequent interviews with this affiant; and that this affidavit is not made by the plaintiffs, because they are nonresidents, as this affiant is informed and believes." The statute (Code, § 257) provided that "every pleading in a court of record must be subscribed by the party, or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also;" and by another section (§ 258) it was declared that "the verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, he believes it to be true, and must be by affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties, acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations be within the personal knowledge of the agent or attorney." The court held that the verification was insufficient, since the attorney

who made it did not pretend to have any personal knowledge of the allegations of the complaint, and the action was not founded upon a written instrument.

In *Quesenberry v. People's Bldg. Loan & Sav. Asso.* (1898) 44 W. Va. 512, 30 S. E. 73, it was held that the verification of a pleading by the attorney for the defendant corporation was incomplete and insufficient where it did not show that he was personally cognizant of the facts, and was hearsay on its face.

*Tibballs v. Selfridge* (1856) 12 How. Pr. (N. Y.) 64, was a motion to strike the verification of a complaint which read as follows: "A. B., being duly sworn, says that he is the attorney of plaintiffs in this action; that he knows the contents of the foregoing complaint, and that the same is true, except as to matters stated on information and belief, and as to those matters he believes it to be true; that the grounds of deponent's knowledge are the admissions of defendant . . . to him, as also from other persons; and that the reason why plaintiffs do not verify this complaint is that they are absent from this county." The statute (Code, § 157) declared that "a pleading must be verified, as 'true to the knowledge of the person making it, except,'" etc. It was urged that subsequently stating "the grounds of deponent's knowledge" shows what he must have meant, and supplies any deficiency in the prior language. It was held that the verification was bad, since it was perfectly easy to make it right, and no hardship was imposed on anyone in requiring it to be made so, and certainly would never be obtained otherwise.

In *Globe Iron Roofing & Corrugating Co. v. Thacher* (1888) 87 Ala. 458, 6 So. 366, a proceeding to enforce a statutory lien, it appeared that the statute (Code, § 3022) required the statement of claim in such cases to be "verified by the oath of the claimant or some other person having knowledge of the facts." The verification was made by an officer of the claimant corporation, and read, in part, that "the foregoing statement is

true as to the best of the affiant's knowledge and belief." It was held that affiant, whether he was considered as the claimant or another person, and although it be conceded that he was the claimant, did not have a knowledge of the facts embraced in the statement, and the verification was insufficient, since the affiant did not swear that he knew the facts to be true, or that they were true, but, on the contrary, the construction of the verification most favorable to the lien would be that some of the facts were known to be true, and others, though not within the knowledge of the affiant, were believed to be true.

In *Treen Motors Corp. v. Van Pelt* (1919) 106 Misc. 357, 174 N. Y. Supp. 500, the answer was verified by the affidavit of defendant's attorney, reading as follows: "That he is the attorney for defendant in the above-entitled action, and that he has read the answer herein and knows the contents thereof, and that the same is true. That the reason this verification is made by deponent, and not by defendant, is that defendant is absent from the county where deponent has his principal office and place of business, and deponent is familiar with the facts." The statute (§ 525, subd. 3) provided that an attorney might verify where all the material allegations of the pleading were within the personal knowledge of the agent or attorney. It was held that the verification did not comport with this provision, and that the complaint was not properly verified.

In *Branch Bank v. Coleman* (1852) 20 Ala. 140, a petition for supersedeas, it was objected the petition was verified by an agent. It appeared that the statute which authorized the circuit court judges to grant writs of supersedeas in vacation read as follows: "The judges of the circuit court, respectively, shall have power and authority, in vacation, to supersede any execution, when it shall satisfactorily appear to them, or any of them, that the same shall have improperly issued from the clerk's office of any of the circuit courts of this state." It was held that the objection could not be allowed to

prevail, and that the petition presented should be verified by the oath of the person in whose name and in whose behalf it was filed; but that it was sufficient, if the judge to whom it was presented was satisfied that the execution had improperly issued; and any person who knew the matters set forth in the petition to be true, might verify it.

In *Goldbeck v. Brady* (1887) 4 Pa. Co. Ct. 169, the action involved the Married Woman's Property Act (June 3, 1887, P. L. 333, the Act of May 25, 1887, P. L. 271), relating to proceedings in civil causes, and a rule of court (126) which provided as follows: "Plaintiff's statement shall contain a specific averment of facts sufficient to constitute a good cause of action. Such statement shall be supported by an affidavit of the truth of the matters alleged as the basis of the claim." It was held that where a stranger makes the affidavit the reason in some manner should appear, since otherwise unjust demands and unjust defenses might be made.

In *Fowble v. Kemp* (1901) 92 Md. 630, 48 Atl. 379, it was held that the prima facie evidence to authorize a court of equity to issue an injunction may consist of the oath of the plaintiff or of a third person, if he knows the facts, or of documentary evidence, such verification of the bill being required in addition to the sufficiency of the allegations so that the confidence of the court may be obtained.

In *American Insulator Co. v. Bankers' & M. Teleg. Co.* (1885) 13 Daly, 200, 17 N. Y. Civ. Proc. Rep. 443, 2 How. Pr. N. S. 120, it was held that, where the verification of a pleading is made by a person other than the party, he must set forth in his affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party (Code Civ. Proc. § 526).

When the territory or any officer in its behalf is a party, the verification of a pleading may, under direct provisions of statute (Practice Act, § 55), be made by any person acquainted with the facts, except that, in an action prosecuted by the attorney gen-

eral or district attorney in behalf of the territory, the pleadings need not in any case be verified. And a pleading may be verified by a third person where the facts are within the knowledge of such person, and he sets forth in his affidavit the reason why it is not made by the party. *Heintzelman v. L'Amoroux* (1867) 8 Nev. 377.

In *Colorado Springs Rapid Transit R. Co. v. Albrecht* (1912) 22 Colo. App. 201, 128 Pac. 957, an action for damages, motion was made to strike the separate replications because they were verified by the plaintiff's attorney and the affidavit failed to state the reasons why it was not made by one of the parties, as required by the Code. It was held that the verification was not sufficient, since the provision of the Code is mandatory, and the affidavit was rather an allegation that the attorney was familiar with the pleadings than that the facts were within his knowledge, and; further, that if the verification was made by the attorney because the facts were within his knowledge, it should have been substantially in the form required by the Code when made by a party to the suit, instead of in the form allowed where the affidavit is made by an agent or attorney for a corporation.

In *Pollard v. Southern Fertilizer Co.* (1898) 122 Ala. 409, 25 So. 169, a suit seeking the appointment of a receiver, the signed verification was by one of the attorneys for the complainant, and read as follows: "In person appeared before the undersigned officer [Affiant], who, first being sworn, deposes and says that he is attorney at law for the complainant named in the foregoing bill, and that the facts and allegations stated therein, so far as they come within his own knowledge, are true, and so far as derived from the knowledge of others, he believes them to be true." It was held that the verification was so defective that it practically amounted to no evidence of the facts alleged in the bill.

In *Johnson v. Woodbury Trust Co.* (1899; Kan.) 57 Pac. 134, an attachment action under the Landlord and Tenant Act, the answer of the defendant, which contained a gen-

eral denial, and was verified, stated that the affiant "deposes and says that he is one of the attorneys and agent for the defendant herein; that he is familiar with all the facts set out in the above and foregoing answer, and knows the contents thereof; and that said answer, and all the facts and allegations and matters in said answer contained and alleged, are true and correct, as I verily believe." Section 108 of the Code of Civil Procedure provided that in all actions allegations of the execution of written instruments and indorsements thereon, and of the existence of a corporation, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney. Section 114, under which the verification was made, reads: "When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: First, when the facts are within the personal knowledge of the agent or attorney; second, when the plaintiff is an infant, or of unsound mind, or imprisoned; third, when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney; fourth, when the party is not a resident of or is absent from the county." The question was whether the answer of the defendant, verified as above stated, was sufficient to put the plaintiff upon its proof as to the allegations of corporate existence and of the assignment of the lease, no evidence having been offered in support of such allegations, and the reply having been unverified. It was held that the words of the affidavit, "that he is familiar with all the facts set out in the above and foregoing answer," showed that the affiant possessed a personal knowledge of those facts, in even stronger language than that found in the statute, and hence the verification was sufficient.

And in the same case on appeal, *Johnson v. Woodbury* (1901) 63 Kan. 880, 64 Pac. 1030, an action for the recovery of rental in which attach-

ment was issued, it appeared that the defendant answered: (1) By a general denial; (2) in substance, denying the ownership of the property by the Sioux Investment Company, or its right to lease the same, and the right of the plaintiff to recover the rental agreed upon. The defendant's answer was verified by an attorney and agent of the defendant, by an affidavit as follows: "[The affiant], of lawful age, being first duly sworn, deposes and says that he is one of the attorneys and agent of defendant herein; that he is familiar with all the facts set out in the above and foregoing answer, and knows the contents thereof; and that said answer, and all of the facts and allegations and matters in said answer contained and alleged, are true and correct, as I verily believe." It was held that neither the answer itself nor the affidavit intended to verify the pleading showed such a state of facts as authorized the affiant, as the agent or attorney for the defendant, to verify the pleading under the provisions of the Code, and hence the verification was insufficient. The court, however, did not cite the Code provisions, nor did it point out wherein the affidavit was insufficient.

In *Banks v. Gay Mfg. Co.* (1891) 108 N. C. 282, 12 S. E. 741, an action for damages for malicious prosecution, the verification of the answer was by an agent of the corporation, and was as follows: "[Affiant], agent for the said Gay Manufacturing Company, being duly sworn, maketh oath that the facts stated in the above answer are true of his own knowledge." It was held that, even if this affidavit could be made by an agent of the corporation, it was not sufficient, in that it did not set forth "his knowledge, or the grounds of his belief on the subject, and the reason why it was not made by the party," as it is necessary to set out these things in all cases where the verification is made by agent or attorney.

In *Boston Locomotive Works v. Wright* (1875) 15 How. Pr. (N. Y.) 253, the verification of the complaint by an alleged agent of the plaintiff was held defective because it did not

show the extent of the affiant's agency, or his character as agent, and because he did not profess to have any knowledge, or did not state any, with respect to the "material allegations of the pleading," the statute (Code, § 157) requiring that, when the pleading is verified by any other person than the party, he shall set forth in his affidavit his knowledge, or the grounds of his belief on the subject, and the reason why it is not made by the party.

*Searle v. Richardson* (1885) 67 Iowa, 170, 25 N. W. 118, an action on a promissory note, there was attached to the original answer the affidavit of one of the attorneys who appeared for defendant, in which he swore that he appeared as attorney for defendant in an action brought by plaintiff on the same promissory note, in which it was judicially determined that plaintiff did, for a valuable consideration, extend the time of payment of said note to the maker, and that on the trial of said cause plaintiff admitted that this defendant was surety on the note, and that her agreement with the maker was made without defendant's knowledge or consent. After reciting these facts, the affidavit concluded with the following statement: "Wherefore, the affiant says he has personal knowledge of the matters alleged in the foregoing answer, and of the allegations therein contained, as I verily believe." Plaintiff filed a motion to strike the answer from the files, on the ground that it was not properly verified. The statute (Code, § 2669) provided that, when the petition was verified, all subsequent pleadings must be verified also. It was provided by the statute (Code, § 2673) that "if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same." The question raised by the motion was whether it was shown by the averments of the affidavit that the attorney was competent to make it. It was held that the affiant was undoubtedly competent to verify those statements in the answer, the truth of which the plaintiff had admitted in

his presence, but as to the adjudications, it was the fact which he swears was adjudicated, and not the adjudication, which was pleaded, and . . . his knowledge of the adjudication alone [did] not render him competent to verify the statement of the fact."

In *Sioux Valley State Bank v. Kellog* (1890) 81 Iowa, 124, 46 N. W. 859, an action on a promissory note, the defendant moved in the court below to strike the verification of the plaintiff's petition on the ground that, being made by the attorney for the plaintiff, it failed to show that he had knowledge of the statements contained in the petition or to show his competency to make the affidavits, in accordance with the provisions of the statute (Code, § 2672). It was held that the verification was sufficient, because it was made under § 2951 of the Code, which provided that the petition in an action wherein an attachment is sought must be verified, but which contained no provision to the effect that the competency of the affiant must be shown in the verification.

And see *Hoopes v. Buford & G. Implement Co.* (1891) 45 Kan. 549, 26 Pac. 34, which was an action brought by a corporation against partners, at the same time that an order of attachment was procured by the plaintiff. The plaintiff's reply was verified by one of its attorneys, the signed affidavit reading as follows: "[Affiant], being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he believes the facts stated in the foregoing answer to be true, and the reason why this affidavit is not made by the plaintiff is, that said plaintiff is not a resident of and is now absent from the state." It was contended that this verification was not sufficient, for the reason that it did not state that the facts set out in the plaintiff's pleading were within the personal knowledge of the attorney verifying. The court held that, in view of the statute (Civ. Code, §§ 108 and 114), the court below did not commit any material error in overruling an objection to the pleading until after



a large portion of the evidence had been introduced, and that the trial court probably at that time had the discretion either to overrule the objection, as it did, or to require that the verification be amended.

In *Ross v. Longmuir* (1862) 15 Abb. Pr. (N. Y.) 326, the signed verification of the answer by the defendant's agent was as follows: "[Affiant], being duly sworn, says that he is, and has for a long time been, agent for the defendant in this action; that the foregoing answer is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why the verification is not made by the defendant is that all the material allegations in the answer are within the personal knowledge of deponent, and not within the personal knowledge of the defendant." The statute (Code, § 57) allowed the affidavit of verification to be made by the agent or attorney of the party in a case where the action or defense was founded upon a written instrument for the payment of money only. It was contended that the affidavit failed to set forth the knowledge or the grounds of belief of the agent who made it. It was held that the verification was not defective, since there was nothing in the answer stated on information and belief, but each and every allegation was stated positively, and without qualification, so that that part of the affidavit which referred to matters in the answer supposed to have been stated on information and belief might be treated as surplusage.

## 2. Statement of grounds of information or belief.

### (a) Majority rule.

Under the various statutes it is generally held that when an agent or attorney verifies on information and belief he must also allege in his affidavit the grounds of such information and belief, or at least it must appear that he has some knowledge touching the matter, on which to form a belief.

**Alabama.**—*Pickle v. Ezzell* (1855)

27 Ala. 623; *Dennis v. Coker* (1859) 34 Ala. 611; *Burgess v. Martin* (1895) 111 Ala. 656, 20 So. 506.

**California.**—*Re Hotchkiss* (1881) 58 Cal. 39.

**Georgia.**—*Plant v. Mutual L. Ins. Co.* (1893) 92 Ga. 636, 19 S. E. 719.

**Iowa.**—*Leach v. Keach* (1858) 7 Iowa, 232; *Clute Bros. v. Hazleton* (1879) 51 Iowa, 355, 1 N. W. 672; *Yoe v. Nichols* (1879) 51 Iowa, 330, 1 N. W. 664.

**Missouri.**—*Bridgeford v. The Elk* (1840) 6 Mo. 356.

**New York.**—*Bank of Orleans v. Skinner* (1841) 9 Paige, 307; *Bank of Maine v. Buel* (1857) 14 How. Pr. 311; *Soutter v. Mather* (1862) 14 Abb. Pr. 440; *Wilkin v. Gilman* (1856) 13 How. Pr. 225; *High Rock Knitting Co. v. Bronner* (1896) 18 Misc. 627, 43 N. Y. Supp. 725; *Stannard v. Mattice* (1852) 7 How. Pr. 4; *Meads v. Gleason* (1856) 13 How. Pr. 309; *Dixwell v. Wordsworth* (1849) 2 N. Y. Code Rep. 1; *Hubbard v. National Protection Ins. Co.* (1855) 11 How. Pr. 149; *Johnson v. Case* (1916) 97 Misc. 247, 162 N. Y. Supp. 841, affirmed without opinion in (1917) 179 App. Div. 948, 165 N. Y. Supp. 1093; *American Audit Co. v. Industrial Federation* (1903) 84 App. Div. 304, 82 N. Y. Supp. 642; *Bowery Sav. Bank v. Ward* (1919) 188 App. Div. 593, 177 N. Y. Supp. 219.

**North Carolina.**—*Cowles v. Hardin* (1878) 79 N. C. 577.

**South Carolina.**—*Hecht v. Friesleben* (1888) 28 S. C. 181, 5 S. E. 475.

**Texas.**—*Thomas v. Kean* (1917) — Tex. Civ. App. —, 190 S. W. 847.

In *Bank of Maine v. Buel* (1857) 14 How. Pr. (N. Y.) 311, the verification of the complaint by the plaintiff's attorney read as follows: "[Affiant], being duly sworn, says he is plaintiff's attorney in this action, and that the foregoing complaint is true to the knowledge of this deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true. And deponent further says that the drafts or bills of exchange set out in the complaint are both in the possession of deponent; and he has heard defendant, in talking of same, admit, or at

least assume, that they were genuine, and that he had the money thereon from the plaintiff; and the same information has been communicated to deponent by the president of said bank (the plaintiff.)" It was held that the verification of both the complaint and the answer was insufficient, because in each case the attorney failed to give the grounds of his belief.

In *Bank of Orleans v. Skinner* (1841) 9 Paige (N. Y.) 307, the verification of the bill was by the agent of the complainant corporation. The affiant stated in the affidavit that he had read the bill and knew the contents thereof, that he had information as to all the matters stated therein, and that a number of the material and important facts stated in the bill and the principal part thereof he knew of his own knowledge to be true, and that he believed all the statements in the bill were true. It was held that the affidavit was defective in not stating what allegations in the bill were matters within his own knowledge, and what were founded upon his belief only, as derived from the information of others.

In *Bowery Sav. Bank v. Ward* (1919) 188 App. Div. 598, 177 N. Y. Supp. 219, a verification of a complaint by plaintiff's agent was held insufficient for the reasons (1) that there were three paragraphs of the complaint the facts contained in which were alleged upon information and belief, and that as to those matters there was no averment as required by the Code, that the affiant believes it to be true; and (2) that the verification being by the agent and not by the party, he failed to set forth in the affidavit the grounds of his belief as to those three paragraphs.

In *Soutter v. Mather* (1862) 14 Abb. Pr. (N. Y.) 440, an action on a promissory note, the signed verification of the complaint by one of the firm of plaintiff's attorneys read as follows: "[Affiant], being duly sworn, says that he is one of the firm of Benedict & Boardman, the attorneys for the plaintiff in this action; that the foregoing complaint is true to his own knowl-

edge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that this action is founded upon a written instrument for the payment of money only; namely, under a promissory note; and such instrument is in the possession of deponent's said firm, as attorneys for the plaintiff." The verification in the answer by the affidavit of one of the defendant's attorneys was as follows: "[Affiant], being duly sworn, says that he is one of the attorneys for the defendant Mather in this action, and that he has read the foregoing answer, and knows the contents thereof; and that the same is true according to this deponent's belief; that the reason why he believes the same to be true is because the said defendant Mather told him so." The plaintiff's attorney returned the answer as not sufficiently verified. The defendant's attorneys reserved the answer, calling plaintiff's attention to the fact that they claimed the right to serve an unverified answer, on the ground of the defective verification of the complaint. The plaintiff entered judgment by default as for want of answer, which defendant moved to vacate. The court granted the motion, apparently on the ground that the attorney should have stated his grounds of belief, saying: "It is laid down that, in all cases of verification by an attorney, he must state his knowledge or grounds of belief. The cases of *Meads v. Gleason* (1856) 13 How. Pr. (N. Y.) 309, and *Treadwell v. Fassett* (1854) 10 How. Pr. (N. Y.) 184, in which the court held the verifications defective, were actions on promissory notes, the verifications were by attorney in substantially the same form as the verification to the complaint in this action. As these decisions were rendered at special terms in other districts, I should not feel bound to follow them if I thought them erroneous; but I think the construction given by these decisions to the section of the Code under consideration correct."

In *Stannard v. Mattice* (1852) 7 How. Pr. (N. Y.) 4, the complaint in the action was verified by the plain-

tiff's attorney by a signed affidavit reading as follows: "[Affiant] says that he has read the foregoing complaint, and that he knows the contents thereof and knows the same to be true, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true. That the reason plaintiff does not make this affidavit is that he resides in Albany county. Deponent has more knowledge of the record evidence and proceedings than the plaintiff; that he, this deponent, has been the plaintiff's attorney in all the proceedings set out in the complaint and knows the existence thereof as therein stated, of the deed in the clerk's office; heard the defendant admit the fact that said deed was executed when he was not present, and when said Henry Mattice was on his way off to leave this state. Deponent knows the fact, from information, that Henry Mattice was unembarrassed and owed no debts, and was in easy circumstances in January, 1850; that the plaintiff is a poor man and that it will be an unnecessary expense to send to him to make oath to his complaint, and further deponent says not." It was contended, without denying that the complaint could be made by attorney, that the verification as made by the attorney was insufficient. The statute then in force provided that the verification can be made by the party if such party is within the county where the attorney resides and capable of making the verification, and in no other case does the statute require the affidavit to be made by the party. But the same section further provides that the affidavit may be made by the agent or attorney if the action or defense be founded on a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. It is also provided in the same section that "where the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge" or the grounds of his belief on

the subject, and the reasons why it is not made by the party. The complaint was held sufficient.

In *Leach v. Keach* (1858) 7 Iowa, 232, the reply was verified by the wife of the complainant, and, to show her means of information, and her ability to answer for the party, she stated that she was the wife of the complainant; that he was absent in California; that he left her his agent, and that she was well acquainted with his business before he left, and still was; that certain transactions, having taken place after his leaving, were peculiarly within her knowledge, and she stated reasons why she believed she had knowledge of others and that she verily believed the allegations in relation to the agreement to be untrue; and that, if such had existed, she could but believe that she would have known it; but did not claim any specific or certain knowledge upon this transaction. The court held the verification insufficient because the agent who made the sworn denial did not pretend any special information upon it, nor to such as might be supposed to arise from a general knowledge of her husband's affairs, and thus did not answer the requirement of the statute.

In *Meads v. Gleason* (1856) 13 How. Pr. (N. Y.) 309, a motion to set aside the judgment in an action brought on a promissory note, the complaint was verified by one of plaintiff's attorneys as follows: "[Affiant] of the city of Albany, being duly sworn, says that he is one of the plaintiff's attorneys in this action; that said plaintiff is not now within the county of Albany, where deponent resides; that this action is founded upon a written instrument for the payment of money only, to wit, the promissory note set forth and described in the foregoing complaint, and which note is now in the possession of deponent as such attorney; that the said complaint is true of deponent's own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes the same to be true." It was held that the verification was defective, since, in order to dispense with a verification by the

party, the person who makes the affidavit, stating that the facts set forth in the pleading are true of his own knowledge, must state what knowledge he has on the subject; and when he states that he believes the facts alleged upon information and belief to be true, he must state the grounds on which his belief is founded; and then, in addition to this, he must go on to state why he and not the party makes the affidavit.

In *Pickle v. Ezzell* (1855) 27 Ala. 623, a claim against an insolvent estate, the statute (Code, § 1847) required all claims against insolvent estates to be verified by the oath of the claimant, or of some other person, "who knows the correctness of the claim, and that the same is due." The claims were verified by a third person who stated that said claims, "to the best of affiant's knowledge, information, and belief, are yet due and unpaid." It was held that the affidavit could not be regarded as a fulfilment of the requisition of the Code provision, in that it did not show that the affiant had any knowledge either as to the correctness of the claim or that it was then due, and that even if no objection had been made to it, the court should have allowed the claim.

So in another case, involving a claim against an insolvent estate, it was held that the affidavit of a person not a party to the claim "that the annexed account is just and correct to the best of his knowledge and belief" did not sufficiently verify the claim. *Dennis v. Coker* (1859) 34 Ala. 611.

In *Hubbard v. National Protection Ins. Co.* (1855) 11 How. Pr. (N. Y.) 149, an action on a fire insurance policy, the complaint was verified by the plaintiff's attorney. The affidavit read as follows: "The matters and things stated in the complaint are true, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true; that the action is founded on an instrument for the payment of money only, which instrument was in his possession as attorney for the plaintiffs, neither of whom were residents of Erie county, where the at-

torney resided, nor was either of them capable of making the affidavit verifying the complaint." The statute (Code, § 157) "requires, when a pleading is verified by any person other than the party, that the party verifying 'shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.'" It was held that the verification was defective, since the affiant did not set forth his knowledge or the ground of his belief on that subject.

In *Re Hotchkiss* (1881) 58 Cal. 39, a proceeding to remove an attorney at law, it was required that, in such proceedings, when brought at the instance of some other person than the court, the "accusation" must be verified by oath "to the effect that the charges therein contained are true" (Code Civ. Proc. § 291). The statute relating to verification, generally, provided as follows: "Where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties." The accusation was signed by two persons styling themselves informants, and all the allegations of acts involving moral turpitude of the attorney sought to be removed were "upon information." The affidavit attached, subscribed by a third person, was that the affiant, "being duly sworn, says that he has read the foregoing information, and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes them to be true." It was held that the verification was insufficient in form and substance, because there was no pretense in the accusation or affidavit that the affiant had any information on the subject except such as might be derived from the recitals

in the accusation, and that anyone else who had confidence in the complainants could have made the affidavit.

But in *Patterson v. Ely* (1861) 19 Cal. 28, an action in ejectment, the complaint was verified by one of the plaintiffs, who "says the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of plaintiffs, and as to those matters he believes it to be true." The statute (Practice Act, § 55) declared that the verification to the complaint complied with the statute treating the complaint in an action of ejectment, and another statute (§ 113) provided a somewhat different form, but in substance the same, where an injunction is sought, requiring that the affidavit must state that "the person making the oath has read the complaint, or heard the complaint read, and knows the contents thereof." It was held that the verification of the complaint was sufficient under § 55, treating the complaint as a pleading in an action of ejectment, and that, without the use of the words required by § 113, a knowledge of the contents of a pleading is affirmed by everyone who undertakes to swear to its truth. On rehearing, it was further held that § 55 should have a reasonable interpretation, so that if the pleading does not contain a statement of any matters on information or belief, there can be no occasion for any expression of belief in the affidavit as to such matters, the object of the verification being to insure good faith in the averments of the party; hence, if the pleader avers positively, the verification will be sufficient if the affiant states that the pleading is true of his knowledge; and if he avers matters "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be true, and that to require anything further would be to sink the evident spirit and object of the statute into a mere observance of its letter.

In *Hecht v. Friesleben* (1888) 28

S. C. 181, 5 S. E. 475, an action by alleged copartners on an account, the complaint was verified by one of the plaintiffs' attorneys as follows: "[Affiant], being duly sworn, says he is an attorney for the plaintiffs in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true. That the sources of his knowledge and information are the possession of a verified itemized statement of the account sued upon, the admissions and statements of the defendant. . . . That the reason this verification is made by one of the plaintiffs is that neither of them is in this county or state, in which defendant is a resident." The Code required that, "when the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party." It was held that the verification was not sufficient in substance, since it was of the most general and indefinite character and did not state what were the admissions or statements of the defendant, or what were the statements of the third persons named, or that the defendant admitted all or even any material allegation of the complaint, or made any specific statements from which such admission might be inferred, and what was the nature of the statements made by the third persons did not appear, and there was no fact stated in the verification from which the court could infer that there was any ground for the belief that all the material allegations of the complaint were true.

In *Bridgeford v. The Elk* (1840) 6 Mo. 356, a suit instituted under the Boats and Vessels Act (Rev. Code 1835, p. 103) the verification was by an individual not a party, agent, or attorney. The affidavit annexed to the complaint read as follows: "[Affiant] . . . on his oath declareth and saith that the above complaint is true, to the best of his knowledge and belief." It was held that the affidavit was not

sufficient, since the person making the affidavit, obviously not being the party complaining, did not show what means he had of knowing the truth of any of the particulars specified, and, coupled with the qualifying words at the end of his affidavit, might have been under a great misconception of the construction which its law would put on it.

In *Dixwell v. Wordsworth* (1849) 2 N. Y. Code Rep. 1, the answer was verified by the defendant's attorney, his affidavit reading as follows: "[Affiant], being sworn, says he is attorney for the defendant above named, and resides at Hyde Park in the county of Dutchess, and that said defendant resides in but is now absent from the county of Dutchess (being engaged in business at Yonkers in the county of Westchester, at which place he now remains), which absence of the defendant is the reason why this verification is not made by him. That from the information furnished this deponent by said defendant, and from his representations (which are the grounds of this deponent's knowledge and belief in the matter) he believes the foregoing answer to be true." It was objected that if such a verification as this were allowed it would be a complete evasion of the spirit of the Code, for a defendant need but represent to his attorney that the answer is true, and then leave the county, to enable the attorney to verify the pleading, which he might safely do in this manner, although the answer were totally and wholly false. It was held that the verification was sufficient, the court saying that it is seldom that an attorney has more knowledge of the subject-matter of the action than that which he derives from the representations of his client, and such representations are sufficient grounds for the attorney to form a belief on the subject.

In *Burgess v. Martin* (1895) 111 Ala. 656, 20 So. 506, a bill praying for the discovery of assets and the appointment of a receiver, etc., the allegations of the bill were sworn to by a person named, "as true to the best of his knowledge, information, and be-

lief." It was held that if the affidavit were to be construed according to the general rule most unfavorable to the party relying on it, there was no room for affirmatively saying that the words used meant anything more than that the affiant believed the allegations of the bill to be true, although he had neither knowledge nor information of their truth, the court saying further: "As said by counsel for appellant, it is quite true that it is frequently necessary, especially in bills for discovery, as this one is, to aver facts 'upon information and belief.' This is not to say, however, that an averment upon either information or belief would be good. The form of the averment is that complainant has been informed and believes, and upon such information and belief charges the fact to be, etc., etc., and whether the allegations intended to be verified are made positively or upon information and belief, an affidavit of belief in their truth simply amounts to nothing. When the averment is positive the verification should be so. When it is upon information and belief, the verification should embrace both the facts that the affiant has been informed and believes them to be true, either in terms or by affirming positively that the facts alleged in the bill are true as therein stated."

*Wilkin v. Gilman* (1856) 13 How. Pr. (N. Y.) 225, was an action for labor and services. The verification of the answer was made by the defendant's attorney, stating that the defendant resided in New York city, and the attorney in the county of Sullivan. The affidavit of verification stated that "deponent's knowledge of the material allegations of the answer is founded upon communications made to him by the defendant, through his son." The verification then proceeded to state that the "answer is true of deponent's own knowledge, except such matters as are stated on information and belief, and as to those matters he believes it to be true." It was held that the verification, although sufficient by the liberal construction enjoined by the framers of the Code, was awkwardly expressed, since the statements in

the answer were made on information and belief, and the attorney was required to state in his verification why he believed the allegation to be true.

In *High Rock Knitting Co. v. Bronner* (1896) 18 Misc. 627, 43 N. Y. Supp. 725, the complaint of a domestic corporation was verified by the attorney. The affidavit of the verification contained the following language: "And this deponent's knowledge is derived from information received from the letters of plaintiff now in deponent's possession, and also from the admissions of defendant to this deponent on the 29th day of October, 1896, that he was owing the full amount as claimed in the complaint and that it would be due as therein stated on the 30th day of October, 1896." The Code required a person making a verification, other than party, to set forth "the grounds of his belief as to all matters not stated by his knowledge." It was held that while the language was not in the form usually employed, it was sufficient.

In *Cowles v. Hardin* (1878) 79 N. C. 577, a civil action to recover land was brought under a statute which directed "that the complaint shall be sworn to as is prescribed in other actions." The signed verification was by an agent of the plaintiff, and read: "[Affiant], agent of the plaintiff, makes oath that the facts herein stated are true to the best of his knowledge, information, and belief." The Code (§§ 116, 117) declared that the oath must be to the effect that the complaint or other pleading verified "is true to the knowledge of the person making it, except as to those matters stated upon information and belief, and as to those matters he believes it to be true." It was held that the complaint was insufficient, since the proceeding was special and the essential requirements of the statute must be observed.

In *Plant v. Mutual L. Ins. Co.* (1893) 92 Ga. 636, 19 S. E. 719, a process of garnishment, it was held that the statement by an agent of the garnishee that the answer was true to the best of his knowledge and belief was insufficient, without a further statement

pointing out what facts he knew and what facts he believed, together with the grounds of his belief.

In *Clute Bros. v. Hazleton* (1879) 51 Iowa, 355, 1 N. W. 672, an action on a promissory note, the reply was verified by one of the plaintiff's attorneys, by an affidavit reading as follows: "[Affiant], being duly sworn, deposes and says: I am the principal attorney for the plaintiffs in the above-entitled action; that all the correspondence had by plaintiffs or their attorney, in regard to said action, has been had with me; that I have the contract of purchase of said engine in my possession (or copy of same); that I believe the above reply to be correct and true; that said plaintiffs are nonresidents of the state of Iowa, and are not now within the state of Iowa." It was held that the affidavit was insufficient, since it failed to show the affiant to be competent, in that he did not state in the affidavit, as required, that he had any knowledge whatever of the truth of the allegations in the answer or reply.

In *Yoe v. Nichols* (1879) 51 Iowa, 330, 1 N. W. 664, an action on account for goods sold and delivered, the reply read as follows: "Comes now the plaintiff in this cause and for reply avers the following facts: That as to the truth of the facts stated in the answer of defendant, on which affirmative relief is asked other than as a defense pro tanto to plaintiffs' claim, plaintiffs have no knowledge sufficient to form a belief, and therefore deny them." It was verified by a signed affidavit of the plaintiffs' attorney as follows: "[Affiant] being duly sworn, on oath deposes and says: I am one of the attorneys for the plaintiffs in this cause; that plaintiffs are a co-partnership residing in Chicago, in the state of Illinois; that I have held no correspondence with plaintiffs since the filing of defendant's amended answer, and I believe they can have no knowledge of the facts stated therein, nor of the truth of said facts; that since the commencing this action I have had sole charge of the same, and my knowledge of the facts and the truth of the facts stated in said answer is better than any knowledge

thereof that plaintiffs could have; that I know the contents of the foregoing reply, and the facts stated therein are true as I believe." By statute (Code, § 2673), "if the statements of a pleading are known to any other person than the party, such person may make the affidavit which shall contain averments showing affiant competent to make the same." It was held that the verification was sufficient, since plaintiffs had not sufficient knowledge to form a belief, and the affiant stated this to be true as he believes, which is sufficient in the absence of a statute providing otherwise.

In *Thomas v. Kean* (1917) — Tex. Civ. App. —, 190 S. W. 847, the verification of the answer by one of the defendant's attorneys read as follows: "[Affiant], one of the attorneys for defendant herein, deposes and says that the things set forth in the foregoing answer are true and correct to the best of his knowledge, formed upon information furnished by his client." The statute (Act 33 Leg. chap. 217 [Vernon's Sayles's Anno. Civ. Stat. 1914, arts. 1827, 1829, 1829a, 1829b]) required that the affiant must state the pleadings are true, or that he "believes" them true. The affidavit was held defective, since it should be positive to the truth of the statements made in the answer, or it must show that the affiant believes them to be true.

In *American Audit Co. v. Industrial Federation* (1908) 84 App. Div. 304, 82 N. Y. Supp. 642, in which the answer was verified by the signed affidavit of the attorney for the defendant as follows: "[Affiant], being duly sworn, says that he is the attorney for the above-named defendant; that he has read the foregoing answer; that the same is true to the knowledge of the deponent, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true, and that the reason why this verification is not made by the defendant is that the said defendant is a foreign corporation." Among other things it was claimed that the affidavit was defective in that the attorney did not

set forth the grounds of his belief, but it was held that the verification was in proper form, the court saying: "It is claimed that the verification is defective in that the attorney did not set forth the grounds of his belief, but the allegations of the answer are not on information and belief. On the contrary, the defendant denies any knowledge or information sufficient to form a belief. It is difficult to see, where one has no knowledge or information whatever on a subject, how he can state the grounds of his belief. The answer is in proper form to raise an issue. The verification is in proper form, and is verified by a proper person."

The requirement of the Code that, where the verification is by a person other than the party, "he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge," was held in *Davidson v. Penn-Virginia Coal & Coke Co.* (1919) 109 Misc. 180, 178 N. Y. Supp. 205, to be sufficiently complied with in case of verification of an answer by the vice president of a foreign corporation by the statement that the sources of deponent's information and the grounds of his belief as to all matters not stated on his knowledge are the books and records of said corporation. The court said that, taking these words in a reasonably broad sense, it was fair to infer that the books and records contained information relative to the matters in question in the answer, and that there was a sufficient presumption of the truth of such sources of information to warrant the court in treating the affidavit as a sufficient compliance with the requirements of the Code.

Compare *Johnson v. Case* (1916) 97 Misc. 247, 162 N. Y. Supp. 841, affirmed without opinion in (1917) 179 App. Div. 948, 165 N. Y. Supp. 1093, where in it was held that, when the treasurer of an unincorporated association verifies a pleading as provided by statute, he does so as to the plaintiff himself, and thus it is not the case of an agent or attorney verifying, and his verification, therefore, is not rendered defective because the affidavit fails to



state the sources of his information and the grounds of his belief, as required by statute (Code, § 526).

(b) *Minority rule.*

However, it has been held in Wisconsin that it is not necessary to allege specifically in the affidavit of verification the source of information or grounds of belief. *Taylor v. Robinson* (1870) 26 Wis. 545; *Roosevelt v. Ulmer* (1898) 98 Wis. 356, 74 N. W. 124.

Thus in *Taylor v. Robinson* (Wis.) *supra*, an action to recover the balance due on a bill of goods and merchandise, the allegations in the complaint were positive and direct, but the verification was made by the attorney, who stated that he believed each and every allegation to be true, stating fully his grounds of belief on the subject and the reasons why the complaint was not verified by one of the plaintiffs. It was contended that because the allegations in the complaint were absolute and unqualified, the verification should have stated that the same were true to the knowledge of the attorney. It was held that the verification was sufficient, since, when a pleading is verified by the agent or attorney upon information or belief, the form of the averments is not material, because the conscience of the person making the affidavit may be as firmly bound, and perjury as well assigned, when the averments are direct and positive, as when they are made on information and belief. If he makes the affidavit without having reasonable grounds for believing, and without believing, that all the material facts and allegations are true, in whichever form they may be stated, he is forsworn, and upon proper proof may be convicted of perjury.

In *Roosevelt v. Ulmer* (1898) 98 Wis. 356, 74 N. W. 124, an action to recover instalments due on the lease of certain real estate, the plaintiff being a nonresident, the complaint was verified by his agent and attorney, the principal allegations in the complaint being made on knowledge. The verification showed that the affiant had acted as agent for the plaintiff in collecting rents from the defendants for

several years, and as to the allegations in the complaint made upon information and belief the affiant stated in effect that the grounds of his belief were founded on and derived from such transactions. It was held that the verification was sufficient, since the affiant's agency would necessarily place him in possession of the material facts, and the grounds of his belief are shown to have been founded upon and derived from transactions wherein he was the plaintiff's agent.

c. *Action on written instrument for payment of money.*

1. *In general.*

It is generally provided by statute that an agent or attorney, having in his possession a written instrument for the payment of money only on which the action or defense is founded, may verify the pleadings. See *Gibson v. Shorb* (1898) 7 Kan. App. 732, 52 Pac. 579; *Smith v. Mulliken* (1858) 2 Minn. 319, Gil. 273; *Abbott v. Campbell* (1903) 69 Neb. 371, 95 N. W. 591; *Boykins Buggy Co. v. Lightsey* (1915) 102 S. C. 283, 86 S. E. 639.

In *Boykins Buggy Co. v. Lightsey* (S. C.) *supra*, an action on a check and three sealed notes, the complaint was verified by the plaintiff's attorney, who stated in the verification, in substance, that the facts were true of his own knowledge, so far as knowledge of them could be derived from the instruments sued on, and that the allegations in each cause of action were based on information derived from correspondence with the plaintiff and the instruments sued on, which were in his possession, and that he made the verification as attorney for the plaintiff. The objection to the verification was that it failed to show why it was not made by the plaintiff. The statute (Code Civ. Proc. § 207) provided that the verification might be made by the attorney, if the action were founded on a written instrument for the payment of money only, and if that instrument were in the possession of the attorney. The statute also provided that, when verification shall be made by the attorney, he shall set forth in his affidavit his knowledge or

the grounds of his belief on the subject, which was done, and the reason why it was not made by the party. It was held that the complaint was sufficiently verified.

In *Abbott v. Campbell* (1903) 69 Neb. 371, 95 N. W. 591, the petition was verified by an attorney, who stated, among other things, that the action was founded "upon a contract for the payment of money only, and such instrument is in my possession." It was held that the verification was not rendered defective by its failure to state expressly that the instrument sued on was written, and that the verification was not subject to the objection that it did not state that the action was founded upon a "written instrument for the payment of money only," as required by statute (Code, § 120), since the verification of a pleading need not be in the exact words of the statute, it being sufficient if the substance of the statutory requirements be fairly set forth.

In *Smith v. Milliken* (1858) 2 Minn. 319, Gil. 273, an action on a foreign judgment, the complaint was verified by the attorney for the plaintiff under a statute (March 1, 1856, Sess. Laws 1856, p. 687) which provided that "when the action or defense is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney," the pleading may be verified by such agent or attorney. The verification was held to be insufficient, because the words "written instrument for the payment of money only," in the statute, referred to and comprehended bills of exchange, notes, bonds, contracts, or any instrument, the creature of contracting parties, containing stipulations for the payment of money only, but did not include a judgment.

In *Gibson v. Shorb* (1898) 7 Kan. App. 732, 52 Pac. 579, an action for an amount due on a promissory note, the answer of one of the defendants was verified by an affidavit reading as follows: "[Affiant] . . . says that he is attorney for the defendant, Perry A. Gibson; that said Perry A. Gibson is a nonresident of the state, and is

at this time absent therefrom; that affiant has read the allegations of the foregoing answer, and that the allegations therein contained are true, as affiant is informed and verily believes." A section (108) of the statute provided that certain allegations shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent, or attorney. Section 111 provided that if the affidavit states that such party, agent, or attorney believes the facts stated in the pleading to be true, it shall be sufficient. Section 114 provided four different grounds on which the affidavit might be made by the agent or attorney, and the affidavit of the agent or attorney must set forth the reason why it is not made by the party: First, "when the facts are within the personal knowledge of the agent or attorney." Second, "when the plaintiff is an infant, or of unsound mind, or imprisoned." Third, "when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney." Fourth, "when the party is not a resident of or is absent from the county." It was held that the complaint was sufficiently verified, since each reason was clearly sufficient within itself, and entirely independent of the other reasons.

But it has also been held that, in view of other statutory provisions requiring one who verifies for another to state the sources of his knowledge and the grounds of his information or belief, these allegations must be made in addition to alleging possession of the instrument. In *Marshall Field Co. v. Oren Ruffcorn Co.* (1902) 117 Iowa, 159, 90 N. W. 618, an action seeking recovery on three promissory notes, wherein it was said that where the officer of a corporation verifies a pleading under his statutory authority to do so (Code, § 3581) it is probable that the officer should show knowledge of the facts in order for him to verify an answer denying the signature of the notes.

In *Bray Clothing Co. v. Shealy* (1898) 53 S. C. 12, 30 S. E. 620, it was

held that an account verified by the maker, an officer of a corporation, is not a written instrument for the payment of money only, since the affiant could not say that the items as they appeared in the account were correct.

In *Kerns v. Roberts* (1861) 2 Ohio Dec. Reprint, 537, an action on a promissory note, verification of the petition by the signed affidavit of the plaintiff's attorney read as follows: "[Affiant], being duly sworn, says that he is the attorney for the plaintiff in the above action, and that the note and mortgage upon which this action is brought are now in his possession, and that the facts stated in the allegations in the foregoing petition are true, as affiant believes." The statute contained the following provisions: "Every pleading of fact must be verified by the affidavit of the party, his agent, or attorney; when the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only (1) when the facts are within the personal knowledge of the agent or attorney; (2) when the plaintiff is an infant, or of unsound mind, or imprisoned; (3) when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney; (4) when the party is not a resident of or is absent from the county." It was urged that the mortgage on which the action was founded was a written instrument for the payment of money only. It was held that the affidavit was insufficient, since the mortgage itself was in the usual form to secure a promissory note, and while the note was an "instrument for the payment of money only," the mortgage was a pledge only and contained no promise to pay.

## 2. Rule in New York.

In New York, the decisions, with the exception of two early cases, support the general rule that an agent or attorney having in his possession a written instrument for the payment of money only, on which an action or defense is founded, may verify the plead-

ings. *Clark's Cove Fertilizer Co. v. Stever* (1899) 29 Misc. 571, 62 N. Y. Supp. 249; *Hyde v. Saig* (1882) 27 Hun, 369; *Kirkland v. Aiken* (1870) 66 Barb. 211; *Smith v. Rosenthall* (1855) 11 How. Pr. 442; *Mason v. Brown* (1852) 6 How. Pr. 481; *Syracuse Moulding Co. v. Squires* (1890) 19 N. Y. Civ. Proc. Rep. 241.

In *Clark's Cove Fertilizer Co. v. Stever*, supra, it was held that a statement contained in the affidavit of plaintiff's attorney that he had the contract on which the action was brought for the recovery of money only was sufficient to bring the complaint within the provision of the statute (Code, § 925, subd. 3), which authorized the agent or attorney for the plaintiff to verify a complaint, "where the action is founded upon a written instrument for the payment of money only, which is in the possession of the agent or attorney."

In *Mason v. Brown* (1852) 6 How. Pr. 481, an action on a promissory note, the affidavit of verification subjoined to plaintiff's reply was as follows: "The reply is true of the defendant's own knowledge, except as to matters stated upon information and belief, and as to those matters he believes it to be true; that the ground of his belief is information derived from . . . the payee of the note mentioned in the complaint, and which he believes to be true; that the action is founded upon a written instrument, which is in the possession of the attorney; that the reason why the affidavit was not made by the plaintiff was that he resided at Nashua in the state of New Hampshire, and was not present to make it." By statute (Code, § 157) the affidavit of the attorney was allowable, when the action or defense was founded on a written instrument and when all the material allegations of the pleading were within his knowledge. It was held that the verification was sufficient, as the attorney showed his right to make affidavit under the first provision, and in such case it is unnecessary to bring himself within the latter.

In *Smith v. Rosenthall* (1855) 11 How. Pr. 442, an action on a promis-

sory note, the affidavit verifying the complaint was by one of the attorneys of the plaintiff, who stated, in addition to what was required in an affidavit of verification by a party, that he had in his possession the promissory note on which the action was brought. It was contended that the affidavit was defective in omitting to state the grounds of belief of the attorney; that the complaint was true; and the reason why it was not made by the party. It was held that the affidavit of verification was sufficient under the second clause of the statute (Code, § 157), since, when the action or defense is on a written instrument for the payment of money only, and the pleading is on information or belief, the affidavit is good, if it is stated by the agent or attorney that the instrument is in his possession, and that this sufficiently showed the ground of his belief and the reason why the party did not make the affidavit as provided under the third clause of the statute.

In *Hyde v. Salg* (1882) 27 Hun, 369, the verification of the complaint by one of the plaintiff's attorneys was as follows: "[Affiant], being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action, and that the within complaint is true to his knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That said action is founded upon a written instrument for the payment of money only, now in deponent's possession for collection, which said instrument is the source of deponent's information and belief." It was held that if the affidavit had used "as the grounds of his belief," instead of "the source of deponent's information and belief," it would have been in the exact language of the statute (Code Civ. Proc. § 526), and that the verification was in substantial compliance with that section in that regard.

In *Kirkland v. Aiken* (1870) 66 Barb. 211, an action on a promissory note, the complaint was verified by the agent of the plaintiffs, having in his possession the note on which

the action was brought, according to the provisions of § 157 of the Code. The defendants in their answer alleged that the note was given on the purchase by the defendant of certain goods of the plaintiffs, and set up by way of defense a warranty of quality of the goods, and a breach thereof, claiming damages therefor. The plaintiffs' attorney served a reply to the counterclaim, also verified by the agent by an affidavit in which he stated that he was the agent of the plaintiffs for the purpose of collecting the demand set forth in the complaint; that the action was founded on a written instrument for the payment of money only; that such instrument was in the possession of the deponent; and also stated the grounds of his belief as to the truth of the allegations of the reply, and the reasons why the verification was not made by the plaintiffs. The defendants' attorney returned the reply on the ground, amongst others, that it was not properly verified. The verification was held sufficient, the court saying: "In this case the action 'is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent.' Whatever plausibility there may be in the argument that the possession of the written instrument does not, in a case like the present, help the agent to any knowledge or information concerning the truth of the matters alleged in the reply, yet reasons might be suggested why the legislature should have intentionally provided that the agent, who is competent to verify the complaint for this reason, should also be permitted to verify the reply, and be enabled to bring the action to a speedy issue. At all events, the alleged absurdity is not so manifest as to require us to put a construction upon this provision of the Code which is not in accordance with its clear and explicit language. The order appealed from is affirmed."

However, the view that, in addition to the allegations as to the written instrument, the attorney must also state knowledge or grounds of belief, is supported by two early cases in New

York: *Matthews v. Smith* (1886) 9 N. Y. Civ. Proc. Rep. 165; *Treadwell v. Fassett* (1854) 10 How Pr. 184. See also *Gamble v. Beattie* (1849) 4 How. Pr. 41.

In *McConnell v. Fried* (1919) 176 N. Y. Supp. 521, where the answer in an action on notes alleged "upon information and belief" that the notes were obtained from the defendant by plaintiff by duress and fraud, the verification by the defendant's attorney which was held sufficient contained the statement that the reason the verification was made by him was that the defendant was absent from the city and county of New York, and that the sources of deponent's information were personal interviews had with the defendant.

### 3. Rule in North Carolina.

In *Griffin v. Asheville Light Co.* (1892) 111 N. C. 434, 16 S. E. 423, an action on a promissory note, the complaint was verified by counsel for the plaintiffs, who stated with respect to his right to verify that plaintiffs were nonresidents of the state, "and there is not now time for this complaint to be forwarded to them for verification and be returned in time to be filed within the first three days of this term, and for the further reason that this action is founded upon a written instrument for the payment of money only, which is in affiant's possession; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except it be as to matters therein stated on information and belief, and as to those matters he believes it to be true." The statute (Code, § 258) provided that, whenever the party was a non-resident of the county, the pleading might be verified by an agent or attorney in two cases: First, when the action was on written instrument for the payment of money only, and the instrument was in possession of the agent or attorney; second, when all the material allegations of the pleadings were within the personal knowledge of the agent or attorney. It was held that the verification was suffi-

cient, since the allegation of the possession of the note sued on was an allegation of the "knowledge or ground of belief" of the matters in the complaint, material to be shown by plaintiff. In *Johnson v. Maxwell* (1882) 87 N. C. 18, an action to recover the amount due on several promissory notes, the plaintiff's agent and attorney made the signed affidavit to the replication, which was similar to that annexed to the complaint and was as follows: "[Affiant] makes oath that the plaintiffs are all nonresidents; that he is both agent and attorney for them in this county and state; that the claims sued on are all in writing and in his possession for collection; that most of the facts involved are in his personal knowledge, or derived from correspondence with the plaintiffs, and from frequent interviews for them with defendant, . . . and that the same are true except those stated on information and belief, and as to those he believes them true." It was held that the affidavit was in substantial compliance with the statute, and fulfilled the conditions prescribed when the verifying oath is made by the agent or attorney.

### 4. Rule in Wisconsin.

In Wisconsin, the majority of cases hold that, in view of the other statutory provisions requiring one who verifies for another to state the sources of his knowledge and grounds of his belief, these allegations must be made in an affidavit verifying a pleading, in addition to alleging possession of the instrument. *Hecht v. Chase* (1914) 158 Wis. 342, 149 N. W. 29; *Closson v. Chase* (1914) 158 Wis. 346, 149 N. W. 26; *Crane v. Wiley* (1861) 14 Wis. 658; *Gillet v. Houghton* (1858) 8 Wis. 311.

In *Hecht v. Chase*, *supra*, a suit on two promissory notes, the complaint was verified by the signed affidavit of the plaintiff's attorney in part as follows: "[Affiant], being first duly sworn on oath, says that he is the attorney for the above-named plaintiff in said action; that he has read the foregoing complaint and knows the contents thereof, and that the same

is true to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true. And deponent further says that the said action is founded on two certain written instruments for the payment of money only, and that said written instruments are now in his possession as such attorney, and that the reason why this affidavit is not made by the plaintiff is that the said plaintiff resides at Logansport, in the state of Indiana, and is not now within the county in which deponent resides." It was held that the verification was fatally defective, since, to support it, it would be necessary to hold that it would be a sufficient statement of the affiant's "knowledge and belief" to state that the written instrument was in the affiant's possession.

In *Crane v. Wiley* (1861) 14 Wis. 658, an action on a promissory note, all the allegations of the complaint were positive, none being stated on information and belief. The verification by plaintiff's attorney was as follows: "[Affiant], being duly sworn, says he is one of the attorneys of the plaintiff in this action; that the foregoing amended complaint is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true; that the note referred to in said complaint is now in his possession, as one of the attorneys for the plaintiff, which is the ground of his belief. And deponent further says that the plaintiff in this action does not verify the said complaint for the reason that he does not reside in, and is now absent from the county . . . where his attorney resides." The statute provided that when the pleading is verified by another person, he shall set forth in the affidavit his knowledge or the grounds of his belief. It was held that while the attorney was authorized to verify the complaint, the verification was defective in not stating what knowledge the attorney had on the subject.

In *Gillet v. Houghton* (1858) 8 Wis. 311, it was held that the verifi-

cation by an attorney of the complaint in an action upon a promissory note was sufficient, where the attorney not only alleged that the claim was founded on an instrument in writing for the payment of money only, and that the same was in his possession, but that his belief of the facts set forth was founded upon his possession of such instrument and the signature of the defendant thereto with which he was acquainted.

In *Closson v. Chase* (1914) 158 Wis. 846, 149 N. W. 26, an action on several promissory notes, a dishonorable check, and an account, the signed verification by the plaintiff's attorney was in the following words: "[Affiant], being first duly sworn, on oath says that he is the attorney for the above-entitled plaintiff, and makes this verification for and in his behalf and was authorized so to do; that he has read the foregoing complaint and knows the contents thereof and that the same is true; that the reason this verification is not made by the plaintiff is: (1) For the reason the notes described in the foregoing complaint, the check, and account, are for the payment of money only, and the said notes, check, and account, correspondence between defendant and payees in said notes, are all in affiant's possession, and form the grounds of affiant's belief as to the allegations set forth in said complaint. (2) That the said plaintiff is a nonresident of the state." It was held that the affidavit was a substantial compliance with the statute, though the attorney used the words, "is true," instead of "believes to be true."

However, in *Market Nat. Bank v. Hogan* (1867) 21 Wis. 318, an action on two promissory notes, the verification of the complaint was by one of the plaintiff's attorneys and stated that the complaint was true to affiant's own knowledge, except as to those matters which were therein stated on information and belief, and as to those matters he believed it to be true; and that "the reason why this verification is not made by the plaintiff is, as well that said plaintiff is a corporation and nonresident . . . in said state, as

that this action is founded upon written instruments for the payment of money only, and that such instruments are in the possession of deponent; and that his knowledge is derived from said instruments, and from the admission of the agent of the plaintiff to deponent in regard thereto; and that the grounds of his belief are the possession of said instruments and the aforesaid admissions." The statute (Rev. Stat. chap. 125, § 19) provided that the attorney might verify, if the action or defense were founded on a written instrument for the payment of money only; or if all the material allegations of the pleadings were within his personal knowledge. A subsequent provision was to the effect that, when a corporation is a party, verification may be made by an officer thereof. It was held that the verification was sufficient.

*d. Absence of party from county.*

It is provided by statute in many jurisdictions that a pleading may be verified by the agent or attorney if the party is absent from the county in which the attorney resides, but that fact must be stated positively in the affidavit. *Stephens v. Parrish* (1890) 83 Cal. 561, 23 Pac. 797; *Burgess v. Jacobs* (1854) 14 B. Mon. (Ky.) 517; *Northern Lake Ice Co. v. Orr* (1898) 102 Ky. 586, 44 S. W. 216; *Treen Motors Corp. v. Van Pelt* (1919) 106 Misc. 357, 174 N. Y. Supp. 500; *Neuberger v. Webb* (1881) 24 Hun (N. Y.) 347; *Roscoe v. Maison* (1852) 7 How. Pr. (N. Y.) 121; *Lyons v. Murat* (1877) 54 How. Pr. (N. Y.) 23; *Pardi v. Conde* (1899) 27 Misc. 496, 58 N. Y. Supp. 410, reversing (1899) 26 Misc. 202, 29 N. Y. Civ. Proc. Rep. 48, 55 N. Y. Supp. 1004; *Levey v. Duff* (1904) 90 N. Y. Supp. 410; *Frisk v. Reigelman* (1890) 75 Wis. 499, 117 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766; *Morley v. Guild* (1861) 13 Wis. 577.

In *Northern Lake Ice Co. v. Orr* (1898) 102 Ky. 586, 44 S. W. 216, an action by a corporation on an account, it appeared that the plaintiff's attorney made the affidavit for attachment, which read as follows: "[Affiant]

says that the plaintiff is a corporation; that he is its attorney; that the above statements are true." By statute (Civ. Code of Prac. § 196), under certain conditions, the agent or attorney of the plaintiff might make the affidavit. Another Code provision (§ 550) was as follows: "Any affidavit which this Code requires or authorizes a party to make may, unless otherwise expressed, be made by his agent or attorney, if he be absent from the county. . . . (5) The affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney." And by another section (§ 117) it was provided as follows: "Pleadings, the verification of which is required by this Code, must be verified as follows: . . . (2) That of a county, or of a municipal or private corporation, must be verified by its chief officer or agent, upon whom a summons in the action is lawfully served, or might be lawfully served if it were a defendant; or, if it have no such officer nor agent residing in the county in which the action is brought, or is pending, it may be verified by its attorney." It was held that the affidavit was defective, since it was essential that the agent or attorney should state the absence from the county of the party for whom he was making the affidavit.

In *Lyons v. Murat* (1877) 54 How. Pr. (N. Y.) 23, the plaintiffs served alleged replies to new matter which was set up in the answers of the defendants, which replies were verified by the plaintiff's attorney on the ground that he could not find the plaintiff in the city, and that it was his last day to reply. It was held that the verification was insufficient, in that it did not state any legal reason why it was not made by the party.

In *Neuberger v. Webb* (1881) 24 Hun (N. Y.) 347, a separate answer was verified by an attorney who stated that he resided in the county and that the answer was true of his own knowledge, except as to the matters therein stated to be on information and belief, and that as to those mat-

ters he believed the same to be true, giving as a reason why the verification was not made by the defendant that the latter was not a resident of or within the county, and stating that the grounds of the affiant's belief were statements made by his client to him. It was held that the verification was sufficient, under a statute (Code, § 525) which allowed a verification to be made when the party was not within the county in which the attorney resided.

In *Levey v. Duff* (1904) 90 N. Y. Supp. 410, an amended answer was verified by the attorney for the defendant who in addition to setting forth the usual statements required in the verification of pleadings, added that the reasons why the verification was not made by the defendant was that he was not within the county where the deponent resided. The contention was that it was verified by the attorney, instead of the plaintiff himself. The statute (Mun. Ct. Act, § 164, Laws 1902, p. 1541, chap. 580) provided that the verification of a pleading might be by a party or (§ 164, subd. 3), where the party was not within the county where the attorney resided, the verification might be made by the agent of or attorney for the party. The verification was held to be sufficient.

In *Pardi v. Conde* (1899) 27 Misc. 496, 58 N. Y. Supp. 410, reversing on other grounds (1899) 26 Misc. 202, 22 N. Y. Civ. Proc. Rep. 48, 55 N. Y. Supp. 1004, the answer was verified by the defendant's attorney in the usual form required by the statute (Code Civ. Proc. § 525, subd. 3), to the effect that the defendant was not within the state, and also alleged the source of the information concerning matters stated in the answer. It was conceded by the attorney for the respondent that, had the answer been verified by the defendant in person, the objections made by the appellant to its sufficiency would have been well taken, but he claimed that, the defendant having been absent from the county and the verification having been made by his attorney, these facts were sufficient to take the case out of the

rule that where the allegations set forth in a pleading must, from their very nature, be within the knowledge of the defendant, he cannot deny on information merely. It was held that the verification was sufficient, though the answer itself was insufficient, and the facts that the party was absent from the county, and that his attorney had verified it in due form of law, did not cure the defects in the pleading itself.

In *Roscoe v. Maison* (1852) 7 How. Pr. (N. Y.) 121, the verification of the reply was by the plaintiff's attorney. The statute (Civ. Code, § 156) provided that when any pleading was verified every subsequent pleading except a demurrer must also be verified. Section 157 provided that the verification "must be by the affidavit of the party, or if there be several parties united in the interest, and pleading together, by one at least of such parties acquainted with the facts—if such party be within the county where the attorney resides, and capable of making the affidavit." It was held that the reply could be verified by the attorney on the ground that his client was absent from the county, and that the attorney, by substantially swearing to that fact, stated a sufficient reason for making the affidavit himself.

In *Frisk v. Reigelman* (1890) 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766, an action on an account for goods sold and delivered wherein a writ of attachment was issued, the complaint was verified by the plaintiffs' attorney to the effect that he was such attorney and made the verification in their behalf; that he had read the complaint and knew the contents thereof, and verily believed the same to be true; that the sources of his information were derived from statements of the plaintiffs' account, and letters in reference thereto, received by him from the plaintiffs; and that the reason that the complaint was not verified by one of the plaintiffs was that none of them were within the county in which he resided. It was held that the verification was sufficient.

In *Treen Motors Corp. v. Van Pelt*



(1919) 106 Misc. 357, 174 N. Y. Supp. 500, the answer was verified by the affidavit of the defendant's attorney and read as follows: "That he is the attorney for defendant in the above-entitled action, and that he has read the answer herein and knows the contents thereof, and that the same is true. That the reason this verification is made by deponent, and not by defendant, is that defendant is absent from the county where deponent has his principal office and place of business, and deponent is familiar with the facts." The statute (Code, § 525, subd. 3) provided that to justify an attorney verifying on the ground that his client is absent, it must be shown that the client is "not within the county where the attorney resides, or, if the [client] is not a resident of the state, the county where he has his office and capable of making the affidavit." It was held that the verification did not come within this rule.

#### IV. Miscellaneous.

In *Solomon v. Huey* (1880) 1 Posey Unrep. Cas. (Tex.) 265, a suit on a promissory note against an administrator, it was held that the widow of an intestate, being better informed, and for the protection of her interest, which otherwise might be jeopardized, could intervene to make the affidavit to a plea of non est factum, where the administrator was unwilling to make the affidavit.

In *Hoffman's Estate* (1899) 23 Pa. Co. Ct. 496, from the language of the court it would seem that under a rule of the court counsel could not verify a petition purporting to be by a son of a testator, who was not an appellant from the decision of the register admitting the will of his late father to probate.

In *Sizer v. Miller* (1842) 9 Paige (N. Y.) 605, an action to dissolve an injunction, a creditor's bill was verified by one complainant and by the oaths of the attorneys of the other complainants, who swore positively to the recovery of the judgments and other proceedings in favor of their respective clients in the suits at law, and also to the amounts due thereon, stating that their clients respectively

resided in the city of New York, and were not as well acquainted with any of the facts in the bill as were the deponents. It was held that the objection that the affidavits of the defendant showed that a receiver of his property was unnecessary was frivolous.

The affidavit of the real party in interest, who was not a party to the action, in the form prescribed by statute (Code, § 157), and who swore that he was the real party in interest, and had taken the defense of the action upon himself, has been held to be a sufficient verification of a pleading. *Taber v. Gardner* (1869) 6 Abb. Pr. N. S. (N. Y.) 147. To the same effect see *Hart v. Oatman* (1847) 1 Barb. (N. Y.) 229.

In *Carter v. Vaulx* (1858) 2 Swan (Tenn.) 639, an action of debt on a lost note, an affidavit by an individual to whom the note was sworn to have been mailed, to the effect that the note had never come into his possession, and that he believed it had been lost or miscarried in the mail, was held defective, because the note never came into his hands, and he knew nothing of its existence or loss. The verification was also held defective on the ground that it was not verified before the court, as required by statute.

*Ely v. Frisbie* (1861) 17 Cal. 250, was an appeal from an order granting an injunction, restraining the enforcement of a judgment recovered by the defendants for the possession of certain premises in the occupation of plaintiff. The verification to the answer by one of the defendants stated that his codefendant left this state before the complaint was filed, "and is not in this state; that the foregoing answer is true of this defendant's own knowledge, except as to the matters therein stated to be upon information and belief of defendants, and as to those matters he, this defendant, believes the same to be true." It was held that the verification, although not complying in form with the exact language of the statute, was sufficient to entitle the answer to be considered as an affidavit as offered, and that exhibits of pleadings and proceedings in

the action brought in the name of the United States did not require verification, or at least need be verified only by the clerk of the circuit court by the United States.

In *Alapaugh v. Adams* (1887) 80 Ga. 345, 5 S. E. 496, it was held that while the affidavit of counsel in verification of a bill was not sufficient to warrant the grant of an injunction, where they do not swear positively, the sufficiency of the affidavits of others produced at the hearing would not be affected by that defect.

In *Warman v. First Nat. Bank* (1897) 70 Ill. App. 181, affirmed in (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6, an action in assumpsit on a promissory note, it appeared that the general issue in assumpsit was verified by an agent of the defendants by an affidavit that he had read it and "verily believes the same to be true." It was held that, waiving the inquiry whether such affidavit must be by the party himself, such an affidavit did not verify the plea, the court saying: "Upon writ of error in a criminal case, the cause must be determined solely upon the record sent up to this court, and the only exception in civil cases is where there is a plea in this court to the assignment of errors, setting up extrinsic matters, such as a release of errors, etc. In the absence of such plea, the same rule obtains in civil cases."

In *Imlay v. New York & H. R. Co.* (1848) 1 N. Y. Code Rep. 94, 1 Sandf. 733, it was objected that the affidavit of no answer was made by a stranger to the suit, whereas it should be made by the attorney. The person making it was not described as a clerk, or in any manner. It was held that the affidavit of no answer ought to have been made by the attorney, or by a managing clerk, or by some person shown in the affidavit to have had charge of the suit or to be otherwise in a situation to have had knowledge of the matter, but the court further held that the case did not require a decision of this point, because in another affidavit filed therewith, made by such person and forming a part of the same record, he was described as the clerk of the plaintiff's attorney, that

the court was bound to take the two affidavits together, and that it sufficiently appeared that the affiant was in entire charge of the suit, which was a sufficient answer to the objection.

In *Moore v. Holmes* (1897) 68 Minn. 108, 70 N. W. 872, an action on a promissory note wherein the answer specifically denied the making or signing of the note, the verification of the answer was made by the defendant's attorney on information and belief, the defendant then being absent from the county where she resided. A statute (Gen. Stat. 1894, § 5751) provided that "every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit." It was held that while the general denial in the answer, verified on information and belief by the defendant's attorney, put in issue the execution of the note as a rule of pleading, the statutory requirement with reference to the necessity of denying the signature and execution of a written instrument was a rule of evidence, and not of pleading, and the failure of the defendant to comply with the statute in this respect, by denying her signature or the execution of the note by her oath or affidavit, entitled the plaintiff to put the note in evidence without first proving its execution.

In *Hecht v. Friesleben* (1888) 28 S. C. 181, 5 S. E. 475, an action by alleged copartners on an open account, the complaint was verified by one of the plaintiff's attorneys as follows: "[Affiant], being duly sworn, says he is an attorney for the plaintiffs in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true. That the sources of his knowledge and information are the possession of a verified itemized statement of the account sued upon, the admissions and statements of the defendant, and . . . others. That the

reason this verification is not made by one of the plaintiffs is that neither of them is in this county or state, in which deponent is a resident." It was held that the complaint was objectionable, as the verification was not in such form as would make it practicable to maintain an action for perjury thereon.

In *Beirne v. Imboden* (1853) 14 Ark. 237, under a statute requiring one who has a claim against the estate of a deceased person to authenticate his claim by his own affidavit before evidence shall be heard to sustain it, it was held that an authentication of a claim by another than the claimant was not sufficient, within the provision of the statute.

In *Hernick v. Union P. R. Co.* (1911) 85 Kan. 568, 38 L.R.A. (N.S.) 826, 118 Pac. 60, Ann. Cas. 1913A, 208, it was held that the verification of a pleading by the agent or attorney of a corporation, under direct provisions of a statute (Civ. Code, § 112), was sufficient, without compliance with another statute (§ 116) providing the manner in which a verification should be made by an agent or attorney.

In *Bowen v. Powell* (1869) 1 Lans. (N. Y.) 1, the plaintiff claimed that a contract involved was made with a named agent of the defendants. The answer was verified by that agent. In the affidavit of verification, the affiant said that he was the agent for the defendants in the matters out of which the cause of action, as claimed by the plaintiff, arose, and was acquainted with and had personal knowledge of all the material allegations contained in the answer; and that he had read the answer and that the reason of his making the affidavit was that the defendants were nonresidents of the county, and neither was present to make it. The statute (Code, § 157) authorized the verification of a pleading to be made by an agent. The court did not discuss the sufficiency of the verification, but held that it was not competent evidence to prove the fact of agency.

In *Thompson v. First Nat. Bank* (1904) 85 Miss. 261, 37 So. 645, a suit brought by a trustee in bankruptcy

against the defendant bank, the verification of the answer was by the president of the bank, and, in part, read that he was "the proper person, as well as duly authorized, to swear to the discovery given in answer to the interrogatories contained in said bill, and, further, that the matters stated in said discovery as of his knowledge are true of his own personal knowledge, and those things stated on information and belief in said discovery he personally believes to be true upon his own personal information and belief." It was held that as the affidavit was, by its terms, restricted to those allegations which were made in response to the prayers for discovery, and did not aver the truth of all of the allegations contained in the answer, it did not challenge the character in which the plaintiff sued, which, by statute, was required to be specially denied by a verified pleading.

In *Gamble v. Beattie* (1849) 4 How. Pr. (N. Y.) 41, the complaint was founded on a promissory note, and was verified by the oath of the plaintiff's attorney to the effect that he believed it to be true. The answer denied the substance of the complaint, set up payment, and was verified in the same manner by the attorney for the defendant. It was held that the verification of the answer was sufficient "under the old Code" (evidently the original Code, § 133), but that the answer was not verified according to the amended Code (§ 157).

In *Seiffert v. People's Bank* (1873) 2 Tenn. Ch. 17, it was held that the affidavit to a plea was defective under a statute (Code, § 2901) providing that the truth on a plea in abatement must be "verified by the oath of the party or otherwise," and the further requirement that the oath must be positive, and not on information or belief.

The point that an affidavit to a plaintiff's amended petition, to which interrogatories are attached, was made by an attorney, cannot be considered on appeal where it appears that it was not made in the trial court. *Blair v. Sioux City & P. R. Co.* (1899) 109 Iowa, 369, 80 N. W. 673. R. H. H.

GILBERT M. RITCH  
v.  
CAROLINE ROBERTSON, Appt.

*Connecticut Supreme Court of Errors—May 2, 1919.*

(93 Conn. 459, 106 Atl. 509.)

**Broker — commission — purchase through stranger.**

1. A broker introducing a purchaser to the owner of real estate is not entitled to a commission if the customer secures a third person to make the purchase at more advantageous terms than he can secure, and immediately convey to him, he denying desire to purchase upon inquiry from the owner, and the owner not knowing of his interest until after the contract to sell is made.

[See note on this question beginning on page 87.]

**—exclusive right of sale.**

2. To give a real estate broker the exclusive right of sale, it must be given in unequivocal terms or by necessary implication.

[See 4 R. C. L. 259.]

**—antagonistic position.**

3. A broker cannot put himself in a position antagonistic to his principal's interest.

[See 4 R. C. L. 274 et seq.]

**Appeal — review of facts.**

4. A finding as a conclusion of fact from subordinate facts that a broker was the procuring cause of sale of real estate may be reviewed on appeal.

[See 2 R. C. L. 208.]

**Principal and agent — undisclosed principal — application of rule.**

5. The rule that a principal of an undisclosed agent may appear and claim all the benefits of the contract from the other contracting party is never applied when it would work an injury to the other contracting party.

[See 21 R. C. L. 897.]

**Broker — right to adopt secret transaction of customer.**

6. A broker cannot, for the purpose of recovering his commission, adopt a secret transaction by which the customer whom he introduced bought through a stranger, without the knowledge of either broker or owner, and after the latter had tried in vain to make the sale to the customer.

**—effect of sale for less price.**

7. An owner is not relieved from liability for a broker's commission by the fact that he sold for less than the price to which the broker was limited.

[See 4 R. C. L. 322.]

**—sale by owner — effect.**

8. An owner is not relieved from liability for the broker's commission by the fact that he himself effected the sale to the customer introduced by the broker.

[See 4 R. C. L. 320.]

**APPEAL** by defendant from a judgment of the Court of Common Pleas for Fairfield County (Booth, J.) in favor of plaintiff in an action brought to recover a broker's commission. *Reversed.*

Statement by Gager, J.:

The defendant employed the plaintiff to sell certain real estate for \$6,500, for a commission of 2½ per cent. The plaintiff attempted to sell to one Robertson, who refused to pay more than \$5,500. The defendant then authorized a sale for \$6,000, but Robertson still refused to pay more than \$5,500. Thereupon, at the request of the defend-

ant, she was by the plaintiff introduced to Robertson under the agreement that if she sold to Robertson she would pay the plaintiff his commission. The defendant was unable to effect a sale to Robertson. Robertson, believing that a third party could buy cheaper than he could, arranged with one Ehlers to buy for not more than \$5,750 and then deed the property to him,

agreeing to furnish Ehlers the money. Ehlers then attempted to buy the property of the defendant, which, after considerable negotiation, he succeeded in doing, for \$5,750. The defendant supposed and believed that Ehlers was acting for himself, and had no connection with or relation to either Robertson or the plaintiff, and before closing with Ehlers she called Robertson on the telephone, informed him of the offer and proposed to sell to him for \$5,800, if he still desired to buy. Robertson, knowing Ehlers made the offer, declined to buy, and the defendant then entered into a written agreement to sell to Ehlers, who also paid something down. This was about August 2, 1915.

The defendant, some time after she had made her contract with Ehlers, and before September 8, 1915, learned of the arrangement between Ehlers and Robertson. She executed and delivered her deed to Ehlers September 20, 1915, and at the same time Ehlers executed and delivered his deed of the same property to Robertson. Robertson furnished Ehlers the money necessary to complete the transaction. Both deeds of the property were, at the request of the defendant, prepared by her attorney, after she learned of the Ehlers-Robertson arrangement, and prior to the day of delivery. The plaintiff knew nothing of the negotiations between Ehlers and the defendant, nor does it appear that he knew of the arrangement between Ehlers and Robertson until after the sale was completed and the deeds passed. The defendant had not withdrawn the property from the hands of the plaintiff prior to September 20, 1915.

Upon this statement of facts, slightly condensed from the record, the trial court rendered judgment for the plaintiff to recover his commission. The defendant appealed.

Messrs. William C. Rungee and George E. Beers, for appellant:

To be entitled to a commission, the broker must procure a customer ready,

able, and willing to buy upon the terms prescribed by the owner.

Home Bkg. & Realty Co. v. Baum, 85 Conn. 383, 82 Atl. 970; Seward v. M. Seward & Son Co. 91 Conn. 191, 99 Atl. 887; Hoadley v. Savings Bank, 71 Conn. 599, 44 L.R.A. 321, 42 Atl. 667.

The sale was not made on the "terms prescribed."

Home Bkg. & Realty Co. v. Baum, *supra*.

The sale was not made upon terms "accepted" by the owner.

Clark v. Henry G. Thompson & Son Co. 75 Conn. 161, 52 Atl. 720; Wendle v. Palmer, 77 Conn. 12, 58 Atl. 12; Hoxie v. Home Ins. Co. 32 Conn. 40, 85 Am. Dec. 240; Butler v. Ouwelant, 90 Conn. 434, 97 Atl. 310.

The owner had no notice of any effective services performed by the broker.

Barnett v. Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; Fischer v. Bell, 91 Ind. 243.

In the absence of an agreement to the contrary, the owner may himself sell without incurring any liability for commissions.

9 C. J. 575; Hungerford v. Hicks, 39 Conn. 259.

Messrs. Walter M. Anderson and Spotswood D. Bowers, for appellee:

The fact that the sale was at a lower price and upon different terms than those upon which the plaintiff was authorized to sell does not prevent the recovery of the commission.

Hoadley v. Savings Bank, 71 Conn. 610, 44 L.R.A. 321, 42 Atl. 667; Schlegal v. Allerton, 65 Conn. 264, 82 Atl. 363; Wendle v. Palmer, 77 Conn. 12, 58 Atl. 12; 4 R. C. L. p. 313, note 12, p. 321, note 13; Notkins v. Pashalinski, 83 Conn. 458, 76 Atl. 1104, 20 Ann. Cas. 1023.

A finding that the plaintiff was the procuring cause of the sale is a finding of fact which is conclusive unless unsupported by the subordinate facts, or in conflict with the settled rules of logic and reason, or found in violation of some rule or principle of law.

Seward v. M. Seward & Son Co. 91 Conn. 193, 99 Atl. 887.

Gager, J., delivered the opinion of the court:

The contract did not give the plaintiff the exclusive right of sale. To have this effect, the right must be given to the

Broker—  
exclusive right  
of sale.

broker in unequivocal terms or by necessary implication. *Hungerford v. Hicks*, 39 Conn. 259; 4 R. C. L. 259; notes in 44 L.R.A. 344 and 24 L.R.A.(N.S.) 279. This court has many times stated what was necessary to entitle a broker to his commission. In the recent case of *Butler v. Ouwelant*, 90 Conn. 434, 97 Atl. 310, the court, citing a number of earlier cases, said: "To entitle the plaintiffs, as brokers, to the compensation which they claim to recover in this action, it should appear that they produced a person who was ready, able, and willing, both to accept and live up to the terms offered by the defendant."

It is also well settled that a broker cannot put himself in a position antagonistic to his principal's interest. *Ebert v. Haskell*, 217 Mass. 211, 104 N. E. 556; *Veasey v. Carson*, 53 L.R.A. 241, and note (177 Mass. 117, 58 N. E. 177).

The appeal turns, substantially, upon the answer to the question: Was the plaintiff the procuring cause of the sale? The trial court found, as a conclusion of fact from subordinate facts set forth in the finding, that the plaintiff was the procuring cause.

This conclusion may be reviewed on appeal. *Hoadley v. Savings Bank*, 71 Conn. 599, 44 L.R.A. 321, 42 Atl. 667; *Seward v. M. Seward & Son Co.* 91 Conn. 190, 99 Atl. 887. Robertson appears to have been the only person with whom the plaintiff had negotiations. After twice failing to sell to him, the plaintiff and the defendant agreed that the defendant should be introduced to Robertson, and that if she succeeded in effecting a sale to him the plaintiff should have his commission. The defendant also failed to make the sale to Robertson, and negotiations with Robertson were at a standstill. It appears, however, that Robertson really wanted the property, and, entirely without the knowledge of either the plaintiff or defendant,

put up a scheme by which he hoped ultimately to get the property at a less price than that for which he could buy it directly. He agreed with one Ehlers, hitherto unknown to both plaintiff and defendant as a possible purchaser, that Ehlers should buy the property, if possible, at a price as an original independent purchaser, and then convey to him. Ehlers offered \$5,750, but the defendant, with the utmost good faith, both to the plaintiff and to Robertson, called up Robertson before closing with Ehlers and again offered him the property for \$5,800. He declined to buy. The defendant's good faith to the plaintiff is clear when it is observed that a sale to Robertson for \$5,800, less commission, would have meant a loss to the defendant of \$95 as against the sale to Ehlers with no commission. Upon the refusal of Robertson to buy, the defendant made her contract with Ehlers, and became bound to convey to him. If bound to Ehlers, information subsequently obtained by her of Robertson's scheme is immaterial. She had no contract with Robertson. Knowing that Ehlers had made her an offer, Robertson had expressly declined to buy upon notice from the defendant and upon her offer still to sell to him before closing with Ehlers. Upon the plainest principles of estoppel, Robertson could not thereafter, as against the defendant, insist that he was the real principal. *East Haddam Bank v. Shailor*, 20 Conn. 18; 31 Cyc. 1234. Yet the plaintiff claims that, because pursuant to the secret agreement between Ehlers and Robertson the property was immediately conveyed by Ehlers to Robertson, the defendant should be held liable for commissions as upon a sale by her to Robertson under the modified agreement.

The finding is clear that the plaintiff did not in fact procure Ehlers as a purchaser. The plaintiff in no way intervened so as to bring Ehlers' attention to the property. But the plaintiff claims that because he had been in negotiations with

—antagonistic position.

Appeal—review of facts.

Robertson, and Robertson made the contract with Ehlers to buy, therefore the plaintiff was the procuring cause of Ehlers' purchase. The plaintiff had nothing to do with the sale in fact made, nor did he know of it until after the

Broker—  
commission—  
purchase  
through  
stranger.

sale had been consummated. Neither the plaintiff nor Robertson introduced Ehlers to the defendant. Ehlers approached the defendant entirely as an original independent purchaser and secured his contract in that guise. The general rule is stated in 9 C. J. 614, in this way: "The facts that a person with whom the broker unsuccessfully negotiated for a sale called the attention of another to the property, and that the other finally bought it, do not give the broker a right to a commission."

This rule is based upon the well-established distinction between what the books call the "*causa causans*" and the "*causa sine qua non*." The cases are numerous. We mention *Burchell v. Gowrie & B. Collieries*, [1910] A. C. 624, 80 L. J. P. C. N. S. 41, 103 L. T. N. S. 325; *Imrie v. Wilson*, — Ont. —, 3 D. L. R. 826, 21 Ont. Week. Rep. 964, 3 Ont. Week. N. 1145. In *Gleason v. Nelson*, 162 Mass. 245, 38 N. E. 497, it is said: "Where there has been no direct communication between the broker and the purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose."

We also cite *Johnson v. Seidel*, 150 Pa. 396, 24 Atl. 687; *Baumgartl v. Hoyne*, 54 Ill. App. 496. See also the citations in note in 44 L.R.A. 321, i. d.

Perhaps we should here notice our own case of *Lincoln v. McClatchie*, 36 Conn. 136. Here the broker had been engaged to sell. Burdick was looking for a house. His friend Goodwin, knowing this, and seeing the broker's advertisement, interviewed the broker and reported to

Burdick, who requested Goodwin to examine the house and report to him. Goodwin did so, and Burdick then examined the house, negotiated directly with the owner, and bought the property without any personal interview or dealing with the broker. Before his purchase, Burdick was informed by Goodwin that the broker had the property for sale. In the superior court, Judge Loomis decided for the defendant. On appeal this court held that the broker was entitled to his commission on the ground that on these facts the principle, "*qui facit per alium, facit per se*," applied, and that Burdick obtained his information from the plaintiff through Goodwin, who was in fact the messenger and agent of Burdick. The facts clearly warranted the assumption of such an agency. The felt necessity of invoking the doctrine of agency but confirms the general rule stated above. *Butler v. Ouwelant*, supra, is decided upon the theory that the defendant, with knowledge of what the plaintiff broker had done, combined with a third party in the attempt unjustly to deprive the plaintiff of his commission. There is nothing in the present case to suggest in the slightest degree that the defendant desired or planned to avoid paying a commission. Directly the contrary is true.

The complaint is based upon a sale by the defendant to Robertson, and the finding shows the final arrangement between the plaintiff and defendant was based on the possible ability of the defendant to effect a sale to Robertson.

The plaintiff argues that the facts show that Ehlers was the undisclosed agent of Robertson. Whether the arrangement made between Robertson and Ehlers was a contract of purchase and sale or a contract of agency, it is not necessary now to decide. If it was a contract of purchase and sale, then clearly the plaintiff would not be entitled to recover, for the sale would have been to Ehlers, and not to Robertson. If, on the contrary,

Ehlers was in fact the undisclosed agent of Robertson, still the plaintiff cannot recover. The case is not one of agent for an undisclosed principal, that is, where the seller is aware that he is dealing with one who is acting as an agent, only the principal being undisclosed. In such case the law seems clear that either the agent or the principal may sue upon the contract. *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332, a case where the agent confessedly acted as such to the knowledge of the vendee, so states the general rule. In the present case the fact of the agency was not only undisclosed, but the defendant upon particular inquiry was, by the very person now claimed to have been the principal, justifiably led to believe there was no agency in fact, and thereupon made her sale as she rightfully supposed to a third person free of liability for commission which she would have had to pay had she sold, as in truth she unsuccessfully attempted, to Robertson himself.

This, however, is not a case of one acting as agent, but not disclosing the principal.

If we assume that, as between Ehlers and Robertson, the relation of principal and agent existed, not only was this fact not known to the defendant, but was purposely concealed from her by both Ehlers and Robertson. So that the most that the plaintiff can claim is that this is a case of undisclosed agency. The difference between these two situations must be kept in mind in determining the liability and rights of the vendor. Furthermore, we are not now deciding the rights of Robertson against Ehlers. The rules of law as frequently stated with reference to the right of an undisclosed principal against the vendee must be critically examined to determine whether the rule as stated is applied with reference to an undisclosed agency, or to a case of disclosed agency but undisclosed principal. *Rhoades v. Blackiston*, *supra*, is an illustration.

While it is generally true that a principal of an undisclosed agent may appear in his true character and claim all the benefits of the contract from the other contracting party, yet this rule is never applied when to follow it would work an injury to the other contracting party.

Principal and agent—undisclosed—principal—application of rule.

In *Barry v. Page*, 10 Gray, 398, cited with approval in *Sullivan v. Shailor*, 70 Conn. 737, 40 Atl. 1055, it is said: "As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let into all the equities, set-offs, and other defenses to which he would have been entitled, if the action had been brought in the name of the agent."

As stated in 21 R. C. L. 898, the principal's right to claim the benefits of the contract is recognized "so far as he can do so without injury to that other by the substitution of himself for his agent." Numerous cases are cited in the note.

It needs no argument to show that if Robertson were permitted to substitute himself for his assumed agent under the circumstances of this case, thereby making the sale one from the defendant direct to him, and to bring the case within the allegations of the complaint and within the terms of the final brokerage contract between the plaintiff and defendant, this would be to the harm of the defendant to the extent of the commission on the sale. The defendant was thus un-



der no obligation to Robertson under her contract with Ehlers, and Robertson could not have enforced Ehlers's contract with the defendant as his own. It is said in 2 Mechem, Agency, § 2070, if the vendor has "dealt with the agent as being in fact the principal and upon terms in a written contract which exclude the existence of any other principal," the undisclosed principal is not a party to the contract and cannot enforce it. To do so would contradict the writing. The finding does not set out the terms of the written contract, but does show there was such a contract, and the circumstances irresistibly point to the conclusion that no agency was suggested and by Robertson's own statement that certainly he was not connected with it. It is then clear that upon the settled principles of undisclosed agency the sale was not to Robertson, and that the plaintiff cannot recover on the theory that he was the procuring cause of a sale to Robertson.

There is another point of view which shows that the plaintiff cannot recover. Should it still be held that the defendant in law, though certainly not in fact, sold to Robertson, because Robertson subsequently obtained title to the property, the plaintiff must as matter of law be held to have adopted the method by which Robertson subsequently obtained title. This method was, as we have seen, by secretly putting forward a third party as a purchaser in opposition to Robertson, to obtain the property at a less price than Robertson believed he could buy it for, and by adopting Robertson's statement to the defendant, upon specific inquiry by the defendant if he still wanted the property, that he did not want to buy. To be sure, the plaintiff did not in fact do this, but he must adopt this conduct, antagonistic to the interest of his client, to establish that he was the procuring cause of the sale the defendant in fact made. This he will not be allowed to do. To compel the defendant to pay commission on a sale so

obtained, when she, though unsuccessful, took every possible means to make the sale as she supposed which would entitle the plaintiff to his commission, would inflict an undeserved loss upon her. The sale in fact was made through concealing the identity of the real purchaser, and so leading the defendant to sell at a less price. *Veasey v. Carson*, 177 Mass. 117, 53 L.R.A. 241, 58 N. E. 177; *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. 858; *Young v. Hughes*, 32 N. J. Eq. 372; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499. The plaintiff cannot benefit by an imposition practised upon the defendant by the very person whose conduct he must adopt to show any sale whatever.

Broker—right to adopt secret transaction of customer.

Perhaps it is not irrelevant to call attention to *Gormley v. Dangel*, 214 Mass. 5, 100 N. E. 1084, a substantially parallel case. The plaintiff was generally authorized to find a purchaser, and negotiated with the defendant for a sale at \$6,000, the lowest price the owner would take. The defendant ceased to negotiate with the plaintiff, posed as broker, and effected a sale by the owner to one Ross, who was, secretly, a dummy purchaser for the defendant. The defendant as an independent broker collected a commission from the owner, thereby getting the property from the owner really at the owner's price less commission. The court held that this conduct of the defendant was fraudulent to the plaintiff broker, and allowed the broker to recover his commission from the defendant. It appeared that the owner in good faith supposed Ross was the real purchaser and the defendant a broker in fact. As to the bearing of good faith on the part of the owner, the court says: "If the owner, knowing that Ross was merely the tool or agent of the defendant, had made the conveyance to him, the plaintiff could have recovered his commission from the owner."

The possible liability of the own-

er for commission is thus based on the assumption of her lack of good faith. But in that case, as in the present, the owner's good faith in supposing that she was actually selling to a third party was apparently unquestioned. In that case, too, the good faith of the owner in paying a commission to the one she innocently supposed was a disinterested broker is the same in effect as the good faith of the defendant in selling to a third party at a less price than she would have sold if she had become obligated to pay a commission.

For various somewhat analogous situations, see *Quist v. Goodfellow*, 8 L.R.A.(N.S.) 153, and cases collected in the note (99 Minn. 509, 110 N. W. 65, 9 Ann. Cas. 431).

We agree with the plaintiff's

claim that the defendant was not released from the obligation to pay a commission merely from the fact that she sold for a less price than that to which the broker was limited, nor was she released by the mere fact that she in person made the sale; but we hold that the defendant did not as matter of fact sell to Robertson, and that, under the settled rules of agency, the plaintiff was not the procuring cause of the sale to Ehlers in any such sense as will entitle him to a commission.

—effect of sale  
for less price.

—sale by  
owner—effect.

There is error. The judgment is reversed, and the cause remanded, with directions to enter a judgment for the defendant.

The other Judges concur.

### ANNOTATION.

**Broker's right to commission where property is sold to third person who is acting for broker's customer.**

It will be seen that in the reported case (*RITCH v. ROBERTSON*, ante, 81) it is held that the broker is not entitled to his commission if the owner in good faith sells to a dummy of the broker's customer. The court seems to base its decision largely on the proposition that the real buyer was estopped to say to the seller that he was the buyer. It is not clear why this estoppel should defeat the broker's claim to his commission. The court does not directly refer to the general rule that the owner's ignorance that the broker procured the customer is no defense to the broker's claim for commission.

In *Feldman v. O'Brien* (1898) 23 Misc. 341, 51 N. Y. Supp. 309, R., wishing to invest some money in real estate, called upon the plaintiff, a real estate broker, who showed her the houses in question, which were also in the hands of B., another broker; and R. negotiated about the matter severally with both brokers. Finally B. made a contract to buy the houses himself at a lower figure than was given to the plaintiff, stating that he hoped

to sell them to R., which he did, assigning the contract. It was held that the plaintiff was not entitled to any commission.

In *White v. Maynard* (1910) 15 B. C. 340, the defendant listed a lot with the plaintiff for sale, who interested R.; the defendants then gave an option to D., a real estate agent, who sold to R., not knowing of the former negotiation. It was held that the plaintiff was not entitled to a commission, there being no evidence that the defendants knew that R. was the purchaser, or that they colluded with D. to deprive the plaintiff of his commission.

The two following cases are closely similar on the facts to the reported case (*RITCH v. ROBERTSON*):

In *Goldstein v. Walters* (1889) 15 Daly, 397, 28 N. Y. S. R. 177, 7 N. Y. Supp. 756, reargument denied in (1890) 29 N. Y. S. R. 323, 8 N. Y. Supp. 957, it was held that the plaintiff was not the procuring cause of the sale where the sale was made direct to another, acting for the plaintiff's customer, in the ignorance of the owner,

the defendant. The court does not refer to the New York cases holding that the broker's right to commission is not affected by the owner's ignorance that he is the producing cause of the sale. See, for example, *Lloyd v. Matthews* (1872) 51 N. Y. 124; *Sussendorff v. Schmidt* (1873) 55 N. Y. 321.

In *Stone v. Kreis* (1916) 202 Ill. App. 43, after the plaintiffs had for two years endeavored to induce H. to purchase the property, H. and the defendant informed the plaintiffs that they would not negotiate further; thereafter the property was sold to W., who conveyed to H. It was held error to refuse to instruct the jury "that if they believed from the evidence that the defendant acted in good faith at the time he sold the property in question to Woodward, and did not know that Woodward was purchasing said property for the benefit of Joseph Hock, their verdict should be for defendant." The court said: "Where, as in the present case, there is evidence tending to show abandonment of negotiations with the broker's customer, and entry upon negotiations with another party, apparently in his own interest, but in fact as the secret representative of plaintiffs' customer, of which defendant was ignorant, and that defendant, on due inquiry, was led to believe that he was dealing with an entirely new party and was not to pay commissions, and was thereby induced to sell at such lower price, we think the element of good faith is material. It would not only seem unjust, if he acted in good faith in the transaction, that he should be mulcted for damages in the form of commissions because of bad faith and deceit practised upon him by plaintiffs' customer, but to present the question whether, so far as the operating influences on defendant are concerned, plaintiffs, under such circumstances, could be said to be the procuring cause of the sale." The court does not refer to *Adams v. Decker* (1899) 34 Ill. App. 20, holding that it was wholly unimportant whether the owner knew that his purchaser was sent by the broker or not.

In *Baumgartl v. Hoyne* (1894) 54

Ill. App. 496, agents employed the plaintiff to sell property, who saw several persons about it, one of whom spoke to R., who eventually bought the property and resold it at an advance to a syndicate composed of himself and several others, some of whom had been approached at first by the plaintiff. It was held that the plaintiff was not entitled to a commission, as he was not the proximate cause of the sale.

*Gormley v. Dangel* (1913) 214 Mass. 5, 100 N. E. 1084, is sufficiently set out in the reported case (*RITCH v. ROBERTSON*, ante, 81).

In *Steidl v. McClymonds* (1903) 90 Minn. 205, 95 N. W. 906, W., interested by the plaintiff, a broker, in property of the defendant in a distant city, sent C. to such city, who met the defendant's manager, and took contract and deed in his own name, and conveyed the property to W. It was held that the knowledge of the manager that C. was acting for W. was the knowledge of the defendant. [Minnesota does not support the general rule that ignorance of the owner that the broker procures the purchaser is no defense to the broker's claim for commission. See *Quist v. Goodfellow* (1906) 99 Minn. 509, 8 L.R.A. (N.S.) 153, 110 N. W. 65, 9 Ann. Cas. 431.]

It will be seen that the two following cases are directly opposed to the reported case (*RITCH v. ROBERTSON*):

In *Glade v. Eastern Illinois Min. Co.* (1908) 129 Mo. App. 443, 107 S. W. 1002, it was held that if one interested by the broker procures a third person to buy the defendant's property for him, the defendant is liable for the broker's commission, even though he did not know that the person interested by the broker was interested in the purchase.

In *Schultz v. Zelman* (1908) — Tex. Civ. App. —, 111 S. W. 776, it was held that the plaintiff was entitled to compensation where the defendant placed the property with several agents for sale, including the plaintiff, who showed it to D. in the defendant's presence, and it was agreed between the plaintiff and the defendant that the defendant should negotiate di-

rectly with D., but he was not able to see him; and D. bought the property through another broker, who told the defendant he was not acting for D., and the defendant did not discover the contrary until after signing the contract.

Where the plaintiffs, employed by the defendant's husband to sell her property, negotiated with the vice president of a bank, and the husband, having notice thereof, sold the property to such vice president for the bank, the conveyance being made to the cashier, the bank paying the money, the plaintiffs were held entitled to their commissions. *Barnett v. Gluting* (1891) 3 Ind. App. 415, 29 N. E. 154. The court said: "The fact that the conveyance was made to some person other than the real purchaser, if it was the same transaction, and resulted in a sale of the property of which the broker was the procuring cause, would not debar the latter from recovering his commission."

An agreement in substance that the broker was to have his commission if he sold or named a customer who bought, leased, or got full control of the property within a time mentioned, was fulfilled by the broker, where he named as probable customers a railroad company, and a coal company controlled by the railroad company, and the person who was secretary and treasurer of both companies bought the property and deeded it to the coal company within the time specified. *Langdon v. Taylor* (1910) 103 C. C. A. 531, 180 Fed. 385.

A colorable sale to a third party in order to deprive the broker of his com-

mission will not have that result. *Randup v. Schroeder* (1898) 22 Misc. 367, 49 N. Y. Supp. 290.

"An agent cannot be deprived of his commission merely because the actual purchaser takes title in another's name." *Konner v. Anderson* (1900) 32 Misc. 511, 66 N. Y. Supp. 388.

In *Bogart v. Williams* (1895) — Tex. Civ. App. —, 31 S. W. 494, the plaintiffs procured a purchaser who only wished part of the property, and induced their employee to take the other part, with the knowledge of the owner, the defendant. Thereafter the defendant persuaded such employee to take a deed for the whole, and then to convey to the customer, but it was held that he could not in this way deprive the plaintiffs of their commission.

The following case, while not strictly in point on the facts, may be here referred to:

Where an agent has been employed to procure a purchaser of real estate at a price satisfactory to the owner, for a stated commission, and the agent introduces to the owner a prospective purchaser, who takes an option and allows it to be canceled, but the agent continues to discuss the matter with the person so introduced, who subsequently, with a partner, purchases the property by negotiations with the brother of the owner, in which the agent took no part, the agent, having introduced and continued to interest the person who, with his partner, did eventually buy, is entitled to his commission as agreed. *Cumberland Sav. & T. Co. v. McGriff* (1911) 61 Fla. 159, 54 So. 265. B. B. B.

## RE F. H. REILY.

*Oklahoma Supreme Court — July 29, 1910.*

(— Okla. —, 183 Pac. 728.)

### Attorney and client — presumption of innocence.

1. In a proceeding to disbar an attorney at law, such attorney is presumed to be innocent of the charges preferred and to have performed his duty as an officer of the court in accordance with his oath, and the

evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment.

[See note on this question beginning on page 93.]

—disbarment — control over referee.

2. A referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require.

[See 23 R. C. L. 300.]

—effect of report of referee.

3. The report of a referee appointed to take evidence and report his findings of fact and conclusions of law in a disbarment proceeding is not conclusive as to either the findings of fact or the conclusions of law, but is accorded every reasonable presumption of being correct. The burden is on the party attacking it, but it is to be freely set aside by the court if found to be incorrect.

[See 23 R. C. L. 302.]

(Pitchford, J., dissents.)

ORIGINAL action on motion of the Bar Commission for disbarment of respondent based on charges filed by relator. *Findings and conclusions of referee recommending disbarment set aside, and proceeding dismissed.*

The facts are stated in the opinion of the court.

Mr. W. S. Pendleton, relator.

Mr. Frank Dale, prosecutor.

Messrs. E. R. Hastings and S. W. Hayes, for respondent:

Advances in the disbursement of the Enos Nichols estate by its representative for the benefit of Harriet Nichols Cook and her estate could be made before the final distribution of the estate.

18 Cyc. 615; Re Moore, 96 Cal. 522, 31 Pac. 584.

The supreme court had the inherent power to appoint a referee to take the evidence and report to the court with his findings of fact and conclusions of law, but such report would not be conclusive upon the court as to either.

Grove v. Haskell, 31 Okla. 77, 116 Pac. 805; Krapp v. Aderholt, 42 Kan. 247, 21 Pac. 1063; Humble v. German Alliance Ins. Co. 85 Kan. 145, 116 Pac. 472, Ann. Cas. 1912D, 630.

The evidence in support of the charges on which it is sought to disbar an attorney must satisfy the court to a reasonable certainty that the charges

—technical infractions of law.

4. The law does not demand that every technical infraction of the law by an attorney shall require his disbarment, although an attorney should endeavor to observe literally the law, but it is those infractions of duty that involve moral turpitude and evince a depraved character that render such attorney untrustworthy and are a reflection upon the bar and the court, as an officer thereof, that demand his disbarment.

[See 2 R. C. L. 1089.]

Evidence — sufficiency.

5. Evidence examined, and held not sufficient to warrant disbarment of respondent.

are true, to warrant a judgment of disbarment.

People ex rel. Shufeldt v. Barker, 56 Ill. 299; Re Parsons, 35 Mont. 478, 90 Pac. 163; People ex rel. Healy v. Thornton, 228 Ill. 42, 81 N. E. 793; Re Newby, 82 Neb. 235, 117 N. W. 691; State Bar Commission ex rel. Williams v. Sullivan, 35 Okla. 745, L.R.A.1915D, 1218, 131 Pac. 703; Re Sitton, — Okla. —, 177 Pac. 555.

Owen, Ch. J., delivered the opinion of the court:

This is an original action brought on motion of the Bar Commission, based on charges filed by W. S. Pendleton, hereinafter referred to as relator, for disbarment of F. H. Reily, a member of the bar of Pottawatomie county. Honorable James R. Tolbert of Hobart was appointed referee to take testimony and report his findings of fact and conclusions of law. He reported specific findings as to three counts

of the charges, together with his conclusions, recommending disbarment of respondent. To this report exceptions were filed.

Respondent was attorney for one Harriet Nichols Cook, of New Jersey, claimed to be sole heir at law of Enos Nichols, deceased, who died in Pottawatomie county in December, 1911. He was employed as associate counsel under the direction of J. Warren Davis of New Jersey. Harriet Nichols Cook died, and J. Warren Davis was appointed executor of her estate, respondent continuing under his direction to represent the estate as a beneficiary of the Enos Nichols estate. Prior to her death respondent secured a loan of \$5,000 for her, guaranteeing payment himself by separate instrument. Lydick and Eggerman, attorneys of Shawnee, held an assignment from Harriet Nichols Cook of \$30,000 of her interest in the Enos Nichols estate, claiming that amount as attorneys' fees. Respondent brought suit to cancel this assignment. A compromise was effected by the terms of which Lydick and Eggerman were to receive \$15,000. But by agreement judgment was entered in their favor for \$20,000, and \$5,000 of this amount was paid to respondent, for which he gave receipt in the name of Harriet Nichols Cook estate by himself as attorney. This transaction was at the time unknown to the executor, but when explained to him a few days later was entirely satisfactory and ratified. Respondent deposited this \$5,000 to his own account, and retained same with the consent of his client until September, 1917, when he returned the money to the executor. In explanation of this transaction respondent shows the money was secured to protect him on his guaranty of the \$5,000 loan of Harriet Nichols Cook, and his client agreed he might keep the money until he had been relieved of this personal obligation. The uncontradicted evidence shows he returned the money when the first demand was made. The referee

found that respondent wrongfully converted the \$5,000 to his own use with the attempt to deprive the estate of same, and was therefore guilty of the crime of embezzlement. We do not approve the method used by respondent in obtaining this money, and we are not unmindful that irregularities of this character sometimes lead to grave consequences. Yet we do not find that the transaction, as explained by respondent, shows any intent on his part to defraud, or that the estate was to any extent defrauded.

The second count alleges fraud and irregularities in the collection of an expense account of \$1,835, from the administrator of the Enos Nichols estate, and made a charge against the estate of Harriet Nichols Cook. This account was for money advanced by respondent for court costs and expense of taking depositions in various parts of the United States, representing the Harriet Nichols Cook estate. The account was submitted to James Mercer Davis, attorney for J. Warren Davis, who approved the same, and his action was later ratified by J. Warren Davis as executor. It does not appear the account was either itemized or sworn to, but the amount was recognized as correct, and was paid as a proper claim against the estate of Harriet Nichols Cook as an advancement out of the Enos Nichols estate. Respondent later prepared the report for the executor, which was filed with the county court of Pottawatomie county, showing the expenditures of this \$1,835 item.

The referee found that respondent acted arbitrarily, and had been grossly negligent and guilty of conduct unbecoming a lawyer in this transaction, although not prompted by a bad or criminal motive. There was no question as to the correctness of the account, and while good business methods and that degree of care due the handling of accounts by lawyers for their clients would require the account be itemized and

verified, the evidence is not sufficient to warrant disbarment.

The third count alleges, in substance, that respondent entered into a conspiracy with E. E. Hood, an attorney of Shawnee, to employ a number of attorneys of that county, and by paying them a retaining fee disqualify them in an election of special judge to preside in the hearing of the probate of the will of Enos Nichols, and thereby thwarting the administration of justice. The referee found that respondent, acting with his associate counsel, had the administrator pay out the sum of \$390 to eight different lawyers, with the express purpose and intent to disqualify them in participating in the election of the special judge, and that he was thereby guilty of an attempt to pollute the administration of the law. It appears Hood represented some of the same interests represented by respondent, but was not employed as an associate counsel with respondent. His employment was by J. Warren Davis, and he reported directly to him and to one Farrington, who represented some of the heirs of Harriet Nichols Cook residing at Springfield, Missouri. Hood suggested to respondent the necessity of retaining additional attorneys to assist in such matters as might arise in connection with the Harriet Nichols Cook estate. The probate of the proffered will was being bitterly contested. A large number of lawyers had been employed by the interests adverse to those of the Harriet Nichols Cook estate. Depositions were being taken in various parts of the United States, necessitating the absence of respondent from Shawnee much of the time. Lawyers were retained and paid by Hood, totaling \$390, and this amount was allowed by the administrator on the advice of respondent. But the attorneys retained were not shown to have been unfriendly to respondent, or to the interests he represented, and there is no evidence indicating they would have voted adverse to his interests. A

special judge suggested by opposing litigants was elected, and rendered a judgment adverse to respondent and his clients.

The remaining count, including a charge that respondent had prevented relator from obtaining an attorney's fee in a case in which it was alleged he was co-counsel with relator, was found by the referee not to be supported by sufficient evidence to justify a recommendation for disbarment.

We have read the report of the referee and transcript of the testimony with care; and, while we give due regard to his findings and conclusions, both because of his office and his very high standing and recognized ability as a lawyer, we are unable to agree with his findings or approve his conclusions.

The referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require. 23 R. C. L. 300; Krapp v. Aderholt, 42 Kan. 247, 21 Pac. 1063. The rule to be applied in considering the report was stated in Grove v. Haskell, 31 Okla. 77-79, 116 Pac. 806, as follows: "The report of the referee appointed to take the evidence and report the same to this court with his findings of fact and conclusions of law would not be conclusive on either. It should and would be accorded every reasonable presumption of being correct, with the burden on the party attacking it, but to be freely set aside by the court if found to be incorrect."

The serious consequences of disbarment should follow only where there is a clear preponderance of evidence against the respondent. In such proceeding the attorney sought to be disbarred is presumed to be innocent of the charges preferred, and to have per-

Attorney and client—disbarment—control over referee.

—effect of report of referee.

—presumption of innocence.

(— Okla. —, 183 Pac. 788.)

formed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment. *Re Sitton*, — Okla. —, 177 Pac. 555; *Re Parsons*, 35 Mont. 478, 90 Pac. 163; *People ex rel. Healy v. Thornton*, 228 Ill. 42, 81 N. E. 798; *Re Newby*, 82 Neb. 235, 117 N. W. 691. In the case of *People ex rel. Shufeldt v. Barker*, 56 Ill. 299, it was said: "A charge so grave in its character, and so fatal in its consequences, ought certainly to be proved by what the law denominates a clear preponderance of the evidence."

This language was quoted with approval in the case of *State Bar Commission ex rel. Williams v. Sullivan*, 35 Okla. 745, L.R.A.1915D, 1218, 131 Pac. 703.

The law does not demand that —technical every technical infractions of law. fraction of the law by an attorney shall require his disbarment, although an

attorney should endeavor to observe literally the law; but it is those infractions of duty by an attorney that involve moral turpitude and evince a depraved character, rendering such attorney untrustworthy and a reflection upon the bar and the court, as an officer thereof, that demand his disbarment. The evidence in this case, as we view it, fails to prove by sufficient Evidence—sufficiency. preponderance that respondent has been guilty of such conduct. Therefore the findings and conclusions of the referee will be set aside and the proceeding dismissed.

*Kane, Sharp, Harrison, Johnson, and McNeill, JJ.*, concur.

*Pitchford, J.*, dissents.

*Rainey and Higgins, JJ.*, not participating.

Petition for rehearing denied September 23, 1919.

## ANNOTATION.

### Presumption of innocence in disbarment proceeding.

In a proceeding for the disbarment or suspension of an attorney, the attorney is presumed to be innocent. *Re Haymond* (1898) 121 Cal. 385, 53 Pac. 899; *Re Parsons* (1907) 35 Mont. 478, 90 Pac. 163; *Re Newby* (1908) 82 Neb. 235, 117 N. W. 691; *Re ———* (1916) 175 App. Div. 653, 161 N. Y. Supp. 504; and see the reported case (*RE REILY*, ante, 89).

Thus, in the case of *Re Haymond* (1898) 121 Cal. 385, 53 Pac. 899, an attorney was accused of having violated his oath of office and duty as an attorney, in that he failed to maintain the respect due the courts, and had not discharged his duties to the best of his ability. It was alleged that the accused offered to sell a confession of a man about to be tried for a felony, and agreed that it would be attested by the district attorney and judge of the superior court. Dis-

missing the accusation, the court held that all intendments were in favor of the accused. The court said: "This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent."

In the case of *Re Parsons* (1907) 35 Mont. 478, 90 Pac. 163, a petition for the disbarment of two attorneys at law recited that the accused had been guilty of subornation of perjury, attempted subornation of perjury, and conspiracy. The record disclosed that someone had attempted to defraud the accuser, but it did not appear that the accused had any knowledge of the transaction until after it took place, nor did it appear that the parties at fault communicated to the accused, who were their attorneys, any guilty



knowledge they might have had. The courts held that in disbarment proceedings the accused were presumed to be innocent of the charges preferred, and to have performed their duties as officers of the court in accordance with their oaths, saying: "There is but one allegation of the petition that is substantiated, and that is that some person or persons attempted to defraud the W. H. Smead Company of its money by inducing Mrs. Vandervoort to compel the mortgage of record. There is no evidence whatsoever that the accused had any knowledge of the transaction until after this act was done. Thereafter they appeared as counsel for the Paynes and Kennedy, but there is no proof that any guilty knowledge these persons may have had was ever communicated to their attorneys. They are presumed to be innocent of the charges preferred, and presumed to have properly performed their duties as officers of the court in accordance with their oaths."

In the case of *Re Newby* (1908) 82 Neb. 235, 117 N. W. 691, a proceeding for disbarment, an attorney was charged with impersonating a deceased person, forging the name of the deceased person, and assuming to appear for him. The court said: "While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession, and his reputation as an honest and honorable man, the presumption of innocence applies, and his culpability must be established by at least a clear-preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true. . . . We cannot say that we are satisfied from the evidence that he is innocent of the charges made against him, nor can we say that we are satisfied to a reasonable certainty of his guilt. The mind of the court being in this condition, it is our duty to give Mr. Newby the benefit of the doubt, and to hold that the charges have not been sustained by the evi-

dence to such an extent as to warrant the infliction of the severe penalty that must inevitably have followed had we been fully satisfied of his guilt."

In *Re* — (1916) 175 App. Div. 653, 161 N. Y. Supp. 504, an attorney was accused of having conspired to defraud a railroad, in that he purchased a ticket from the company, feigned sickness, and on the refusal of the agent to redeem the ticket, instituted an action to recover the statutory penalty from the company. He was also accused of having committed perjury in that trial. The court held that the accused in disbarment proceedings was presumed to be innocent, especially when the charges, if true, would constitute a crime. It was said: "The evidence to sustain charges such as have been here made, and in a proceeding of this kind, should be clear and satisfactory and convincing. The respondent is presumed to be innocent, and proof of his guilt should be clearly established. This is especially true where, as in this case, the charges, if true, constitute violations of the criminal law."

In *Ex parte Gadsden* (1911) 89 S. C. 352, 71 S. E. 952, it appeared that an appeal of an action to set aside an assignment because of fraudulent misrepresentations of an attorney, record and decision in which reflected disastrously on the professional character of the attorney, was abandoned. Whereupon the attorney petitioned the court that it retain and examine the record on appeal, and give him such protection as in the opinion of the court was proper. The court held that an attorney's integrity was presumed, saying: "In considering the conclusion to be drawn from these conditions, it is to be borne in mind that the law forbids that any person should participate officially as an attorney in the administration of justice until he has furnished satisfactory proof of good character. The presumption is therefore in favor of the integrity of the bar; and on the great issue of the honesty or depravity of an attorney the rule of authority and reason is that the court should require the charge of depravity to be estab-

lished by the clear preponderance of the evidence."

In the case of *Re Wellcome* (1899) 23 Mont. 450, 59 Pac. 445, a proceeding to disbar an attorney, the accused was charged with having committed bribery to obtain the election of a certain person to the United States Senate. On the trial the accused failed to testify in his own defense. The court held that while the accused was presumed to be innocent of the charge preferred against him, the presumption remained only until it appeared with reasonable certainty that he was guilty. When this was made to appear, then it was incumbent on him to speak. It was said: "Certainly the accused is presumed to be innocent until the contrary appears, but in this kind of proceeding this presumption remains with him only until it appears to the court with reasonable certainty that he is guilty. When this is made to appear, then it is incumbent upon him to speak."

In Colorado, however, the contrary rule has been declared in *People ex rel. Colorado Bar Asso. v. Webster* (1901) 28 Colo. 223, 64 Pac. 207. In that case an attorney at law was charged with collecting money and

failing to pay it over on demand, and with receiving money from a client with instructions to bring suit to establish a lien on certain land, to pay a docket fee, to pay delinquent taxes and redeem the land from a tax sale, and a failure to follow such instructions. The accused interposed an answer which alleged that prior to the institution of the disbarment proceedings he paid over to the clients the full amount collected less necessary fees and charges. He also alleged that on being informed that a tax deed had been issued on the land, a suit was brought to foreclose the deed of trust and annul the tax deed, that the accused held part of the money to pay the taxes if it should be decided that the client should pay them, and if not he was ready to pay the money to the client. Holding that the answer was evasive and insufficient, the court said: "In cases of this character there is no presumption that the respondent is innocent; and unless respondent fairly and in detail explains to the court his entire connection with the transaction wherein he is charged with improper conduct, it will be presumed that he is unable to do so."

R. C. L.

## CITY OF MONTESANO

v.

F. L. CARR.

*Washington Supreme Court (Dept. No. 2) — July 11, 1914.*

(80 Wash. 384, 141 Pac. 894.)

### Corporation — creditor's suit on stock subscription.

1. An unsecured creditor of an insolvent corporation cannot maintain an action at law for his own benefit to recover his claim from one who has not paid his subscription to the stock of the corporation.

[See note on this question beginning on page 100.]

### Judgment — conformity to pleadings.

2. A petition by an individual creditor of a corporation for judgment in a certain sum against a stockholder who has not paid his subscription, and for such other and further relief as to the court may seem just and equitable, will

not support a judgment in favor of the creditors generally of the corporation, with the appointment of a receiver to collect the subscription and distribute the proceeds.

[See 15 R. C. L. 604.]

**Action — distinction between law and equity.**

3. Even where the distinction between actions at law and suits in equity

has been abolished, courts must nevertheless, of necessity, recognize certain inherent distinctions between them.

[See 10 R. C. L. 264.]

**CROSS APPEALS** from a judgment of the Superior Court for Chehalis County (Irwin, J.) in an action to recover a claim against a corporation from a defaulting subscriber to stock, defendant appealing from the judgment against him in favor of the creditors of the insolvent corporation, with the appointment of a receiver to enforce payment of the judgment by execution and to distribute the proceeds; and the city appealing from the judgment in favor of the creditors instead of in its favor for its exclusive use and benefit. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morgan & Brewer and Gordon & Easterday, for defendant:

The proceeds of an unpaid stock subscription is a trust fund for the benefit of all the creditors of a corporation.

Burch v. Taylor, 1 Wash. 245, 24 Pac. 438; Wilson v. Book, 13 Wash. 676, 43 Pac. 939; Watterson v. Master-son, 15 Wash. 514, 46 Pac. 1041; Mitchell v. Jordan, 36 Wash. 649, 79 Pac. 311; New York Nat. Exch. Bank v. Metropolitan Sav. Bank, 28 Wash. 558, 68 Pac. 905.

A stockholder is not liable on his subscription to capital stock of a corporation unless the whole of the capital stock has been subscribed.

Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. Rep. 130, 32 Pac. 1002; Denny Hotel Co. v. Gilmore, 6 Wash. 152, 32 Pac. 1004.

Mr. O. M. Nelson for plaintiff.

Parker, J., delivered the opinion of the court:

As we proceed, we think it will appear that this cause was commenced and prosecuted to final judgment in the superior court by the plaintiff city as a pure action at law, seeking only recovery for its own exclusive use and benefit of a personal money judgment against the defendant, Carr. The city seeks recovery of such judgment against Carr upon the ground that it is a creditor of the Montesano Planing Mill Company, an insolvent corporation, and that Carr is indebted to that company in the sum of \$1,000 for an unpaid stock subscription made by him to its capital stock. After trial before the court without a jury, a personal money judgment

was rendered by the court against Carr, not in favor of the city for its own use and benefit, but in favor of the creditors of the Montesano Planing Mill Company, including the appointment of a receiver for that company to enforce payment of the judgment by execution, if not voluntarily paid by Carr, and distribute the proceeds thereof among the creditors of the Montesano Planing Mill Company. Carr has appealed from the judgment, seeking reversal thereof upon the ground, among others, that the trial court erred in permitting the city to maintain an action for its own benefit, and in rendering the judgment, in view of the fact that the cause was commenced, and at all times prosecuted by the city, as a law action for its exclusive use and benefit. The record before us plainly shows that Carr is entitled to here urge reversal of the judgment upon these grounds. The city has also appealed from the judgment, seeking reversal thereof and the rendering of a judgment in its favor against Carr for its exclusive use and benefit.

The facts determinative of the city's right to maintain this action we may regard as not in dispute. It is of no material consequence here whether we regard the question as being presented by the claim of error made by counsel for Carr on the trial court's overruling of his demurrer to the city's third amended complaint, or by the claim of error made by counsel for Carr in the rendering of the judgment by the

court upon the evidence presented at the trial. The controlling facts touching this question may be summarized as follows: The Montesano Planing Mill Company is a domestic corporation of this state. In December, 1909, it became insolvent, and passed into the hands of a receiver appointed by the superior court of Chehalis county for the purpose of winding up its affairs, reducing its assets into money, and distributing the same to its creditors. The receiver proceeded accordingly, administered his trust to completion, as he and the court evidently then thought, resulting in the payment of a dividend of 8 per cent to the creditors, and the discharge of the receiver by the court in January, 1911. The city became a creditor of the Montesano Planing Mill Company by reason of being compelled to pay for certain lumber used in a public improvement which had been constructed by the Montesano Planing Mill Company for the city, because of the failure of that company to pay for the lumber; the city having previously paid that company for the construction of the improvement. Just when the city thus became a creditor of the Montesano Planing Mill Company is not rendered certain by the record before us, though we assume, for argument's sake, as counsel insist, that the city became such creditor after the discharge of the receiver. The city has not reduced its claim against the Montesano Planing Mill Company to judgment. This action constitutes its first effort to secure payment of its claim. Thereafter, in November, 1910, the city commenced this action against Carr, as sole defendant, resting its claim upon the facts we have summarized and assumed as true, as claimed by counsel for the city, and also upon the alleged fact that Carr is indebted to the Montesano Planing Mill Company in the sum of \$1,000, and interest thereon, upon an unpaid subscription made by him to the capital stock of that company. The entire prayer of the city's third

amended complaint, the one upon which the trial proceeded after the overruling of Carr's demurrer thereto, reads as follows: "Wherefore plaintiff prays for judgment in the sum of \$1,687.44, with interest thereon at 6 per cent, against the said F. L. Carr, and for such other and further relief as to the court may seem just and equitable."

So far as our law recognizes a distinction between an action at law and a suit in equity, it is manifest that counsel for the city has, at all times up to the moment of rendering judgment in this action, prosecuted the same upon the theory that this is a pure law action. Indeed, his very appeal to this court but emphasizes this fact, wherein he is still seeking a personal money judgment against Carr, and insisting that the trial court erred in not awarding the city such a judgment upon the trial for the exclusive use and benefit of the city. At no time has counsel for the city waged the action in the interest of the other creditors of the insolvent Montesano Planing Mill Company, nor is there anything in the record suggesting that the action would assume this form until after the trial and submission of the cause to the court for final decision, when the court, of its own motion, rendered the judgment against Carr and in favor of the creditors generally of the Montesano Planing Mill Company, appointing a receiver to enforce payment of the judgment, and distribute the proceeds thereof among such creditors. Carr has not been called upon at any time from the beginning to the end of this action to defend against the rendition of a judgment of the nature here entered against him by the court of its own motion.

Judgment—  
conformity to  
pleadings.

While the distinction between actions at law and suits in equity as to the mere form no longer exists in this state, the courts nevertheless are, of necessity, compelled to recognize certain inherent distinctions between them. Thompson v. Caton,

3 Wash. Terr. 31, 13 Pac. 185;

**Action—  
distinction  
between law  
and equity.** Distler v. Dabney,  
7 Wash. 431, 35 Pac.  
138, 1119; Barto v.  
Seattle & I. R. Co.

28 Wash. 179, 182, 68 Pac. 442;  
Overlock v. Shinn, 28 Wash. 205,  
210, 68 Pac. 436.

It is often necessary to recognize this distinction as an aid to the determination of the question of the right of a party to prosecute an action for his exclusive benefit, and this, we think, is the real question here involved.

In the early case of *Burch v. Taylor*, 1 Wash. 245, 24 Pac. 438, this court had occasion to consider the question of the right of a creditor of an insolvent corporation to sue for and recover the debt due him from the corporation by an action at law against a stockholder of the corporation to the extent of his unpaid stock subscription. The action was so commenced and prosecuted to a personal money judgment rendered against the stock subscriber in a justice court. The defendant appealed to the territorial district court, where the judgment of the justice court was reversed. On appeal from the decision of the district court to this court, the decision of the district court was affirmed upon the theory that an action at law could not be maintained by a creditor of an insolvent corporation against one of its stockholders upon an unpaid stock subscription for the exclusive use and benefit of such creditor. Justice Stiles, speaking for the court, said: "The main question involved in this case is: Does § 2434 of the Code of Washington authorize an action at law by a creditor of a corporation against a stock subscriber? This inquiry, if determined in the negative, would oust the justice's court of jurisdiction. The second clause of § 2434 is as follows: 'Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise,' which is

simply a declaration of the American doctrine of the common law of corporations as held, almost without exception, in the decisions of the courts. *Thomp. Liability of Stockholders*, §§ 25-37; *Cook, Stock and Stockholders*, § 199, and note 1; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731."

And, after holding that unpaid stock subscriptions are a trust fund for the payment of creditors, he continued: "To enforce a right to participate in a trust fund requires proceedings in equity, unless there be peculiar and explicit statutory provisions to the contrary. So in this class of cases the action must be in equity where the creditor desires himself to be the actor in the proceedings to collect and apply subscriptions. Therefore, in the case at bar, the justice had no jurisdiction of the subject-matter of the action, and the judgment must be affirmed."

We note that the exact language of the early statute quoted in that decision is preserved as a part of our present law in § 3698, *Rem. & Bal. Code*, which is, in substance, the same as that found in § 4, article 12, of our state Constitution.

*Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, was also a law action by a creditor of an insolvent bank, seeking recovery for his own benefit from a stockholder of the bank upon the stockholder's secondary liability; that is, the liability imposed upon the stockholder by § 11, article 12, of the state Constitution, beyond what he might owe upon his stock subscription. The question was there again examined by the court and the former holding adhered to, the trust theory being applied, as where the recovery was sought upon an implied stock subscription. Chief Justice Hoyt, speaking for the court, said: "A method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors, and might result in such annoyance to the stockholders, that

only the most positive language would justify the courts in holding that the liability might be thus enforced. So to hold would enable one creditor to obtain more than his share of the fund which should be derived from this liability. Not only would such a holding allow a creditor to do this, but under it a stockholder could be subjected to a separate suit at the instance of each one of the creditors of the corporation."

The question was again examined by this court in *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041, and the former decision adhered to, after earnest argument by learned counsel to induce the court to depart from its former holdings.

• Our attention is called to the decisions in *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *New York Nat. Exch. Bank v. Metropolitan Sav. Bank*, 28 Wash. 553, 68 Pac. 905; *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598. These decisions are not in the least inconsistent with the conclusions reached by the court in the above-noticed cases. These decisions simply recognize the right of a creditor to maintain a suit in equity, in the interest of himself and all other creditors of an insolvent corporation, against a stockholder of such corporation, to compel payment of his unpaid stock subscriptions, or payment of the additional liability which the Constitution imposed upon him as a stockholder, quite a different matter from the claimed right of a creditor to maintain an action at law for his own exclusive benefit against a stockholder upon his liability to the corporation as such. In the last-cited case (41 Wash., at page 669) it is said: "An action of this kind is in the nature of a creditor's bill." While speaking generally, this is a correct statement. We think the real nature of the action is that of a creditor's bill where the plaintiff prosecutes for himself and all other creditors, in view of the fact that he is seeking payment of his claim from a trust fund

against which his rights are not preferred, but are the same as other creditors.

We do not overlook the holding of this court in *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807. In that case the action, it is true, was originally commenced by the creditor against the stockholder upon his unpaid stock subscription, for the exclusive use and benefit of the creditor; but, while the case was pending, the plaintiff creditor gave notice to the defendants and filed a written offer, requesting that an order be entered in the cause, substituting one Beach, the receiver of the corporation, as plaintiff; Beach having been appointed receiver of the corporation pending the action, in another action, and offering to assign any judgment recovered in the action to the receiver, to the end that the proceeds thereof might be equitably distributed among the creditors. This was a voluntary conversion of the law action into an equitable one for the benefit of all creditors before the rendition of judgment in that action. Thereafter the cause proceeded, and judgment was rendered accordingly. The city, plaintiff and appellant in this action, has at no time ever assumed such an attitude. It not only prosecuted this action for its own benefit as a pure law action up to the very moment of the rendition of the judgment, but continues in that attitude by appealing from the judgment rendered, and claiming error on the part of the learned trial court in not rendering judgment in its favor for its own exclusive use and benefit. We are of the opinion that the city has no legal right to maintain this action. The decisions of this court in *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1086; *Mitchell v. Jordan*, 36 Wash. 645, 79 Pac. 311, and *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, holding that a receiver for an insolvent corporation may maintain an action either at law or in equity to recover from a stockholder upon his liability as such, are not inconsistent with the conclusion we here

reach. Whatever the nature of the action may be, when prosecuted by a receiver, it is, of course, for the benefit of all creditors of the insolvent corporation.

We have not lost sight of the fact that the city's prayer for a personal money judgment against Carr concludes with the words, "and such other and further relief as to the court may seem just and equitable." Whatever construction might be placed upon this language of the prayer, under different circumstances, it seems to us quite plain that it does not result in converting this action into an equitable action for the benefit of the city and the other creditors of the insolvent Montesano Planing Mill Company, in view of the manifest theory upon which counsel for the city has waged this action. Indeed, his attitude constitutes, in substance, an assertion that his general prayer for relief had no such meaning. He is still consistently insisting here that the judgment of the trial court was erroneous in so far as it was rendered in favor of the creditors, instead of in favor of the city for its exclusive use and benefit.

As to the appeal taken by the city

in this cause, little need be said; it being practically disposed of by our discussion above made, which necessarily leads to the conclusion that the city cannot recover from Carr in the manner here sought upon his unpaid stock subscription if, in fact, he is indebted to the Corporation—  
creditor's suit on stock subscription.  
 Montesano Planing Mill Company upon that subscription. Other contentions made by counsel for the city upon its appeal, we think, are wholly without merit, and do not call for discussion.

If it be suggested that the judgment of the learned trial court was, in any event, a correct disposition of the cause upon the merits, which theory counsel for the city is combating even at this time, we think such suggestion may be answered in the negative by the fact that Carr, as defendant, was not called upon to defend, and was not defending, an action calling for any such judgment.

We conclude that the judgment must be reversed and the action dismissed.

It is so ordered.

Fullerton, Morris, and Mount, JJ., concur.

## ANNOTATION.

### Right of creditor of insolvent corporation to sue stockholder at law upon unpaid subscription.

I. In general, 100.

II. Under statutes, 102.

#### I. In general.

The general theory of the cases is that, in the absence of statute expressly authorizing such an action, the liability of a stockholder in an insolvent corporation upon his unpaid subscription is to the corporation or its representative; and it is held that a creditor cannot maintain an action at law against the stockholder upon this unpaid subscription. *Patterson v. Lynde* (1883) 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432; *Re Glen Iron Works* (1878) 13 Phila. 479, Fed. Cas. No. 17,636; *Brown v. Fisk* (1885) 23 Fed.

228; *Jones v. Jarman* (1879) 34 Ark. 323; *German Nat. Bank v. Farmers & M. Bank* (1898) 54 Neb. 593, 74 N. W. 1086; *Van Pelt v. Gardner* (1898) 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874; *Reed v. Burg* (1901) 2 Neb. (Unof.) 117, 96 N. W. 414; *Thompson-Houston Electric Co. v. Murray* (1897) 60 N. J. L. 20, 37 Atl. 443; *Wellington v. Continental Constr. & Improv. Co.* (1889) 52 Hun, 408, 5 N. Y. Supp. 587; *Ladd v. Cartwright* (1879) 7 Or. 329, 13 Mor. Min. Rep. 607; *MONTESANO v. CARR* (reported herewith) ante, 95.

See *Griffith v. Mangam* (1878) 73 N. Y. 611, *infra*.

An action at law cannot be maintained by the creditor of the corpora-

tion against a stockholder to recover on his unpaid subscription under a statute making each and every stockholder "personally liable to the creditors of the company to the amount of what remains unpaid on his subscription to the capital stock and not otherwise." *Burch v. Taylor* (1890) 1 Wash. 245, 24 Pac. 438. The court makes a distinction between what is known as the statutory liability of the stockholders, which is the liability created by statute in addition to unpaid subscriptions, and the liability created by statute such as that cited above, it being stated that stock subscriptions are a trust fund for the payment of creditors, and the action must be in equity where the creditor desires himself to be the actor in the proceedings to collect and apply subscriptions. A similar decision under a similar statute appears in *Graeber v. Ehr Gott* (1918) 182 App. Div. 377, 169 N. Y. Supp. 82.

In fact, the right of a single creditor to sue in equity to collect unpaid subscriptions and thus secure payment of his own debt to the exclusion of other creditors has been denied. *George W. Signor Tie Co. v. Monett & S. W. Constr. Co.* (1912) 198 Fed. 412, approved in *J. A. Roebbling's Sons Co. v. Kinnicut* (1917) 248 Fed. 596. Upon the theory that the amount due the corporation upon an unpaid subscription after default in answering a call can be reached by the ordinary course of law against the subscribers as debtors of the corporation, the right of creditors to proceed in equity to reach unpaid subscriptions has been denied. *Allen v. Montgomery R. Co.* (1847) 11 Ala. 487. The right to proceed in equity, however, has not been generally considered herein. Nor has the right to garnish the stockholder in a suit against the corporation been considered.

The Supreme Court of the United States in *Patterson v. Lynde* (1883) 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432, was dealing with a case which arose under a constitutional provision that "the stockholders of all corporations and joint stock companies shall be liable for the indebted-

ness of such corporation to the amount of their stock subscribed and unpaid, and no more." A subsequent provision relating to the sales of stock made the seller liable "to existing creditors for the amount of such balance [the amount unpaid on the stock] unless the same be duly paid by such purchaser." The court states that the liability under this provision is "not to the creditors, but for the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them, and the creditor has not been given, either by the Constitution or the statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and when sued for the money he owes, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself."

Whatever may be the liability to creditors, where a receiver has been appointed, a creditor is not entitled to maintain an action against the stockholder. *New Orleans Gaslight Co. v. Bennett* (1851) 6 La. Ann. 456; *Gaslight & Bkg. Co. v. Haynes* (1852) 7 La. Ann. 114; *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* (1892) 48 Minn. 361, 51 N. W. 119 (action under a statute against a number of stockholders). The right of creditors to sue the stockholders of a corporation under receivership is denied also in *Big Creek Stone Co. v. Seward* (1895) 144 Ind. 205, 42 N. E. 464. The suit in this case was brought by judgment creditors of the corporation against the corporation and certain named subscribers to the capital stock. The complaint alleged the failure of the subscribers to pay more than a



small proportion of their subscription; that assessments and calls had been made and remained unpaid; that the corporation held no property subject to execution, but was wholly insolvent and in the hands of a receiver; that there were subscribers who had unpaid assessments and calls. Discovery as to additional subscribers, the amount subscribed, and the amount unpaid upon subscriptions, assessments, and calls was prayed for, and a decree was sought requiring the stock subscribers to pay into court sums sufficient to discharge the indebtedness of the corporation. The Indiana court states: "As we have seen the obligation is owing to the corporation, it is as assets of the corporation, to be gathered in by the receiver, and, when added to other available assets, applied, not upon the debt of some creditor or creditors whom he may prefer, but pro rata among all of the creditors, unless there is some legal or equitable preference by reason of existing liens. It is not the policy of the law that creditors, singly or collectively, may ignore the receiver's possession of corporate assets and his right and duty to protect and preserve them for disposition as the court appointing may direct. If such were the policy, the property might easily be dissipated, some creditors gain advantage over others, the objects for which the receiver is appointed would be frustrated and the authority of the court defeated." In *Franklin v. Menown* (1882) 11 Mo. App. 592, it is held that a creditor of a corporation cannot proceed against a stockholder by motion after the corporation has assigned its assets including unpaid stock subscriptions for the benefit of its creditors.

It is the theory of some cases that an action in equity may be maintained by a creditor to recover unpaid subscriptions, although no account is asked to be taken of the other indebtedness of the corporation. *Crawford v. Rohrer* (1883) 59 Md. 605. And that an action at law may be maintained is recognized in *Pittsburg Steel Co. v. Baltimore Equitable Soc.* (1910) 113 Md. 77, 77 Atl. 255, but it is held

in this case, and the decision is affirmed by the United States Supreme Court in (1913) 226 U. S. 455, 57 L. ed. 297, 33 Sup. Ct. Rep. 167, that this right may be taken away and a bill in equity substituted as an exclusive remedy for the enforcement by creditors of the liability to them of stockholders for any unpaid balances on their stock without depriving such creditors of any constitutional rights. Speaking of the right of a creditor to sue a stockholder at law the supreme court of Maryland states that "it was a mere right held by him in common with all other creditors of the corporation to whom the stockholder was liable, and one which the stockholder could satisfy and destroy by payment to any other or others of such creditors. The right, therefore, of the creditor under such circumstances to bring a separate suit at law for an obligation which the debtor might satisfy by payment to a stranger to the suit was not a very valuable right." A similar decision appears in *Bettendorf Axle Co. v. Field* (1911) 114 Md. 487, 79 Atl. 724, and in this case also the right of a creditor prior to the enactment of the statute in question to sue a stockholder at law upon his unpaid subscription is recognized.

In *Jessamine County v. Swigert* (1887) 8 Ky. L. Rep. 692, 8 S. W. 13, it is stated that "where a creditor of an insolvent corporation simply seeks payment of his debt out of an unpaid stock subscription, it is the duty of the defendants, if there are other creditors or debtors, to ask for a settlement and an equitable distribution of the assets, and if they fail to do so, the only inquiry is as to the liability of the defendant stockholder to the plaintiff for the payment of their debts."

## II. Under statutes.

The following cases sustaining an action at law to recover on the unpaid subscription were decided under statutes expressly authorizing an action at law by a corporate creditor against a stockholder to recover any sums due the corporation by the stockholder: *National Park Bank v. Peavey* (1894) 64 Fed. 912 (decision under

Iowa statute); *First Nat. Bank v. Peavey* (1895) 69 Fed. 455 (decision under Iowa statute); *Atlantic Trust Co. v. Osgood* (1902) 116 Fed. 1019 (decision under Iowa statute); *Bagnell v. Ives* (1911) 184 Fed. 466 (obiter as to Missouri statute); *Tama Water-Power Co. v. Hopkins* (1890) 79 Iowa, 653, 44 N. W. 797; *Calumet Paper Co. v. Stotts Invest. Co.* (1895) 96 Iowa, 147, 59 Am. St. Rep. 362, 64 N. W. 782; *White v. Blum* (1876) 4 Neb. 555. In *Rood v. Crocus Hill Min. Co.* (1911) 157 Mo. App. 405, 139 S. W. 222, it is stated that the creditor of a corporation who seeks to reach an unpaid subscription may proceed under the statute by motion for execution or bring an action at law under the statute. The Delaware Corporation Law (22 Del. Laws, chap. 394, § 20) provides for a creditor's action at law or a bill in chancery, but these remedies were held not exclusive in *Dupont v. Ball* (Del.) post, 955.

But see *Burch v. Taylor* (1890) 1 Wash. 245, 24 Pac. 438, supra, I.

Some statutes provide that, upon the dissolution of a company leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit. Under such a statute a judgment creditor of an insolvent and dissolved corporation has been held empowered to maintain an action at law against a stockholder in the corporation to determine the true value of property conveyed by him to the corporation in payment of his stock, and to obtain judgment against the stockholder to the extent of plaintiff's claim, and to make the judgment payable by the stockholder from the amount due on the unpaid subscription as thus determined. *Farmers Bank v. Gallaher* (1890) 43 Mo. App. 482.

Other statutes expressly provide that whenever any action is brought to recover any indebtedness against a corporation, it shall be competent to proceed against any one or more stock-

holders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not as in cases of garnishment. It has been stated that under this statute a stockholder is directly liable to the creditor whether the assets of the corporation are sufficient to pay its debts or not; that the creditor can collect either from the corporation or from the stockholders as he sees fit, that it is not necessary to obtain a judgment and have an execution returned "no property found" before instituting the garnishment proceeding, but that both may be set on foot at the same time. *Parmelee v. Price* (1904) 208 Ill. 544, 70 N. E. 725 (obiter,—action in this case was a creditor's bill in equity) approved in *Cohen v. Toy Gun Mfg. Co.* (1912) 172 Ill. App. 330 (action in equity which invited other creditors to join). This statute proceeds upon the theory of garnishment actions. As stated above, the right to garnish the stockholder in a suit against the corporation has not been considered herein.

Not all statutes which impose a liability to creditors, upon stockholders, have been held to authorize an action at law by the creditors. Thus, under a statute providing that "when the whole capital of a corporation shall not be paid in, and the capital paid shall not be sufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company," an action at law cannot be maintained by a creditor of the corporation against one of the stockholders, it being held that an action to charge a stockholder under such statute is one in equity bringing in the other stockholders who have not paid. *Griffith v. Mangam* (1878) 73 N. Y. 611. W. A. E.

W. H. PLUMMER et al., Doing Business under the Firm Name and Style of Plummer & Lavin, Appts.,  
v.

**NORTHERN PACIFIC RAILWAY COMPANY, Respt.**

*Washington Supreme Court (Dept. No. 1) — August 22, 1917.*

(98 Wash. 67, 167 Pac. 73.)

**Infant — contract by guardian ad litem — attorneys' compensation.**

1. A guardian ad litem for an infant has no authority to contract with attorneys employed to bring suit on its behalf as to the compensation to be received by them.

[See note on this question beginning on page 108.]

— repudiation of contract — making new one.

2. A minor avoids his contract employing attorneys to prosecute a claim for personal injuries, by applying for the appointment of a general guardian and making an independent settlement with the one responsible for the injuries.

— right as to repudiation of contract.

3. Attorneys can enforce no rights under a contract by which an infant employed them to bring an action for him to recover for personal injuries,

after it has been repudiated by the infant, although the action might be regarded as a necessary.

**Attorney and client — settlement of action by minor — effect on attorneys' claim.**

4. Attorneys who have contracted to bring a suit for a minor for a share of the recovery can enforce no claim against defendant, who settles with the minor without their consent after the minor has repudiated his contract with them.

**APPEAL** by plaintiffs from a judgment of the Superior Court for Spokane County (Kennan, J.) in favor of defendant in an action brought to recover an amount alleged to be due, under a settlement entered into between defendant and a minor, by virtue of a contract of employment with him. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Plummer & Lavin, for appellants:

The contract made between the minor and plaintiffs for the prosecution of the damage case was a valid, subsisting, legal, and binding contract, and was not void because of the minority of Lester Walsh.

22 Cyc. 594; *Crafts v. Carr*, 24 R. I. 397, 60 L.R.A. 128, 96 Am. St. Rep. 721, 53 Atl. 275; *Sutton v. Heinzle*, 84 Kan. 756, 84 L.R.A. (N.S.) 238, 115 Pac. 560.

The validity of such contract could only be questioned by the minor, and such objection was not available to the defendant, who was not a party to it.

*Chapman v. Duffy*, 20 Colo. App. 471, 79 Pac. 746.

The agreement of the minor for the payment of a contingent fee acted as an assignment to plaintiffs of a part of his claim, and an interest in the amount subsequently agreed to be paid to him.

*Slauson v. Schwabacher Bros.* 4 Wash. 783, 31 Am. St. Rep. 948, 31 Pac. 329; *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924; *Weed v. Foster*, 58 Wash. 675, 109 Pac. 123; *Plummer v. Great Northern R. Co.* 60 Wash. 214, 31 L.R.A. (N.S.) 1215, 110 Pac. 989; *Polk v. Spokane Interstate Fair*, 73 Wash. 610, 132 Pac. 401; *Bell v. Jovita Heights Co.* 71 Wash. 7, 127 Pac. 289; *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656; *Standidge v. Chicago R. Co.* 254 Ill. 524, 40 L.R.A. (N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65.

The guardian ad litem appointed by the court had exclusive charge, control, and jurisdiction over the claim of the minor in connection with which he was appointed, and no other guardian could acquire any right to represent the minor in such proceeding or in connection with such claim or action, so long as the order appointing such guardian remained effective.

*Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726; 22 Cyc. 661; *Harbison v. Harbison*, — Tex. Civ. App. —, 56 S. W. 1006; *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

Defendant's agreement to pay the minor a certain amount and to assume the burden of settling with plaintiffs, his attorneys in the damage case, with whom he made the contract, obligated defendant to pay to them a sum equal to that paid to the minor.

*Curtis v. Metropolitan Street R. Co.* 125 Mo. App. 369, 102 S. W. 62; *Boyd v. G. W. Chase & Son Mercantile Co.* 135 Mo. App. 115, 115 S. W. 1052; *Sutton v. Chicago R. Co.* 258 Ill. 551, 101 N. E. 940; *Standridge v. Chicago R. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1918C, 65; *Johnson v. Great Northern R. Co.* 128 Minn. 365, L.R.A.1917B, 1140, 151 N. W. 125.

*Messrs. Cannon & Ferris and F. J. McKevitt*, for respondent:

Defendant was not bound to pay plaintiffs a fee equal to the amount of the settlement.

2 R. C. L. Attorneys at Law, § 171; *Illinois C. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Randall v. Van Wagenen*, 115 N. Y. 527, 12 Am. St. Rep. 828, 22 N. E. 361; *Smelker v. Chicago & N. W. R. Co.* 106 Wis. 135, 81 N. W. 994; *Fischer-Hansen v. Brooklyn Heights R. Co.* 63 App. Div. 356, 71 N. Y. Supp. 513.

When an attorney alleges that he has been deprived of his fee through a collusive and fraudulent settlement, he should ignore the settlement and prosecute the original suit the same as if no settlement had been made.

2 R. C. L. Attorneys at Law, § 81; *Jackson v. Stearns*, 48 Or. 25, 5 L.R.A.(N.S.) 390, 84 Pac. 798; *Randall v. Van Wagenen*, 115 N. Y. 527, 12 Am. St. Rep. 828, 22 N. E. 361; *Fischer-Hansen v. Brooklyn Heights R. Co.* 63 App. Div. 356, 71 N. Y. Supp. 513; *Potter v. Ajax Min. Co.* 19 Utah, 421, 57 Pac. 270; *McDonald v. Napier*, 14 Ga. 89; *Jones v. Morgan*, 89 Ga. 310, 99 Am. Dec. 458; *Talcott v. Bronson*, 4 Paige, 501; *Wilber v. Baker*, 24 Hun, 24; *Kern v. Chicago, M. & P. S. R. Co.* 201 Fed. 404; *Herman v. Metropolitan Street R. Co.* 121 Fed. 184; *Fuller v. Lanett Bleaching Co.* 186 Ala. 117, 65 So. 61; *Martin v. Smith*, 33 Ky. L. Rep. 532, 110 S. W. 413; *Carpenter v. Myers*, 90 Mich. 209, 51 N. W. 206; *Corson v. Lewis*, 77 Neb. 449, 114 N. W.

281; *Bailey v. Murphy*, 136 N. Y. 50, 32 N. E. 627, affirming 51 Hun, 643, 22 N. Y. S. R. 102, 4 N. Y. Supp. 579; *Illinois C. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Powell v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 78 S. W. 975; *Burkhart v. Scott*, 69 W. Va. 694, 22 S. E. 784; *Swift v. Register*, 97 Ga. 446, 25 S. E. 315; *Smelker v. Chicago & N. W. R. Co.* 106 Wis. 135, 81 N. W. 994.

Defendant was not liable for the injury sustained by the minor.

*Southern R. Co. v. Burford*, 120 Va. 157, 90 S. E. 616; *Bougas v. Eschbach-Bruce Co.* 77 Wash. 347, 137 Pac. 472; *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876; *Wachsmuth v. Shaw Electric Crane Co.* 118 Mich. 275, 76 N. W. 497; *Herricks v. Chicago & E. I. R. Co.* 257 Ill. 264, 100 N. E. 897; *Golden v. Ellis*, 104 Me. 177, 77 Atl. 649; *Koschman v. Ash*, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514.

The contract of the minor with plaintiffs was repudiated by the former, hence they are only entitled to a reasonable fee.

22 Cyc. 612; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Southworth v. Rosendahl*, 183 Minn. 447, 3 A.L.R. 468, 158 N. W. 717; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 798; *Badger v. Mayer*, 8 Misc. 533, 28 N. Y. Supp. 765; *Western U. Teleg. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300, 21 Pac. 637; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; 3 Am. & Eng. Enc. Law, 2d ed. 427; *Schmitz v. South Covington & C. Street R. Co.* 131 Ky. 207, 22 L.R.A.(N.S.) 777, 114 S. W. 1197, 18 Ann. Cas. 1114; *Neu v. Brooklyn Heights R. Co.* 113 App. Div. 446, 99 N. Y. Supp. 290; *Texas & N. R. Co. v. Marshall*, — Tex. Civ. App. —, 184 S. W. 643.

The contract between the guardian ad litem and plaintiffs was void, as the guardian ad litem had no power to enter into such a contract.

*Cole v. Superior Ct.* 63 Cal. 86, 49 Am. Rep. 78; *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707; 22 Cyc. 665; *Houck v. Bridwell*, 23 Mo. App. 644; *Colgate v. Colgate*, 23 N. J. Eq. 372.

*Chadwick, J.*, delivered the opinion of the court:

On March 19, 1914, *Lester Walsh*, a minor, fourteen years of age, while working in one of respondent's section gangs under his father as sec-

litem being regarded as absolutely void, there is nothing left on which to base appellants' claim.

The judgment is affirmed.

Ellis, Ch. J., and Fullerton, Main, and Morris, JJ., concur.

Petition for rehearing denied.

### ANNOTATION.

#### Power of guardian ad litem or next friend to bind infant by his contract with attorney fixing compensation.

- I. Introductory, 108.
- II. View of want of power, 108.
- III. Power to make reasonable contracts, 109.
- IV. Where contract is unreasonable, 110.
- V. Rights of attorneys, 110.
- VI. Miscellaneous, 111.

##### *I. Introductory.*

The preliminary question whether a guardian ad litem or next friend has power to hire attorneys whose compensation is to be paid by the infant does not admit of a general answer. It depends upon the nature of the case. For example, where the guardian ad litem is himself a lawyer, it is usual for him to act without other counsel, except in cases of importance.

As to the power to bind the infant by contracts fixing the amount of compensation, there is some variety in judicial expressions. Some courts say there is no such power, others that there is no power to contract for an unreasonable fee, and still others that a contract for a reasonable fee is good. All agree that the infant will not be liable for an unreasonable fee.

##### *II. View of want of power.*

Some of the cases assert the broad rule that a guardian ad litem may not make a contract for compensation which shall bind the infant or his estate. *Cole v. Superior Ct.* (1883) 63 Cal. 86, 49 Am. Rep. 78; *Houck v. Bridwell* (1888) 28 Mo. App. 644; *Re Stone* (1918) 176 N. C. 336, 97 S. E. 216; *PLUMMER v. NORTHERN P. R. Co.* (reported herewith) ante, 104.

A contract by the mother of an infant, who employs an attorney for her infant son, to prosecute an action for personal injuries, agreeing to pay him 40 per cent of the recovery, is not binding on the mother as guardian ad litem for the son in such a suit, but

in granting an order substituting another attorney, the court provided that in the event of recovery in the action an opportunity be awarded to the discharged attorney to have the amount of his compensation fixed for services rendered. *Bryant v. Brooklyn Heights R. Co.* (1901) 64 App. Div. 542, 72 N. Y. Supp. 308.

Some of the cases state that the guardian has no power to make such a contract without the approval of the court. *Ryan v. Philadelphia & R. Coal & I. Co.* (1911) 189 Fed. 253; *Re Hart* (1909) 131 App. Div. 661, 116 N. Y. Supp. 193.

In *Ryan v. Philadelphia & R. Coal & I. Co.* (Fed.) supra, the court approved the making by the guardian ad litem for an infant plaintiff of a contract to pay her attorney 50 per cent compensation, upon the basis of a contingent fee, for his services in the case, no written retainer or contract having been signed until after the case had been substantially settled and the lack of such a contract noticed. The court said: "This court is bound to hold that a guardian ad litem, being an officer of the court, even though appointed in the state court before removal of the action, cannot enter into a contract with any attorney, who is necessarily an officer of the court, which shall bind the ward of the court, unless that agreement meet with the court's approval. The guardian ad litem is not a party who is independent, in the ordinary sense. He is rather a party capable of entering into legal relations, who thus supplies the lack of capacity on the part of the infant. But the very fact that he is appointed to represent a ward of the court, and that his appointment is by the court, leaves his actions and the actions of all who are

responsible to the court, subject to the court's scrutiny, before the court can be asked to lend its authority to a determination of the rights of the party whose protection is being attempted. For this reason the guardian ad litem has the right to call into question the action of the attorney in obtaining from her the signature of a contract for a 50 per cent attorney fee, upon such terms as might have been asked before bringing the action, and at a time when the possibility of recovery or the obtaining of evidence was entirely undetermined. Such a charge would be unconscionable and entirely out of proportion, no matter what the hazard of recovery might previously have been, if this charge were made for nothing but the actual settlement of a case already on trial, and in which an amount in settlement had been offered. . . . A fee of this amount even in settlement also does not seem to be out of proportion or unconscionable in this case, from the standpoint of fair compensation to the attorney, including the payment of counsel fees. Especially is this true where the plaintiff will be reimbursed for disbursements or witness fees."

In *Re Hart* (N. Y.) *supra*, where an attorney was disbarred, Ingraham, J., said of an agreement by a guardian ad litem with an attorney by which he was to receive 50 per cent of any recovery in a civil action for assault on the infant: "The guardian had no power to make any contract or agreement which would dispose of or create a lien upon the infant's cause of action, or any money or property realized therefrom, without the approval of the court. The respondent, however, made a bargain with the guardian which disposed of 50 per cent of the infant's cause of action, and which, if valid, would have made him directly interested in the proceeds of the infant's cause of action realized through the legal proceedings which were contemplated. It seems to me that the making of such an agreement is of itself serious professional misconduct. The fact that it was not binding in any way upon the infant does not mitigate the seriousness of

the offense. It was an attempt of an attorney of this court, in violation of his duty and in violation of law, to possess himself of one half of an infant's cause of action by virtue of an agreement made with a person appointed to conduct a litigation, and who was prohibited from receiving the proceeds of such litigation, or any property of the infant, except upon giving a bond approved by a judge."

### III. Power to make reasonable contracts.

It has been held that an agreement by a guardian ad litem or next friend with an attorney, fixing the amount of compensation, is good when the amount is reasonable. *Hickman v. McDonald* (1914) 164 Iowa, 50, 145 N. W. 323; *Sanders v. Woodbury* (1912) 146 Ky. 153, 142 S. W. 207; *Elk Valley Coal Min. Co. v. Willis* (1912) 149 Ky. 449, 149 S. W. 894; *Hanlon v. Wheeler* (1898) — Tex. Civ. App. —, 45 S. W. 821.

An agreement by an infant and her next friend with attorneys for a 50 per cent contingent fee for their services in a case where such services are a necessary is good where the amount is not unreasonable. *Hickman v. McDonald* (Iowa) *supra*.

Where there was an agreement by a next friend with an attorney for a 50 per cent contingent fee for his services in a personal injury case, and the attorney was content to accept a sum of about 42 or 43 per cent, the court held it was error for the trial court to reduce this amount, as it was not unreasonable. The court said: "Our conclusion, then, is that the next friend of an infant may employ counsel to represent him and agree on the compensation to be paid, subject, however, to the limitation that the fee agreed upon shall be reasonable, and this is a question for the court. That being true, such a contract will be upheld if it appears that the compensation contracted for is reasonable." *Sanders v. Woodbury* (1912) 146 Ky. 153, 142 S. W. 207, *supra*.

In *Elk Valley Coal Min. Co. v. Willis* (1912) 149 Ky. 449, 149 S. W. 894, *supra*, the court followed *Sanders v. Woodbury* (Ky.) *supra*, as to 50 per cent in a personal injury case.

In *Hanlon v. Wheeler* (Tex.) *supra*, the court approved a charge to the effect that if the jury thought that the infant and his next friend made a contract with attorneys for 50 per cent of the amount that might be recovered in a suit, and that this was a reasonable compensation, then the infant was bound thereby, but that if the figure was more than a reasonable compensation, then the infant was not bound, and the attorneys would be entitled to a reasonable compensation, the court observing that the contract was one for necessities.

And in *Haj v. American Bottle Co.* (1913) 182 Ill. App. 636, where the contract with an attorney was made by the infant and his next friend in relation to a claim for personal injuries, agreeing that the fee should be one third of the recovery or settlement, it was held that the services were a necessary, and that the infant could make a valid contract to pay an attorney a reasonable compensation, and that his next friend could also do so, and that the compensation in this case was reasonable in the absence of proof to the contrary. [This case was reversed in (1913) 261 Ill. 362, 103 N. E. 1000, Ann. Cas. 1915A, 220, on the ground that notice of the lien had not been given to the defendant in compliance with the statute.]

#### IV. Where contract is unreasonable.

A guardian ad litem or next friend cannot bind the infant by a contract with an attorney for an unreasonable compensation. *Everson v. Hurn* (1911) 89 Neb. 716, 131 N. W. 1130; *Hanlon v. Wheeler* (1898) — Tex. Civ. App. —, 45 S. W. 821. See also cases throughout this note, particularly *Ryan v. Philadelphia & R. Coal & I. Co.* (1911) 189 Fed. 258, *supra*, II.

In *Everson v. Hurn* (Neb.) *supra*, it was held that an agreement by the mother and grandfather of an infant with an attorney to contest a will for the infant for one third to one half of the recovery "could not bind the minor, or any estate which he might acquire through such contest proceedings, for anything more than reasonable compensation to the attorney so employed; and it is the duty of the

court in such a case, where proceedings are instituted to recover for services so performed, even if no such defense is interposed, on its own motion, to limit the recovery of the plaintiff in such a proceeding to a reasonable compensation for the services rendered."

#### V. Rights of attorneys.

The reader will understand that cases here referred to holding that an attorney is entitled to a reasonable fee do not mean that there may not be cases in which the attorney is not entitled to any fee at all. For example, the question whether in the particular case a next friend or guardian ad litem has any right to employ an attorney at all for whose services the infant would be liable is beyond the scope of this note.

There are a number of cases holding that attorneys employed by a next friend or guardian ad litem are entitled to a reasonable fee. *Owens v. Gunther* (1905) 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 180; *Burns v. Illinois C. R. Co.* (1914) 190 Ill. App. 191; *Connor v. Ashley* (1899) 57 S. C. 305, 35 S. E. 546; *Ex parte Smithson* (1902) 108 Tenn. 442, 67 S. W. 864; *Searcy v. Hunter* (1891) 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Hanlon v. Wheeler* (1898) — Tex. Civ. App. —, 45 S. W. 821.

This has been held where an action in equity brought by a guardian ad litem resulted in a recovery for the infant. *Connor v. Ashley* (1899) 57 S. C. 305, 35 S. E. 546, *supra*. And where an infant suing by next friend recovered "damages," it was held that the attorneys had a lien on the recovery for their reasonable compensation. *Ex parte Smithson* (1902) 108 Tenn. 442, 67 S. W. 864, *supra*.

And where the statutory guardian has an interest so adverse to the infant in a suit in equity brought against him, that the court appoints a guardian ad litem whose attorneys appear and render beneficial and necessary services, they are entitled to a reasonable fee, but not, it was held, to a lien on the infant's property. *Owens v. Gunther* (Ark.) *supra*.

In *Burns v. Illinois C. R. Co.* (1914)

190 Ill. App. 191, *supra*, it was held that an infant or his next friend may hire attorneys' services, as these are necessities, and the attorneys are entitled to a reasonable compensation.

In *Searcy v. Hunter* (1891) 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372, the court said, referring to an action relating to land: "Looking to the condition of affairs in our own state, it seems to us that to refuse to allow an attorney who, at the instance of a next friend, has instituted a suit in behalf of a minor and recovered for him money or property, to claim from the infant a reasonable compensation for his services, would be to establish a rule which would operate to the prejudice of the class it is designed to protect. In such case, where the services have been beneficial to the infant, we are of opinion that reasonable compensation should be allowed."

In *Sutton v. Heinze* (1911) 84 Kan. 756, 34 L.R.A. (N.S.) 238, 115 Pac. 560, where the appellant contended that the contract of an attorney with the minor, or with the next friend for the minor, was void, the court, while not discussing the amount of compensation, said: "Whether or not an express contract as to the attorney's compensation was enforceable according to its terms, the services having been rendered and having been beneficial to the minor, a liability exists to pay for them on the ground that they are classed as 'necessaries.'"

Where the father as next friend employed an attorney to prosecute a suit for his infant daughter for assault, and it did not appear that there was any agreement fixing the amount of compensation, the court considered the services as necessities, and said: "The third request of the defendant, which the presiding justice denied, viz., 'If the defendant was an infant under the age of twenty-one years, the father could not bind her estate by any contract with the plaintiff for professional services,'—might be correct as an abstract proposition of law, disconnected from the circumstances of this case, but with its connections, we think it was properly denied. The father's employment of the plaintiff as

counsel in the action against Brown was simply for his infant daughter while he was acting as her *prochein ami*, and in connection with the conduct of his daughter was not the father's promise, but the implied promise of the infant daughter." *Crafts v. Carr* (1902) 24 R. I. 397; 60 L.R.A. 128, 96 Am. St. Rep. 721, 53 Atl. 275.

Some of the cases assert that the next friend or guardian ad litem may employ an attorney, the amount of compensation to be fixed by the court. *Re Stone* (1918) 176 N. C. 386, 97 S. E. 216; *Plummer v. Northern P. R. Co.* (reported herewith) ante, 104.

While, as heretofore stated, this note does not take up the question as to what cases are proper for the hire of attorneys by next friends and guardians ad litem, it may be noted, for example, that in *Grissem v. Beidelman* (1912) 35 Okla. 348, 44 L.R.A. (N.S.) 411, 129 Pac. 853, Ann. Cas. 1914D, 599, it was held that where a next friend contracts for the services of an attorney to prosecute an action to recover the infant's interest in lands, the attorney cannot recover of the infant in an action at law for his services, as the same are not a necessary; and that in *Re Johnston* (1887) 6 Dem. (N. Y.) 355, the surrogate, while making an allowance to the special guardian of infants, refused an allowance to the special guardian for his counsel, as it had never been the practice of the court to make any such allowance,

#### VI. Miscellaneous.

In *Blake v. Corcoran* (1912) 211 Mass. 406, 97 N. E. 1002, where an infant brought an action by his father as next friend, and his attorneys collected a judgment in his favor, it was held that his father as next friend could not thereafter settle with them as to the amount they should retain for their services.

In *Colgate v. Colgate* (1873) 23 N. J. Eq. 872, when the guardian ad litem was the clerk of the court, appointed pro forma, only for the purpose of placing the infant within the jurisdiction of the court, the court directed that "the guardian ad litem must therefore be directed to employ proper counsel, approved by the court, to rep-



resent the infant in this investigation, whose compensation, as well as the expenses necessarily incurred in the investigation, will be directed to be paid by the trustee out of the moneys of the infant in his hands."

In case of an infant defendant, the court observed: "The better practice would seem to be, where the guardian ad litem is appointed and he believes that his ward has rights, for him to apply to the court for leave to employ counsel, and the court should, in granting leave, fix the amount that might, if required, be expended for the purpose of the defense, which, if it, from protracted litigation or otherwise, should prove insufficient, the court, on being satisfied of the fact, might increase the sum." *Smith v. Smith* (1873) 69 Ill. 308. Quoted and approved in *Richardson v. Tyson* (1901) 110 Wis. 572, 84 Am. St. Rep. 937, 86 N. W. 250.

In the brief report of the case of *Nagel v. Schilling* (1884) 14 Mo. App.

576, it is stated to have been there held that the proper defense of a suit against an infant is a necessity, for the cost of which the estate may be liable, and that a request for the defense of such a suit may be presumed from the necessities of the case, taken in connection with the exercise of discretion by the guardian ad litem in engaging for such defense the services of the law firm of which he is a member.

In a case where, when the court spoke, the infant was of age, it was said: "Where, as in the present case, the plaintiff adopts and ratifies a settlement, he is liable for such costs, if any, as he would have been liable for had he been an adult when he began the action. It will, therefore, be open to him to prove, if he can, that the services of the solicitors were to be gratis or on any special terms." *Vano v. Canadian Coloured Cotton Mills Co.* (1910) 21 Ont. L. Rep. 144.

B. B. B.

W. O. TAYLOR

v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

*West Virginia Supreme Court of Appeals—September 9, 1919.*

(— W. Va. —, 100 S. E. 218.)

**Water — right to place obstruction in channel.**

1. The right to erect dikes to protect riparian land will not justify a riparian owner or other person in erecting or placing within the channel or banks of such stream any obstruction or barrier which will interfere with the free flow of the waters therein or cause the same to be backed up and to flood the land or property of a riparian owner along such stream.

[See note on this question beginning on page 116.]

—liability for act of God.

2. In the absence of some initial or intervening act of negligence on his part contributing thereto, one is not liable for damages arising from an act of God, such as an unprecedented flood of waters of great force and volume caused by a cloud-burst at the head waters of a creek or river.

—right to natural flow.

3. A riparian proprietor has as a

general rule the right to have the waters of a stream or watercourse pass his land in its natural flow unobstructed and to render anyone violating or interfering with such right liable to him in damages sustained thereby.

—right to confine flood to stream.

4. The only limitation on such right of a riparian owner is that any other riparian owner may erect barriers or dikes on his own land on the banks

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of such watercourse or on the interior of his land for the purpose of confining flood waters within the natural

banks of the stream, although such action may result in injury to another riparian owner.

**CERTIFICATION** by the Circuit Court for Kanawha County for the determination by the Supreme Court of Appeals of questions arising upon the sustaining of a demurrer to the declaration in an action brought to recover damages for injury to plaintiff's property alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. Howard Hundley and Harold W. Houston, for plaintiff:

A party whose wrongful acts cooperate with, augment, or accelerate those forces of nature known as the "act of God," to the injury of another, is liable in damages therefor.

1 C. J. 1174; Shearm. & Redf. Neg. § 39; Sutherland, Damages, § 38; Williams v. Columbus Producing Co. 80 W. Va. 683, L.R.A.1918B, 179, 93 S. E. 809; Atkinson v. Chesapeake & O. R. Co. 74 W. Va. 633, 82 S. E. 502; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95; Axtell v. Northern P. R. Co. 9 Idaho, 392, 74 Pac. 1075; Kirby v. Wylie, 108 Md. 501, 21 L.R.A. (N.S.) 129, 129 Am. St. Rep. 451, 70 Atl. 213; Michaels v. New York C. R. Co. 80 N. Y. 564, 86 Am. Dec. 415; Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; Scott v. Hunter, 46 Pa. 192, 84 Am. Dec. 542.

The right of a riparian proprietor to have the water of the stream pass his land in its natural flow or channel is a right annexed to the soil and exists as a parcel of the land.

Roberts v. Martin, 72 W. Va. 92, 77 S. E. 535; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Fahnestock v. Feldner, 98 Md. 335, 56 Atl. 785; Webb v. Carter, 121 Mo. App. 147, 98 S. W. 776; Spink v. Corning, 61 App. Div. 84, 70 N. Y. Supp. 143; Chatfield v. Wilson, 31 Vt. 358; Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199; Rickels v. Log-Owners' Booming Co. 139 Mich. 111, 102 N. W. 652; Baltimore v. Appold, 42 Md. 443; Irwin v. Richardson, 88 Wis. 429, 60 N. W. 786; Noe v. Chicago, B. & Q. R. Co. 76 Iowa, 360, 41 N. W. 42; Dayton v. Drainage Comrs. 123 Ill. 271, 21 N. E. 198; Central R. Co. v. Champion, 160 Ala. 517, 49 So. 415.

Any interference with the flow of waters in a natural watercourse, either diverting them, changing the channel, or backing the waters up—  
7 A.L.R.—8.

stream, makes the party liable to any riparian owner who is damaged thereby.

Roberts v. Martin, supra; Williams v. Columbus Producing Co. 80 W. Va. 683, L.R.A.1918B, 179, 93 S. E. 809; Cline v. Norfolk & W. R. Co. 69 W. Va. 436, 71 S. E. 705; Atkinson v. Chesapeake & O. R. Co. 74 W. Va. 633, 82 S. E. 502; Neal v. Ohio River R. Co. 47 W. Va. 316, 34 S. E. 914; Hargreaves v. Kimberly, 26 W. Va. 788, 53 Am. Rep. 121; Norfolk & W. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Cheeves v. Danielly, 80 Ga. 114, 4 S. E. 902; McGehee v. Tidewater R. Co. 108 Va. 508, 62 S. E. 856; Hartshorn v. Chaddock, 135 N. Y. 116, 17 L.R.A. 426, 81 N. E. 997; Bliss v. Johnson, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785; DeBaker v. Southern California R. Co. 106 Cal. 597, 46 Am. St. Rep. 237, 89 Pac. 610; Ladd v. Redle, 12 Wyo. 862, 75 Pac. 691.

A party may build barriers and embankments along a watercourse in order to protect his property and keep the waters in the channel, but he must not obstruct the flow of the waters in the channel or divert them therefrom.

Parker v. Atchison, 58 Kan. 29, 48 Pac. 631; Gerrish v. Clough, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301; 1 Wood, Nuisances, § 350; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Cairo & V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Coulson & F. Waters, pp. 180, 181; Ballentine v. Hammond, 68 S. E. 153, 46 S. E. 1000; McGehee v. Tidewater R. Co. 108 Va. 508, 62 S. E. 856; Mitchell v. Bain, 142 Ind. 604, 42 N. E. 230.

Riparian owners may, without lia-

bility to other riparian owners, protect themselves from the consequences of accidental and extraordinary floods by erecting defensive works along the front of their lands.

*Cubbins v. Mississippi River Commission*, 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671; *Chesapeake & O. R. Co. v. Meriwether*, 120 Va. 55, 91 S. E. 92; *Mailhot v. Pugh*, 30 La. Ann. 1359; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205; 2 *Farnham, Waters*, 1839; *Angell, Watercourses*, §§ 347, 348.

A party cannot transfer to the land of another a danger or mischief already existing upon his own land.

*Whalley v. Lancashire & Y. R. Co.* 53 L. J. Q. B. N. S. 285, L. R. 13 Q. B. Div. 131, 50 L. T. N. S. 472, 32 Week. Rep. 711, 48 J. P. 500; *Menzies v. Breadalbane*, 3 Bligh, N. R. 414, 4 Eng. Reprint, 1387; *Coulson & F. Waters*, pp. 177-182.

If a riparian owner build a levee or embankment to protect his property, he is not liable for damages to another riparian owner caused by unusual or extraordinary floods unless he should have reasonably anticipated same, but he is liable when his acts co-operate with the act of God at the time, or when he should have anticipated the consequences of his acts.

*Williams v. Columbus Producing Co.* 80 W. Va. 683, L.R.A.1918B, 179, 93 S. E. 809; 40 Cyc. 573; *Atkinson v. Chesapeake & O. R. Co.* 74 W. Va. 633, 82 S. E. 502; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205; *Angell, Watercourses*, §§ 347, 348.

Messrs. *Fitzpatrick, Campbell, Brown, & Davis* and *C. W. Strickling* for defendant.

*Miller, P.*, delivered the opinion of the court:

The sufficiency of plaintiff's declaration was challenged by defendant's demurrer. The court below sustained the demurrer, and has certified the questions presented with its rulings thereon to us for review.

The substantial averments are that the plaintiff was owner of certain real estate and personal property in the town of Eskdale, situated upon and near the banks of Cabin creek, a non-navigable stream, and about 100 yards above the trestles or bridges of the de-

fendant company crossing said creek; that on or about August 9, 1916, there was a cloud-burst on the head waters of said creek which caused a flood therein of unprecedented volume and violence to sweep down the valley and channel of said creek and through said town of Eskdale and Cane Fork and over and through said trestles or bridges of the defendant company, carrying large quantities of wreckage and debris before it; and that defendant, through its agents, servants, and employees acting within the scope of their employment, and with full knowledge that the said flood was sweeping down the channel of said creek toward its said railroad trestles or bridges, and in disregard of its duty not to divert, impede, or obstruct the natural flow of the waters in said creek so as to cause them to flow back, over and upon the plaintiff's property and damage it, and for the purpose and with the object of protecting its said trestles or bridges from being washed away and destroyed by said flood, wrongfully, negligently, knowingly, and unlawfully ran, or caused to be run and propelled, a large railroad engine, owned and controlled by it, out upon one of said trestles or bridges just below the said town of Eskdale and just below plaintiff's property, and in the course and pathway of the waters of said flood, and there to remain and to obstruct the natural flow of the waters in said creek, and causing the wreckage and debris then being conveyed down said stream, and thereby causing the water to be dammed and backed up stream and over and upon plaintiff's said property, whereby it was damaged and destroyed and whereby he sustained great damage and loss, amounting to \$10,000.

It is conceded on both sides that the cloud-burst causing the flood and the waters of unprecedented volume and force to flow down the creek as alleged constituted an act of God for which the defendant without some initial act of negligence on its part could not be ran-

dered liable in damages to plaintiff.

Water-  
liability for  
act of God.

This is a well-settled proposition of law in this state and elsewhere. *Williams v. Columbus Producing Co.* 80 W. Va. 683, L.R.A.1918B, 179, 93 S. E. 809; *Atkinson v. Chesapeake & O. R. Co.* 74 W. Va. 633, 82 S. E. 502.

But counsel for plaintiff contend that with knowledge on the part of defendant of the oncoming flood waters, the placing of its engine on the trestle or bridge in the middle of the creek and in the way of the stream so as to obstruct the natural flow of the water therein, which, together with the wreckage and debris caught thereby, caused the water to be dammed and backed up upon plaintiff's property as alleged, constituted an original act of negligence and invasion of his rights for which defendant is liable to account to him in damages.

The right of a riparian proprietor to have the waters of a stream or watercourse pass his land in its natural course unobstructed and to

—right to  
natural flow.

hold anyone violating this right liable for damages sustained thereby is not controverted. This proposition is well settled and recognized not only by the decisions of this court but elsewhere. *Roberts v. Martin*, 72 W. Va. 92, 77 S. E. 535; *Williams v. Columbus Producing Co.* and *Atkinson v. Chesapeake & O. R. Co.* supra; *Cline v. Norfolk & W. R. Co.* 69 W. Va. 436, 71 S. E. 705; *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671.

The only limitation upon this right is that each riparian owner for his own protection may erect

—right to  
confine flood  
to stream.

barriers or dikes so as to confine the flood waters within the natural banks of the stream, a right pertaining to all such proprietors, and when exercised no one has the right to complain of another, although the effect of the thing done may have caused some injury to him or his property. *Cubbins v. Mis-*

*issippi River Commission*, 241 U. S. 364, 60 L. ed. 1047, 36 Sup. Ct. Rep. 671, supra, and cases cited.

The contention of counsel for demurrant is that because of the accidental and extraordinary conditions existing at the time of the alleged injury, the defendant had the right to run its engine upon the trestle or bridge, not for the purpose of restraining the flood waters to the natural banks of the creek and thereby protecting its property, but to hold in place works constructed by it across the stream, though the result of that act was to obstruct the free flow of the waters in the channel, catching the wreckage and debris therein, and to dam up the water and throw it back upon plaintiff. We find no warrant for this position in *Chesapeake & O. R. Co. v. Meriwether*, 120 Va. 55, 91 S. E. 92, nor in *Cubbins v. Mississippi River Commission*, supra, nor in *Jackson v. United States*, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, cited and relied on by counsel. The only right recognized in these cases is the defensive one accorded owners to protect themselves against damages by defensive works constructed at or upon the borders of rivers or creeks or on the interior of their own lands against such extraordinary conditions. This is the limitation recognized by very ancient authority and in the Federal and other cases cited. But they furnish no precedent for the position of counsel that the defendant might lawfully, in the emergency existing, cast the burden of loss on plaintiff in order to protect its own property. Section

—right to place  
obstruction  
in channel.

50, subd. 6, of chapter 54 (§ 2949) of the Code, gives railroad companies the right to cross with their railroads along or upon any stream or watercourse, but specifically requires them to restore such stream or watercourse to its former state so as not to injure or impair its usefulness.

The case presented by the declaration, in our opinion, comes clearly

within the principles of *Williams v. Columbus Producing Co.* 80 W. Va. 683, L.R.A.1918B, 179, 93 S. E. 809; *Atkinson v. Chesapeake & O. R. Co.* 74 W. Va. 633, 82 S. E. 502, and *Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914. The first of these cases cited originated or grew out of the same flood conditions on Cabin creek involved in the case at bar. The only material difference in the facts is that in the *Williams Case* the injury resulted from the building of an oil well derrick and oil tanks within the banks of the creek, while in this case the alleged negligence consisted in placing a railroad engine across the stream in view of the approaching

waters to avoid damages to the trestles or bridges of the railroad company. The latter was as much an initial act of negligence as the other.

Counsel for defendant also rely on cases involving the blowing up of buildings to prevent the spread of fire such as *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613, and *Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385, all involving the exercise of the police power of the state. We think these cases have no application to the case at bar.

Our conclusion is to reverse the judgment below, to overrule the demurrer to the declaration, and to remand the case to the Circuit Court.

### ANNOTATION.

#### **Liability for damages to riparian owner by means adopted to protect bridge or other structure in or across stream at time of flood.**

An interesting question is presented in the reported case (*TAYLOR v. CHESAPEAKE & O. R. Co.* ante, 112) as to the liability for damages to riparian property by means adopted to protect a bridge or other structure in or across a stream during a flood. The court admits the defensive right accorded riparian owners to protect themselves against damages by defensive works constructed at or on the borders of a stream, but holds that a riparian owner has no aggressive right to cast the burden of loss on another riparian owner in order to protect his own property. This question was also presented for adjudication in the case of *Higgins v. New York, L. E. & W. R. Co.* (1894) 78 Hun, 567, 29 N. Y. Supp. 563, wherein it appeared that during a flood the defendant's servants placed railroad planks and pieces of logs at the ends of an immense piece of timber chained across the stream so as to throw the water off. This turned the water across the premises of the plaintiff. In an action to recover for the damage done to the premises, the court said: "If this evidence is true, it tends to show that much of the damage suffered by the plaintiff on this occasion occurred through the means

adopted by the defendant's servants in protecting the bridge, and, if so, there can be no doubt as to the right of the plaintiff to recover."

In *Noyes v. Shepherd* (1849) 30 Me. 173, 50 Am. Dec. 625, the court said by way of dictum: "Imminent danger expected from fire or flood cannot excuse or exempt one from the use of ordinary care to prevent unnecessary injury to the property of others. What would under such circumstances be ordinary care must be determined by a jury; and it might not be the same care, or an equal degree of caution, which would reasonably be expected when there was little or no cause to apprehend immediate danger. However imminent the danger may be, a person must be held responsible for an injury to the property of another, occasioned by negligence of a less culpable character than such gross carelessness as would reasonably authorize an inference that it was done with an evil intent."

A person causing damage by precautions taken to protect his property from flood is liable if his act is found to be negligent. *Hunter v. Pelham Mills* (1898) 52 S. C. 279, 68 Am. St. Rep. 904, 29 S. E. 727. In that case the de-

defendant offered testimony which tended to show that an unusually heavy rainy season had obtained in the section where his property was located, and that, on the day of the injury to the plaintiff's property, there was a heavy rainstorm, which caused the water to rise to a considerable height in an hour. It appeared that the defendant had five floodgates in his dam across the stream, and when the water overflowed his dam, he opened two of the floodgates to preserve his own property from injury. The water thus released caused the already swollen stream to overflow the lands and destroy the crops of the plaintiff. The defendant further alleged that to have allowed the water to run as it was doing when the two floodgates were raised would not only have flooded the defendant's mills, but would have caused greater danger to the plaintiff's property than could possibly have happened after the raising of the floodgates. The lower court instructed the jury that "negligence is the gist of this action. To find for the plaintiff, the jury must be satisfied from the evidence that the defendant negligently opened the floodgates of its dam, and that the raising of said floodgates caused the damage complained of." The jury found the defendant negligent, and on appeal the instruction was sustained.

The case of *Ross v. Horsey* (1840) 3 Harr. (Del.) 60, arose under the Statute of 1819 "for the preservation of mill property" (Dig. 405), providing that when a riparian owner discharged any unusual amount of water through his dam, notice must be given to the owner nearest the dam. It appeared that during a violent storm, the defendant cut his own dam when it was on the point of being broken, and that he gave no notice to the plaintiff residing next below the dam. The court said: "The duty of providing for the safety of his neighbor's mill cannot be paramount to the right of taking care of his own. This would be unreasonable. If the force of tempest and flood was so great on this occasion as to require the presence of Mr. Horsey and all under his command, to preserve his own mill and dam, he could not reasonably be required to detach a part of that force as a messenger to the lower mill, in this state of peril to all mill property, arising from this unusual storm, all persons were bound to be vigilant to provide for its effects; and though the duty of transmitting actual notice of breaches from those above to those below attached the moment it could be done without abandoning their own property, and in fact increasing the danger to all, it is not reasonable, and the law does not require, that it should be given sooner."

A. S. M.

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A. F. CLARK, Plff. in Err.,

v.

NORFOLK & WESTERN RAILWAY COMPANY.

*West Virginia Supreme Court of Appeals — September 23, 1910.*

(— W. Va. —, 100 S. E. 480.)

**Search — of train — warrant by justice of peace — validity.**

1. A warrant issued by a justice of the peace, commanding search to be made of a certain passenger train, to ascertain if intoxicating liquors are being carried thereon contrary to law, is not proper evidence to be considered by the jury against the plaintiff in the trial of an action by him against the carrier for his unlawful expulsion from the car. Such warrant is void.

[See note on this question beginning on page 121.]

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Headnotes by WILLIAMS, J.

**Carrier — duty to protect passenger from arrest.**

2. Although a carrier is obliged to use reasonable diligence to protect its passengers against unlawful assaults by other passengers, its own servants, and third persons, its servants are under no duty to resist or interfere with a known officer in making an arrest of a passenger, unless they know or by reasonable diligence ought to know that the arrest is unlawful; neither

are they bound to make inquiry into such known officer's authority.

[See 4 R. C. L. 1193.]

**Master and servant — special agent of railroad company — liability for act.**

3. A railroad company is not liable for the act of its special agent in assisting prohibition officers in forcing a passenger off a train, if in that transaction he was acting under special deputation of the officers and not as agent of the railroad company.

[See 4 R. C. L. 1180.]

**ERROR** to the Circuit Court for McDowell County to review a judgment setting aside a verdict in plaintiff's favor in an action brought to recover damages for alleged unlawful expulsion from defendant's train. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Froe & Capehart for plaintiff in error.

Messrs. Sale & Tucker, for defendant in error:

The verdict of the jury was not supported by the evidence.

*White v. L. Hoster Brewing Co.* 51 W. Va. 259, 41 S. E. 180; *Lovett v. West Virginia Central Gas Co.* 73 W. Va. 40, 79 S. E. 1007.

The action of the officers in removing Clark from the train was legal, and the court should have directed a verdict for the defendant, because there was no duty upon the employees of the railway company to interfere.

*Claiborne v. Chesapeake & O. R. Co.* 46 W. Va. 363, 33 S. E. 262; *Tryon v. Pingree*, 112 Mich. 338, 37 L.R.A. 222, 67 Am. St. Rep. 398, 70 N. W. 905; *Hofschulte v. Doe*, 78 Fed. 436; *Page v. Citizens' Bkg. Co.* 111 Ga. 73, 51 L.R.A. 463, 78 Am. St. Rep. 144, 36 S. E. 418; *Anania v. Norfolk & W. R. Co.* 77 W. Va. 105, L.R.A.1916C, 439, 87 S. E. 167, 11 N. C. C. A. 1025.

The railway company could not be held liable for the failure of its employees to interfere with the action of known officers of the law in the apparent exercise of their official authority, and the court should have directed a verdict for the defendant.

*Nashville, C. & St. L. R. Co. v. Crosby*, 183 Ala. 237, 62 So. 889; *Louisville & N. R. Co. v. Byrley*, 152 Ky. 35, 153 S. W. 36, Ann. Cas. 1915B, 240; *Anania v. Norfolk & W. R. Co.* 77 W. Va. 105, L.R.A.1916C, 439, 87 S. E. 167, 11 N. C. C. A. 1025; *Bowden v. Atlantic Coast Line R. Co.* 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783; 10 C. J. 908; *May-*

*field v. St. Louis, I. M. & S. R. Co.* 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168; *Thompkins v. Missouri, K. & T. R. Co.* 52 L.R.A. (N.S.) 791, 128 C. C. A. 1, 211 Fed. 391; *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254; *Owens v. Wilmington & W. R. Co.* 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

The instruction given by the court after the jury had failed to agree was error, in that it took from their consideration every question except that of the presence of the officers.

*Stuck v. Kanawha & M. R. Co.* 78 W. Va. 490, 89 S. E. 280; *Petry v. Cabin Creek Consol. Coal Co.* 77 W. Va. 654, 88 S. E. 105; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813.

**Williams, J.**, delivered the opinion of the court:

In an action of trespass on the case plaintiff recovered a verdict against defendant for \$500, which, on motion of defendant, the court set aside, and plaintiff brings error, asking that the judgment be reversed, and judgment entered here on the verdict.

Plaintiff purchased a ticket from Ironton, Ohio, to Iaeger, West Virginia, and boarded one of defendant's trains as a passenger on December 16, 1916. He and a number of others had gone to Ironton on the day previous to purchase liquor. It was not then unlawful for a person

to carry more than 2 quarts of liquor into the state for personal use, provided the container thereof was properly labeled, showing the kind and quantity thereof. A coach was attached to the rear of the train just behind a Pullman car at Iron-ton for the accommodation of those passengers who were carrying liquor, and plaintiff was told to get in that coach and did so. In fact, that coach seems to have been filled with such passengers. Plaintiff admits he had 16 quarts of whisky and 1 quart of alcohol in a suit case, but swears it was properly labeled, and the jury evidently believed him, which they had a right to do, although his testimony on this point is contradicted by other witnesses for defendant. When the train arrived and stopped at Williamson, West Virginia, which is the end of one of defendant's divisions, where a change of crews is made, and which is a long distance west of Iaeger, the prohibition officer and his deputies, four or five in number, armed with pistols, entered the coach and forced a number of the passengers, including plaintiff, to alight. Three or four of them, but not the plaintiff, were arrested for not having labels on their packages of whisky. Plaintiff did not attempt to reboard the train, but spent the night at a hotel and took another train the next morning for Iaeger. Plaintiff swears the train stopped some distance before it reached the depot at Williamson, and, quoting his language, says: "Some men came in and told us to get off that train, and drew their guns, and some of them unloaded, and I didn't have time to get off until after the train had done started out. I went on into Williamson, and they made us get off."

He was asked:

Who made you get off?

A. Well, there was the brakeman and these here officers.

And, being asked if he was frightened, he replied: "Yes, sir; I was scared not to get off the train, after

I didn't know what they were going to do to me."

He was further asked what the brakeman did to him, and replied: "The brakeman didn't do anything; just asked me to go ahead off."

And, the question being repeated, he added, "To further any more trouble," meaning, of course, to avoid any further trouble. Some of plaintiff's answers are hardly intelligible; but it fairly appears from his testimony that, when the officers entered the car, it caused a great deal of commotion among the passengers, some of whom got off immediately, and others a little later, after the train had pulled up to the depot, and that none of the train crew protested, or did anything to protect plaintiff from being ejected. Plaintiff's counsel rely on the cases of *Gillingham v. Ohio River R. Co.* 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243, and *Anania v. Norfolk & W. R. Co.* 77 W. Va. 105, L.R.A. 1916C, 439, 87 S. E. 167, 11 N. C. C. A. 1025, in support of their contention that, under the state of facts established by plaintiff's evidence, the defendant is liable; that a carrier is under obligation to protect its passengers from unlawful arrest or ejection from its train.

In the *Gillingham Case*, the conductor of the train actually caused plaintiff's arrest for an offense committed in his presence, and which, by the exercise of proper diligence, he was bound to know plaintiff was innocent of. After sending for the officer to make the arrest, the conductor pointed out *Gillingham* to him as the guilty person; whereas the guilty party was shown to be another passenger occupying a seat behind him. The assault for which the arrest was made was committed on the conductor, and he pointed out to the officer the wrong man as the one who had committed it.

In the *Anania Case*, the officer, who happened to be on the train at the time, arrested *Anania* and some other passengers for disorderly conduct, which occurred in the presence



of the conductor and the officer. Anania had been guilty of no misconduct. The opinion in that case states that the conductor knew, or if reasonably diligent ought to have known, that fact. It was clearly the duty of the conductor in that instance to have protested, at least, against Anania's arrest.

But here the facts are quite different. It is a fact, proven and not disputed, that the conductor and brakemen in charge of the train all knew that the men who forced plaintiff to alight were officers, and in such case the law imposes no

**Carrier—duty  
to protect  
passenger  
from arrest.**

duty upon the carrier or its servants or agents to inquire into the officer's authority, or substitute their opinions for his, or to protest against his arresting a passenger. A passenger train is not intended as a place of refuge for criminals, and unless a passenger is arrested for an offense of which the carrier's agent knew, or by proper diligence ought to have known, he is not guilty, he is not obliged to interfere or protest against the arrest. The rule, however, is different where the carrier's servants know, or by the exercise of proper diligence ought to know, that the arrest of the passenger is unlawful, as was the case in *Anania v. Norfolk & W. R. Co. supra*.

In *Bowden v. Atlantic Coast Line R. Co.* 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, it appears that plaintiff ran away with a sixteen-year-old girl for the purpose of marrying her. They were passengers on defendant's train. In response to a telegram from a brother of the girl to the chief of police of Jacksonville, North Carolina, notifying him that the parties had eloped, the moment the train arrived at Jacksonville he boarded the train to make the arrest. Apprehending his arrest, plaintiff, without the knowledge of the conductor, took refuge in the water-closet and bolted the door on the inside. The officer demanded the key of the conductor, and he instructed the porter

to deliver it to the officer. Finding he could not open the door with the key, the officer presented his pistol through the window of the closet, and compelled plaintiff to unbolt the door and surrender. He then took the couple from the train. The court held the carrier not liable and in its opinion says that plaintiff having concealed himself in the closet without the knowledge of the conductor, the fact that the conductor surrendered the key is no evidence of a purpose to aid and abet the officer, nor is the fact that the train remained at the station a few minutes longer than usual any evidence of the conductor's intent to aid the officer in making the arrest. Says the court: "The most that can be said is that the conductor did not resist the officers in executing their purpose to arrest plaintiff. It is not the duty of a conductor to resist a known officer of the law in making an arrest."

In this case the brakeman's advice to plaintiff to "go ahead off," if he said it, which the brakemen all deny, and plaintiff was not able to identify the person who, he says, told him, is not evidence of any intent to aid the officers. According to plaintiff's testimony, the request was made simply to avoid further trouble. There is no evidence whether or not defendant's servants knew that plaintiff's suit case was properly labeled as containing whisky, or that they knew why the officers ejected him from the car. Knowing that they were officers, the defendant's agents were under no duty to inquire into the legality of their acts. The following authorities are in point, and support the principles announced in this opinion: 4 R. C. L. 1194; 10 C. J. 908; *Nashville, C. & St. L. R. Co. v. Crosby*, 183 Ala. 237, 62 So. 889; *Louisville & N. R. Co. v. Byrley*, 152 Ky. 35, 158 S. W. 36, Ann. Cas. 1915B, 240; *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254, and *Thompkins v. Missouri, K. & T. R. Co.* 52 L.R.A.

(N.S.) 791, 128 C. C. A. 1, 211 Fed. 391.

Counsel for plaintiff insist that I. W. Clark, although appointed by the governor of the state, was a special agent of the railway company, and assisted the officers in ejecting plaintiff and other passengers from the train. Said Clark was not acting as agent of the railway company on this occasion. He swears he was deputized by Mr. Keadle and Mr. Slater, the prohibition officers, to assist them, and his testimony is

Master and  
servant—special  
agent of rail-  
road company—  
liability for act.

not denied. He was acting outside of his duty to the railway company and as a deputized officer, and his assistance in expelling plaintiff constitutes no ground of liability on defendant.

The justice's warrant, under which the prohibition officers acted in searching the car, was introduced

and read as evidence over the objection of plaintiff.

This was error. Search—of train  
—warrant by  
justice of peace  
—validity.  
The law does not authorize a justice

of the peace to issue his warrant commanding search to be made of the coaches of a passenger train in transit, to ascertain if liquor is being carried therein in violation of the law. A passenger train in transit is not one of the places mentioned, or contemplated by § 9, chapter 32A, Barnes's Code 1918 (Code 1913, chap. 32A, § 9 [§ 1288]) of which search may be made under the provisions of that section.

Under the state of evidence appearing from the record, defendant's peremptory instruction should have been given, and the court was justified in setting aside the verdict and ordering a new trial, and we therefore affirm the judgment and remand the cause for a new trial.

## ANNOTATION.

### Power to issue warrant for search of train.

As to constitutional guaranties against unreasonable searches and seizures as applied to search for, or seizure of, intoxicating liquor, see annotation to *People v. Marxhausen*, 3 A.L.R. 1514.

By the 4th Amendment to the Federal Constitution it is provided that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

A similar provision is contained in the Constitutions of the several states limiting the power of state officers with respect to the writ.

The power to issue warrants for the search of trains depends, of course, upon the particular phraseology of these provisions.

It will be observed that in the reported case (*CLARK v. NORFOLK & W. R. Co.* ante, 117) it was decided that a justice of the peace was not authorized to issue a warrant commanding search to be made of the coaches of a passenger train in transit to ascertain if liquor was being carried in violation of law, the court holding that a passenger train was not one of the places contemplated by the West Virginia statute, of which search might be made.

Generally, for the application of constitutional guaranties against unreasonable searches and seizures to search for or seizure of intoxicating liquor, see annotation in 3 A.L.R. 1514.

This appears to be the only case in which, as yet, there has been occasion to consider this question. It is, therefore, of particular value, especially in view of the national Prohibition Amendment.

J. T. W.

## CITY OF BLOOMFIELD, Appt.,

v.

JAMES A. ALLEN.

*Kentucky Court of Appeals — December 15, 1911.*

(146 Ky. 34, 141 S. W. 400.)

**Dedication — right of way — permissive use.**

1. Dedication of a right of way for a footpath along the edge of a lot abutting on a railroad right of way is effected, where it lies between the turnpike and the depot, by the owner's consent to a neighbor's building a sidewalk upon it, followed by use by the public in going to and from the depot for more than twenty-five years, while individuals have bought lots access to which is secured by such way upon the faith of its being public, and the owner has complied with the direction of the town to reconstruct the sidewalk.

[See note on this question beginning on page 125.]

—acceptance — sufficiency.

2. Acceptance of a dedication of a footpath between a turnpike and a depot is shown by its use by the pub-

lic for more than fifteen years, and the town's requiring the construction of a sidewalk thereon.

[See 8 R. C. L. 900.]

APPEAL by defendant from a judgment of the Circuit Court for Nelson County in plaintiff's favor in an action brought to restrain defendant and its officers from building a sidewalk in front of plaintiff's property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morgan Yewell, C. F. Atkinson, and John A. Fulton, for appellant:

The evidence shows both a dedication of the footpath and the acceptance of the same by the public use.

West Covington v. Ludlow, 12 Ky. L. Rep. 785, 15 S. W. 353; Dover v. Fox, 9 B. Mon. 200; 24 Am. & Eng. Enc. Law, 7, 9; Marion v. Skillman, 127 Ind. 130, 11 L.R.A. 55, 26 N. E. 676; Hood v. Lebanon, 12 Ky. L. Rep. 813, 15 S. W. 516; Eastern Cemetery Co. v. Louisville, 13 Ky. L. Rep. 279, 15 S. W. 1117; Bidinger v. Bishop, 76 Ind. 244; Brown v. Stark, 83 Cal. 636, 24 Pac. 162; Columbus v. Dahn, 36 Ind. 330; Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228; Denver v. Clements, 3 Colo. 484; Barraclough v. Johnson, 8 Ad. & El. 105, 112 Eng. Reprint, 773, 3 Nev. & P. 233, 1 W. W. & H. 162, 7 L. J. Q. B. N. S. 172, 2 Jur. 839; Harding v. Jasper, 14 Cal. 642; 5 Am. & Eng. Enc. Law, 398; Riley v. Buchanan, 116 Ky. 629, 63 L.R.A. 642, 76 S. W. 527, 3 Ann. Cas. 788; Washb. Easements & Servitudes, 219; Kentucky C. R. Co. v. Paris, 95 Ky. 627, 27 S. W. 84; Bogard v.

O'Brien, 14 Ky. L. Rep. 648, 20 S. W. 1097; Ray v. Nally, 28 Ky. L. Rep. 421, 89 S. W. 486.

Messrs. N. W. Halstead, John D. Wickliffe, and Kelly & Cherry for appellee.

Clay, C., filed the following opinion:

The town of Bloomfield, a city of the sixth class, through its board of trustees, passed an ordinance directing the building of a sidewalk, according to certain specifications therein named, in front of the property of James A. Allen and others. Instead of complying with the ordinance, appellee, Allen, built a fence across the old sidewalk. Thereupon the town, by its board of trustees, directed that the town marshal remove the fence. This he did. The ordinance provided that, in case any property holder should fail to build the sidewalk as required by the ordinance, the town marshal should proceed to build the same.

Claiming that the ground upon

which the town was proceeding to build a sidewalk was his private property, appellee brought this action to restrain the town and its officers from proceeding in the matter. The town defended on the ground that the sidewalk had been dedicated to the public use, and the dedication accepted by the town. A temporary injunction was granted, and, upon final hearing, the injunction was made permanent. From that judgment the town of Bloomfield appeals.

It appears from the record that, in the year 1881, the Cumberland & Ohio Railroad completed a branch road to the town of Bloomfield. This branch road was afterwards acquired by the Louisville & Nashville Railroad Company, and is now owned and operated by it. The railroad tracks terminated with the Bloomfield and Fairfield turnpike. The depot is situated about 400 yards from this pike. The railroad company owns a right of way, 66 feet in width, extending from the depot to the pike. The western half of this right of way is used by the road for its tracks and switches. The eastern half is used by the public in going to and from the depot. While there was formerly another route to the depot, which passed over Simpson's creek, a majority of the public no longer use this route, because at certain times in the year it is impassable. The record shows that perhaps 90 per cent of the public travel is along the railroad right of way, extending from the Bloomfield and Fairfield turnpike.

Appellee owns two lots which abut on the right of way. One of these lots has a storehouse on it, and fronts on the pike. Next to this lot is the property of the colored Odd Fellows. Just south of the property of the colored Odd Fellows is the other lot owned by appellee. A portion of these lots and the other lots abutting on the right of way has been used by the traveling public, in going to and from the depot, for twenty-seven or twenty-eight years.

The evidence for appellee is to the

effect that he never dedicated that part of his own lot in controversy to the public use. On the contrary, he permitted a man by the name of Huston, who had bought a lot in that vicinity, to build along the lot in question a sidewalk composed of ties and cinders. In doing this, Huston asked his permission, and also stated to his vendee that he had made and used the sidewalk merely by the permission of appellee. Several former marshals and other officers of the town of Bloomfield testified that the town had never exercised any control over either that portion of the right of way used by the traveling public, or that portion of the abutting lots used by pedestrians; on the contrary, they did not claim any control over either.

The evidence for appellant is to the effect that, ever since the railroad opened up its right of way to the traveling public, and the other route to the depot was practically abandoned, the public, in large numbers, have used the sidewalk. This use has continued for more than twenty-five years. Prior to 1890, the Davis and Thomas lots originally extended across the railroad right of way, and the then owners built a fence near the east line of the right of way to inclose their lots. At that time the traveling public passed over the Allen lot at the south end, then over the Odd Fellows' lot, then over the vacant lot in controversy, along the east edge of the right of way to the Thomas lot; thence around the ends of the Thomas and Davis lots to the depot. When Huston bought the Davis lot, in 1890, he moved his west fence back the full width of the sidewalk. At that time the public was crossing the west end of the Davis lot; the fence being down at each side, leaving the sidewalk clear from the pike to the depot grounds. The sidewalk is now located as it existed over the lots of appellee and the colored Odd Fellows' lot for nearly thirty years, and over the lots of Huston (now Gore) and Davis (now Merrifield)

for over sixteen years. The two latter have not only dedicated the sidewalks in front of their lots, but have made gravel walks with substantial curbing. In the year 1906, the colored Odd Fellows' lodge built a brick pavement in front of their lot, in obedience to an ordinance of the town council. At the south end of appellee's store was a plank platform, about a foot high and 12 feet in width. There was a pump in this platform, and vehicles were set upon part of it. This platform was also used by the public. Afterwards a gravel walk was substituted for the platform. From this lot to the Huston lot, planks and stepping stones were used in muddy places, until Huston set his fence back and built his sidewalk. When the railroad was completed into Bloomfield, in the year 1881, there was not a house on the east side of the railroad right of way that fronted in the direction of the railroad. There was then but one dwelling house between the pike and the depot, and that house fronted on the east. Since that time there have been built four new residences, one large tobacco warehouse, and the colored lodge building, and the dwelling house then owned by Thomas has been changed so as to front towards the railroad right of way.

There was also evidence to the effect that, about the year 1907, the board of trustees of the town of Bloomfield enacted an ordinance, requiring the property owners abutting on the railroad right of way to construct brick pavements. In response to this ordinance, the colored Odd Fellows had built a brick pavement. Appellee declined to build a brick pavement, but went before the board of trustees and agreed to build a gravel pavement, because that was better suited to the heavy hauling which was necessary in his business. This fact is testified to by a former marshal and one of the board of trustees. Appellee denies that he built the gravel walk in pursuance of any ordinance of the town of Bloomfield, or of any agreement

with it, but claims that he built it merely for his own convenience.

For appellee, it is insisted that the judgment of the chancellor was proper, because whatever use the public made of the sidewalk in question was merely permissive, and the facts in the case do not show that, even if there was a dedication, it was ever accepted by the town of Bloomfield. While it is true that appellee permitted Huston to build the sidewalk, it is also true that the public from that time on, without let or hindrance, used the sidewalk which Huston had built, and even before that time they had made a like use of the ground where the sidewalk was built, although the sidewalk then existing was of a very unsubstantial kind. Upon the faith of the right to use the sidewalk in front of the lot in question, the others acquired property and made it front towards the railroad, and built sidewalks in front of their property. They used the sidewalk in question along with the traveling public. This use has continued for more than fifteen years since Huston built the sidewalk. Upon these facts, we think there was a sufficient dedication of the sidewalk in question to the public use.

Dedication—  
right of way—  
permissive use.

In the case of *Riley v. Buchanan*, 116 Ky. 625, 63 L.R.A. 642, 76 S. W. 527, 3 Ann. Cas. 788, this court, in a lengthy discussion of the question of dedication and acceptance of public highways, announced the rule that, where a passway has been used by the public continuously for more than fifteen years, without let or hindrance from the owners of the land over which it runs, both a dedication by the owner of the land and an acceptance by the proper legal authority of the passway as a public highway will be conclusively presumed to have taken place.

—acceptance—  
sufficiency.

In addition to the long-continued use of the public of the sidewalk in question, the weight of the evidence

is to the effect that the town of Bloomfield, about the year 1907, enacted an ordinance, directing the property owners along the passway in question to construct brick pavements. In response to this ordinance, appellee appeared before the board of trustees and agreed to construct a gravel sidewalk, which he subsequently did. By enacting the ordinance in question, the town assumed control over the sidewalk in

question as a public sidewalk, and appellee, by building the gravel sidewalk in response to the ordinance, plainly dedicated it to the public use. These acts upon the part of the town and of the appellee were, we think, sufficient to show a dedication and an acceptance.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

Petition for rehearing denied.

## ANNOTATION.

### Dedication of footway by permissive use.

This note does not include the question of dedication of footways along the sides of highways, and increasing their width.

It is common learning that there may be a public footway. *Thrower's Case* (1672) 1 Ventr. 208, 86 Eng. Reprint, 140; *Reg. v. Cluworth* (1704) 6 Mod. 163, 87 Eng. Reprint, 920; *Reg. v. Saintiff* (1704) 6 Mod. 255, 87 Eng. Reprint, 1002; *Rex v. Burgess* (1760) 2 Burr. 908, 97 Eng. Reprint, 627; *Poole v. Huskinson* (1843) 11 Mees. & W. 827, 162 Eng. Reprint, 1039, per Parke, B. (stating the rule); *Reg. v. Chorley* (1848) 12 Q. B. 515, 116 Eng. Reprint, 960, 12 Jur. 822 (admitted); *Mercer v. Woodgate* (1869) L. R. 5 Q. B. 26, 39 L. J. Mag. Cas. N. S. 21, 21 L. T. N. S. 458, 18 Week. Rep. 116, 12 Eng. Rul. Cas. 573; *Board of Works v. Maudslay* (1870) L. R. 5 Q. B. (Eng.) 397, 39 L. J. Q. B. N. S. 205, 23 L. T. N. S. 121, 18 Week. Rep. 948; *Arnold v. Holbrook* (1873) L. R. 8 Q. B. (Eng.) 96, 42 L. J. Q. B. N. S. 80, 28 L. T. N. S. 23, 21 Week. Rep. 330; *Atty. Gen. v. Biphosphated Guano Co.* (1878) L. R. 11 Ch. Div. (Eng.) 327, 49 L. J. Ch. N. S. 68, 40 L. T. N. S. 201, 27 Week. Rep. 621; *Powers v. Bathurst* (1880) 42 L. T. N. S. (Eng.) 123, 49 L. J. Ch. N. S. 294, 28 Week. Rep. 390; *Grand Junction Canal Co. v. Petty* (1888) L. R. 21 Q. B. Div. (Eng.) 273, 57 L. J. Q. B. N. S. 572, 59 L. T. N. S. 767, 36 Week. Rep. 795, 52 J. P. 692; *Sheringham Urban Dist. Council v. Holsey* (1904) 20 Times L. R. (Eng.) 402, 68

J. P. 394, 91 L. T. N. S. 225, 2 L. G. R. 744; *Atty. Gen. v. Chandos Land & Bldg. Soc.* (1910) 74 J. P. (Eng.) 401; *BLOOMFIELD v. ALLEN* (reported herewith) ante, 122; *Chadwick v. McCausland* (1860) 47 Me. 342; *Hemphill v. Boston* (1851) 8 Cush. (Mass.) 195, 54 Am. Dec. 749; *Tyler v. Sturdy* (1871) 108 Mass. 196; *Gould v. Boston* (1876) 120 Mass. 300.

In a case where the evidence is not reported, the court said: "The evidence introduced at the trial was ample to prove a public footway by dedication across the plaintiff's close." *Tyler v. Sturdy* (1871) 108 Mass. 196, *supra*.

But in *Boyden v. Achenbach* (1878) 79 N. C. 539, it was said: "In our new country the 'highways' alone were of much public importance. . . . We have no other kinds of public roads in this state. The 'footpaths' and 'neighborhood roads' have never had that importance. They are understood to be used by leave, and they are closed when the owners of the lands desire to put them under cultivation or to inclose them. Their use cannot be claimed by prescription, and a grant will not be presumed from any length of user under such circumstances," stating further that the mere user of footpaths and neighborhood roads without the same being worked and kept in order by the public "will raise no such presumption, however long the time."

In *Baker v. Barry* (1901) 22 R. I. 471, 48 Atl. 795, the court said and

held: "Public Laws, chap. 976, passed April 12, 1872, provided that no footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time. Since that time, therefore, no right could be acquired by prescription."

It may be noted in this connection that the right to use a place as one of recreation is superior to the right to use it as a mere right of footway. Thus, in *Abercromby v. Fermoy Town Comrs.* [1900] 1 Ir. R. 302, Holmes, L. J., said: "I am satisfied that the Barnane walk was not used even by the inhabitants of Fermoy for the sake of reaching any definite point or place. The townspeople assembled on it as a place of recreation—to walk, to saunter, to lounge, to chat, to meet their friend. Dedication of a public right of way cannot, I think, be inferred from user of this kind; but our law has always recognized that the people of a district—a town, a parish, or a hamlet—are capable of acquiring by dedication or custom, certain rights over land which cannot be gained by the general public," the court pointing out that the rights aforesaid were more than a mere right of way.

User is evidence from which dedication of a footway may be inferred. *Openshaw v. Pickering* (1912) 77 J. P. (Eng.) 27, 11 L. G. R. 142.

In *Webb v. Baldwin* (1911) 75 J. P. (Eng.) 564, Parker, J., said: "Dedication may be established by proof of definite acts of dedication on the part of the owners, or it may be inferred from use and enjoyment on the part of the public. But the use and enjoyment from which it can be inferred must be use and enjoyment as of right, known to the owner and acquiesced in by him. Again, this knowledge and recognition on the part of the owner may itself be inferred from the fact that the use and enjoyment have been so open and so notorious as of right as to give rise to the presumption that the owner must have been aware of it and has acquiesced in it, or during living memory the use and enjoyment has been such that had there been an absolute owner capable

of dedicating the way, dedication would have been inferred; and if, at the same time, the circumstances are consistent with such use and enjoyment having been still more ancient, the jury might, I think, properly infer dedication by some owner before living memory."

The dedication of a footway will not be inferred where it is founded on permissive use by the public of open land, where they roam in all directions. Thus, that people have been permitted to go where they liked in an ancient forest does not show a right to a footway. *Schwinge v. Dowell* (1862) 2 Fost. & F. (Eng.) 845.

In *Behrens v. Richards* [1905] 2 Ch. (Eng.) 614, the court said: "To those who are conversant with the Cornish coast or with many other parts of the coast in this country, it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. . . . In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him, and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred."

Where there was an interesting old ruin, the court reviewed the case as follows: "First, people from time to time went to the Roundabout as a place of interest, or to admire the view, or to play games, or to sit with their sweethearts, or to pick sticks. They did not go as of right for those purposes; they were allowed to go because it would have been churlish to stop them so long as no damage was done. They could only go or return along the line of the alleged right of way. Secondly, people began to use the two possible approaches to the Roundabout as a thoroughfare when walking to and from Booker from and to High Wycombe. They did so because it was a pleasant and convenient way and no one objected. Thirdly, a certain number of people who so used

these two approaches arrived at the bona fide belief that there was a right of way and used the way in such belief. I am of opinion, however, that this user has never been so extensive or so notorious as to give rise to the inference that anyone interested in the High Wycombe estate, and capable of dedicating a right of way across it, must have known of or acquiesced in it." *Webb v. Baldwin* (Eng.) *supra*.

It was held that there was no dedication where the public had been allowed for seventy years to cross on foot at will unoccupied land, and for ten years thereafter to cross on foot the same land by means of a laid-out road repaired by the owner. *Folkestone Corp. v. Brockman* [1914] A. C. (Eng.) 338, 83 L. J. K. B. N. S. 745, 110 L. T. N. S. 834, 78 J. P. 273, 30 Times L. R. 297, 12 L. G. R. 384, Ann. Cas. 1914D, 320.

And where a deed of premises reserved an alley in the rear, and the public, after using divers footpaths in the rear of the premises for a number of years, was confined to the alley because of fences, and for some ten years used the alley as a footway, it was held that there was no acquisition of right by the public, that the reservation was for the convenience of the grantee, and that the use by the public had been merely permissive. *Ferdinando v. Scranton* (1899) 190 Pa. 321, 42 Atl. 692.

In *Sutor v. International & G. N. R. Co.* (1910) 59 Tex. Civ. App. 73, 125 S. W. 948, the court considered the passage by pedestrians for a number of years across part of a city lot as merely a permissive use, and nothing more than "cutting across lots." The court said: "It is a use frequently made of vacant lots in cities, where pedestrians going to and from certain points for a matter of convenience will cross the lots without following the streets or sidewalks, and such use could hardly be regarded by the owner as adverse to his rights, unless connected with some other facts indicating that the purpose was to create or establish a way for the benefit or convenience of the public."

It was held in *McNeil v. Boston*

(1901) 178 Mass. 326, 59 N. E. 810, that the use by the public of a stairway in a city building leading to a polling place was merely permissive, and that the stairway was not a highway or townway within the Massachusetts statute.

Where a strip of land, part of property granted to a city for a market, and bordering thereon, had been used for over twenty years as a sidewalk, it was held that that was no evidence that it had been dedicated by the city as a highway, as the city had no such power. *Hamilton v. Morrison* (1868) 18 U. C. C. P. 228.

In *Harper v. Charlesworth* (1825) 4 Barn. & C. 575, 107 Eng. Reprint, 1174, 6 Dowl. & R. 572, 3 L. J. K. B. 265, 28 Revised Rep. 405, where a public footway over Crown land was extinguished by an inclosure act, it was held by Bayley, J., that a dedication was not shown by public use of the footway for twenty years after the inclosure, the land being for the past eight years in possession of the Crown's tenant, and that there was nothing to show consent of the Crown or even of the tenant. The other judges who concurred held that there was no dedication, without expressing their reasons on that question at length.

Coming to cases holding that the footway in question was public, it will be seen that it is held in the reported case (*BLOOMFIELD v. ALLEN*, ante, 122) that dedication was effected where the building of a walk was permitted, followed by use thereof by the public for twenty-five years, together with the purchase of lots thereon in the faith of the walk being a public way.

Long user was held to be strong evidence of a dedication of a footway over copyhold land, both as to the lord and the copyholder, in *Powers v. Bathurst* (1880) 42 L. T. N. S. (Eng.) 123, 49 L. J. Ch. N. S. 294, 28 Week. Rep. 390.

In *Atty. Gen. v. Chandos Land & Bldg. Soc.* (1910) 74 J. P. (Eng.) 401, it was held that an inference of dedication was created where courts which were cul-de-sacs were used by the pub-



lic as public footways for twenty-four years, and were paved, lighted, and cleaned by the public.

There may be a dedication by a canal company of the use of their towing path by the public as a foot-path, shown by such use for a long period of time. *Grand Junction Canal Co. v. Petty* (1888) L. R. 21 Q. B. Div. (Eng.) 273, 57 L. J. Q. B. N. S. 572, 59 L. T. N. S. 767, 36 Week. Rep. 795, 52 J. P. 692.

That a way used by the public passes in part along a sea wall does not interfere with a finding of dedication by evidence of user. *Board of Works v. Maudslay* (1870) L. R. 5 Q. B. (Eng.) 397, 39 L. J. Q. B. N. S. 205, 23 L. T. N. S. 121, 18 Week. Rep. 948.

In *Kentucky C. R. Co. v. Paris* (1894) 95 Ky. 627, 27 S. W. 84, a railway company built a bridge across a creek dividing a city, and made a footway under and attached to the bridge, which footway and other better footways substituted for it were used by the public for thirty-five years, and the city lighted these footways, and caused the railroad company to repair and aid in constructing the approaches. After this time the railway company tore down the old bridge and built a new bridge without a footway. It was held that the company must restore the footway, the court observing that this would not have been required if the old bridge had fallen or had been necessarily removed by decay, and observing that the use was not merely permissive, as the owners did not need the footway.

Where there is a public footway, and adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has devoted to traffic in fact. *Atty. Gen. v. Esher Linoleum Co.* [1901] 2 Ch. (Eng.) 647, 70 L. J. Ch. N. S. 808, 50 Week. Rep. 22, 85 L. T. N. S. 414, 66 J. P. 71.

In this connection it may be noted

that in *Gould v. Boston* (1876) 120 Mass. 300, where an ancient footway lying between lands of an individual and a city was widened on each side by an agreement between the parties declaring that the whole space should be used by the parties and their assigns in common as a passageway for foot passengers, it was held that the agreement did not alter the character of the way.

The failure of occupants of property included in a town-site entry and their grantees to object to the designation, on the map filed by the trustee, of a strip along their water front as a public sidewalk, or to the use of the strip so designated, and the acceptance of deeds bounded on the sidewalk, is sufficient to effect a dedication of the strip to public use so as to cut off the riparian rights of the occupants in the water beyond the strip. *McCloskey v. Pacific Coast Co.* (1909) 22 L.R.A. (N.S.) 673, 87 C. C. A. 568, 160 Fed. 794.

It may be noted that in *Oliver v. Worcester* (1869) 102 Mass. 489, 3 Am. Rep. 485, it was held that a city was not responsible for an accident on a path crossing a city common, viz., along a pavement by the city hall, the statute providing that "no way opened and dedicated to the public use, which has not become a public way, shall be chargeable to a city or town as a highway or town way, unless the same is laid out and established by such city or town in the manner prescribed by the statutes of the commonwealth." The court said: "The whole common is in one sense dedicated to the public use, as a place of public resort and recreation, over any part of which persons may pass freely, unless restricted for some public and sufficient reason. But in marking out suitable parts of it for convenient passing on foot, or even in preparing paths with gravel or pavements, we can see no evidence of intention on the part of the city or its officers to make any new dedication of such paths to a new and distinct public use; nor any reason which the public would have to suppose that they were highways or town ways." B. B. B.

CITY OF PIQUA  
v.  
ANNA S. MORRIS et al.

Ohio Supreme Court — April 2, 1918.

(98 Ohio St. 42, 120 N. E. 300.)

**Appeal — instructions — want of definition.**

1. Where, from a consideration of the whole charge of the court, it is seen that the jury has been given a comprehensive and intelligent instruction concerning the issues and the application of technical terms used, the fact that a particular term is also used in a special charge, or in other parts of the general charge, without such explanation, should not be held to be erroneous.

[See note on this question beginning on page 135.]

**Proximate cause — definition.**

2. The "proximate cause" of a result is that which in a natural and continued sequence, contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury does not relieve him from liability, unless it is shown such other cause would have produced the injury independently of defendant's negligence.

[See 22 R. C. L. 110.]

**Water — storage — injury — liability.**

3. In the construction and maintenance of a hydraulic, or similar work, a municipality or other owner is required to use ordinary skill and foresight to prevent injury to others in times of floods to be reasonably anti-

pated; and if injury is caused by the negligence of such owner, he is liable in damages, provided his negligence is one of the proximate causes of the injury, although it concurred with other causes, including the act of God.

[See 22 R. C. L. 131.]

**— act of God.**

4. In order to fix liability on an owner in such case, it must be shown that his negligence concurred with the act of God in causing the injury; but if the act of God, such as an extraordinary flood, was so overwhelming and destructive as to produce the injury, whether the defendant had been negligent or not, his negligence cannot be held to be the proximate cause of the injury.

[See 22 R. C. L. 132.]

**Headnotes by the COURT.**

CERTIFICATION by the Court of Appeals for Miami County for the determination by the Supreme Court of a question arising upon the reversal of a judgment of the Court of Common Pleas in defendant's favor, in an action brought to recover damages for injuries to plaintiffs' farm, alleged to have been caused by defendant's negligence. *Reversed.*

**Statement by Johnson, J.:**

The defendants in error brought a suit in the common pleas of Miami county against the city of Piqua to recover damages for its negligence in flooding and injuring their farm by washing away soil and gravel and destroying a roadway, gates, and fences, by the breaking of a bank of an hydraulic opposite the farm, and from the rush of a large

volume of water down and over it. The petition alleges that the city owns what is known as "Piqua Hydraulic," which affords water for its waterworks system within the boundary of the city; that in order to maintain at all times a sufficient supply of water the hydraulic has a series of ponds of many acres in area in which to collect surplus waters, and that one of them, known as

"Swift Run pond," lies adjacent to the plaintiffs' lands and buildings thereon, with an embankment about 30 feet high on the west thereof; that in order to take off the surplus water that accumulates or might accumulate in said Swift Run pond, in times of heavy rains and high waters, there was constructed on the east bank of said pond a spillway containing sixteen openings, 30 inches square, each provided with a gate or wicket; that said openings were of sufficient width and size to carry off through the same at all times all the surplus water that might accumulate in said pond, and to keep and confine the water therein and prevent any overflow; that about five years ago the defendant rebuilt the timber part of the spillway, and neglected to provide wickets for four of said openings; that prior to and on the 25th of March, 1913, defendant had negligently and carelessly permitted all of the remaining twelve openings, and the gates or wickets, to become and remain out of repair; that by reason thereof they would not permit more than one half of the amount of water to pass through as if in proper condition, and that on said day all of said twelve gates were permitted to remain closed, and the water was negligently caused and permitted to rise above the normal stage; that on that day a heavy rain fell, which flooded the pond, so that it overflowed its banks; that the water flowed to and passed over and on the plaintiffs' premises, which were east of and adjoining the embankment, and lower, and injured them by washing away about 6 acres of dirt and gravel to a depth of 5 to 10 feet, and doing the damages above stated; and that the embankment had become weakened because of negligence of the defendant. The plaintiffs further alleged that if the defendant had cut a trench in said embankment at the county line, instead of where it was cut, the damage would not have been caused to the plaintiffs.

In its answer the city denied all

the allegations of negligence contained in the petition, denied that the spillway contained sixteen openings, but averred that it contained twelve gates or wickets. For a second defense, the city stated that on March 25, 1913, and prior thereto, there occurred all over the state of Ohio, including Miami county, a heavy and extraordinary rainfall, in excess of and beyond anything occurring in said city and state within the memory of the oldest inhabitant of said city; that the water in the hydraulic, and in all the streams and ponds contributing to its water, rose rapidly to a height theretofore unknown, and flooded all adjacent lands and streams contributing to said hydraulic and pond, and assumed the proportions of an immense and violent flood, breaking away dams and bridges over streams, including defendant's hydraulic and pond, and all streams and rivers contributing to its water supply, causing a great and unprecedented destruction to life and property; that the defendant exercised every caution at its command to protect the property of the plaintiffs and the other inhabitants of Piqua; that in the exercise of due diligence and extraordinary care it was unable to prevent the embankment of the hydraulic canal and run from breaking away; and that it was not possible to cut a trench in the embankment at the county line, nor could it have protected plaintiffs' property by cutting the bank 500 feet north of the point at which it broke through; and it alleged that the damages, if any, were occasioned by an act of God.

The reply denies that the damages were occasioned by the act of God, and reiterates the allegations of the petition that the negligence of the city directly and substantially contributed thereto.

A jury in the common pleas court returned a verdict for the defendant, and the judgment entered on this verdict was, on proceedings in error, reversed by the court of appeals for errors in the charge of the

court. In its entry the court of appeals certified that it found that the judgment upon which it had agreed in the case was in conflict with the judgment pronounced upon the same question by the court of appeals of Hamilton county in the case of Standard Extract Company v. H. Belmer Company. It therefore certified the record of the case to this court for review and determination.

Messrs. Lindsey & Berry, for defendant:

Damages, if any, were occasioned by an act of God, and defendant is not liable.

Pittsburgh, C. & St. L. R. Co. v. Staley, 41 Ohio St. 118, 52 Am. Rep. 74; Loeser v. Humphrey, 41 Ohio St. 378, 52 Am. Rep. 86, 12 Am. Neg. Cas. 487; 2 Greenl. Ev. § 219; Sharp v. Cincinnati, 4 Ohio C. C. N. S. 19; Covington Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558, 12 Am. Neg. Cas. 461; Adams v. Young, 44 Ohio St. 80, 58 Am. Rep. 789, 4 N. E. 599; Fent v. Toledo, P. & W. R. Co. 59 Ill. 349, 14 Am. Rep. 13; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; Houston & G. N. R. Co. v. Parker, 50 Tex. 330; Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401; Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. 374, 11 Am. Neg. Rep. 179; Todd v. Cochell, 17 Cal. 97, 10 Mor. Min. Rep. 655; Mulrone v. Marshall, 35 Mont. 238, 88 Pac. 797; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 70, 42 Am. Rep. 529; Taylor v. Canton Twp. 30 Pa. Super. Ct. 305; Siegfried v. South Bethlehem, 27 Pa. Super. Ct. 456; Miller v. Northern P. R. Co. 24 Idaho, 567, 48 L.R.A. (N.S.) 700, 135 Pac. 845, Ann. Cas. 1915C, 1214; Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 448; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Welty v. Vulgamore, 1 Ohio C. C. N. S. 553.

Messrs. D. B. Van Pelt and A. W. De Weese for plaintiffs.

Johnson, J., delivered the opinion of the court:

The verdict of the jury was general,—all of the issues made by the pleadings were resolved in favor of the defendant. This finding, of course, embraced the issue tendered in the second defense—that, in the exercise of due diligence and ex-

traordinary care, the defendant was unable to prevent the embankment of the hydraulic and "Swift Run" pond from breaking away; that it was not possible to cut a trench in the embankment at the county line, nor could defendant have protected plaintiffs' property by cutting the bank 500 feet north of the point at which it broke; and that the damages to plaintiffs, if any, were occasioned by an act of God, without any fault or neglect of defendant, its officers or servants.

The downfall of water in March, 1913, has passed into the history of the state as its most extraordinary and disastrous flood. The damage and suffering it caused throughout this and adjoining states is a matter of general knowledge. It was so widespread and so devastating that the legislature, less than a month after the flood, passed what is generally known as the "Flood Emergency Act," 103 Ohio Laws, 760, to authorize the duly constituted authorities of the different subdivisions of the state to borrow and expend money for the purpose of the repair, reconstruction, and replacement of public property and ways injured; and this was done as a necessity for the public health, safety, and convenience. The validity of this legislation was upheld in the following June in *Assur v. Cincinnati*, 88 Ohio St. 181, 102 N. E. 702, in which case the wholly unusual and unprecedented character of the flood was recognized and stated to be a matter of general knowledge.

The court of appeals, in reversing the judgment of the common pleas in the case at bar, held that there was error in the giving of defendant's charges Nos. 1, 2, and 6, hereinafter set forth, which were given before argument to the jury, and in employing in charges Nos. 2 and 6 "the terms 'intervenes,' 'proximate,' and 'proximately,' being terms of technical significance, without explanation as to their application as to the evidence and the facts," and in ignoring in charge 6 the possibil-

ity of contributing causes. It also found error in the general charge. Before the giving of the charges requested by defendant, the court had given a number of special charges requested by the plaintiffs, the first of which is as follows: "The term 'act of God,' in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning, and unprecedented floods. It is such a disaster, arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such a natural cause, without human intervention. It must proceed from the violence of nature or the force of the elements alone, and with which the agency of man had nothing to do. If the injury is caused by the agency of man, co-operating with the violence of nature or the force of the elements, it is not the 'act of God.' If there be the action of such a natural cause or force, yet if the resulting injury is directly contributed to by the hand of man, it is not in law the 'act of God.' If the injury is in part occasioned by the wrongful act or the negligent act of any person concurring therein and contributing thereto, such person will be liable therefor, and this applies to a municipal corporation as well as to a natural person."

In addition to the above, the court had also given, at the request of the plaintiffs, five other special charges, in which the nature of the reservoirs involved in the case and their character as dangerous agencies in case of overflow or bursting of embankments are described. The duty of the city in such circumstances, and its liability for damages occurring by reason of failure to perform the duty, or for its negligent performance, are also specifically and fully stated and explained. Plaintiffs' charge No. 1, as above set out, is a correct and comprehensive statement of the law on the subject. The propositions it contains have substantially been ap-

proved by the authorities. 1 C. J. 1172.

It is equally well settled that, if the vis major is so unusual and overwhelming as to do the damage by its own power, without reference <sup>Water-act of God.</sup> to and independently of any negligence by defendant, there is no liability. In 1 Shearman & Redfield on Negligence, 6th ed. § 39, it is said: "It is also agreed that, if the negligence of the defendant concurs with the other cause of the injury in point of time and place, <sup>-storage-injury-liability.</sup> or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated, or been bound to anticipate, the interference of the superior force which, concurring with his own negligence, produced the damage. But if the superior force <sup>Proximate cause-definition.</sup> would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury."

In Central Trust Co. v. Wabash, St. L. & P. R. Co. (C. C.) 57 Fed. 441, 448, the general rule as to the duty of the owners of dams and embankments to use care and skill in their construction and maintenance, so as to not injure others in times of usual, ordinary, and expected floods, is stated, and it is there said: "But his liability extends no further, and he is not held responsible for inevitable accidents, nor for injuries occasioned by extraordinary floods, which could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill."

These general principles are also declared in Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 70, 42 Am. Rep. 529, and Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429. They are in

keeping with the clear and plain dictates of justice. They hold a property owner to the performance of every proper duty to his neighbor, but they do not offend conscience by requiring the impossible.

It will be observed that the issues presented by the pleadings in the case we have here were evidently made in view of this state of the law. In substance, the charges of negligence against the city are that it failed to provide adequate outlets for the outflow of water in times of heavy rains, that it failed to keep existing outlets open, as it should have done under the circumstances, which involved probable danger, and that it unnecessarily cut the bank at or near plaintiffs' premises, and thereby permitted the water to rush over plaintiffs' land. The answer of the city denies all allegations of negligence and fault on its part, and in evident recognition of its duty in connection with the reservoir and banks contains the allegations above referred to, which, if true, relieved the city of any liability in the case, under the principles of law above stated.

Considerable testimony was adduced by the parties touching the issues thus made, and the contest from the first has been waged chiefly concerning the facts. The court of appeals, in the performance of its duty to consider the weight of the evidence, did not find that the verdict in favor of defendant was not sustained by sufficient evidence. The special charges given by the trial court and held to be erroneous by the court of appeals are as follows:

"(1) Defendant before argument requests the court to charge the jury that if they believe from the testimony that an unprecedented rainfall and flood, which could not have been reasonably anticipated by an ordinarily cautious person, was the efficient cause, the one cause that necessarily set in operation said causes contributing to plaintiffs' injury, that plaintiff cannot recover.

"(2) Where an act of God intervenes between the wrongful conduct of the defendant and the injury complained of, this will relieve the defendant from liability, if the act of God appears to be the proximate cause of the loss or injury."

"(6) Where the injury was proximately caused by the act of God, the law does not concern itself with duties, the observance or breach of which had nothing to do with the damage."

With reference to the use of the words "proximate" and "proximately," the court in its general charge, after fully and clearly stating the issues made by the pleadings, and defining the term "act of God" substantially as it had been defined in the charge given at the request of plaintiffs before argument, explained to the jury the nature of instances in which acts of negligence of the nature of those alleged to have occurred in this case would or would not be the proximate cause of injury, and charged that the burden of sustaining its defense that the "act of God" was the direct and proximate cause of the injury rested on the defendant.

Where, from a view of the whole charge, it is seen that the jury has been given a comprehensive and intelligent instruction

concerning the issues and the meaning of technical

Appeal—  
instructions—  
want of  
definition.

terms used, the fact that a particular legal or technical word is also used in a portion of a special charge, or in the general charge, without such explanation or definition, should not be held to be erroneous. Now in this case we think it clear that the only possible meaning which the jury could have given to charge No. 1 was that if they found an unprecedented rainfall and flood, which could not have been reasonably anticipated, was the sole cause of plaintiffs' injury, plaintiffs could not recover. As to Nos. 2 and 6, when considered by the jury in the light of the general charge, we cannot conceive that they could fail

to understand fully the meaning of the terms "proximate" and "proximately," which were used in those charges, or that any prejudice could have resulted to the plaintiffs therefrom. Each case must be determined by its peculiar facts, and the question as to what was the proximate cause of injury in a case such as this is one of fact for the determination of the jury. *Adams v. Young*, 44 Ohio St. 80, 58 Am. Rep. 789, 4 N. E. 599.

The court of appeals also held that the court erred in the following portion of its general charge, namely: "It is not material for you to determine whether defendant could have prevented the break in the bank at the place where it occurred after its dangerous situation was discovered. There is no charge in the petition that the city could have prevented the same from breaking after its dangerous situation was discovered, and you may omit, therefore, that as a factor in determining the question of negligence."

Immediately following this portion of the general charge is the following: "On the other hand, if the city officials did cut the bank, and as a result thereof the water flowed upon plaintiffs' lands which otherwise would not have gone there, it would be no defense that the cut was made to save lives or property, or for any other reason, because the answer does not attempt to justify the cutting of the bank, or give an excuse for doing so,—simply denies that the city cut the bank."

The court proceeded to state that, if the jury found that the city cut the bank, the city was bound to use ordinary care to preserve the property of others in releasing the waters, and, if it was possible by the use of ordinary care to have cut the bank at either of the other places, and thus to have saved the plaintiffs' property, it was its duty to have done so, and, further, that if the jury should find that the bank

was cut by the defendant's agents, "and by the authority of the city, as I have heretofore defined it to you, then you must determine whether the bank, if left alone and not cut, would have gone out, and, if it had gone out, whether the result would have been the same."

From a careful consideration of this record, in connection with the general knowledge concerning this extraordinary flood, we think that the jury were convinced that the flood itself was the *sole* cause of the injury complained of, and that it could not have been prevented by the doing of any of the things suggested.

An apt illustration which has been suggested is that if a river levee had been maintained at the height of 10 feet, and the custodians of the levee had been warned that flood waters might require a levee 16 feet in height, and they neglected to so increase the height of the levee, and an unprecedented flood should ensue, during which it should appear that a levee 26 feet in height would not have held the flood waters, the parties responsible for the levee would not be liable for negligence in failing to maintain a 16-foot levee, when a 26-foot levee would have been unavailing. The answer in this case in effect tendered the clear issue that the damages to the plaintiffs' property were caused solely by the "act of God." We think the finding of the jury amply justified by the record.

We have not been able to see that the supposed infirmities in the charge of the trial court, which have been pointed out by the learned Court of Appeals and by counsel, could have been prejudicial to the rights of the plaintiffs in error, and the judgment of the Court of Appeals will be reversed, and that of the Common Pleas will be affirmed.

Judgment reversed.

Newman, Jones, Matthias, and Donahue, JJ., concur.

## ANNOTATION.

**Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed.**

This note is confined strictly to a discussion of the comparatively few cases wherein an instruction has been complained of because, having defined a technical or legal word or phrase, the court thereafter used that term without definition. The cases involving the refusal of a specific request for the definition of a term which was defined in the general charge are excluded.

It is uniformly held that where the jury has been once informed as to the meaning of a legal or technical word or phrase, it is not necessary to repeat the definition or explanation in the same or other instructions. Where a term has been once intelligently and comprehensively defined, repetition is not only unnecessary, but undesirable, since it unduly impresses the jury with the idea of the importance of the point of law with which the word is connected. *Castner v. People* (1919) — *Colo.* —, 184 *Pac.* 387; *Hinton v. Muhleman* (1916) 201 *Ill. App.* 177; *Sells v. Grand Trunk Western R. Co.* (1918) 206 *Ill. App.* 45; *Louisville & N. R. Co. v. Logsdon* (1903) 114 *Ky.* 746, 71 *S. W.* 905; *W. M. Ritter Lumber Co. v. Jordan* (1910) 138 *Ky.* 522, 128 *S. W.* 596; *State v. Renfrow* (1892) 111 *Mo.* 589, 20 *S. W.* 299; *State v. Dibley* (1912) 242 *Mo.* 461, 147 *S. W.* 111; *Holt v. State* (1907) 51 *Tex. Crim. Rep.* 15, 100 *S. W.* 156; *Wheeler v. State* (1909) 56 *Tex. Crim. Rep.* 547, 121 *S. W.* 166; *Haynes v. State* (1913) 71 *Tex. Crim. Rep.* 31, 159 *S. W.* 1059; *Glover v. Houston Belt & Terminal R. Co.* (1914) — *Tex. Civ. App.* —, 163 *S. W.* 1063. And see the reported case (*PIQUA v. MORRIS*, ante, 129).

In *Hinton v. Muhleman* (1916) 201 *Ill. App.* 177, the court, in instructing the jury as to the measure of damages in an action for assault and battery, did not define the term "unlawful assault." It was held that since the term had been previously defined, repetition was not necessary.

In *Sells v. Grand Trunk Western R. Co.* (1918) 206 *Ill. App.* 45, it appeared that the plaintiff was injured while in the employ of the defendant, and brought his action under the provisions of the Federal Safety Appliance Act. The court said as to the charge: "Objection is made to it on the ground that it does not define the term 'contributory negligence,' but it appears that this term is fully defined in another instruction. It is not necessary, of course, to repeat such a definition in each instruction."

In *Louisville & N. R. Co. v. Logsdon* (1903) 114 *Ky.* 746, 71 *S. W.* 905, the court instructed the jury that the word "negligence" meant the failure to use ordinary care, and later in the paragraph charged that if the jury believed that the defendants "negligently" pushed a car into the one on which plaintiff was working, they should find a verdict for the plaintiff. The defendants criticized the instruction because the word "negligently" was not defined. The court, in holding that it was not necessary to repeat the definition, said: "The court defined the word 'negligence' as meaning the failure to use ordinary care, and with this definition we see no objection to the use of the word 'negligently' in this instruction."

In *W. M. Ritter Lumber Co. v. Jordan* (1910) 138 *Ky.* 522, 128 *S. W.* 596, it appeared that the plaintiff had been injured while in the employ of the defendant. The court charged the jury that if the plaintiff was injured through the negligence of the defendant, they should find for the plaintiff. In a later instruction the word "negligence" was defined. Defendant insisted that the first part of the charge did not restrict defendant's negligence to that alleged in the petition, but included any negligence. It was held that the definition of negligence as given applied to the word as used in the entire charge.

In *State v. Renfrow* (1892) 111 *Mo.*



589, 20 S. W. 299, it was held that there was no error in the failure of the trial judge to define the words "malice," "premeditation," and "deliberation." The court said: "These words were properly defined in connection with the instructions predicated upon the evidence bearing upon the intentional killing of deceased; and there was no need to redefine them in connection with these instructions. The meaning as used in all the instructions was the same."

In *State v. Diple* (1912) 242 Mo. 461, 147 S. W. 111, an instruction was attacked on the ground that it did not define the terms "feloniously," "wilfully," and "deliberately." It appeared that the words were properly defined in a previous instruction, and it was held that it was not necessary to define them in each instruction in which they were used.

In the reported case (*PIQUA v. MORRIS*, ante, 129) the trial court in its general charge defined the word "proximate" and explained its meaning. Subsequently the word was used in a special charge at the defendant's request, but the word was not defined. It was held that the using of the word in the special charge without defining or explaining it was not error.

In *Holt v. State* (1907) 51 Tex. Crim. Rep. 15, 100 S. W. 156, the court, in its charge on manslaughter and justifiable homicide, gave the statutory definitions of provocation, passion, and adequate cause. The defendant complained that in using the terms subsequently no definition was given. It was held that since the terms were previously defined, repetition was unnecessary.

In *Wheeler v. State* (1909) 56 Tex. Crim. Rep. 547, 121 S. W. 166, the defendant had been indicted for murder, and on the trial the judge charged the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, with deadly weapons, as same have hereinbefore been defined to you, in a sudden transport of passion, aroused without ade-

quate cause, with the intent to kill, did shoot and thereby kill Sam Thomas, as charged in the indictment, you will find him guilty of murder in the second degree." It was urged by the defendant that this charge was erroneous, as it failed to repeat the definition of deadly weapons. The court said: "In regard to the first proposition, that deadly weapons are not defined, we think in a preceding part of the charge deadly weapons are sufficiently defined, if it was necessary in this character of case to define them, wherein the court instructed the jury in regard to murder in the first degree, to wit: that if appellant selected and used the weapon or instrument reasonably sufficient to accomplish the death by the mode and manner of its use," etc.

In *Haynes v. State* (1913) 71 Tex. Crim. Rep. 31, 159 S. W. 1059, a prosecution for wilfully disturbing a religious meeting, it was held that, the court having defined the term "wilfully," it was not necessary "to carry the definition forward in each paragraph of the charge wherein the word was used."

In *Glover v. Houston Belt & Terminal R. Co.* (1914) — Tex. Civ. Rep. —, 163 S. W. 1063, it appeared that the plaintiff was injured while in the employ of the defendant, and brought an action to recover damages resulting from such personal injuries. A verdict being rendered for the plaintiff, the defendant appealed, and among the errors assigned was one that the court, in charging the jury as to contributory negligence, had failed to define contributory negligence. The court said: "The seventh assignment attacks the sufficiency and correctness of the thirteenth paragraph of the general charge. It is first objected thereto that it failed to define contributory negligence. There was no necessity that it should have been defined in this particular paragraph, and, since it is elsewhere defined, this criticism is wholly without merit."

E. C. B.

JOHN S. MCCARTHY, Plff. in Err.,  
v.  
LIBERTY NATIONAL BANK.

Oklahoma Supreme Court — August 13, 1913.

(— Okla. —, 175 Pac. 940.)

**Usury — act of bank president.**

1. Where the president of a bank, having full power to make loans for the bank, takes more than the legal rate of interest, the bank is liable for usury, although the president charges the excess over the legal rate as commission, and retains it as his individual property.

[See note on this question beginning on page 139.]

**Bank — liability of successor.**

2. Where a state bank is reincorporated as a national bank under a new name, but the personnel, officers,

management, and business remain the same, the new bank is liable for usury charged and collected by the old bank.  
[See 3 R. C. L. 658.]

Headnotes by POPE, C.

ERROR to the District Court for Tulsa County to review a judgment in favor of defendant in an action brought to recover usury charged and collected by the state bank before its reincorporation as the defendant bank. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. H. B. Martin, L. M. Lane, and A. F. Moss, for plaintiff in error:

The demand for the return of the usury is an accurate, definite, and literal compliance with the statute upon the subject.

Citizens State Bank v. Strahan, — Okla. —, 165 Pac. 189; Ardmore State Bank v. Thompson, 57 Okla. 521, 164 Pac. 977; Robinson v. Farmers & M. Bank, — Okla. —, 162 Pac. 208; Bank of Tuttle v. Gordon, — Okla. —, 161 Pac. 1081; Texmo Cotton Exch. Bank v. Liston, — Okla. —, 160 Pac. 82.

The Tulsa State Bank is liable for the act of its president in charging and reserving \$2,000 for the loan of \$6,000 for one year.

Bean v. Rumrill, — Okla. —, 172 Pac. 453; Langley v. Ford, — Okla. —, 171 Pac. 471; 39 Cyc. 973; Pottle v. Lowe, 99 Ga. 576, 59 Am. St. Rep. 246, 27 S. E. 145; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Olmsted v. New England Mortg. Secur. Co. 11 Neb. 487, 9 N. W. 650; Stein v. Swensen, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55; Vahlberg v. Keaton, 51 Ark. 584, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878; France v. Monroe, 138 Iowa, 1, 19 L.R.A. (N.S.) 391, 115 N. W. 577; Johnson v. Grayson, 230 Mo. 380,

130 S. W. 673; White v. Anderson, 164 Mo. App. 132, 147 S. W. 1122; Landis v. Saxton, 89 Mo. 375, 1 S. W. 359.

The Tulsa State Bank knowingly received all of the usury.

Johnston Fife Hat Co. v. National Bank, 4 Okla. 17, 44 Pac. 192; Farmers' Nat. Bank v. McCoy, 42 Okla. 420, 141 Pac. 791, Ann. Cas. 1916D, 1243.

The Liberty National Bank is liable as the nationalized successor to the Tulsa State Bank in this action.

State ex rel. West v. Farmers' Nat. Bank, 47 Okla. 667, 150 Pac. 212; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. Rep. 450; Coffey v. National Bank, 46 Mo. 140, 2 Am. Rep. 488; Kelley v. National Bank, 69 Pa. 426.

Messrs. Davidson & Williams, for defendant in error:

The Liberty National Bank was wholly separate and distinct in its organization and in no wise responsible, so far as the proof in this case shows, for any act of the Tulsa State Bank.

Ezzard v. State Nat. Bank, 57 Okla. 371, 157 Pac. 127; Austin v. Smith, Ann. Cas. 1913E, 1044, note; Farris v. Hodges, — Okla. —, 158 Pac. 909.

The transaction sued on was not usurious.

Short v. Pullen, 63 Ark. 385, 38 S. W. 1113; Sherwood v. Swift, 64 Ark. 662, 43 S. W. 507; McLean v. Camak, 97 Ga. 804, 25 S. E. 493; Brainard v. Prouty, 66 Minn. 343, 69 N. W. 3; Commonwealth Title Ins. & T. Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088; Barger v. Taylor, 30 Or. 228, 42 Pac. 615, 47 Pac. 618; Harvard v. Davis, 145 Ga. 580, 89 S. E. 740; Chicago Fire Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

Under the Federal law and Federal decisions it is not permissible to recover an attorney's fee.

First Nat. Bank v. Howard, — Okla. —, 158 Pac. 438.

Pope, C., filed the following opinion:

John S. McCarthy, plaintiff in this action in the court below, desiring a loan of \$6,000, went to the Tulsa State Bank and negotiated the loan through the medium of its president. The transaction assumed in outward form the guise of a loan of \$8,000 for one year. This amount was placed to the credit of McCarthy in said bank, who immediately, as a part of the agreed transaction, paid the president of the bank, from said sum, the sum of \$2,000, of which \$800 was to be the interest on the loan and \$1,200 commission to the president of the bank for making the loan—a consideration of 25 per cent paid by McCarthy for the use of the money.

McCarthy paid the note in full, and thereafter demanded the payment to him of \$4,000; his claim being that the said sum was double the amount of the usury paid.

In the verified petition in the record, one of the allegations, which are nowhere denied under oath, is that, after the giving of the notice above mentioned, McCarthy was inveigled into the private room of the bank, which had by that time changed its name to the Liberty National Bank, was locked in said room, forced by threats of being killed to sign an instrument renouncing all claim for usury, and

after the delivery of said instrument was violently assaulted by one A. E. Lewis, who honors the bank by acting as its president.

Thereafter McCarthy brought this action against the Liberty National Bank to recover \$4,000 usury. On the trial it was shown by uncontradicted evidence that the Tulsa State Bank had reincorporated as the Liberty National Bank; the latter bank being organized by the officers and stockholders of the former, taking over its assets, continuing its business, and being conducted by the same officers. Judgment was rendered for the bank, and McCarthy brings error. The bank sought to avoid liability under two theories. The one was that the \$2,000 consideration received for the loan of \$6,000 for a year was not interest; the contention being that only \$800 was interest, and the remaining \$1,200 a commission charged by the president in his individual capacity, and retained by him as a commission for making the loan. The other theory was that the Liberty National Bank, as distinguished from the Tulsa State Bank, was not liable by reason of the change of incorporation and name.

These contentions will be considered in their order.

We cannot agree with the contention of the bank that a part of the 25 per cent charged the plaintiff for this loan was a commission going to the president of the bank, and not interest. The man Lewis, president of both of the banks, or rather the one bank under both names and both corporations, had full charge of making loans for the bank. "I loan the bank's money to whom I want to," he says, and that he kept the \$1,200 as his commission, without the knowledge or consent of the stockholders or the directors. "Certainly, I make a commission on loans every now and then; I reserve that right."

The uncontroverted testimony shows that Lewis had and exercised

the right of making loans for the bank; he was clearly a general agent for that purpose. The funds of the bank were in his possession to be loaned. His official position was such that his knowledge would be the knowledge of the corporation. The authorities amply sustain the

position that compensation received for a loan under such conditions cannot be called a commission, and the pains of usury thus avoided. *Bean v. Rumrill*, — Okla. —, 172 Pac. 453; notes in 46 L.R.A.(N.S.) 1157, and 19 L.R.A.(N.S.) 391.

It may be that the man Lewis was guilty of a fraud on his bank, and was secretly appropriating part of the compensation which he received for loans, without the knowledge of the stockholders and directors. If so, the bank has its remedy against Lewis; but it cannot deny that his knowledge was its knowledge, or escape liability to third persons for the acts of Lewis within the scope of his authority in doing that which it had put into his power to do. If the bank suffers a loss by reason of unauthorized charge of usury by Lewis, the bank may have a remedy against Lewis; but certainly this does not purge the transaction of usury.

Nor can the bank escape liability

because it changed its name from Tulsa State Bank to the Liberty National Bank, and abandoned its state charter and continued business under a Federal charter. The uncontradicted evidence is that it was composed of the same individuals, same officers, the same management, and continuing the same business at the same place. The law seems to be well settled that, where a corporation is the mere incarnation of a prior corporation, the new corporation must answer for all of the obligations of the old. Note in 11 L.R.A.(N.S.) 1119; *Montgomery-Web Co. v. Die-nelt*, 133 Pa. 585, 19 L.R.A. 665, 19 Atl. 428; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.)* 4 McCrary, 432, 13 Fed. 516; *Camden Interstate R. Co. v. Lee*, 27 Ky. L. Rep. 75, 84 S. W. 332.

There seems to be little or no controversy about the facts in this case. We are, therefore, of the opinion that the case should be reversed and remanded, with instructions to the trial court to enter judgment for the plaintiff below for the \$4,000 usury paid, \$300 attorney's fee, and for costs.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied, November 26, 1918.

## ANNOTATION.

**Acceptance of secret compensation by bank officer or employee in making a loan by the bank as charging the bank with usury.**

There are many cases on the general question whether a bonus or other compensation paid to an agent of the lender by the borrower will charge the lender with usury; but the specific question whether a bank is affected with usury because of a bonus to an officer has been rarely presented.

It will be seen that it is held in the reported case (*MCCARTHY v. LIBERTY NAT. BANK*, ante, 137), that an exaction of a secret usurious commission by the president of a bank in making

a loan for the bank charges the bank with usury.

But the only other two bank cases of this kind which have been found were decided in favor of the bank, and it was therein held that the fact that the president of a bank exacts a personal bonus as a condition of making a loan by the bank does not charge the bank with usury, when the bank gets none of the bonus. *Chicago Fire Proofing Co. v. Park Nat. Bank* (1892) 145 Ill. 481, 32 N. E. 534; *Chicago Fire*

Bank—  
liability of  
successor.

**Proofing Co. v. Park Nat. Bank** (1892) 145 Ill. 487, note, 32 N. E. 536.

In **Fowler v. Equitable Trust Co.** (1891) 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1, it was held that a loan made by the Illinois agent of a trust company of another state, by which the borrower was to pay such agent a certain sum for his commission in addition to the highest legal

rate of interest, was usurious, where there was a previous agreement between the lender and his agent that the latter would act as his agent without compensation from the former, but would obtain compensation for his services as such agent by way of commissions exacted from the borrower.

B. B. B.

## ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Appt.,

v.

## STATE OF OKLAHOMA et al.

*Oklahoma Supreme Court — October 7, 1919.*

(— Okla. —, P.U.R.1920A, 605, 184 Pac. 442.)

### Carrier — duty to furnish tank car.

1. Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence, a railroad company was not required, under § 18, art. 9, of the Constitution, to furnish tank cars to carry the oils of a refinery.

[See note on this question beginning on page 143.]

### — duty to receive and carry.

2. The general rule is that it is the duty of every common carrier to receive for carriage and to carry goods of any person tendered to it for transportation, provided the goods are such as it holds itself out as willing to carry; and it is ordinarily the duty of the common carrier to furnish ve-

hicles suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it, and any failure to observe its duty in this regard will render it liable for loss or injury caused thereby.

[See 4 R. C. L. 658.]

Headnotes by OWEN, Ch. J.

**APPEAL** by defendant from an order of the Corporation Commission in favor of complainants in a suit to enjoin defendant from withdrawing certain tank cars from the use of the complainant company, and requiring it to furnish additional tank cars. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. F. Evans, and R. A. Kleinschmidt, for appellant:

The order of the Commission is invalid as a regulation of interstate commerce.

**Southern R. Co. v. Reid**, 222 U. S. 444, 56 L. ed. 263, 32 Sup. Ct. Rep. 145; **Atchison, T. & S. F. R. Co. v. State**, 31 Okla. 767, 123 Pac. 1065.

The Corporation Commission is without jurisdiction or authority to direct a carrier to acquire or furnish

tank car equipment, and the order is unreasonable and unjust.

**United States v. Pennsylvania R. Co.** 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95; **Board of Trade v. Chicago & A. R. Co.** 4 I. C. C. Rep. 158, 3 Inters. Com. Rep. 233; **Pennsylvania R. Co. v. United States**, 227 Fed. 911; **Scofield v. Lake Shore & M. S. R. Co.** 2 I. C. C. Rep. 90, 2 Inters. Com. Rep. 67.

The order is defective and invalid

because it requires defendant to supply cars for movement over the lines of other carriers.

Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1032; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

The order of the Commission will result in depriving defendant of its property without compensation and without due process of law, contrary to the provisions of the state and United States Constitutions.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Chicago, R. I. & P. R. Co. v. State, 23 Okla. 94, 99 Pac. 901; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753.

Order No. 1302 unreasonably and materially discriminates against and burdens the interstate commerce of defendant.

Atchison, T. & S. F. R. Co. v. State, 33 Okla. 158, 124 Pac. 56; St. Louis & S. F. R. Co. v. State, 26 Okla. 62, 30 L.R.A.(N.S.) 187, 107 Pac. 929; Atchison, T. & S. F. R. Co. v. Love, 29 Okla. 738, 119 Pac. 207; St. Louis S. W. R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Southern R. Co. v. Com., 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70.

Mr. S. P. Freeling for the State.

Mr. B. M. Parmenter, for appellee Refining Company:

It is the duty of the carrier to furnish cars fit for the conveyance of the particular class of goods it undertakes to carry.

Johnson v. Toledo, S. & M. R. Co. 133 Mich. 596, 103 Am. St. Rep. 464, 95 N. W. 724; St. Louis, I. M. & S. R. Co. v. Renfro, 82 Ark. 143, 10 L.R.A.(N.S.) 317, 118 Am. St. Rep. 58, 100 S. W. 891; St. Louis, I. M. & S. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Baker v. Boston & M. R. Co. 74 N. H. 100, 124 Am. St. Rep. 937, 65 Atl. 386, 12 Ann. Cas. 1072; New York, P. & N. R. Co. v. Cromwell, 98 Va. 227, 49 L.R.A. 462, 81 Am. St. Rep. 722, 35 S. E. 444, 7 Am. Neg. Rep. 508; Mathis v. Southern R. Co. 65 S. C. 271, 61 L.R.A. 824, 43 S. E. 684; Di Giorgio

Importing & S. S. Co. v. Pennsylvania R. Co. 104 Md. 693, 8 L.R.A.(N.S.) 108, 65 Atl. 428; Forrester v. Southern R. Co. 147 N. C. 553, 18 L.R.A.(N.S.) 508, 61 S. E. 524, 15 Ann. Cas. 143; Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423; Pennsylvania R. Co. v. United States, 227 Fed. 911; United States v. Pennsylvania R. Co. 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95; Chicago, R. I. & P. R. Co. v. Lawton Ref. Co. 165 C. C. A. 299, 253 Fed. 705; State ex rel. Kohler v. Cincinnati, W. & B. R. Co. 47 Ohio St. 130, 7 L.R.A. 319, 23 N. E. 931; Chicago, R. I. & P. R. Co. v. State, 23 Okla. 94, 99 Pac. 901.

Owen, Ch. J., delivered the opinion of the court:

The refining company, a corporation doing business at Lawton, Oklahoma, buying, selling, and shipping crude and refined oils, complained that the railroad company heretofore had furnished four tank cars for the use of the refining company in transporting its merchandise, both crude and refined oils, but had given notice that such cars would be withdrawn from its use, and the volume of business would require the use, not only of these four cars, but additional tank cars, and prayed the railroad company be restrained and enjoined from taking the four cars out of its use, and be required to furnish additional tank cars. The Corporation Commission made an order requiring the railroad company to furnish the refining company the tank cars as requested.

The railroad company contends the Corporation Commission was without jurisdiction or authority to make the order, or to make any order respecting the subject-matter of the complaint. The question necessary for determination is whether it was the duty of the railroad company, under § 18, art. 9, of the Constitution, to furnish tank cars to be used by the refining company in the transportation of its products over the railroad company's tracks.

The general rule is well settled

that it is the duty of every common carrier to receive the goods of any person tendered to it for transportation, provided the goods are such that it holds itself out as willing to carry. 10 C. J. 65; Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Elliott, Railroads, § 1465. Subject to some exceptions, it is also the duty of the common carrier to furnish cars suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it. Special cars must be furnished in some instances for transportation of perishable products, refrigerator cars for vegetables and meats, and other cars particularly adapted for the goods transported, as stock cars for cattle, and any failure to observe its duty in this regard will render the carrier liable for loss or injury caused by such failure. 10 C. J. 85; Hutchinson, Carr. § 505; Atlantic Coast Line R. Co. v. Geraty, 20 L.R.A. (N.S.) 310, 91 C. C. A. 602, 166 Fed. 10. This general rule, however, is not without exception and qualification. Elliott, Railroads, § 1474; United States v. Pennsylvania R. Co. 242 U. S. 209, 61 L. ed. 252, 37 Sup. Ct. Rep. 95; Chicago, R. I. & P. R. Co. v. Lawton Ref. Co. 165 C. C. A. 299, 253 Fed. 705. In the case of United States v. Pennsylvania R. Co. supra, tank cars were held to be an exception to the general rule. It was also held the Interstate Commerce Commission was without authority or power to require the common carrier to furnish such cars, and that case was followed by the circuit court of appeals in the case of Chicago, R. I. & P. R. Co. v. Lawton Ref. Co. supra, where it was said: "Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or to provide facilities of a different kind from those usually furnished for transportation; hence a railroad

company was not required to furnish tank cars to carry the oils of a refinery."

In *Re Private Cars*, 50 Inters. Com. Rep. 652, the Interstate Commerce Commission found there are fifty-nine varieties of liquids regularly transported in tank cars, and that cars used for transportation of one kind of liquid ordinarily cannot be used for transportation of another of the varieties, many of these liquids requiring especially constructed cars, with special fittings. In that case, among other things, it was said: "It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars."

Counsel rely upon the case of *Atlantic Coast Line R. Co. v. Geraty*, supra, where the railroad company was held liable in damages for a failure to furnish refrigerator cars for transportation of vegetables; but the facts of that case easily distinguish it from the instant case. There the railroad company had induced plaintiff, and other vegetable growers in that region, to plant certain crops, expecting that if they raised vegetables refrigerator cars necessary for such vegetables would be obtained, and under these facts it was held the plaintiff was entitled to recover damages sustained by the carrier's refusal to furnish refrigerator cars on reasonable demand for transportation of plaintiff's cabbages. It was said: "Where plaintiff, owning a farm in a truck region, was induced to plant a large quantity of cabbages by assurance of defendant railroad company that refrigerator cars would be furnished to transport the cabbage to market, which it refused to do on reasonable demand, plaintiff was entitled to recover for unharvested

—duty to furnish tank car.

cabbage which spoiled because of defendant's refusal to furnish refrigerator cars."

In the instant case, the action is not for damages, but one to compel the common carrier to furnish tank cars under an alleged duty resting upon the common carrier, and not by virtue of any contract. Counsel also rely upon the case of *State ex rel. Kohler v. Cincinnati, W. & B. R. Co.* 47 Ohio St. 130, 7 L.R.A. 319,

23 N. E. 928, but the question involved there was a discrimination in the rates charged. No such question is presented in this case. The Corporation Commission was without authority to make the order.

The case is therefore reversed, with directions to dismiss the complaint.

Harrison and Bailey, JJ., did not participate.

The other Justices concur.

### ANNOTATION.

#### Duty of carrier to furnish tank cars.

The cases passing directly on the question have held that a railroad company owes no duty to the shipper to furnish tank cars. *ST. LOUIS & S. F. R. CO. v. STATE* (reported herewith) ante, 140; *Chicago, R. I. & P. R. Co. v. Lawton Ref. Co.* (1918) 165 C. C. A. 299, 253 Fed. 705.

It has been held also that under the Interstate Commerce Act the Interstate Commerce Commission has no power to require railroad companies to furnish tank cars to shippers, the duty to furnish such cars, if it exists, being enforceable in the courts, and not by the Commission. *United States v. Pennsylvania R. Co.* (1916) 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95; *Scofield v. Lake Shore & M. S. R. Co.* (1888) 2 I. C. C. Rep. (Fed.) 90, 2 Inters. Com. Rep. 67.

It was held, however, in *Empire Ref. Co. v. Pere Marquette R. Co.* (1910) 10 Can. Ry. Cas. 158, that, where a railway company agreed with a refining company before the latter built its refinery that the railroad company would furnish all the tank cars that might be needed, the railway company could be compelled to carry out its agreement by an order of the Board of Railroad Commissioners, under a statute providing that on complaint by a corporation that a railway company has violated an agreement between the complainant and the company for providing any equipment in connection with the railway, the Board shall hear all matters and make such orders as to it may seem reasonable.

The position that carriers should not be obliged to furnish tank cars derives much support from the report of the Commission in *Re Private Cars* (1918) 50 Inters. Com. Rep. (Fed.) 652, where, in connection with findings and conclusions as to rates and practices of carriers with respect to private cars, it was said: "There are at least thirty-one different liquids regularly transported in tank cars, not including the different kinds and grades of acids and oils. There are seven acids and twenty-one grades and kinds of petroleum oils, making an aggregate of fifty-nine varieties of liquids. Cars used to transport the different liquids cannot be interchanged readily, that is to say, a tank car loaded with fuel oil with an asphalt base cannot be reloaded with refined oils, such as gasoline or kerosene, nor with edible oils, such as cottonseed or coconut, without thorough cleaning, at an expense of from \$5 to \$35 per car. A car in which has been transported any of the petroleum oils cannot be used for molasses or other edible liquids, without thorough cleaning to remove every vestige of oil and odor. Some acids require peculiarly constructed cars. A car for tannic acid must be coated on the inside with acid-resisting material, and all fittings must be of brass. Muriatic acid requires a wooden lined tank. Wine cars are mounted with a steel tank, lined on the inside with special enamel, surrounded on the outside with a wooden tank, with insulating ma-



terial between it and the steel, to preserve the contents from deterioration during transportation; and casing-head gasoline cars are insulated so as to preserve a uniform temperature, and are fitted with special dome-head arrangements and safety appliances. A tank car for transportation of asphalt and other heavy oils requires heater coils in order to liquefy the contents for unloading. Some tank cars are constructed with compartments so that two or more grades of oil may be transported at a time. Special loading and unloading facilities are necessary for oil shipments. It is necessary to force some oils out of the cars by steam pressure, others by the use of pumps, and from still others the liquid flows out by gravity.

Practically all carriers have refused to furnish tank cars for transportation of oil and other liquids.

Refiners of petroleum oils, with substantial unanimity, state that as a practical matter carriers could not furnish tank cars in a manner to insure their efficient use.

The carriers of the country could not as effectively handle the entire refrigerator and tank-car equipment as is now done by the intervention of private owners.

The oil refiner produces certain kinds of oil and desires to reach certain customers. No carrier could inform itself as to his needs, and insure that he would have the kind and number of cars to enable him to conduct his business economically and efficiently. These tank-car owners prefer to furnish their own cars, and they assert it would be impracticable for carriers to do so. Preserving a car for the character of oil handled on its previous trip enables the refiner of oil to eliminate delays in cleaning and transferring cars around from one railroad to another,—delays that would be expensive to the carrier, and which it could not in actual practice prevent. It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasoline and

residuum, requires two kinds of cars. Another refiner producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars. The cost of cleaning a car which has been used for fuel oil, in order to make it fit for handling gasoline, is very great. These and other reasons which are given in detail and might be here repeated, if necessary, have led to the system of private ownership of tank cars throughout the country generally. . . . Doubtless in the beginning demands were made by these shippers that carriers should supply tank and meat cars, but it was quickly demonstrated that business could not be done in the most effective manner were carriers to own or control cars of that kind. As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so."

That the railroad company had held itself out specifically to carry oil in tank cars was contended in *United States v. Pennsylvania R. Co.* (1916) 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95, and it was also contended that the finding of the Interstate Commerce Commission to this effect was one of fact, and not reviewable. This contention, however, was not sustained, the finding being held to be one of law, reviewable in the courts, where it appeared that it was based on a rule in the official classification providing rates for articles in tank cars, which stated that the carriers whose tariffs were covered by such classification assumed no obligation to furnish tank cars.

In *Chicago, R. I. & P. R. Co. v. Lawton Ref. Co.* (1918) 165 C. C. A. 299, 253 Fed. 705, it was held that a railway company, which for three months prior to the suit had supplied a refinery with tank cars, leased by the railway company from private owners, but which, during a drought, had found it necessary to divert these cars for the purpose of hauling water for use of its engines and roundhouses, should not be enjoined from failing to furnish the cars to the refining company. The decision is placed on the ground that tank cars were a spe-

cial kind of equipment which the carrier had not held itself out to furnish, and that because of the extraordinary character of the service it was not obliged to furnish them; also, that the duty of the railway company to the public to keep its trains in operation was superior to the demand of the refining company for the cars.

Assuming that the general rule is that a carrier must furnish proper and suitable cars for every kind of goods which it holds itself out as ready to transport, the question whether a carrier owes a duty to the shipper to furnish tank cars would seem to depend, in the absence of contract, on custom and the question whether the carrier had held itself out as ready to transport goods in tank cars. That carriers do not generally own tank cars in sufficient numbers to supply anything like the demand appears from *Re Private Cars* (1918) 50 Inters. Com. Rep. (Fed.) 652, where, in a tabulated statement, based on reports from a large number of railroads, the number of carrier-owned tank cars for 1917 is given at over 9,000, as compared with over 44,000 privately owned tank cars. The reverse proportion obtains as regards refrigerator cars, it being shown in the same tabulation that, as regards refrigerator cars, the proportion is

over 60,000 carrier-owned cars to over 36,000 privately owned. These facts are of importance in view of the statement in *United States v. Pennsylvania R. Co.* (1916) 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95, that, in the view of the Interstate Commerce Commission, as expressed in *Scofield v. Lake Shore & M. S. R. Co.* (1888) 2 I. C. C. Rep. (Fed.) 90, 2 Inters. Com. Rep. 67, and *Re Transportation & Refrigeration of Fruit* (1904) 10 Inters. Com. Rep. (Fed.) 360, carriers should provide equipment for the transportation of commodities, and that this duty may expand with time and conditions, the special car becoming the common car, and the shipper's right to demand it receiving the sanction of law; that, while at one time the carriers might have declined to provide special equipment in the way of refrigerator cars for the transportation of fruit, the trade had so grown that the carriers now might as well decline to furnish stock cars for the transportation of live stock. It will be noted also that in *Re Private Cars* (Fed.) supra, it is stated that carriers throughout the country generally have provisions in their tariffs, which name rates on petroleum oil and other liquids in tank cars, that they are not under obligation to furnish such cars. R. E. H.

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JAMES W. BOOTHE, Respt.,

v.

H. F. BASSETT and Wife, Appts.

*Washington Supreme Court (Dept. No. 1) — October 9, 1914.*

(82 Wash. 95, 143 Pac. 449.)

**Specific performance — contract for interest in real estate — attempt to defraud creditors — parties not in pari delicto.**

1. Specific performance will not be granted to one who, in uniting with another for the purchase of real estate on joint account, has the title placed in the name of the latter to place it out of the reach of his own creditors, upon the understanding that the parties were to share equally in the profits of the transaction.

[See note on this question beginning on page 150.]

**Appeal — statement of facts — sufficiency.**

2. A statement of facts on appeal will not be stricken for failure to contain all the evidence, if the trial court certifies that all evidence is contained, and respondent proposes no amendment to the statement.

[See 2 R. C. L. 158.]

**Pleading — failure to plead defense — right to consider.**

3. Failure to plead intent to defraud creditors as a defense to an action to

compel specific performance of a contract to convey an interest in real estate, title to which was placed in the name of defendant in a joint undertaking for its purchase under agreement to share profits, for the purpose of placing it beyond the reach of plaintiff's creditors, will not prevent the consideration of such defense if the fact is brought out by plaintiff in his evidence in chief.

[See 25 R. C. L. 334.]

**APPEAL** by defendants from a judgment of the Superior Court for Adams County (Holcomb, J.) in plaintiff's favor in an action brought to compel specific performance of an oral contract for the conveyance of an interest in certain real estate, and for a money judgment. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Zent, Powell, & Redfield, for appellants:

An express trust cannot be proved by parol.

Arnold v. Hall, 72 Wash. 50, 44 L.R.A.(N.S.) 349, 129 Pac. 914.

If plaintiff is to escape the express trust rule, it must be by virtue of the partnership doctrine.

Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; Scheuer v. Cochem, 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573; Morgart v. Smouse, 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1142; Goldstein v. Nathan, 158 Ill. 641, 42 N. E. 72; Miller v. Ferguson, 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 140; Mancusco v. Rosso, 81 Neb. 786, 116 N. W. 679; Case v. Seger, 4 Wash. 492, 30 Pac. 646; Raymond v. Johnson, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492, 19 Mor. Min. Rep. 56; Mack v. Mack, 39 Wash. 196, 81 Pac. 707; Brewer v. Gropp, 10 Wash. 136, 38 Pac. 866.

Land conveyed in fraud of creditors cannot be recovered by the grantor.

2 Moore, Fraud. Conv. chap. 14, p. 629; 14 Am. & Eng. Enc. Law, 2d ed. 272; 20 Cyc. 615; Bouton v. Beers, 78 Conn. 414, 62 Atl. 619, 3 Ann. Cas. 942; Kirkpatrick v. Clark, 132 Ill. 342, 8 L.R.A. 511, 22 Am. St. Rep. 531, 24 N. E. 71; Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068; Coleman v. Coleman, 147 Ky. 383, 39 L.R.A.(N.S.) 193, 144 S. W. 1; Geroso v. DeMaio, 75 N. J. Eq. 410, 72 Atl. 482; Creamer v. Bivert, 214 Mo. 473, 113 S. W. 1118; Tune v. Beeland, 131 Ga. 528, 62 S. E. 976; Allstead v.

Laumeister, 16 Cal. App. 59, 116 Pac. 296; Kitts v. Wilson, 130 Ind. 492, 29 N. E. 401; Hill v. Scott, 12 Ky. L. Rep. 877, 15 S. W. 667; Ybarra v. Lorenzana, 53 Cal. 197; Chantler v. Hubbell, 34 Wash. 211, 75 Pac. 802; Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. 270; 1 Moore, Fraud. Conv. pp. 5, 6.

Messrs. George H. Armitage and W. C. Donovan, for respondent:

A parol agreement is neither illegal nor void. It is a weapon of defense which a party may or may not use for his protection.

W. E. Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co. 56 Wash. 529, 106 Pac. 207; 9 Enc. Pl. & Pr. 704-707.

Real estate belonging to a partnership, whether the legal title be in one or more of the partners, is impressed with a trust for the benefit of the partnership, which follows until it passes into the hands of a bona fide purchaser.

Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C, 689; Kauffman v. Baillie, 46 Wash. 248, 89 Pac. 548; Bond v. Taylor, 68 W. Va. 317, 69 S. E. 1000; Floyd v. Duffy, 68 W. Va. 339, 33 L.R.A.(N.S.) 883, 69 S. E. 993; Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; Freschael v. Bellesheim, 14 N. Y. S. R. 610; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035.

In a joint adventure the parties are entitled to recover their shares of the property acquired in kind.

Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; Leamey v. Fisher, — N. J. Eq. —, 52 Atl. 703.

To make the fraud of the plaintiff a

defense available to defeat his action, it must be pleaded.

Anderson v. Rockwood, 62 Minn. 1, 63 N. W. 1023; Hughes v. Pritchard, 122 N. C. 59, 29 S. E. 93; Houston & T. C. R. Co. v. Reason, 61 Tex. 613; Stockwell v. Stockwell, 72 N. H. 69, 54 Atl. 701; Link v. Link, 90 N. C. 235; Gibson v. Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

Plaintiff was entitled to maintain the action.

Harvey v. Varney, 98 Mass. 118; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732.

Main, J., delivered the opinion of the court:

The purpose of this action was to compel the specific performance of an oral contract for the conveyance of an interest in real estate, and in addition thereto a money judgment. The cause was tried to the court sitting without a jury. Judgment was rendered directing specific performance. The defendants appeal.

The facts are as follows: On the 1st day of October, 1912, and for some time prior thereto, James W. Boothe and H. F. Bassett were engaged in the real estate business at Spokane, Washington. Each was operating independently of the other. On the date mentioned, Bassett had a client who owned an equity in a house and lot in the city of Spokane, which could be purchased for \$750. Boothe had a client who owned certain farm land located in Adams county, which he was willing to exchange for city property. Boothe and Bassett entered into an oral agreement, whereby Boothe was to furnish \$750 for the purpose of acquiring the equity in the city property, and, after this was purchased, an exchange was to be made for the Adams county land. Boothe borrowed the money, the equity was purchased, and the exchange of the properties made; the owners of the respective properties exchanging titles. After these conveyances had been made, the title to the farm land was, by the previous owner of the city property, in turn conveyed to Bassett. Thereupon Boothe and

Bassett arranged for a loan in the sum of \$1,300, and gave a mortgage upon the farm land signed by Bassett and his wife. The money realized from this loan was used to repay Boothe the \$750 which he had previously borrowed to pay for the equity in the city property, and the expenses incident to that loan. The balance of the money was to be used for the purpose of putting the land under cultivation. The date of the loan upon the farm land was October 14, 1912. Some time after the transactions took place, as above indicated, Boothe demanded that Bassett convey to him an undivided one-half interest in the farm land, and also pay over one half of the money realized from the mortgage which had not been expended. Under the agreement entered into, the parties were to share equally in the profits of the transaction. The present action was instituted on or about the 5th day of March, 1913. After the issues were formed, the cause in due time came on for trial. The plaintiff was the only witness who testified upon the trial. The plaintiff on direct examination testified that "this property came to be in Mr. Bassett's name, because I had signed as surety on a bond on an appeal to the supreme court. The judgment was affirmed, and that made it so I was bound to pay the judgment. They were bothering me about that, and I was afraid if the title stood in my name that it would make trouble."

On cross-examination he further testified: "The reason I had this title put in Mr. Bassett's name was because I knew if it showed in my name this creditor might learn of it and try to take it on that judgment; because of that and because it was more convenient. It would not be necessary for so many of us to sign papers. All of us were living at Spokane. It was less trouble to have it in his name alone. I did not have any property in my name at that time."

The bond upon which the judgment referred to was rendered was

a supersedeas bond, the amount of which is not stated. At the conclusion of the plaintiff's evidence, the defendants moved that the action be dismissed. This motion was denied. Thereupon the defendants elected to stand upon the record as then made, and offered no testimony. Judgment was entered as above indicated. The defendants have appealed.

The respondent opens his brief in this court with a motion to strike the statement of facts and affirm the judgment. This motion appears to be based upon the contention that the statement of facts does not contain all the evidence. In the certificate of the trial judge to the statement of facts, it is said "that the above and foregoing statement of facts contains all the material facts, matters, and proceedings heretofore occurring in said cause and not already a part of the record therein, contains all the evidence, oral and in writing, therein, and that the above and foregoing statement of facts was duly and regularly filed with the clerk of the said court, and thereafter duly and regularly served within the time authorized by law, and that no amendments were proposed to said statement of facts."

It thus appears that the trial judge certified that the statement of facts contained not only all the material facts, but all the evidence, both oral and in writing. It also appears that the respondent proposed no amendment to the statement of facts. We think the motion to strike not well founded.

Upon the merits it will be necessary to notice but one assignment of error. From the facts stated, it appears that the primary reason for placing the entire title in the name of Bassett was to put the property beyond the reach of Boothe's judgment creditor. Where a conveyance of property is made to hinder, delay, or defraud creditors, as between parties, it is good, and a court of equity will not interfere, at the

instance of a fraudulent grantor, to aid him in a recovery of the property. Such a conveyance is illegal as to creditors only. This rule is founded upon public policy. 14 Am. & Eng. Enc. Law, 2d ed. 274; 20 Cyc. 615; 2 Moore, Fraud. Conv. 630; *Kitts v. Wilson*, 130 Ind. 492, 29 N. E. 401; *Chantler v. Hubbell*, 34 Wash. 211, 75 Pac. 802. In the case last cited it was said: "While there are certain admitted exceptions to the general rule that courts will refuse to aid either party to a fraudulent transaction, this case does not fall within them. The courts refuse to aid in fraudulent transactions, because of public policy, and the rule operates, of course, only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to enter into them—that is to say, when it tends to promote good morals not to aid either party, aid is refused by the courts; but whenever public policy is considered advanced by giving relief to either party, then such relief will be given. Cases, however, where public policy will be best subserved by aiding or enforcing a fraudulent transaction are very rare, and instances where the rule has been put in force are not many; but a frequently cited instance is found in the case of *Montefiori v. Montefiori*, 1 W. Bl. 363, 96 Eng. Reprint, 203, where one brother gave to another a note in order to enable the latter to make a wealthy marriage. This note was enforced because such contracts would best be discouraged by enforcing them. But it is evident that the case at bar does not fall within any such rule. If the mortgage is to be held free of fraud, then there is no question of public policy involved. If, on the other hand, it was intended to defraud the appellant's creditors, the appellant cannot, by any proceeding in the courts, compel the respondent to share with him, or turn over to him, the profit the respondent may have made by reason of the fraud. Such

Appeal—  
statement of  
facts—  
sufficiency.

a rule would encourage, not discourage, fraudulent transactions."

The rule applies not only when there has been a conveyance from the previous holder of title for the purpose of defrauding his creditors, but also where title to property, at the time it is acquired, is placed in the name of a third party for the purpose of interfering with the rights of creditors. *Coleman v. Coleman*, 147 Ky. 383, 39 L.R.A. (N.S.) 193, 144 S. W. 1; *Kirkpatrick v. Clark*, 132 Ill. 342, 8 L.R.A. 511, 22 Am. St. Rep. 531, 24 N. E. 71; *Hill v. Scott*, 12 Ky. L. Rep. 877, 15 S. W. 667. In the *Kirkpatrick Case* it is said: "If it be true, as the evidence offered would tend to show, that the defendant purchased the lot in question of Ashelby with her own money, but, for the purpose of hindering and defrauding her creditors, entered into a fraudulent arrangement or conspiracy with the plaintiff to have said lot conveyed to him, said transaction was illegal, and within the condemnation of the 4th section of our present Statute of Frauds. The transaction being consummated by the execution of the conveyance to the plaintiff, leaving the defendant in the possession which she had previously obtained under a demise from Ashelby, the law should leave them both where it finds them. The defendant clearly could not be permitted to go into a court of equity to compel an execution by the plaintiff of his trust, and it would seem that, upon the same principle, the plaintiff should be debarred from coming into a court of law to use his ill-gotten title for the purpose of recovering of the defendant the possession."

In the present case, however, it is claimed that the rule does not apply because it does not appear that the parties were in *pari delicto*. So far as the record shows, the purpose of Bassett, in receiving title in his own name, was not to aid in hindering, delaying, or defrauding the creditors of Boothe. If Bassett were the actor in this action, it doubtless

would be true that, the parties not being in *pari delicto*, the rule would not be operative against him, but the actor in the present action is the party who sought to defraud his judgment creditor by keeping his name free from the title. In such a case the party guilty of the attempted fraud is within the rule.

Specific performance—contract for interest in real estate—attempt to defraud creditors—parties not in *pari delicto*.

In *Allstead v. Laumeister*, 16 Cal. App. 59, 116 Pac. 296, it was said: "It may be true that, although Van Allstead stood in *pari delicto* to the fraud, the defendant would not sustain that relation thereto unless she accepted the trust with notice or knowledge of its fraudulent character or that its purpose was to defraud third parties; still, nevertheless, the transaction between plaintiff and his son was so tainted with corruption that its nature, as thus characterized, could not be changed, however many times the property might be transferred, except where conveyed to an innocent purchaser for value and without notice or knowledge of the fraud. In other words, it is obviously immaterial, so far as the plaintiff—the actor in this suit—is concerned, whether the defendant stood or did not stand in *pari delicto* to the fraudulent creation of the trust which she accepted from Van Allstead and promised to execute. The question whether she stood in *pari delicto* to the fraudulent contract or as a *particeps criminis* in the fraud giving rise to it could be material only where she was also seeking affirmative relief as to the property, in which case, should she be found, equally with plaintiff, to be a party to the fraud, a court of equity would refuse to interfere in behalf of either."

The respondent cites the case of *Harvey v. Varney*, 98 Mass. 118, as sustaining his right to maintain the action, notwithstanding the fact that the title was placed in the name of Bassett for the purpose of hindering, delaying, and defrauding a creditor of Boothe. Without detail-

ing the facts in that case, it may be said that to have applied the rule there forbidding recovery would have worked a great hardship. It is doubtful whether that case can be distinguished in principle from the present case, but, if it cannot be so distinguished, it is not in harmony with the doctrine of this court in *Chantler v. Hubbell*, supra. To permit the contract in this case to be enforced notwithstanding the fraud would encourage fraudulent transactions. This being true, under the rule of the *Chantler* Case the question should be resolved in a way to discourage such transactions.

The respondent, however, claims that, since the fraudulent nature of the transaction was not pleaded as an affirmative defense, it is not available to the appellant. The complaint pleaded an oral contract. This the answer denied, but did not affirmatively plead that the title was taken in *Bassett's* name for the purpose of hindering, delaying, and defrauding a creditor of *Boothe's*. The record shows that the fraudulent nature of the transaction appeared in the answer of the respondent upon direct examination to a question propounded to him by his

counsel. It is further elaborated upon cross-examination without objection. The matter, having been brought out on direct examination and pursued upon cross-examination without objection, is available to the appellants without their having pleaded it affirmatively. *Geroso v. DeMaio*, 75 N. J. Eq. 410, 72 Atl. 432; *Harvey v. Varney*, supra. Had the fraudulent nature of the transaction not have been brought out by the respondent as a part of his case in chief, and the defendant had gone into the matter on cross-examination over objection, or had sought to show it as a part of his defense without pleading it, a different question would be presented.

Pleading—  
failure to  
plead defense—  
right to  
consider.

There being no cross appeal, the correctness of the court's judgment in declining to award a money judgment is not open to review.

The judgment will be reversed, and the cause remanded, with instructions to the Superior Court to dismiss the action for specific performance.

*Crow, Ch. J., and Chadwick, Ellis, and Gose, JJ., concur.*

Petition for rehearing denied.

### ANNOTATION.

**The fact that the parties to a conveyance in fraud of creditors are not in pari delicto as affecting the right of the party guilty of fraud to relief.**

Courts of equity, in refusing aid to one who has made a conveyance to hinder or defraud creditors, have frequently assigned as a reason for their decision the well-known maxim "In pari delicto potior est conditio defendentis." It seems clear, however, both on reason and authority, that the fact that the parties are not in pari delicto, or that one of them is innocent of any fraudulent design, will not avail the one who is guilty of the fraud to obtain equitable relief. And in a few cases it has been held that the fact that the grantee or transferee, where there has been a conveyance or

transfer in fraud of creditors, is innocent of the fraud, or at least is not in pari delicto with the grantor or transferrer, will not aid the latter where he is the one seeking affirmative equitable relief. *BOOTHE v. BASSETT* (reported herewith) ante, 145; *Allstead v. Laumeister* (1911) 16 Cal. App. 59, 116 Pac. 296; *Weir v. Day* (1881) 57 Iowa, 84, 10 N. W. 304; *Moore v. Jordan* (1887) 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737; *Robertson v. Sayre* (1892) 134 N. Y. 97, 30 Am. St. Rep. 627, 31 N. E. 250; *O'Brien v. O'Brien* (1919) 188 App. Div. 309, 177 N. Y. Supp. 25.

In *Allstead v. Laumeister* (1911) 16 Cal. App. 59, 116 Pac. 296, from which the court quotes in the opinion in the reported case (*BOOTHE v. BASSETT*, ante, 145), a conveyance was made by a debtor to his son for the purpose of defrauding creditors, and the son conveyed to the defendant under an agreement by the latter similar to that in the conveyance to the son, that the property should be reconveyed to the father on demand. In an action by the latter to compel a reconveyance, it was held to be immaterial whether the defendant was in *pari delicto* to the fraudulent contract, since this would be material only in case the defendant were seeking affirmative relief, the plaintiff being, in any event, by his own fraud, precluded from obtaining relief in a court of equity.

Where a purchaser of land, for the purpose of hindering and delaying his creditors, procured a deed to be made out in the name of a third party, without the latter's knowledge or authority, and had it recorded, it was held that the grantor or his heirs were not entitled to equitable relief against the grantee or one to whom the latter had conveyed the property. *Robertson v. Sayre* (1892) 134 N. Y. 97, 30 Am. St. Rep. 627, 31 N. E. 250. The action was by the heirs against one claiming under the grantee. The court said that since the grantor had the conveyance of these lots made to a third party for the purpose of defrauding creditors, he had no legal estate in them which could be reached by execution or which on his death descended to his heirs; that this rule was a penalty imposed by law for the prevention of fraud and for the protection of subsequent purchasers; and that the reason for its application was not weakened by the fact that the grantee, as in the case before the court, was not a participant in the fraud; that it was clear that neither the grantor in his lifetime, nor his heirs since his death, could have recovered the land or its proceeds from the grantee or from the latter's grantee by any legal or equitable remedy.

In *O'Brien v. O'Brien* (1919) 188 App. Div. 309, 177 N. Y. Supp. 25, it was held that a grantor could not obtain cancellation of a deed made to his son for the purpose of defeating a creditor, although the court stated that there were no charges of fraud or of procurement on the part of the grantee.

In *Moore v. Jordan* (1887) 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. 737, equitable relief was refused to the grantor in a conveyance in fraud of creditors, against one who, the court said, took no part in the scheme other than to receive the conveyance, and was only subject to the imputation of fraud in that she declined to reconvey the property, the conveyance having been made at the instigation of a confidential adviser, who promised a reconveyance, but received no consideration and practised no fraud on the grantor.

In holding that one who had conveyed property for the purpose of defrauding creditors could not obtain relief in equity against an innocent grantee, the court, in *Weir v. Day* (1881) 57 Iowa, 84, 10 N. W. 304, said: "It appears that the court below was of opinion that, as it was not shown that . . . [the defendant] had knowledge of the fraudulent intent of the plaintiff, the conveyance was not fraudulent; that a fraudulent purpose on the part of the grantor alone is not sufficient; that there must be a like intent, or, at least, a knowledge of the fraudulent intent, traced to the grantee. This is undoubtedly the rule where creditors seek to set aside a conveyance as fraudulent. But the ground upon which a fraudulent grantor is precluded from gainsaying the transaction is that he comes into a court of justice with unclean hands, and seeking to take advantage of his own wrong. In *Holliday v. Holliday* (1859) 10 Iowa, 200, the plaintiff purchased real estate, paid for it, and took the title in the name of his wife. After her death he sought to compel the children of the wife to convey to him. It appeared that he procured the conveyance to be made to his wife to place the property beyond the reach



of legal process, if he should be prosecuted upon a certain demand which he regarded as unjust. It does not appear that the wife participated in or had any knowledge of the fraudulent intent of her husband."

There are doubtless many cases like *Holliday v. Holliday* (Iowa) *supra*, where the grantee may have been innocent of any fraud, but relief was denied the grantor because of his fraud in conveying the property, without consideration of the point of the grantee's nonparticipation in the fraud.

*McConaughy v. Farney* (1902) 2 Neb. (Unof.) 638, 89 N. W. 812, is to the effect that if the vendee has par-

ticipated in the fraud, where the conveyance is in fraud of creditors, he may set this up as a complete defense in an action by the vendor or his assignee for creditors on notes given for the purchase price, under the maxim "in pari delicto potior est conditio defendentis;" or if the property has been taken away from him without his fault in a suit by creditors, the vendee may, if innocent of the fraud, plead a breach of the warranty of title. It does not clearly appear, however, that the court meant to hold that the vendee must in the former event have participated in the fraud in order for the vendor's fraud to defeat the action.

R. E. H.

## WINTLER ABSTRACT & LOAN COMPANY, Appt.,

v.

CHARLES B. SEARS et al., Respts.

*Washington Supreme Court (Dept. No. 2) — October 15, 1919.*

(— Wash. —, 184 Pac. 309.)

### Chattel mortgage — of records of title — right to photograph.

1. Although a mortgage of records containing abstracts of title of property in a county carries a mere lien, the mortgagor cannot photograph the records for use in a competing business to the destruction of the security of the mortgage, where the statutes give a mortgagee a right immediately to foreclose if he has reasonable cause to believe that the mortgaged property will be destroyed, and make destruction by the mortgagor a misdemeanor.

[See note on this question beginning on page 156.]

#### — effect on title.

2. A mortgage of personal property does not convey the title, but creates a lien only, leaving the title in the mortgagor.

[See 5 R. C. L. 383.]

#### — foreclosure — what passes by sale.

3. A purchaser at foreclosure sale

under a mortgage of title abstract books does not secure title to photographic copies which have been made of the books, where the description in the foreclosure decree and the sheriff's bill of sale do not include such copies.

APPEAL by plaintiff from a judgment of the Superior Court for Clarke County (Reynolds, J.) dismissing an action brought to recover photographic reproductions of certain mortgaged abstract books and records, and to recover damages. *Affirmed.*

The facts are stated in the opinion of the court.

(— Wash. —, 184 Pac. 309.)

Messrs. Crass & Hardin for appellant.

Messrs. McMaster, Hall, & Drowley, for respondents:

The mortgage of the index books would not give any lien on the literary property in the compilation; for the literary property is the right to reproduce and publish, and is a thing apart from the manuscript itself. It no more passes by a mortgage or sale of the manuscript than would patent rights pass with the sale of one of the patented articles or a copyright pass with the sale of a book.

Bartlett v. Crittenden, 5 McLean, 41, Fed. Cas. No. 1,076; Stephens v. Cady, 14 How. 528, 530, 14 L. ed. 528, 529.

Irrespective of what was mortgaged, a mortgage in this state is nothing more than a lien without any of the qualities of ownership or title, and leaves undisturbed in the owner the fullest rights to the use thereof.

Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836; Ephraim v. Kelleher, 4 Wash. 243, 18 L.R.A. 604, 29 Pac. 985; Binnian v. Baker, 6 Wash. 50, 82 Pac. 1008; Voorhies v. Hennessy, 7 Wash. 243, 34 Pac. 931; Re Johnson, 224 Fed. 184; Shoovert v. De Motta, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487.

The photographs and damages were not recoverable in any event.

State v. State Journal Co. 75 Neb. 275, 9 L.R.A. (N.S.) 174, 106 N. W. 434, 13 Ann. Cas. 254; 18 Cyc. 174, note, 85.

Bridges, J., delivered the opinion of the court:

This action was brought to recover the photographic reproductions of certain mortgaged abstract books and records and to recover damages. The trial court nonsuited the plaintiff, and this appeal is from the judgment dismissing the action.

The facts are substantially as follows: In the year 1912, the Clarke County Abstract & Loan Company was the owner and in possession of certain real estate and certain records, books, plats, maps, instruments, machines, furniture, and fixtures, constituting a complete plant used in the conduct of its business as a maker and seller of abstracts of title to real property. On August 10, 1912, the abstract and loan company, in order to secure a note

of \$24,000, executed and delivered to Jessie M. Wintler, as trustee, a mortgage upon its real estate and upon the above-mentioned personal property. One clause of the mortgage is as follows: "And the said mortgagor mortgages also to the mortgagee, as additional security for the said note, all of its plant, used in the conduct of its business as engaged in the compilation and sale of abstracts of title to real property and in making loans and other like business, and consisting of all its records, books, plats, maps, instruments, machines, furniture, and fixtures, and all other of its equipment as the same now exists and is located at No. 607 Eleventh street, Vancouver, Washington, or as the same may hereafter be renewed, added to, or enlarged."

After giving the mortgage, the abstract and loan company continued in possession of the mortgaged property and continued the abstract business. It failed to make the payments required by the terms of the note and mortgage, and on October 26, 1915, the trustee commenced an action to foreclose the mortgage. While this action was pending, the abstract and loan company made photographic copies of all of the books and records of the abstract plant and sold them to Charles B. Sears and C. W. Knowles to be used in the same county. Afterwards the mortgage was duly foreclosed, and on April 22, 1916, the property was sold by the sheriff, and the mortgagee became the purchaser at the sale. Thereafter the mortgagee and the persons for whom she was acting as trustee, together with one or two others, organized the appellant corporation, and the property obtained by purchase at the sheriff's sale was conveyed to it. After the photographic reproductions were sold to Sears and Knowles, they formed the Sears Abstract & Loan Company, which continued to use the photographic copies and to make therefrom abstracts of title to real

estate, up to the time of the beginning of this action. On December 26, 1916, the Sears Abstract & Loan Company executed and delivered to the Vancouver National Bank a chattel mortgage covering the photographic copies, together with other personal property. This mortgage was given to secure a bona fide indebtedness owing to the bank. It appears that all of the respondents had actual knowledge of the existence of the mortgage to Jessie M. Wintler and the taking and sale of the photographic copies.

The chief legal question involved is: May a mortgagor of a set of abstract books and records lawfully, and without violating any of the rights of the mortgagee, make photographic copies of such books and records for the purpose of using the same after the mortgage is foreclosed, in the business of making abstracts of title to property, or selling the same to be used for a like purpose. In discussing this question it must always be kept in mind

**Chattel  
mortgage—  
effect on title.**

that in this state a mortgage does not serve to convey the title, but creates a lien only, leaving the title in the mortgagor. *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Richter v. Buchanan*, 48 Wash. 32, 92 Pac. 782; *Nettleton v. Evans*, 67 Wash. 227, 121 Pac. 54.

Apparently, the question involved here is one of first impression; for no cases in point are cited in the briefs, and the somewhat extended search which we have made fails to reveal any. There is a line of cases cited by appellant which holds that an author, at common law, has a property in his manuscript, and may obtain redress against one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication. The case of *Press Pub. Co. v. Monroe*, 51 L.R.A. 353, 19 C. A. 429, 38 U. S. App. 410, 78 Fed. 196, is illustrative of this principle; but those cases cannot help us here,

because there the owner was the complaining party, while here the one who complains holds only a mortgage lien. Nor—and for nearly the same reason—can we get any light from that line of cases where a photographer, employed to take certain photographs of the employer, uses his negatives or plates to take additional pictures, to be sold to others or to be put to some other use. *Klug v. Sheriffs*, 129 Wis. 468, 7 L.R.A. (N.S.) 362, 116 Am. St. Rep. 967, 109 N. W. 656, 9 Ann. Cas. 1013; *Levy v. Clements*, 175 Mass. 376, 50 L.R.A. 397, 56 N. E. 735; *Douglas v. Stokes*, 149 Ky. 506, 42 L.R.A. (N.S.) 386, 149 S. W. 849, Ann. Cas. 1914B, 374; *Corliss v. F. W. Walker Co.* (C. C.) 31 L.R.A. 283, 64 Fed. 280.

The respondents contend that the mortgagor, being the owner of the property, had a right to take these photographs and dispose of them, provided he did thereby no unnecessary damage to the mortgaged property; that the mortgage did not cover the photographs, and therefore could not be foreclosed as to them. The lower court seems to have also taken this view of the case. We cannot believe that the only right which a mortgagee has is to foreclose his mortgage. The mortgagor's ownership is not unqualified; he may not do with the property as he may fit; he may use it in the usual and customary way, doing no unnecessary damage; but he may not, over the objections of the mortgagee, use the property in any unusual, unc customary, or unexpected way, and particularly so if such use greatly injures the property or depreciates its value. The mortgagee has, and in the very nature of the relation must have, the right at all times to protect the property, which gives him security against any unusual or unnecessary damage. These principles are laid down by Jones on *Chattel Mortgages*. At § 451, 5th ed. he says: "A mortgagee, in case of apprehended danger of loss of the mortgaged property, may have a receiver ap-

pointed, even before his right to foreclose has accrued. It is sufficient to authorize the appointment of a receiver that the mortgagor is insolvent, that the property is not sufficient in value to secure the debt, and that there is still danger of its removal beyond the jurisdiction of the court. The power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted. A bill for an injunction and the appointment of a receiver may be sustained, where it is shown that these remedies are proper for the mortgagee's protection, although the time of payment set in the mortgage has not arrived."

And at § 490: "A purchaser of property upon which there is a valid mortgage who consumes or sells the property or any part of it is liable to the mortgagee for the damages so occasioned him; and it makes no difference that the purchaser took the property in hostility to the mortgage, and denying that it was an existing lien."

The same general principle has been recognized by our legislature and enacted as a part of the laws of this state. Section 1111, Rem. Code, provides that where a debt secured by mortgage is not due and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he may maintain an immediate action for foreclosure of his mortgage. Section 3669 of the same volume provides that any mortgagor of personal property who, with intent to hinder, delay, or defraud the mortgagee, shall injure or destroy such property or any part thereof, or shall conceal the same or remove it from the county without the consent in writing of the mortgagee, or who shall sell or dispose of the same or any interest therein, shall be guilty of a misdemeanor.

In the instant case the chief value of the security was not in the abstract books themselves, but in the information contained in them.

Any act which would make either the books and records, or the information contained in them, less valuable, would to that extent lessen the value of the security. The mortgage not only covered the books themselves, but the information contained in them; and the making public of that secret information must be considered an unlawful destruction of the security. If one set of photographs may be lawfully taken and sold for use, so may a dozen sets of photographs be taken and sold; and thus what was ample security has become almost valueless. It would be small comfort to the mortgagee to tell him that he must be satisfied if the books themselves have not been injured and if they still contain the original information. That doctrine would take the kernel and leave the shell. If one mortgage a house, used only as a dwelling, he would not subsequently be permitted to convert that mortgaged property into a stable; or if one mortgaged a high-priced pleasure automobile he would not thereafter be permitted to use it as a common truck, although he might not make any physical changes in the conveyance. We have no doubt that if this mortgagee had undertaken to enjoin the taking and selling of these photographs, or had sought to have a receiver appointed to take charge of the property because of such taking and sale, or had commenced suit to foreclose her mortgage because of the depreciation of the security resulting from such taking and sale, she must have prevailed. Any other rule of law would deprive abstract books of nearly all their commercial value; for who would hereafter lend money upon abstract books as security, knowing that one or more sets of photographic copies may afterwards be lawfully taken and sold, to be used in opposition to the mortgaged property? The same rule of law which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property should also

permit him to enjoin any act which would wholly or partially destroy the value of that property. We therefore hold that in this case the mortgagor did not have the right, over the objections of records of title—right to photograph. of the mortgagee, to take and sell these photographic copies. But it does not necessarily follow that the appellant can maintain this suit.

This action is maintained upon the principle that the mortgage covered the photographic copies, and that it was foreclosed as to those copies, and that when the original mortgagee became the purchaser at the sheriff's sale she purchased these copies along with the rest of the personal property, and that she thereafter conveyed the same to the appellant. If it be conceded that under any circumstances the purchaser at the sale might maintain a possessory action such as this, yet we are forced to the conclusion that

the appellant is not in position to maintain this action. The decree of foreclosure gives a particular description of the personal property which was ordered sold. These photographic copies are not included in this description. The sheriff's bill of sale to the purchaser gives an itemized statement of

the property sold, and these photographic copies are not included. It follows that the appellant cannot be the owner or entitled to the possession of these photographic copies, and cannot, therefore, maintain this suit.

While we decide that a mortgagor of abstract books and records has no right, as against the mortgagee, to take and sell photographic copies thereof, and that the mortgagee would have his action to enjoin such taking and sale, yet, where the reproductions have been taken and sold, we expressly do not decide whether such copies would be included within the mortgage, nor do we decide whether the mortgagee's action would be a possessory one such as the one we are dealing with, or one to enjoin the use of such copies, or for their destruction, or a straight action for money damages. Having decided that the appellant is not in position to maintain this action, it is not necessary to determine the form of the proper action or the exact nature of the remedy.

Judgment affirmed.

Holcomb, Ch. J., and Parker, Fullerton, and Mount, JJ., concur.

Petition for rehearing denied.

## ANNOTATION.

**Rights, as regards copying or reproduction, of parties to sale, mortgage, or other contract in relation to records or abstracts.**

The reported case (*WINTLER ABSTRACT & LOAN Co. v. SEARS*, ante, 152) holding that a mortgagor of abstracts of title cannot, over the objection of the mortgagee, make and sell photographic copies, thereby diminishing the security of the mortgage debt, seems to be one of first impression. In the state of Washington a mortgage creates a lien only, and leaves the title to the property in the mortgagor. The court, therefore, was not concerned with any question of the mortgagee's title. Its decision was based on the ground that, though the title is in the

mortgagor, he may do no act that will have the effect of diminishing the value of the security. This seems to be in accord with the general doctrine that a mortgagor must do no act to impair the sufficiency of the mortgagee's security. In 19 R. C. L. p. 319, it is said: "Broadly speaking, a mortgagor in possession, whether by permission of the mortgagee in jurisdictions wherein the latter is entitled to possession or by virtue of his own inherent right in jurisdictions wherein he is regarded as both the legal and

equitable owner of the property with the right of possession, is the absolute and beneficial owner of the property, and may enjoy the ordinary privileges and benefits of ownership so long as he does not unreasonably prejudice the rights or security of the mortgagee." A. S. M.

**GAULEY & EASTERN RAILWAY COMPANY, Plff. in Err.,**  
v.  
**C. A. CONLEY et al.**

*West Virginia Supreme Court of Appeals—September 16, 1919.*

(— W. Va. —, 100 S. E. 290.)

**Evidence — damages — eminent domain — profits of business.**

1. In a proceeding to condemn private property for public use, evidence of past annual profits derived from a business conducted on the property, in the form of net income arising from such business, offered as an index to the market value of the property, is ordinarily inadmissible, because the extent to which such income arises out of the property used is uncertain; it being dependent upon the capital invested, business conditions obtaining, and the trading skill and business capacity of the owner, as well as adaptability of the property to the business.

[See note on this question beginning on page 163.]

**—disadvantage of new location of business.**

2. If, in such case, the business is to be continued at another location and on property different from that involved in the proceeding, evidence of the relative inconvenience and disadvantages of the new location is inadmissible, because the constitutional guaranty of indemnity does not extend to the business conducted upon the property taken.

[See 10 R. C. L. 145.]

**Damages — eminent domain — cost of new building.**

3. Nor, in the event of the erection of a new building on a different piece of land, in which such business is to be continued, can the cost thereof be included in the compensation or damages awarded, or proved as tending to show the value of the old building, in the absence of disclosure of like or closely similar construction and conditions in all respects.

**—injury to contiguous lot.**

4. In such case, the admission of evidence of damages to a lot not involved in the proceeding, nor used in connection with the property proceed-

ed against, though contiguous to it, is erroneous.

[See 10 R. C. L. 157.]

**Evidence — eminent domain — offer of compensation — authority of agent.**

5. It is also erroneous, in such case, to permit the landowner to prove an inquiry to him by an agent and attorney of the condemnor, as to whether he would accept a named sum of money, in payment of compensation for the property to be taken and damages to the residue, without proof of the agent's authority to fix and determine the amount of such compensation and damages. Evidence of such an inquiry is also inadmissible, because it does not fairly tend to prove an admission as to the value of the property.

[See 10 R. C. L. 217.]

**Damages — eminent domain — taking of part or all of lot.**

6. Ordinarily, when only a part of a lot or parcel of land is taken under the power of eminent domain, the proof of value should be limited to the part actually taken, and, as to the residue, the evidence should be limited to damages; but, when virtually all the prop-

erty is taken and the remnants are relatively worthless, the value of the entire tract or lot may be established and an allowance made for the value of the remnants.

[See 10 R. C. L. 153.]

**Evidence — eminent domain — availability of other property.**

7. After the right to take the property has been adjudicated and acquiesced in, it is inadmissible to prove, upon the inquiry as to compensation and damages, that the condemnor could have obtained other property equally as well suited to its purposes. — availability of other locations.

8. Upon such a trial, a witness cannot base his opinion as to the value of the property upon "the possibility or

impossibility of securing other locations" for the business conducted upon it.

— assessment for taxation.

9. To be admissible, by virtue of § 115, chap. 29 (§ 1000), of the Code, as evidence of the value of property proceeded against under the power of eminent domain, the assessment thereof for purposes of taxation, last certified before the beginning of the proceeding, must be limited to the property so proceeded against, and must not include it and other property as a single or combined piece, unless the property is of uniform value and appears to have been assessed by the acre or by the lot.

[See 10 R. C. L. 217.]

**ERROR to the Circuit Court for Fayette County to review a judgment in favor of defendants in a proceeding for the condemnation of certain property. *Reversed.***

The facts are stated in the opinion of the court.

Messrs. W. N. King, Leroy Allebach, and Dillon & Nuckolls, for plaintiff in error:

In condemnation proceedings it is proper to show how the property is used as an element of value, but it is incompetent to go into the question of profits derived from the business carried on upon it.

Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co. 75 W. Va. 423, 83 S. E. 1031; Hunter v. Chesapeake & O. R. Co. (Fitzhugh v. Chesapeake & O. R. Co.) 107 Va. 158, 17 L.R.A. (N.S.) 124, 59 S. E. 415; Lewis, Em. Dom. 3d ed. p. 727; 15 Cyc. 733.

Incidental loss or inconvenience in business resulting from removal or changes made necessary upon the taking of the property must be borne by the owner for the sake of the general good.

Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co. 75 W. Va. 446, 83 S. E. 1031; Lewis, Em. Dom. 3d ed. 727; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672; Philadelphia Ball Club v. Philadelphia, 192 Pa. 632, 46 L.R.A. 724, 73 Am. St. Rep. 835, 44 Atl. 265.

In condemnation proceedings, brought against joint owners of a lot, it is not permissible to show damages resulting to another lot, belonging to one of the joint owners, no part of which is sought to be taken.

15 Cyc. 729; Sharp v. United States,

191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; Haines v. St. Louis, D. M. & N. R. Co. 65 Iowa, 216, 21 N. W. 573; Minnesota Valley R. Co. v. Doran, 15 Minn. 230, Gil. 179; Wilcox v. St. Paul & N. P. R. Co. 35 Minn. 439, 29 N. W. 148; Pennsylvania Co. v. Pennsylvania Schuylkill Valley R. Co. 151 Pa. 334, 31 Am. St. Rep. 762, 25 Atl. 107; Re New York C. & H. R. R. Co. 6 Hun, 149; Sharpe v. United States, 57 L.R.A. 932, 50 C. C. A. 597, 112 Fed. 893; Lewis, Em. Dom. 697-699, 737; Charleston & S. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69.

The relation of principal and agent must be established by direct evidence, or by facts and circumstances, and a principal is not bound by the declarations of an agent, unless made in the course of business or line of duty.

Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148; Elliott, Railroads, 2d ed. §§ 210, 217.

The owner of land is entitled to the value of the land taken, at the time of taking, and to damages to the residue, deducting special benefits; but he is not entitled to the value of the land not taken.

Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co. 75 W. Va. 442, 83 S. E. 1031; Guinn v. Ohio River R. Co. 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; Lewis, Em. Dom. 3d

ed. § 694; *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

In condemnation proceedings the defendant is entitled to the market value of the land taken, with damages, if any, to the residue; but the value does not depend upon the possibility or impossibility of securing another business location.

*Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.* supra; *Lewis*, Em. Dom. 3d ed. § 694.

The verdict of the jury was clearly against the decided preponderance of the evidence.

*Helvey v. Princeton Power Co.* — W. Va. —, 99 S. E. 182; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 407, 20 S. E. 593; *Chapman v. Liverpool Salt & Coal Co.* 57 W. Va. 395, 50 S. E. 601.

Messrs. Magee McClung and C. R. Summerfield for defendants in error.

Poffenbarger, J., delivered the opinion of the court:

The verdict and judgment in this condemnation proceeding by a railway company to take, for its purposes, a portion of each of two small lots, on one of which there was a horse and mule barn, and on the other a department store building, both in use at the time, are for \$14,000, and the applicant complains of them.

The dimensions of the barn lot were, substantially, 40 by 80 feet, and of the other lot 40 by 54 feet. The railroad right of way line cut into both lots to a depth of about 30 feet and ran through the building on each. Each of the structures was a two-story frame building; the former about 54 by 37 feet, and the latter about 36 by 50 feet. On account of the unfavorable topography of the ground, the building sites had to be prepared at considerable expense, by the blasting out and hauling away of rock and the construction of retaining walls. The barn seems to have been built in 1911, and the storehouse in 1914. Up to a date prior to August, 1917, the time of the institution of this proceeding, the two defendants, C. A. Conley and E. D. Kincaid, were partners trading in horses and

mules, and conducted their business in the barn just described. At the latter date, Conley, having bought out Kincaid, was conducting the horse and mule business alone. They, however, were owners in common of the two lots, and Conley, was paying Kincaid \$25 per month as rental for his interest in the lot on which the barn stood, and the store building paid a rental of \$60 per month.

The commissioners appointed in the usual way ascertained the compensation and damages respecting the lot on which the barn was at \$4,800 and the lot on which the store building was at \$5,500, making a total of \$10,300. The railway company paid this amount into court and obtained an order authorizing it to take possession of the property. The owners excepted to the report of the commissioners and demanded a trial by jury, solely on the question of the amount of compensation and damages; they having acquiesced in the court's decision affirming the right of the applicant to take the property for its railroad purposes, on payment of proper compensation and damages.

All of the numerous assignments of error, except two, are based upon rulings admitting evidence over objections of the plaintiff in error. One of the others denies the propriety of an instruction, because it is based upon evidence alleged to be inadmissible; and the overruling of a motion to set aside the verdict, for insufficiency of the evidence, and as being contrary to the clear and decided preponderance of the evidence, is the subject-matter of the last one.

In the beginning of the trial, the court refused to permit the owners of the property to prove the net income and profits of the horse and mule business conducted in the barn on one of the lots, for the year immediately preceding the month of August, 1917, the date of the institution of this proceeding; but, later, such evidence was admitted over an



objection interposed by the applicant. In the argument submitted here in support of the court's final ruling upon the question, it is frankly admitted that such profits cannot be included in the verdict as an element or item of compensation or damages; but it is earnestly insisted that profits actually derived from business conducted on the property may be proved as one of the circumstances tending to show its market value. The distinction between the two offices of proof is obvious, but it does not overcome the objection to the evidence in question. There is a clear distinction, but it is not co-extensive with the difference. The rental value is always admissible, because it is almost as fixed and certain as the market value of the property. The profits derived from a business conducted upon the property are uncertain and speculative in character, because the question of profit and loss, or the amount of profit, in the event of any, depends more upon the capital invested, general business conditions, and the trading skill and business capacity of the person conducting it, than it does upon the location of the place of business. Profits already derived from a business may not be speculative, in the true sense of the term; but they would, nevertheless, constitute an uncertain measure of the value of the property upon which the business was carried on.

Evidence—  
damages—  
eminent domain  
—profits of  
business.

The argument submitted in support of the admissibility of this evidence is plausible; but it is not in harmony with our decisions, nor with the weight of authority throughout the country. *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.* 75 W. Va. 423, 83 S. E. 1031; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *Richmond, P. & C. R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97,

3 N. E. 720; *Sauer v. New York*, 44 App. Div. 305, 60 N. Y. Supp. 648; *Re Gilroy*, 26 App. Div. 314, 49 N. Y. Supp. 798; *Newton v. Armstrong*, 63 Hun, 628, 45 N. Y. S. R. 18, 19 N. Y. Supp. 573; *Edmands v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438; *Becker v. Philadelphia & R. Terminal R. Co.* 177 Pa. 252, 35 L.R.A. 583, 35 Atl. 617; *Kossler v. Pittsburg, C. C. & St. L. R. Co.* 208 Pa. 50, 57 Atl. 66. Several of these cases specifically deny the admissibility of evidence of past profits derived from the land taken. Others rule out proof of future profits. No authority explicitly holding that, under ordinary circumstances, such evidence can be received to prove market value, has been cited or found.

In some jurisdictions, the peculiar character of the property to be condemned or the circumstances of the owner are permitted to vary the rule and to constitute an exception thereto. Thus, in *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407, in which the subject of condemnation was a toll bridge, the court recognized the exception and permitted the introduction of proof of past annual net profits as tending to show the market value of the bridge. Mr. Justice Paxson, delivering the opinion of the court, said: "The principle is well enough, but it has no application to the facts of this case. The property taken was of a peculiar character, and can hardly be said to have a market value."

In *Pittsburgh & W. R. Co. v. Patterson*, 107 Pa. 461, the same court denied the right of a jury to take in consideration, in its estimate of compensation and damages, any supposed loss of profits, saying: "Such an assessment would be purely speculative, and a rule which justified it would lead to most ruinous results."

In *Metropolitan West Side Elev. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276, the owners were allowed the cost of removal of their personal property from the real estate taken

and damages for interruption of their business; but it was carefully noted that the allowances were made under an exception to the general rule. These cases are referred to merely to show that such exceptions are recognized in some jurisdictions. They are not applicable here, for there is nothing of an anomalous character in this case, justifying an inquiry as to the existence of such exceptions here.

All of the evidence tending to prove that the new barn is not as conveniently or advantageously located as the old one

—disadvantage  
of new location  
of business.

was improperly admitted. As in the case of profits, it pertains, not to the value of the property taken or damage to the residue, but to the business of one of the defendants. For injury or detriment to that the law does not require the condemnor to compensate. *Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co.* 75 W. Va. 423, 83 S. E. 1031; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672. Such damages are said to be common to the owners of other like business enterprises of the community. The true reason may be that presumptively the world affords the trader just as good opportunities in other places, and the inconvenience and expense of finding another location are incidents of the business, and not elements of damage to the property condemned; the constitutional guaranty being limited by its terms to compensation for property taken and indemnity for injury to property not taken. If an established business is to be continued on the residue of property only partially taken, an allowance for interruption to the business may possibly be justifiable, on the theory of temporary loss of use of the residue of the property; but as to this we decide nothing, since the question does not arise, the business having been removed to another piece of land.

Evidence of the cost of construc-

7 A.L.R.—11.

tion of a new barn on another site was improperly admitted also. The applicant pays the value of the old

Damages—  
eminent domain  
—cost of new  
building.

barn, and, out of that compensation or otherwise, the defendant should provide himself with a new one, if he needs or desires it. As the applicant takes a good portion of each building, and the lots are too small to afford room for them on what remains of each lot, they are in legal contemplation wholly taken. In other words, they are to be treated, upon the inquiry as to compensation, as if they were wholly taken. *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. 1093; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 180, 20 L. ed. 557; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147. They are parts of the property taken, and are therefore to be paid for. The condemnor is not required, in addition to such payment, to provide new buildings. The case is entirely different from one in which a building can be moved over onto the untaken residue of a tract of land and its uses continued. In the latter case, cost of removal might be evidence bearing on the question of damages to the residue; but we do not have this question. The evidence of the cost of erection of the new barn is too uncertain as an element of proof of the value of the old one. It was put up on different ground, and the cost of preparation of the new site may have been considerably more or less than that incident to the construction of the old one, which included expensive excavation and retaining walls. If identity or close similarity of conditions in all respects would make this evidence admissible, as tending to prove the value of the old barn, it is not disclosed, and the record does not indicate that it can be.

Between the two lots in question there was another small one owned by Conley alone, and a part of which was taken. Kincaid alone owned another lot adjoining all

three of those involved in the proceeding, and on it he resided in a house worth probably \$3,000; but no part of that lot was taken. Defendants were allowed, over objections, to prove damages to his residence lot, resulting from the construction of the railroad in front of it. No direct effort is made in the brief for defendant in error to sustain this ruling, but it is treated as part of the evidence relating to an assessment for taxation, in an effort to apportion the assessment between the residence lot and the store lot; they having been assessed together. This effort at apportionment, however, did not necessarily involve proof of damage to the residence lot, which was not involved in the proceeding.

—injury to  
contiguous lot.

Admission of such proof was a palpable error. On this subject, the rule is strict. *Lewis, Em. Dom. 697*, citing numerous cases sustaining the text.

Evidence of an inquiry made by an agent and attorney of the condemnor as to whether one of the defendants would accept a certain amount of money by way of compensation and damages, if he were sole owner of the property, was admitted over objection. As there

Evidence—  
eminent domain  
—offer of com-  
pensation—  
authority of  
agent.

was no proof of any authority in the agent and attorney to bind his principal by an agreement as to the compensation and damages, this evidence was improperly admitted. One dealing with an agent must know the extent of his authority. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148. The inquiry, if made, was no evidence of the value of the property and rights sought. It was an effort to ascertain the attitude of the defendants, and did not import purpose or willingness to pay the amount suggested. Besides, there is no proof of intent on the part of the principal to make the agent a witness either for or against it in

the condemnation proceeding. It was bad for want of proof of authority in the agent, and also for lack of tendency to prove value.

Ordinarily it would be highly improper to permit the owner to prove the value of the entire property, when only a portion of it is taken. But in

Damages—  
eminent domain  
—taking of part  
or all of lot.

this case the remnants are so small and unfavorably located, lying between the railroad track and a rock cliff, that their relative values practically amount to almost nothing, and render the ordinary rule difficult of application. It is much more convenient and intelligible to state the entire values and then make allowances for the remnants. In point of utility, though not of law or fact, the entire lots, according to the evidence, were substantially taken, for the portions not taken were rendered almost useless. The buildings were, in a legal sense, wholly taken, because they had to be moved or destroyed. The assignment of error respecting proof of entire values is, for these reasons, held to be untenable.

As the right of the railroad company to take the land had been previously adjudicated and acquiesced in by the defendants, it was too late for them to set up the defense of lack of necessity for condemnation of

Evidence—  
eminent domain  
—availability of  
other property.

these lots on the ground of existence of another way occasioning less damage. Introduction of evidence at this stage of the case to prove such a way could subserve no useful or legitimate purpose. It pertains neither to the value of the land taken nor damages to the residue. It might become a fallacious basis of an inference of wantonness on the part of the railway company, in seeking unnecessarily to take improved or actually used property, when vacant property would answer its purposes equally well. If effective at all, such an inference could result only in prejudice against the railway company in the trial. The

witness did say the ground on the other side of the road was very steep and rocky; but he had previously stated the condemnor could have gone that way and obtained cheaper property. The court should have sustained the motion to strike that evidence out.

A witness was improperly allowed to give his opinion as to the value of the property, "taking into consideration . . . the possibility or impossibility of securing other locations." It was competent for the defendants to prove the location, the adaptation of the property to any use of which it was susceptible, and the use to which it had been devoted, as bearing on the question of market value; but, for reasons already stated, they could not have the jury take into consideration facts tending to prove detriment to their trading business conducted on the property. This involves no mere interruption to business to be continued on the residue of a tract of land, which may fall within an exception to the general rule. The taking of the land terminates the business on that tract, and the constitutional guaranty does not require reimbursement for loss of business.

The argument submitted in support of the admission of the tax assessment of the Kincaid residence lot and the store building lot, treated as a single piece of property, at the sum of \$17,280, fallaciously assumes that the assessor put the same values on the two pieces of

property as the witnesses accorded to them—\$5,000 on the residence lot and \$12,280 on the other. The unreliability of assessments as indices to the market values of property is shown by the fact that the assessment of these two pieces of property for the preceding year was only \$2,000. Assessments are so fearfully and wonderfully made that it would be unsafe to hazard a guess as to the method adopted in any particular case. The statute (Code 1913, chap. 29, § 115 [§ 1000]) makes them admissible on questions of value; but, ordinarily, the assessment offered should be limited to the particular property involved in the proceeding; for, when two or more pieces are combined, there is no certain means of knowledge affording ground for a just and fair apportionment, unless the land is all of the same quality and appears to have been valued by the <sup>assessment</sup> <sub>for taxation.</sub> acre or the lot. The court should have excluded the assessment and refused the instruction based upon it.

As the evidence on the new trial will be different in material respects from what it was on this trial, it is deemed unnecessary, and might be improper, to enter upon any inquiry as to whether, as it stands now, it is sufficient to sustain the verdict.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

## ANNOTATION.

### Profits derived from business conducted on property taken by eminent domain as evidence of market value.

#### I. Introductory, 164.

#### II. Rule in United States:

##### a. Rule stated, 164.

##### b. Application of rule:

1. Condemnation for use of railroad, 165.
2. Condemnation for other purposes, 167.

#### II.—continued.

##### c. Limitation of rule:

1. Value dependent wholly on profits, 171.
2. Property producing profits independent of owner's industry, 173.

#### III. Rule in Canada and England, 174.

*I. Introductory.*

This note does not include a discussion of the right to recover for the loss of the profits of a business or for an injury thereto where the property on which the business is conducted is taken by virtue of the power of eminent domain, but is confined strictly to the question whether profits derived from a business conducted on property are evidence of its market value in condemnation proceedings.

*II. Rule in United States.**a. Rule stated.*

With remarkable unanimity the American jurisdictions hold that evidence of profits derived from a business conducted on property is too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market value of the property in condemnation proceedings.

**United States.**—*Lehigh Valley Coal Co. v. Chicago* (1886) 26 Fed. 415. Compare *Lafin v. Chicago, W. & N. R. Co.* (1887) 83 Fed. 415.

**California.**—*Stockton & C. R. Co. v. Galgiani* (1874) 49 Cal. 139; *San Diego Land & Town Co. v. Neale* (1891) 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977.

**Georgia.**—Compare *Pause v. Atlanta* (1895) 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489.

**Illinois.**—*Booker v. Venice & C. R. Co.* (1882) 101 Ill. 333; *Jacksonville & S. E. R. Co. v. Walsh* (1888) 106 Ill. 253; *De Buol v. Freeport & M. River R. Co.* (1884) 111 Ill. 499; *Dupuis v. Chicago & N. W. R. Co.* (1885) 115 Ill. 97, 3 N. E. 720; *Illinois C. R. Co. v. Lottant* (1897) 167 Ill. 85, 47 N. E. 62; *West Chicago Park Comrs. v. Boal* (1908) 232 Ill. 248, 83 N. E. 24; *Chicago v. Farwell* (1919) 286 Ill. 415, 121 N. E. 795; *Sanitary Dist. v. McGuirl* (1900) 86 Ill. App. 392. See also *Braun v. West Side Elev. R. Co.* (1896) 166 Ill. 434, 46 N. E. 974.

**Maryland.**—*Tide Water Canal Co. v. Archer* (1838) 9 Gill & J. 479.

**Massachusetts.**—*Whitman v. Boston & M. R. Co.* (1861) 3 Allen, 133; *Cobb v. Boston* (1872) 109 Mass. 438; *Bailey*

*v. Boston & P. R. Corp.* (1903) 182 Mass. 537, 66 N. E. 203; *Boston Belting Co. v. Boston* (1908) 183 Mass. 254, 67 N. E. 428.

**Minnesota.**—*King v. Minneapolis Union R. Co.* (1884) 32 Minn. 224, 20 N. W. 135; *Kafka v. Davidson* (1917) 135 Minn. 389, 160 N. W. 1021.

**Missouri.**—See *Kansas City v. Bacon* (1900) 157 Mo. 450, 57 S. W. 1045.

**New Hampshire.**—*Ranlet v. Concord R. Corp.* (1883) 62 N. H. 561.

**New Jersey.**—*Philadelphia & C. Ferry Co. v. Inter-City Link R. Co.* (1908) 76 N. J. L. 50, 68 Atl. 1093, affirmed in (1909) 77 N. J. L. 616, 72 Atl. 1119.

**New York.**—Re *New York, W. S. & B. R. Co.* (1885) 35 Hun, 633; Re *Buffalo* (1886) 1 N. Y. S. R. 742; *Newton v. Armstrong* (1892) 63 Hun, 628, 45 N. Y. S. R. 18, 19 N. Y. Supp. 573; Re *Gilroy* (1898) 26 App. Div. 314, 49 N. Y. Supp. 798; *Sauer v. New York* (1899) 44 App. Div. 305, 60 N. Y. Supp. 648; *Syracuse v. Stacey* (1899) 45 App. Div. 249, 61 N. Y. Supp. 165, affirmed on other grounds in (1901) 169 N. Y. 231, 62 N. E. 354; Re *Simmons* (1908) 58 Misc. 581, 109 N. Y. Supp. 1036, affirmed in (1909) 130 App. Div. 356, 114 N. Y. Supp. 575; *Brainerd v. State* (1911) 74 Misc. 100, 131 N. Y. Supp. 221.

**Pennsylvania.**—*Schuylkill Nav. Co. v. Thoburn* (1821) 7 Serg. & R. 411; *Schuylkill Nav. Co. v. Freedley* (1841) 6 Whart. 109; *Pittsburgh & W. R. Co. v. Patterson* (1885) 107 Pa. 461; *Miller v. Windsor Water Co.* (1892) 148 Pa. 429, 23 Atl. 1132; *Hamilton v. Pittsburgh, B. & L. E. R. Co.* (1899) 190 Pa. 51, 51 L.R.A. 819, 42 Atl. 369; *Kossler v. Pittsburg, C. C. & St. L. R. Co.* (1904) 208 Pa. 50, 57 Atl. 66; *Cox v. Philadelphia, H. & P. R. Co.* (1906) 215 Pa. 506, 114 Am. St. Rep. 979, 64 Atl. 729; *Robbins v. Scranton* (1907) 217 Pa. 577, 66 Atl. 977; *Cole v. Ellwood Power Co.* (1907) 216 Pa. 283, 65 Atl. 678; *White v. Pennsylvania R. Co.* (1911) 229 Pa. 480, 38 L.R.A. (N.S.) 1040, 78 Atl. 1035.

**Virginia.**—*Richmond, P. & C. R. Co. v. Chamblin* (1902) 100 Va. 401, 41 S. E. 750. Compare *Hunter v. Chesapeake & O. R. Co.* (*Fitzhugh v. Ches-*

peake & O. R. Co.) (1907) 107 Va. 158, 17 L.R.A.(N.S.) 124, 59 S. E. 415.

Washington.—Tacoma v. Nisqually Power Co. (1910) 57 Wash. 426, 107 Pac. 199.

West Virginia.—Norfolk & W. R. Co. v. Davis (1906) 58 W. Va. 620, 52 S. E. 724; Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co. (1914) 75 W. Va. 423, 83 S. E. 1031. And see the reported case (GAULEY & E. R. Co. v. CONLEY, ante, 157).

In Braun v. West Side Elev. R. Co. (Ill.) supra, the court stated the general rule as follows: "The general rule is, that just compensation to the owner of private property taken or damaged for public use is to be measured by its fair cash market value.

. . . This rule excludes all evidence as to the amount of business done or which could be done in the property, or the probate profits arising therefrom." In that case, however, evidence of the profits derived from the business conducted on the condemned property was not offered as an element determining the market value, but as a loss constituting a separate item of damage.

#### *b. Application of rule.*

##### *1. Condemnation for use of railroad.*

Thus in Buckhannon & N. R. Co. v. Great Scott Coal & Coke Co. (1914) 75 W. Va. 423, 83 S. E. 1031, it was held improper to go into the question of profits derived from a business conducted on property taken for the use of a railroad, in order to show its market value, although it was proper to show how the property was used as bearing on its value.

See to the same effect: Jacksonville & S. E. R. Co. v. Walsh (1883) 106 Ill. 253; Whitman v. Boston & M. R. Co. (1861) 3 Allen (Mass.) 133; Bailey v. Boston & P. R. Corp. (1903) 182 Mass. 537, 66 N. E. 203; Philadelphia & C. Ferry Co. v. Inter-City Link R. Co. (1908) 76 N. J. L. 50, 68 Atl. 1033, affirmed in (1909) 77 N. J. L. 616, 72 Atl. 1119; Re New York, W. S. & B. R. Co. (1885) 35 Hun (N. Y.) 633; Becker v. Philadelphia & R. Terminal R. Co. (1896) 177 Pa. 252, 35 L.R.A. 583, 35 Atl. 617; Cox v. Philadelphia,

H. & P. R. Co. (1906) 215 Pa. 506, 114 Am. St. Rep. 979, 64 Atl. 729; White v. Pennsylvania R. Co. (1911) 229 Pa. 480, 38 L.R.A.(N.S.) 1040, 78 Atl. 1035; Richmond, P. & C. R. Co. v. Chamblin (1902) 100 Va. 401, 41 S. E. 750.

In Hamilton v. Pittsburg, B. & L. E. R. Co. (1899) 190 Pa. 51, 51 L.R.A. 319, 42 Atl. 369, a proceeding to determine the amount of compensation due the plaintiff for the taking of part of his land for railroad purposes, he offered in evidence testimony as to the future profits he expected to derive from a business conducted in the property, by reason of a proposed increase in his plant. The court held that it was error to admit this evidence; for it was unreliable, speculative, and remote, and did not constitute evidence of the market value of the property taken.

See to the same effect Booker v. Venice & C. R. Co. (1882) 101 Ill. 333; Pittsburgh & W. R. Co. v. Patterson (1885) 107 Pa. 461; Norfolk & W. R. Co. v. Davis (1906) 58 W. Va. 620, 52 S. E. 724.

Where, in an action to condemn a strip of land, including the appellant's premises, for railroad purposes, the landowner attempted to show the market value of his property by introducing evidence of the profits derived from his wine cellar, the court held that the profits were too remote, and did not tend to throw any light on the market value of the property. De Buol v. Freeport & M. River R. Co. (1884) 111 Ill. 499.

And in Kossler v. Pittsburg, C. C. & St. L. R. Co. (1904) 208 Pa. 50, 57 Atl. 66, wherein it appeared that in part of the plaintiff's lot, taken for railroad purposes, was situated a salt well, and the complainant offered to prove as an element in fixing the market value of the same the profits derived from selling the product of the well after the same had been treated and prepared in a manufacturing plant, the court held that the evidence was improper and inadmissible for the purpose of showing the market value of the property condemned, saying: "In so far as the salt-water well

constituted an element of value, it was merely as contributing a certain volume of salt water. Whether or not this product, as such, had any market value, does not appear from the evidence. No use had been made of it for a period of some nine years, and there was nothing to show what its value was, except in connection with the erection of an evaporating plant, and its operation subject to the contingencies of business. It is suggested in the argument of appellee, that the proof of the value of the salt-water well in this case is to be likened to that of an oil well. Be it so: The market value of an oil well is not determined by evidence of the profits which can be made from the product of the well, by means of a refinery erected upon the spot, operated with successful business skill. Its market value is its selling value as a well. In the present case, the market value of the salt-water well, if it were shown to have had any, at the time of the taking, would be one of the elements entering into the value of the property as a whole. If the well was destroyed, its value would also be one of the elements of depreciation, to be considered in ascertaining the loss in the selling value of the whole property caused by the entry of the defendant company."

In *Stockton & C. R. Co. v. Galgiani* (1874) 49 Cal. 139, an action to determine the value of lands taken for railroad purposes, it appeared that the land of the respondent and his cotenants was planted with vines and cultivated as a vineyard. In the court below evidence was allowed showing the annual net profits per acre derived from the land taken as an element of its market value. The court held that the evidence was inadmissible, saying: "The fact to be ascertained was the value of the land at the time of the taking. It is not allowed to arrive at this fact by proof of the annual net profits derived from a particular use. The profit for any year would depend upon many and varying circumstances, such as the nature of the season, the price of labor, the condition of the market as to supply and demand in re-

spect to the particular product, etc. A valuation derived from such evidence would be conjectural and speculative, and would not form a proper basis for an estimate of damages."

In *King v. Minneapolis Union R. Co.* (1884) 32 Minn. 224, 20 N. W. 135, wherein it appeared that manufacturing business had been carried on for a number of years on property sought to be condemned for railroad purposes, the court held that it was proper to consider the business conducted on the premises as an element in ascertaining its market value, but recourse could not be had to evidence showing the profits derived from the business.

So, in *Ranlet v. Concord R. Corp.* (1883) 62 N. H. 561, wherein it appeared that the plaintiff's lands, on which he conducted a coal and wood business, were taken for railroad purposes, evidence was offered showing the annual profits and income derived from the business. The court held that the evidence was immaterial and was properly excluded; for the true measure of damages for the taking of the lands was the market value thereof, and the evidence excluded could furnish no aid in the determination of that question.

In the reported case (*GAULEY & E. R. Co. v. CONLEY*, ante, 157), it appears that two lots were condemned for the use of a railroad, upon one of which was a horse and mule barn. The owners were permitted over objection to prove in evidence the net income and profits of the horse and mule business conducted by them on the property, as an index to its market value. The court holds that the evidence was inadmissible; for the profits derived from a business conducted upon the property was uncertain and speculative in character, depending on the capital invested, the skill and management of the owners, and other elements extrinsic to the property itself, and therefore it did not afford a true basis for the ascertainment of the market value of the property.

But compare *Laffin v. Chicago, W. & N. R. Co.* (1887) 33 Fed. 415, wherein the plaintiff sought the ascertainment of damages sustained by the

construction of the defendant's railroad across a tract of land owned by him. It appeared that the plaintiff conducted a summer hotel on part of the property, and that the remainder of the land he proposed to plot and sell in the form of village lots. For the purpose of showing the depreciation in the market value of the hotel property and the lots, the plaintiff offered evidence showing loss of patronage and profits to the hotel by reason of the operation of the defendant's railroad, and the expected prices and profits to be derived from the sale of the lots. The court instructed the jury, firstly, to disregard the evidence showing the expected profits from the sale of the lands by lots, as a measure of their value; for any supposed profits that might be made in the future were too remote, uncertain, and speculative; but, secondly, they could take with consideration the probable effects upon the hotel business and the loss or profits therefrom, not for the purpose of assessing damages for such items individually, but in order to determine how much the property was diminished in value by these remote injuries. The court said: "You will therefore bear clearly in mind that you are not to allow the plaintiff, as damages, any loss of profits in the business of the hotel, or loss of business or patronage, either presently or prospectively; nor are you to allow him damages on account of inconvenience or danger in the use of the drives on or around the premises, or on account of annoyances arising from smoke from the engines or noise of the engine whistles, or increased exposure to fire, or on account of any inconveniences in the use of the hotel property. The true question is, How much was the salable value of the lands of the plaintiff, and the improvements thereon, from which the strip for right of way was severed, diminished by the taking of that strip for railroad purposes? While, therefore, it is your duty, in computing the damages in this case, to exclude the items before mentioned, and any others of a similar nature, from your consideration, as independent items of damage,

you will at the same time understand that you have the right, and that it is entirely proper, to consider this testimony of alleged inconveniences, annoyances, and dangers, and any probable effects upon the business of the hotel, as accounting in some measure for the valuations stated by the witnesses; also to enable you to estimate the value of the opinions of witnesses as to the alleged depreciation in the value of the property; and, determining from the testimony how much, if at all, the property is diminished in value by exposure to those remote injuries, in that manner to aid you in measuring the actual or real loss, if any, to the plaintiff by the severance from his lands of the strip taken for right of way, and its appropriation for railroad purposes."

Compare also *Hunter v. Chesapeake & O. R. Co.* (*Fitzhugh v. Chesapeake & O. R. Co.*) (1907) 107 Va. 158, 17 L.R.A.(N.S.) 124, 59 S. E. 415, where in a condemnation proceeding, it appeared that a certain parcel of real estate was taken for railroad purposes, and upon this property a large and profitable business had been conducted. The court held that, while loss of profits or damage to business was not an element for consideration in determining the market value of the property because a matter of speculation and conjecture, nevertheless, the profits earned in a business conducted on the property taken were proper to be considered in ascertaining and fixing the market value of the property. However, in the instant case profits derived from the business conducted on the property were not offered as evidence of the market value, but the plaintiff claimed damages for the loss of profits as an independent item.

## 2. *Condemnation for other purposes.*

In *Chicago v. Farwell* (1919) 286 Ill. 415, 121 N. E. 795, wherein evidence was offered of the profits derived from a soap manufactory conducted on the property, part of which was condemned by the defendant city for a municipal purpose, as an element showing the market value of the property, the court held that where property had a market value evidence of



profits derived from it was inadmissible as a basis for fixing compensation.

In *Re Simmons* (1908) 58 Misc. 581, 109 N. Y. Supp. 1036, affirmed in (1909) 130 App. Div. 356, 114 N. Y. Supp. 575, it was held that the commissioners, appointed solely to ascertain the market value of lands condemned for the purpose of constructing thereon a city reservoir, properly rejected evidence of the gross receipts and net profits derived from a business conducted on the land; for the testimony offered was no evidence of the market value of the property.

See to the same effect *San Diego Land & Town Co. v. Neale* (1891) 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977.

In *Lehigh Valley Coal Co. v. Chicago* (1886) 26 Fed. 415, in determining the depreciation in the market value of the plaintiff's premises by reason of the construction of a viaduct, the court instructed the jury not to consider the past or future profits of the business there carried on, for they were too speculative and uncertain, and therefore not a proper basis upon which to ascertain the market value of the property. See to the same effect *Robbins v. Scranton* (1907) 217 Pa. 577, 66 Atl. 977; *Sauer v. New York* (1899) 44 App. Div. 305, 60 N. Y. Supp. 648.

In *Newton v. Armstrong* (1892) 63 Hun, 628, 45 N. Y. S. R. 18, 19 N. Y. Supp. 573, a proceeding to condemn certain lands for aqueduct purposes, the owner of the lands sought to prove, as showing the value of the property, the amount of business done by him in a mill conducted on the land, and the profits derived therefrom. The court held that this evidence was properly excluded, for it did not tend to prove the market value of the property, holding that "the size and capacity of the mill, and the extent of the water, of course, were relevant. But an inquiry into the owner's business involved other elements—the owner's business skill, the price of labor, the absence of presence of competition—which did not affect the value of the property."

And in *Schuylkill Nav. Co. v. Thoburn* (1821) 7 Serg. & R. (Pa.) 411, an action to ascertain the amount of

damage suffered by a landowner by the inundation of his property caused by the waters of a stream dammed for a public use, the court held that the market value of the property could not be shown by evidence of the profits derived from a business conducted thereon, saying: "It is evident that the profit, in any branch of manufactures, must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on; but it would be plainly unjust to put in the power of the plaintiff by an increase of all these, to an amount beyond what the demand for the manufactured article would justify, to charge the defendant in the same proportion for the injuries sustained by the impeding of his works in his business thus extended, as for a loss in his ordinary mode of carrying it on; that would make the defendant an insurer of ordinary profits, in a new state of the business, pushed to a morbid extent, and would put in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained. The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could be first demanded; they are to value the injury to the property, without reference to the person of the owner, or the actual state of his business; and in doing that, the only safe rule is to inquire, What would the property, unaffected by the obstruction, have sold for, at the time the injury was committed? What would it have sold for, as affected by the injury? The difference is the true measure of compensation."

In *Syracuse v. Stacey* (1899) 45 App. Div. 249, 61 N. Y. Supp. 165, affirmed on other grounds in (1901) 169 N. Y. 231, 62 N. E. 354, wherein it appeared that certain land and water rights were taken for the purposes of erecting and maintaining a reservoir for a city, evidence was excluded of

profits earned in a business conducted on the property taken, which was offered in determining the market value of the premises. The court held that the evidence was inadmissible.

And in *Kafka v. Davidson* (1917) 135 Minn. 389, 160 N. W. 1021, wherein it appeared that a strip of property was condemned for the purpose of widening a city street, the court held that it was competent to prove that the market value of the premises taken was enhanced by the fact that a cigar business had been maintained for a number of years on the property, but evidence as to the amount of profits derived from the business was not admissible as an element showing the market value of the property or the injury thereto.

In *Tide Water Canal Co. v. Archer* (1838) 9 Gill & J. (Md.) 479, wherein testimony was offered to show what profits might reasonably or probably be made from a business carried on by tenants on property sought to be condemned, the court held that such evidence was too uncertain and variable to be admissible in order to determine the value of the tenants' lease rights.

In an action to determine the value of a leasehold estate taken by the city of Boston under the Statute of 1867, chap. 308, evidence was offered as to the annual profits derived from a business conducted on the premises taken. The court held that an exclusion of the evidence was proper; for profits of a business did not constitute, and could not be considered in determining, the market value of the estate condemned. *Cobb v. Boston* (1872) 109 Mass. 438.

In *Boston Belting Co. v. Boston* (1903) 183 Mass. 254, 67 N. E. 428, it was held that loss of business could not be considered as an element showing the depreciation in market value of the property on which the business was conducted, caused by the taking of the waters of a brook flowing through the property and used in the operation of the business conducted thereon.

In *West Chicago Park Comrs. v. Boal* (1908) 232 Ill. 248, 83 N. E. 824, a proceeding to ascertain the compensation to be paid for certain lots to

be devoted to public use as a park, it appeared that the defendant was the owner of a number of the lots, on one of which was conducted a saloon. Evidence was received of the profits and net income from the saloon as an element showing the market value of the leasehold. The court held that the admission of this evidence was erroneous, for the amount of business transacted in the saloon or the profits thereof were not elements to be considered in fixing the market value.

Where, in a proceeding to appraise the value of certain property taken for the use of a city, the owners of the property sought to show the profits derived from a business conducted by them on the premises as evidence of its market value, the court held that an exclusion of such evidence was proper, saying: "It is doubtless competent for the landowner to prove the value of the land taken from him for any purpose for which it may properly be used, and he is entitled to that value, even though he may put the property to a different use. It was of course competent to show that the property was used for business purposes and was suitable for such purposes, for as a rule business property demands a higher price than property used merely for the purpose of residence. It was also competent to show the general character of the business, for property desirable or available for business of a certain character commands higher prices than property only suitable for business of another character; but the profits the occupants had realized from the business carried on upon the property do not tend to show the value of the property itself." *Re Gilroy* (1898) 26 App. Div. 314, 49 N. Y. Supp. 798.

In *Re Buffalo* (1886) 1 N. Y. S. R. 742, the court held that, in estimating the market value of property taken for municipal purposes, loss of profits from a business conducted on the property should not be considered, for the same was no evidence of the market value of the property.

In *Brainerd v. State* (1911) 74 Misc. 100, 181 N. Y. Supp. 221, wherein it was contended by the claimants that

the market value of property taken for the use of the state should be fixed by reference to the profits realized from a business conducted on the property, the court held that as a general rule profits could not be taken as the basis for estimating the market value of property taken under the right of eminent domain, saying: "The claimant may have done a profitable business upon the premises in question, but other parties may prove a failure in the same business on the same premises; and even the claimants may not continue to make the same profits in the future that they have made in the past, if left undisturbed. No one can foresee changes that may reduce a profitable business to an unprofitable one."

In *Illinois C. R. Co. v. Lostant* (1897) 167 Ill. 85, 47 N. E. 62, the court held that evidence showing the amount of freight shipped over the defendant's railroad by certain grain elevators whose approaches to the railroad would be blocked by the taking of certain land in the defendant's right of way, was inadmissible as an element in determining the compensation to be paid for the land taken. It was said: "The position attempted to be maintained is, opening the supposed streets will destroy the approaches to the elevator, thereby injuring their business, and so deprive the company of profits which it would otherwise receive for shipping grain and coal; and the extraordinary claim is made that such prospective profits may properly be taken into account in determining the just compensation to be paid for the land taken. It is not pretended that the railroad company has any property rights in the approaches. The ground on which they stand was not leased to the owners of the elevators, nor is it pretended that they, by the terms of their leases, were required to put these approaches where they are or maintain them there. The owners of the elevators make no complaint in this proceeding. The alleged loss to the defendant is manifestly incapable of an intelligent estimate. It is remote, uncertain, and purely speculative. That the evidence

was incompetent is too clear for argument."

In *Tacoma v. Nisqually Power Co.* (1910) 57 Wash. 420, 107 Pac. 199, a proceeding to condemn certain land and water rights for the purpose of generating electric power for a city, evidence was offered showing the possible profits which might be derived from a power plant upon the land taken. The court held that the evidence was inadmissible in determining the market value of the property.

In *Cole v. Ellwood Power Co.* (1907) 216 Pa. 283, 65 Atl. 678, wherein it appeared that a stone quarry was condemned for a public use, the court held that the value of the stone after it had been manufactured into curbstone and sold in the market, less the cost of production and transportation, in other words, the profit derived from its sale, was not the true measure of the property taken, but the true measure of damages was the value of the stone in place.

And in *Miller v. Windsor Water Co.* (1892) 148 Pa. 429, 23 Atl. 1132, a proceeding to determine the compensation to which the plaintiff was entitled for property taken by the defendant water company, the court upheld the following charge to the jury: "The jury must consider the question of damages without reference to the person of the owner or the actual state of profits of his business. The test is not what he makes, but what is the market value of the land. As to the market value of the land, the jury will disregard any estimate founded wholly upon those considerations, and they will disregard all estimate in so far as they may have entered into them. But the jury may consider the use to which a property may be put, and if that property, by reason of its location or use to which it is put, may be worth more for that particular use than any other, its market value would be governed accordingly."

In *Schuylkill Nav. Co. v. Freedley* (1841) 6 Whart. (Pa.) 109, a proceeding to ascertain the damage caused the plaintiff's mill by the erection of a dam above it in the stream which provided its motive power, the com-

plaintant offered to show his loss in profits as evidence of the depreciated market value of the property. The court held that the evidence was improper and inadmissible, as the profits alleged to have been lost were too speculative and conjectural to afford a true measure of damage.

But the rule that profits derived from a business conducted on property are no evidence of its market value in condemnation proceedings was strictly confined by the court in *Dupuis v. Chicago & N. W. R. Co.* (1885) 115 Ill. 97, 8 N. E. 720, wherein it was held that an instruction to the jury informing them that profits, or supposed profits, arising from the defendant's business were not proper elements to be considered, nor should they take into consideration the character of the business transacted on the property, was misleading, the court saying: "It may be true that the profit or supposed profits arising from the business was not a proper element of damages, as declared in the instruction, but it will be observed that the instruction does not stop with profits or supposed profits, but goes further, and informs the jury that they should not take into consideration the character of the business transacted on the property. As said before, the main inquiry was the fair market value of the property to be taken, but in arriving at a solution of this question, it was proper for the jury to consider the purposes for which the lands were used,—whether they were adapted to that particular use, whether the lands were profitable and valuable for that use; and in so far as the particular use to which the lands were or had been appropriated, added to their market value, that might be considered by the jury. If the lands were valuable, as located, bordering on or near the river, as it is contended they were, for a sawmill, planing mill, or factory of any description, or for any other purpose, the testimony tending to prove such purpose was proper for the consideration of the jury, in passing upon the fair market value of the property taken or damaged."

See also *Kansas City v. Bacon*

(1900) 157 Mo. 450, 57 S. W. 1045, wherein the court sustained an instruction to the jury in the following form: "In passing upon the value of lots . . . containing the spring of water known as Willow spring, the jury are authorized, in connection with all the other evidence in the case, to take into consideration the special value of said spring, if any, together with all the lawful uses, such as sale of water or piping to supply families, to which the owner may put such spring and water as a source of profit." It was held that this charge did not authorize the jury to indulge in speculation as to profits that might be made by the sale of water in determining the market value of the property taken.

But compare *Pause v. Atlanta* (1895) 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489, wherein it appeared that the plaintiff suffered damages by reason of the building of a bridge near her property whereby her business of keeping a restaurant and bar was broken up and destroyed. The court held that recovery could not be had for the profits of the business by way of damages, but evidence that the business was profitable was "admissible to illustrate and throw light upon the value of the premises for rent."

#### *c. Limitation of rule.*

##### *1. Value dependent wholly on profits.*

Where it appears that the property condemned is of such a nature that the profits derived from its use are the entire or chief source of its value, evidence of the amount of the profits is to be considered in determining the market value.

*State v. Suffield & T. Bridge Co.* (1909) 82 Conn. 460, 74 Atl. 775; *Columbia Delaware Bridge Co. v. Geisse* (1875) 38 N. J. L. 39, affirmed in (1876) 38 N. J. L. 580; *Re State Reservation* (1884) 16 Abb. N. C. (N. Y.) 159; *Cincinnati v. Scarborough* (1880) 6 Ohio Dec. Reprint, 874; *Avondale v. Cincinnati & A. Turnp. Co.* (1884) 10 Ohio Dec. Reprint, 82; *Montgomery County v. Schuylkill Bridge Co.* (1885) 110 Pa. 54, 20 Atl. 407; *Mifflin Bridge Co. v. Juniata County* (1891) 144 Pa.

365, 13 L.R.A. 431, 22 Atl. 896; Harrisburg, C. & C. Turnp. Road Co. v. Cumberland County (1909) 225 Pa. 467, 74 Atl. 340; Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County (1910) 228 Pa. 1, 76 Atl. 726.

Thus in *Re State Reservation* (1884) 16 Abb. N. C. (N. Y.) 159, a proceeding to ascertain the amount of compensation to be paid for the taking by the state of New York of property in the vicinity of Niagara Falls, including Prospect Park and Goat Island, two revenue producing scenic spots, evidence was received of the annual net income derived from these resorts by the charging of admission. The court held that while as a general rule evidence of the profits of a business transacted upon property taken by eminent domain is not legitimate evidence of its market value, yet that in view of the peculiar nature of the property in question, and the absence of other means of ascertaining its market value, the annual profits derived could not be omitted as an element in fixing the value of the properties. But it was held further that, before the annual net income could be made a measure of value, it must satisfactorily appear that it had the element of permanency, and that such income was derivable from the property itself, and not from the skill of the management of the property.

And in *Columbia Delaware Bridge Co. v. Geisse* (1875) 38 N. J. L. 39, affirmed in (1876) 38 N. J. L. 580, it appeared that the defendant bridge company constructed a toll bridge over a river at a point where the plaintiffs had maintained a ferry pursuant to a franchise granted them by the state. In determining the value of the franchise destroyed by the erection and operation of the bridge, the court held that evidence showing the income and profits derived by the plaintiffs from the ferry was competent and proper, saying: "This testimony was clearly competent. The jury was required by the defendant's charter to compensate the plaintiffs for the damages they sustained by the erection of the bridge. The injury they suffered was in being deprived of the tolls they

might have received from the ferry, in case the bridge had not been built. In no other way would the jury have been able to estimate the extent of the injury, except by proof of the earnings previously realized from the ferry."

In *State v. Suffield & T. Bridge Co.* (1909) 82 Conn. 460, 74 Atl. 775, an action to determine the amount of compensation which should be paid to the defendant for the taking of its toll bridge, the court held that evidence bearing upon the net income and profit of the structure should have been admitted and considered as a factor in determining its market value, saying: "Where the property taken has earning capacity, and the market value is just compensation, while evidence of the net income of the property is always competent evidence, it is not necessarily controlling. A purchaser in the market for it will not only look to the present and past income from it, but will inquire as to its future prospects. In the case of a toll bridge, the prospective increase of the population in the contiguous territory, and consequent increase of traffic across the bridge, would tend to increase the market value. The fact, if such should be a fact, that free bridges across the same stream in close proximity to such toll bridge were about to be opened, would have a contrary effect. So, too, the cost of replacing the bridge by a new structure, in case it should be carried away by a freshet or otherwise destroyed, would be likely to be considered by a prospective customer. Evidence of all these facts, and of others of like nature, as well as of the net income received from the property, the par value of the stock of a corporation owning it, and the dividends paid upon such stock, is admissible upon the question of just compensation for taking such a bridge, and when received can be and should be considered and weighed together in arriving at the sum which will constitute such compensation."

See to the same effect *Chestnut Hill & S. H. Turnp. Road Co. v. Montgomery County* (1910) 228 Pa. 1, 76 Atl. 726; *Montgomery County v. Schuylkill*

Bridge Co. (1885) 110 Pa. 54, 20 Atl. 407.

So, in *Avondale v. Cincinnati & A. Turnp. Co.* (1884) 10 Ohio Dec. Reprint, 82, the court instructed the jury that in determining the compensation to be paid a turnpike company for the taking of its toll road within the corporate limits of a village recourse could be had to the past profits and income derived from the tolls collected, saying: "Before the village of Avondale can take possession of that portion of the turnpike the law requires that it shall compensate the Turnpike Company in money for the damage it will sustain by reason of the taking or appropriation as such portion of its turnpike; and you are called here to assess the amount of what that compensation should be; in other words, to determine the amount which, in justice, will fairly and justly compensate the Turnpike Company, for being deprived of the right to collect toll in the future upon so much of its road as lies within the corporate limits of Avondale. And if such deprivation will have the effect of impairing or lessening the Turnpike Company's proportionate income on the remaining portion of its road, such impairment or injury to such remaining portion, if any, should also be compensated for and allowed for, in the compensation awarded in your verdict. In the progress of this case, you have necessarily noticed that the nature of the property or right which is sought to be appropriated by the village of Avondale is peculiar in that its value cannot be ascertained by the ordinary rules for determining values, namely, 'market value.' For this kind of property there does not appear to be any market value which can be ascertained, hence recourse is had to another mode of determining the value."

See to the same effect *Cincinnati v. Scarborough* (1880) 6 Ohio Dec. Reprint, 874; *Harrisburg, C. & C. Turnp. Road Co. v. Cumberland County* (1909) 225 Pa. 467, 74 Atl. 340.

**2. Property producing profits independent of owner's industry.**

Where property is of such a nature that it produces a profit independent

of the labor of the owner, that profit is to be considered in determining the market value of the property. *Pegler v. Hyde Park* (1900) 176 Mass. 101, 57 N. E. 327; *Gearhart v. Clear Spring Water Co.* (1902) 202 Pa. 292, 51 Atl. 891; *Iron City Automobile Co. v. Pittsburgh* (1916) 253 Pa. 478, L.R.A.1917C, 420, 98 Atl. 679; *Weyer v. Chicago, W. & N. R. Co.* (1887) 68 Wis. 180, 31 N. W. 710; *Stolze v. Manitowoc Terminal Co.* (1898) 100 Wis. 208, 75 N. W. 987.

Thus, in *Iron City Automobile Co. v. Pittsburgh* (1916) 253 Pa. 478, L.R.A. 1917C, 421, 98 Atl. 679, the court held that while, in fixing the value of a leasehold destroyed by the taking of the property, recourse could not be had to evidence showing the annual profits and income of a business conducted by the tenant, as an element fixing the market value of the lease, nevertheless, if the leasehold was one which, because of certain peculiar qualities in and of itself, actually produced a revenue or enabled the tenant directly to make a saving in the conduct of his business, aside from the results of his personal management, then the profits directly produced by the property could be considered in ascertaining its market value.

And in *Weyer v. Chicago, W. & N. R. Co.* (1887) 68 Wis. 180, 31 N. W. 710, it was held that in estimating the value of farming land it was proper to consider its productiveness, or the income derived therefrom; for from the nature of the land and its use no better criterion could have been adopted in order to ascertain its real value.

So, in *Pegler v. Hyde Park* (1900) 176 Mass. 101, 57 N. E. 327, a proceeding to assess damages for the taking of a leasehold estate in property used for greenhouses, it appeared that evidence was received of the amount of business done by the owner. The court held that the evidence was admissible as bearing upon the question of the capacity of the real estate for use.

In *Stolze v. Manitowoc Terminal Co.* (1898) 100 Wis. 208, 75 N. W. 987, wherein it appeared that the land condemned for railroad purposes was

used and cultivated as a market garden, the court held that there was no error in allowing the plaintiffs to prove the net profits derived from the land; for its character and use necessitated a liberal rule of evidence in proving its market value.

And in *Gearhart v. Clear Spring Water Co.* (1902) 202 Pa. 292, 51 Atl. 891, the court held that evidence of the probable returns from an investment in land because of the uses which might be made of it was a consideration which entered with an intelligent estimate of its value, and was entirely distinct from an estimate based on the profits of a business which might be conducted on it. The decision was apparently based on the fact that the land had a productivity independent of the management, skill, and industry of the owner, since it appeared that the property taken consisted of reservoir land which was part of the bottom of a natural basin and peculiarly adapted for the formation of ice.

### III. Rule in Canada and England.

In the British jurisdictions, in the few cases wherein the subject has been discussed, evidence of the profits derived from a business conducted on property is considered as an element in fixing the market value in expropriation proceedings. *Re Davies* (1918) 28 Ont. L. Rep. 544, 4 Ont. Week. N. 1154, 13 D. L. R. 912; *Re Meyer* (1914) 30 Ont. L. Rep. 426, 5 Ont. Week. N. 733, 19 D. L. R. 785; *Ripley v. Great Northern R. Co.* (1875) L. R. 10 Ch. (Eng.) 435, 31 L. T. N. S. 869, 23 Week. Rep. 685. See also *Reg. v. Vaughan* (1868) L. R. 4 Q. B. (Eng.) 190, 38 L. J. Mag. Cas. N. S. 49, 17 Week. Rep. 115. See also *Pile v. Pile* (1876) L. R. 3 Ch. Div. (Eng.) 36, 45 L. J. Ch. N. S. 841, 35 L. T. N. S. 18, 24 Week. Rep. 1003.

Thus, in *Re Meyer* (1914) 30 Ont. L. Rep. 426, 5 Ont. Week. N. 733, 19 D. L. R. 785, wherein it appeared that a parcel of land upon which the owner conducted a profitable business was expropriated for municipal purposes, the court held that the profits derived from the business conducted on the land constituted an element to be con-

sidered in fixing the value of the property taken.

In *Ripley v. Great Northern R. Co.* (1875) L. R. 10 Ch. (Eng.) 435, 31 L. T. N. S. 869, 23 Week. Rep. 685, a proceeding to determine the compensation to be paid the plaintiff for the taking of certain lands, evidence was received of the profits which might have been derived from supplying water from a reservoir on the property to cotton mills when built. The court held that the arbitrator was right in considering the evidence as an element in fixing the award, saying: "It is said that even then the umpire ought not to have admitted evidence as to the prospective profits which would be made by selling the water to the mills to be built. Now, I confess I do not see how it was possible that the umpire could discover what loss Mr. Ripley had sustained by reason of his being deprived of the advantage of selling the water from his reservoirs to the mills, without going into evidence of what those profits would be. No doubt there are deductions to be made from the gross profits, and when the profits are ascertained it has to be considered that the compensation will be given at once, whereas the profits would only be gained at a future time, and would only be gained at a certain risk and certain expense. All those deductions are to be made; but I do not know how the value of such property can possibly be ascertained unless you commence by ascertaining the profits, and then make all proper deductions."

In *Re Davies* (1913) 28 Ont. L. Rep. 544, 4 Ont. Week. N. 1154, 13 D. L. R. 912, wherein it appeared that the respondent was the owner of property on which he maintained a brick works, and that lands immediately adjacent thereto and necessary in the expansion of his business were taken for railroad purposes, the court held that it was proper, in estimating the value of the land, to compute how much the owner could make by using it in connection with his business.

See also *Pile v. Pile* (1876) L. R. 3 Ch. Div. (Eng.) 36, 45 L. J. Ch. N. S. 841, 35 L. T. N. S. 18, 24 Week. Rep.

1003, an action for the administration of an estate involving the award of arbitration in a condemnation proceeding wherein it seems that the umpires in computing the value of land taken considered the profits of a business conducted on the property as one of the elements fixing its value.

In *Reg. v. Vaughan* (1868) L. R. 4 Q. B. (Eng.) 190, 38 L. J. Mag. Cas.

N. S. 49, 17 Week. Rep. 115, the court held that while a tenant of property taken under the right of eminent domain was entitled to compensation based on the profits derived from his business as a publican, he could not recover in the basis of profits received after the property had been taken possession of under the proceedings to condemn.  
W. J. K.

**METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Plff. in Err.,**

v.

**EMMA E. JOHNSTON, Exrx., etc., of Henry Johnston, Deceased.**

*United States Circuit Court of Appeals, Third Circuit — November 30, 1917.*

(159 C. C. A. 283, 247 Fed. 65.)

**Trial — question for jury — time for notice of accident.**

1. Whether notice of accident under an insurance policy was given within the required number of days, or as soon thereafter as was reasonably possible, is ordinarily a question for the jury.

[See note on this question beginning on page 186.]

**Insurance — accident — provision for notice.**

2. A provision in an accident insurance policy requiring notice of an accident to be given to the insurer within a specified time after its occurrence is valid.

[See 14 R. C. L. 1325.]

— reasonable time for notice.

3. A provision of an accident insurance policy that notice of accidents shall be given the insurer within a specified number of days unless the giving of such notice shall not be reasonably possible, in which event such notice shall be given as soon as reasonably possible, requires notice to be given within a reasonable time.

[See 14 R. C. L. 1329.]

**Evidence — burden of proof — time for giving notice of accident.**

4. One suing on an accident insurance policy requiring notice of accidents to be given insurer within a specified number of days, or, if this is not reasonably possible, then as soon as reasonably possible, has the burden of showing that notice was given within the number of days specified, or that

such notice was not reasonably possible, and that notice was given as soon after the accident as was reasonably possible.

[See 14 R. C. L. 1327.]

**Trial — question for court.**

5. The court may determine whether the conditions of an accident insurance policy as to notice of accidents were complied with if from the proven facts no doubtful inferences can be drawn as to the reasonable impossibility of giving notice within the required time, or that it was given as soon thereafter as was reasonably possible.

[See 14 R. C. L. 1329.]

**Insurance — impossibility of giving notice of accident.**

6. An insured is absolved from the duty of giving notice of an accident within a specified time if the accident created a mental condition in him which rendered it impossible for him to give notice, and the policy required notice as soon thereafter as was reasonably possible under such conditions.

[See 14 R. C. L. 1333.]



— necessity of notice by wife.

7. The wife of one holding an accident insurance policy is not, upon his being rendered by accident incapable of notifying the company of the accident as required by the policy, bound to furnish the notice if she was ignorant of the terms of the policy, although she knew of its existence.

— delay for eighteen months — effect.

8. A delay of eighteen months in giving notice of an accident, under a

policy requiring notice within a specified number of days or as soon thereafter as is reasonably possible, will not bar an action on the policy if the accident created a mental condition in insured which made notice by him impossible, and those in attendance on him were ignorant of the terms of the policy, which also provided that in case of impossibility notice should be given as soon thereafter as was reasonably possible.

[See 14 R. C. L. 1333.]

(McPherson, Circuit Judge, dissents in part.)

**ERROR** to the District Court of the United States for the District of New Jersey (Haight, J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Messrs. Wicoff & Lanning, Heyn & Covington, and George B. Covington for plaintiff in error.

Mr. J. Raymond Tiffany for defendant in error.

Woolley, Circuit Judge, delivered the opinion of the court:

This is an action on a policy of accident insurance. While the errors assigned cover the whole range of the trial, the single question urged on review is whether notice of the accident was given the insurance company within the time stipulated in the contract of insurance, and whether, accordingly, the trial court erred in refusing a motion for binding instructions in favor of the defendant.

A policy of accident insurance, issued by the defendant company to Henry Johnston, was in force on February 28, 1914, when Johnston fell upon a sidewalk and sustained injuries to his head. On August 30, 1915, he died, and September 4 following, Emma E. Johnston, his widow and executrix, notified the insurance company of the accident and made claims for indemnities under the policy. The insurance company, considering notification of an accident eighteen months after its occurrence to be flagrantly violative of the provision of the

policy respecting notice, refused payment, whereupon the plaintiff brought this suit.

The indemnities which the insurance company had stipulated to pay in the event of accident to the insured were two kinds, namely, weekly indemnities for disabilities payable to the insured, and death indemnity payable to his wife. Action was therefore brought on the double undertaking of the insurance company by the wife of the insured in her dual capacity of executrix and beneficiary.

As the proceedings at the trial followed the double aspect of the cause of action, the court instructed the jury that if they found for the plaintiff they should render two verdicts in her favor, one in her capacity of executrix and the other in her individual capacity. The evidence, so far as we can discern, was of a character that would support one verdict as well as the other, yet the jury, curiously enough, made a discrimination and rendered a verdict against the plaintiff as beneficiary and for the plaintiff as executrix of the insured.

The plaintiff was apparently content with the opposing verdicts. The defendant insurance company was not. It sued out this writ of error, but directed it solely to that part of the judgment which holds it

liable to the executrix for weekly indemnities covering the period from the date of the accident to the date of the death of the insured.

The merits of the controversy were embraced in the issues, whether there was an accident, and if so, whether the disabilities and subsequent death of the insured were solely and directly due to the accident independently of all other causes. With these issues, the defendant concedes, we have nothing to do, as they were resolved by the verdict of the jury in favor of the plaintiff. We are concerned only with the question whether the plaintiff was precluded from maintaining this action in either of her capacities, because of the failure (astonishing as it at first appears) to give the insurance company notice of the accident until eighteen months after its occurrence.

The rights involved in this litigation are contractual, and arise from an agreement between the parties. This agreement is embodied in the policy of insurance. There the insurer undertook to indemnify the insured for the consequences of accidents, and the insured undertook to notify the insurer of any accident upon which he would make claim for indemnity. The time within which such notice should be given was indicated in the policy, and was agreed to by the insured. The giving of notice within the time stipulated therefor became an undertaking on the part of the insured, the performance of which is regarded by the law as an absolute condition precedent to the enforcement of the insurer's liability.

The provision of the policy is as follows: "Written notice must be given the company . . . of any accident or injury for which a claim is to be made, . . . within twenty-one days from the date of the accident or injury, *unless the giving of such notice within such time shall not be reasonably possible, in which event such notice must be so given as soon as reasonably possible.*"

7 A.L.R.—12.

In inserting this provision in the policy of insurance, it is evident the insurer considered it a substantial feature of the contract and intended that its liability for indemnities should be conditioned upon compliance with it. The law views such provisions as reasonable means to be employed by insurance companies in protecting themselves against fraudulent claims, and requires that they be complied with in the manner and within the time

Insurance—  
accident—  
provision for  
notice.

agreed upon as a condition precedent to an action on the policy. But under this rule there frequently arise questions as to what constitutes compliance with such provisions, and courts are called upon to interpret their meaning. So, in this case, it becomes necessary to construe the provision in order to determine whether notice was given in compliance with its terms. The plaintiff urges that the insured, though he gave no notice of the accident, was excused for not complying with the provision because of a mental condition occasioned by the accident, which made compliance impossible. On the other hand, the defendant contends that the insured was not so excused, or, if he was, then the duty of complying with the provision devolved upon his wife, or if not upon her, then upon her niece, who were persons next to the insured and in a measure conversant with the contract of insurance and of the insured's undertaking to give notice.

These contentions, considered with reference to the evidence, raise no new questions of law. The novel feature of the case is in the application of the law to a notice of the unusual character of the one here given eighteen months after the accident.

The manifest object of providing in a contract of accident insurance for notice to be given within a time either precisely prescribed or generally defined is to afford the in-

suror an opportunity promptly to inquire into the accident, and to take such steps for its protection as can only be taken shortly after its occurrence. To attain this end different insurance companies write different provisions in their policies according to their varying notions of what is necessary for their protection. Some require that the notice shall be given within a specified number of days after the accident, others that "immediate notice" be given, and still others that notice be given "as soon as possible," or "as soon as reasonably possible."

Notice within a given number of days is held by some courts, though harsh, to be unconditionally binding upon the insured, even though the giving of such notice be made impossible by the very accident insured against. *Whiteside v. North American Acci. Ins. Co.* 200 N. Y. 320, 35 L.R.A.(N.S.) 696, 93 N. E. 948; *Roehner v. Knickerbocker L. Ins. Co.* 63 N. Y. 160, 164; *Heywood v. Maine Mut. Acci. Asso.* 85 Me. 289, 27 Atl. 154. Other courts interpret like provisions as made by the parties in full contemplation of the possibility of the insured being rendered incapable of giving the prescribed notice by the accident insured against, and follow what now appears to be the rule, that where, because of circumstances surrounding the accident, including the mental condition of the insured as a consequence of the accident, the giving of notice within the time specified becomes impossible, it will be excused, and notice given within a reasonable time after the removal of the obstacle will be sufficient.

A discussion of these cases appears in notes to *Jennings v. Brotherhood Acci. Co.* 18 L.R.A.(N.S.) 109, 130 Am. St. Rep. 109, and in a note to *Hilmer v. Western Travelers' Acci. Asso.* 27 L.R.A.(N.S.) 319. As the provision in controversy does not unconditionally limit the giving of notice to a given number of days, some of the cases cited bear upon the question

under discussion only as they show the drift of judicial decision from the harsh rule requiring compliance with the provision without regard to the ability of the insured to comply with it, to the more liberal rule that such provisions are made and agreed to in contemplation of the impossibility of literal compliance. Other cases cited bear directly upon the matter under discussion, in that they contain judicial interpretations of the expressions, "immediate notice," and "notice as soon as possible," found in many policies. "Immediate notice" is not construed to mean notice to be instantly given, but is construed to mean "reasonable notice," or notice to be given within a reasonable time. In this regard the defendant concedes that a provision for "immediate notice" is identical in point of law with the provision of the <sup>reasonable</sup> ~~time for notice.~~ policy in this case requiring (in the last event) that notice "be given as soon as reasonably possible." *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69. The legal meaning of both is that notice shall be given within a reasonable time. What is a reasonable time depends upon the circumstances of the case and upon the reasonable opportunity for giving notice which the circumstances afford the one upon whom devolves the duty of giving it.

See *Fidelity & D. Co. v. Courtney*, 186 U. S. 342, 346, 347, 46 L. ed. 1193, 1196, 22 Sup. Ct. Rep. 833; *Travelers' Ins. Co. v. Nax*, 73 C. C. A. 649, 142 Fed. 653; *National Surety Co. v. Western P. R. Co.* 119 C. C. A. 91, 200 Fed. 675; *People's Mut. Acci. Asso. v. Smith*, 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605; *Lyon v. Railway Pass. Assur. Co.* 46 Iowa, 631; *Roseberry v. American Benev. Asso.* 142 Mo. App. 552, 121 S. W. 785.

The provision in dispute contains two binding clauses and one saving clause. As we construe it, the first requires written notice of an accident within twenty-one days

from the date of its occurrence. By this clause the insured is bound to give notice within the time specified, unless, as provided by the saving clause that follows, the giving of notice within that time shall not be reasonably possible. In that event, the concluding clause binds the insured to give notice as soon thereafter as is reasonably possible. In suing on a policy containing such a provision, an insured, or his legal representative, has the burden of showing performance of this condition precedent. He must show that notice was given within twenty-one days, or, failing in this, he must excuse his failure by showing that it was not reasonably possible for him to give notice within that time, and that he has complied with the remaining clause by giving notice as soon thereafter as was reasonably possible. Whether notice was not given within the initial limit of twenty-one days because it was not reasonably possible, and whether it was given as soon thereafter as was reasonably possible, this being the ultimate limit of the provision, are clearly questions of fact and ordinarily are questions for the jury. Whether such questions are for the jury or the court is determined by familiar rules. *Travelers' Ins. Co. v. Nax*, 73 C. C. A. 649, 142 Fed. 653, 660.

**Evidence—burden of proof—time for giving notice of accident.**

**Trial—question for jury—time for notice of accident.**

If the facts are not controverted, or if from proven facts no doubtful inferences can be drawn as to the reasonable impossibility of the insured giving notice within twenty-one days, or as to whether he gave notice as soon thereafter as was reasonably possible, then, of course, there is nothing to submit to the jury, and the court may hold as a matter of law that the condition precedent has or has not been performed. But if the facts and circumstances are controverted, and are such as to sustain an inference

that it was not reasonably possible for the insured to give notice within twenty-one days, and that the notice thereafter was given as soon as was reasonably possible, the question whether the insured has performed the condition precedent to the enforcement of the insurer's liability for indemnity is for the jury. The language of Mr. Justice Paxson, in speaking for the supreme court of Pennsylvania, in *People's Mut. Acci. Asso. v. Smith*, 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605, is peculiarly appropriate to this discussion. He said: "A person might be so injured as to be physically unable to give notice for weeks. Hence it is that such questions are referred to the jury, to say whether, under all the circumstances, there has been an unreasonable delay in giving notice."

See *National Surety Co. v. Western P. R. Co.* 119 C. C. A. 91, 200 Fed. 675, 681; *Travelers' Ins. Co. v. Nax*, 73 C. C. A. 649, 142 Fed. 653; *Hughes v. Central Acci. Ins. Co.* 222 Pa. 462, 71 Atl. 923; *Everson v. General Acci. F. & L. Assur. Corp.* 202 Mass. 169, 88 N. E. 658 (" . . . as soon as possible").

Applying these observations to the facts of this case, startling as these facts are, we shall first inquire whether a right of action on the policy by the personal representative of the insured was lost by the failure of the insured to give notice at any time. This inquiry can readily be disposed of. The evidence upon which the jury found that injury to the insured and his death were due solely to the accident was sufficient to sustain a finding that the accident created a mental condition in the insured which made compliance with the provision of the policy impossible. The trial court squarely charged the jury that, if they found it was reasonably possible for the insured to give notice at any time, the plaintiff could not recover. The verdict was for the plaintiff, hence the verdict was

**—question for court.**

a finding that it was not reasonably possible for the insured, in view of his mental condition, to give notice at any time after the accident. By this finding, the insured was excused.

**Insurance—  
impossibility of  
giving notice of  
accident.**

The next questions are whether the undertaking of the insured to give notice of the accident devolved upon his wife when he became incapable of performing it, and whether the court should have decided that question as a matter of law.

The defendant contends, upon authority of a stray dictum in *Travelers' Ins. Co. v. Nax*, 73 C. C. A. 649, 142 Fed. 653, 657, that the provision of the policy required notice to be given by someone on behalf of the insured within the time prescribed, if the insured himself was not able to give the notice. The controlling fact of the *Nax* Case was that the insured was in full possession of his faculties for a long period after the accident, and could have given the notice, and the point of decision was that, being able to give notice, he was bound to give it, and that his failure barred recovery on the policy by his personal representative. Manifestly the *Nax* Case does not rule this case.

The evidence upon which the defendant bases its contention that the wife of the insured was bound to give the notice required of him is meager and unsatisfactory. The evidence tends to prove that Johnston never spoke of his accident insurance after the accident; that Mrs. Johnston knew that her husband carried a policy of accident insurance and that he kept it in a safe deposit box, the key to which was accessible; that she did not know the name of the company which issued the policy; that in September, 1914, about seven months after the accident, there was received in her husband's mail a renewal certificate in the form of a receipt for a renewal premium of \$40, then due on the policy; that, accepting this certificate as a notice as well as a receipt,

Mrs. Johnston sent her check for \$40 to the insurance company, inclosed in a letter showing that the check was in payment of a premium on the policy in suit; that the letter and check had been written by her niece and that she signed them at her request; and that she was wholly ignorant of the terms and conditions of the policy until after her husband's death, when she found the policy, and promptly gave notice of the accident.

From this testimony, it was possible for the jury to find two facts, first, that Mrs. Johnston knew of the existence of the policy, and second, that she was ignorant of its terms. The trial court refused to find as a matter of law that Mrs. Johnston knew the terms of the policy, and refused to hold, therefore, that she was bound by the undertaking of her husband to give notice of the accident, as a condition precedent to her action on the policy. What the court did was to leave the question of Mrs. Johnston's knowledge of the terms of the policy to the jury, under instructions that if they found that she knew the terms of the policy in the lifetime of her husband, it was her duty to give the notice, and failing so to do, she could not recover. The jury rendered a verdict for Mrs. Johnston as executrix of her husband's will, which was a finding that she did not know the terms of the policy. Clearly no duty devolved upon the wife to perform an undertaking of her husband to which she was not a party, and of which she was ignorant. Assuming, without deciding, that such a duty devolved upon her had she knowledge of her husband's undertaking, the finding by the jury that she had no such knowledge disposed of any question of her duty and left her free to maintain this action.

**—necessity of  
notice by wife.**

The contention that the action was barred because the niece failed to give the notice which the policy required of the insured is no stronger than the case made against the

wife; for, while the evidence showed that the niece had a wider knowledge of the business affairs of the insured, it was sufficient for the jury to find that she also was ignorant of the terms of the policy.

In showing knowledge of the terms of the policy on the part of the wife and the niece, the defendant laid stress, with no little force, upon a phrase appearing in the renewal certificate received after the accident. In this certificate were printed in conspicuous type the words: "Notify the Company at Once in Event of Accident." This direction to the insured, coming, it is assumed, within the observation of the wife and niece, is persuasive of the defendant's contention that they were thereby substantially informed of the terms of the policy, yet, opposed to this evidence, there was the testimony of the wife and niece that they were ignorant of its terms, and the jury, by accepting, reconciling, or disregarding the testimony as they chose, found that the wife and niece did not know the terms of the policy.

The finding of the jury was, in effect, that it was not reasonably possible for the insured to give notice of the accident because of his mental incapacity occasioned by the accident; and that <sup>—delay for</sup> <sup>eighteen months</sup> <sup>—effect.</sup> it was not reasonably possible for the wife and niece to give notice for him, because of their ignorance of the requirement until after his death, when, the obstacle of their ignorance being removed, notice was given as soon as reasonably possible. This finding was upon a question which the court could not avoid submitting, and was sustained by one view of the evidence. It is not within our province to say that the finding was wrong. It, therefore, concluded the defendant.

The judgment below is affirmed.

McPherson, Circuit Judge, dissenting:

I agree with nearly all that has been so well said by Judge Woolley,

but I regret to find myself obliged to disagree at a vital point. In my opinion the company was entitled to binding instructions, for the reason that the wife and the niece should be conclusively charged with knowledge of the company's provision for notice, and should bear the consequence of their failure to comply until nearly a year thereafter. The insured was injured in February, 1914; in September, his wife and his niece received and read the company's letter concerning the renewal of the policy, the letter bearing the words, in large type, "Notify the Company at Once in Event of Accident," and they acted on the letter by paying the premium and thus extending the policy for another year. The insured did not die until August 30, 1915, but no notice of the accident was given until September 4, a year and a half after the fall, and almost a year after the wife and the niece had learned that prompt notice of the injury was required. I do not see how a court could permit a jury to find that they did not know the contents of the letter, when concededly they opened it and read it and sent a check to the company in compliance with its contents, even referring to the policy by its number and the name of the insured. Those who receive and act upon a writing must be held to know its terms, just as a man cannot be allowed to say that he looked, but did not see a train, although he stepped directly in front of a moving car.

Moreover, no one can doubt that the wife and the niece had a right to make the payment, although they were assuming to act for the insured without his express authority, and no one can doubt that they would have been justified also in giving notice of the accident on his behalf. The closeness of the family relation is a sufficient reason, coupled with his inability to act for himself. But if the wife and the niece had these implied rights, I think they were impliedly bound to discharge the corresponding duties.

If they stood in the shoes of the insured, and were protecting the interest that he could not protect for himself, why were they not bound by the same duty that would have bound him—of course, so far only as their actual or presumed knowledge extended? In a word, the evidence seems to me conclusive that they knew what was conspicuously before their eyes, and since they knew it I think they were bound to act thereon. No doubt they had a reasonable time to act after the knowledge reached them, but under the facts of this case a year is not reasonable, and I think the court should have said so as a matter of law.

Petition for rehearing denied, January 8, 1918.

**NOTE.**

The question of the reasonableness

of time of notice of an accident or injury within the requirement of an accident policy, as a question for the jury, is discussed in the annotation to *EMPLOYERS' LIABILITY ASSUR. CORP. v. ROEHM*, post, 186. The view adopted in the reported case (*METROPOLITAN CASUALTY INS. CO. v. JOHNSTON*, ante, 175) is in accord with the general rule laid down in the introduction in that annotation that, where there are disputed facts and circumstances concerning the reasonableness of the giving of notice of accident or injury, or there are doubtful inferences from proven facts, the question is for the jury, otherwise the question is one of law for the court. The question of delay due to incapacity to give notice, under policies providing for notice as soon as reasonably possible, or qualification "unless not reasonably possible," is covered under subd. II. subsec. c.

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**EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited,**  
Plff. in Err.,  
v.

**JOHN ROEHM.**

*Ohio Supreme Court — April 2, 1919.*

(— Ohio St. —, 124 N. E. 223.)

**Insurance — indemnity — provision for notice.**

A provision in a policy of indemnity insurance, to the effect that written notice should be given the company within thirty days from the date of sustaining the injury, is of the essence of the contract, and, like other contracts, should be construed so as to give effect to the intention and express language of the parties. This rule of law is subject to the qualification that if at the time of the accident, and within the period stipulated for the giving of notice, no reasonable ground existed warranting a belief that the injury was anything but trivial in its character, not justifying a claim for damages, and it subsequently develops that as a result of such accident serious consequences have ensued, and that immediately upon being advised of this fact the insured gives written notice to the insurer, the question whether the notice was given within time is not a matter of law, but is a question for the determination of a jury. The last clause of the fourth proposition of the syllabus in the case of *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458, is disapproved.

[See note on this question beginning on page 186.]

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Headnote by the COURT.

(— Ohio St. —, 124 N. E. 223.)

**ERROR** to the Court of Appeals for Montgomery County to review a judgment reversing a judgment of the Court of Common Pleas sustaining a demurrer to a petition filed to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McMahon & McMahon, for plaintiff in error:

Policies of insurance, like other contracts, should be construed so as to give effect to the intention and express language of the parties.

Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458.

Plaintiff's ignorance of the true character of his injury did not excuse his failure to give notice within the thirty days.

Pittsburgh, C. & St. L. R. Co. v. Moore, 33 Ohio St. 384, 81 Am. Rep. 543; Travelers' Ins. Co. v. Myers, supra; Coldham v. Pacific Mut. L. Ins. Co. 2 Ohio S. & C. P. Dec. 314; Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A.(N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; Hefner v. Fidelity & C. Co. — Tex. Civ. App. —, 160 S. W. 330; Sweeney v. Travelers' Ins. Co. 199 Mich. 584, 165 N. W. 775; Whiteside v. North American Acci. Ins. Co. 200 N. Y. 320, 35 L.R.A.(N.S.) 696, 93 N. E. 948; Gamble v. Accident Assur. Co. Ir. Rep. 4 C. L. 204; Patton v. Employers' Liability Assur. Co. Ir. L. R. 20 Eq. 93; Northwestern Teleph. Exch. Co. v. Maryland Casualty Co. 86 Minn. 467, 90 N. W. 1110.

Failure to comply with the notice clause in a policy of accident insurance bars the right to recover under the policy.

Travelers' Ins. Co. v. Nax, 78 C. C. A. 649, 142 Fed. 653; Williams v. United States Casualty Co. 150 N. C. 597, 64 S. E. 510; Heywood v. Maine Mut. Acci. Asso. 85 Me. 289, 27 Atl. 154; United Benev. Soc. v. Freeman, 111 Ga. 355, 36 S. E. 764.

Messrs. Breene, Dwyer, & Finn, for defendant in error:

Where, because of circumstances and conditions surrounding the transaction, the giving of notice within the time specified became impossible, it will be excused and held sufficient if given within a reasonable time after the removal of the obstacle.

Jennings v. Brotherhood Acci. Co. 44 Colo. 68, 18 L.R.A.(N.S.) 109, 130 Am. St. Rep. 109, 96 Pac. 982; Manufacturers' Acci. Indemnity Co. v.

Fletcher, 5 Ohio C. C. 633, 3 Ohio C. D. 308; American Acci. Co. v. Card, 13 Ohio C. C. 155, 7 Ohio C. D. 504; Gibbs v. Girard, 88 Ohio St. 41, 102 N. E. 299; Farmers Nat. Bank v. Delaware Ins. Co. 83 Ohio St. 310, 94 N. E. 834; Graves v. United Commercial Travelers, 165 Wis. 427, 162 N. W. 425; United States Casualty Co. v. Hanson, 20 Colo. App. 394, 79 Pac. 176; Phillips v. United States Benev. Soc. 120 Mich. 142, 79 N. W. 1; Chapin v. Ocean Acci. & Guarantee Corp. 96 Neb. 213, 52 L.R.A.(N.S.) 227, 147 N. W. 465; Maryland Casualty Co. v. Ohle, 120 Md. 371, 87 Atl. 763; People's Mut. Acci. Asso. v. Smith, 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605; Hughes v. Central Acci. Ins. Co. 222 Pa. 462, 71 Atl. 923; Shafer v. United States Casualty Co. 90 Wash. 687, 156 Pac. 861; Hilmer v. Western Travelers Acci. Asso. 86 Neb. 285, 27 L.R.A.(N.S.) 319, 125 N. W. 535.

Plaintiff gave notice to defendant immediately after it became known that bodily injuries had been sustained, and that is a sufficient compliance with the stipulation in regard to notice.

Fischer Auto & Service Co. v. General Acci. & F. Life Assur. Co. 29 Ohio C. A. 300; Chapin v. Ocean Acci. & Guarantee Corp. 96 Neb. 213, 52 L.R.A.(N.S.) 227, 147 N. W. 465; Midland Glass & Paint Co. v. Ocean Acci. & Guarantee Corp. 102 Neb. 349, L.R.A. 1918D, 442, 167 N. W. 211.

Nichols, Ch. J., delivered the opinion of the court:

The defendant in error, John Roehm, while engaged in a game of basket ball, on ——— day of June, 1914, in the city of Dayton, Ohio, was accidentally struck a hard blow in the left eye. Although immediately seeking medical treatment, neither he nor his physician apprehended any serious injury from the blow. For about ten months thereafter he attended to his ordinary business, wholly without appreciation that his sight was other than normal. Consulting another physician in April, 1915, he learned for



the first time that as a direct result of such accidental blow he had lost the greater part of the vision of the injured eye. He thereupon submitted to treatment, in endeavor to save his sight; all, however, without relief, the final outcome of the affair being the entire loss of the sight of both eyes. Immediately after becoming aware of the fact that serious injury had been occasioned by the blow, due notice was given the insurance company.

At the time the defendant in error met with the accident he was the holder of a policy in the Employers' Liability Assurance Corporation, Limited, which insured him "against bodily injuries during the term of the policy." This policy contained the following provision on the subject of notice: "No claim shall be valid on account of any injuries, fatal or otherwise, unless written notice is given to the company within thirty days from the date of sustaining any injuries, fatal or otherwise (unless such notice may be shown not to have been reasonably possible), for which claim is to be made."

In August, 1917, within a month of the time that full knowledge was available as to the ultimate extent of the injury, action was entered in the common pleas court of Montgomery county to recover on the policy.

The insurance company demurred to the petition, its position being that since the petition showed that notice was not given of the happening of the accident within the time stipulated by the policy, namely thirty days, the plaintiff was without remedy.

From the time the blow on the eye was received until the serving of the notice, a period of quite ten months elapsed, so unless circumstances are disclosed constituting a legal excuse for failure to serve notice sooner, and within the period of thirty days, the demurrer to the petition was properly sustained by the court of common pleas of Montgomery county.

The only excuse recognized by the company for failure to serve notice is that the service of such notice was not reasonably possible. It is claimed by the company that this excusing clause has no relation to the injury itself, or its nature and extent, but relates wholly to some condition that the insured might have found himself in at the time—for instance, continued delirium, or some state of mind that would have rendered him practically unaccountable in law for his conduct. It refuses to recognize that any uncertainty as to the extent of the injury, or even the belief on the part of the insured that the injury was so insignificant that he did not want to dignify it by presenting a claim therefor, constitutes any excuse under this clause for failure to give notice.

The position of the defendant in error is that his conduct was entirely consistent with the attitude of a reasonable and prudent man; that, so long as he was unaware that any consequence of a serious nature was to be apprehended, he had decided to refrain from presenting a claim, and therefore notice was unnecessary; and that it was only when the truth had forced itself on his attention that the very serious effect soon thereafter realized to the fullest was likely to follow that he felt he had a valid claim under the policy, and that then he immediately gave the required notice.

The question for determination is: Do the facts alleged in the petition justify the holding that, as a matter of law, the plaintiff is to be denied recovery, or are they such as to require the submission of the cause to a jury for its solution?

We are of opinion that the failure of the plaintiff to notify the company of the fact that he had suffered a blow over the eye, within the thirty-day period, will not necessarily operate to defeat a recovery. His conduct between the day that the blow was inflicted and the day that the

Insurance—  
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provision for  
notice.

terrible possibility fell on him like a thunderbolt was highly commendable, if not exceptional. It showed a high regard for the rights of the insurance company, for all too often very slight injuries are made the basis of a claim for indemnity. It would seem a poor reward for virtue, if conduct of this character were to be made the groundwork for a successful defense against recovery for a grievous loss. It would penalize a decent regard for the rights of others and put a premium on that sort of conduct that carries insurance for profit rather than protection.

It would seem quite clear that the entire lack of knowledge, or even apprehension, on Roehm's part, that any serious result was to follow from the accidental blow, creates a condition fairly within the terms of the policy excusing notice. At no time within the period of ten months would it have been possible for him to give notice of a state of facts entirely unknown to and unsuspected by himself.

It is recognized in every jurisdiction that provisions as to notice must be reasonably construed; indeed, the authorities generally hold that such provisions should be liberally construed in favor of the insured. Much the greater weight of authority outside of Ohio supports the doctrine that notice given immediately after the extent of the injury is brought to the knowledge of the insured is a compliance with the requirement that notice must be given within a time reasonably possible after the happening of the accident.

In the case of *Maryland Casualty Co. v. Ohle*, 120 Md. 371, 87 Atl. 763, the court held in effect that, under a clause in an accident insurance policy which required notice of injury to be given as soon as might be reasonably possible, a notice given by a physician of loss of sight, due to infection during an operation, five months after the injury was received, but as soon as he

learned that his sight was destroyed, was sufficient.

Practically the same doctrine was announced by the supreme court of Pennsylvania in the case of *People's Mut. Acci. Co. v. Smith*, 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605. Similar views were evidently held by the supreme court of Nebraska, as announced in the case of *Midland Glass & Paint Co. v. Ocean Acci. & Guarantee Corp.* 102 Neb. 349, L.R.A.1918D, 442, 167 N. W. 211.

In the case at bar there is no charge of fraud or claim of bad faith, nor can there be any pretense that the delay in giving notice was prejudicial to the insurer. Neither can it be urged that there are not circumstances tending to justify the delay.

In these vital respects this case is to be distinguished from the case of *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458, upon which authority the plaintiff in error chiefly relies.

Notwithstanding this difference in fact we are of opinion that the conclusion we have reached in the case at bar will necessitate the overruling of the fourth proposition advanced in the syllabus of the *Myers Case*, supra. Our disagreement is not, of course, with the first paragraph of the proposition in question, for we are now holding that the question of compliance with terms of the notice may depend upon the circumstances of the case. We are, however, out of harmony with the view that, in a case of the character under investigation, with its attendant circumstances, where the facts are not disputed, what is a sufficient compliance with the policy requirements as to notice is a question of law. On the contrary, we feel that the insured has a right to have a jury pass on the question, and determine whether the circumstances of this particular case did not justify and excuse his conduct in failing to give the notice called for by the policy until he actually became

aware that his eyesight was seriously affected.

We find authority supporting our conclusion herein in the second proposition of the syllabus of the case of *Hickman v. Ohio State L. Ins. Co.* 92 Ohio St. 87, 110 N. E. 542. That case, like the one at bar, was one involving the right to recover on an accident insurance policy. The policy provided that in the event the insured exposed himself to obvious risk of injury, or obvious danger, the company's liability should be but one fifth the face of the policy. The litigation was centered around the question whether the insured had so exposed himself. The court of appeals of Cuyahoga county held that since the facts in the matter were substantially undisputed it became the duty of the court to determine the issue as a matter of law, and denied the right of a jury to pass on the question of fact. This court reversed the court of appeals, holding, in the second proposition of the syllabus: "When, in such an action, an issue of fact is made by the pleadings as to whether the injury to the insured resulted while he was exposing himself to a risk or danger

which was obvious to him at the time, and there is no substantial conflict in the testimony of the witnesses on the trial, but the conflicting testimony discloses a variety of circumstances from which different minds might reasonably arrive at different conclusions as to that issue, it is the duty of the court to submit the determination of it to the jury."

So, in the instant case, the question as to whether it was reasonably possible for Roehm to notify the company as to the injuries sustained, at a period of time earlier than that employed by him, and within the thirty days mentioned in the policy, is one about which different minds might reasonably arrive at different conclusions.

The judgment of the Court of Appeals is therefore affirmed, and the cause is remanded to the Court of Common Pleas of Montgomery County, with instructions to overrule the demurrer of the insurance company, and for further proceedings according to law.

Jones, Matthias, Johnson, Donahue, Wanamaker, and Robinson, JJ., concur.

## ANNOTATION.

### Accident insurance: reasonableness of time of notice of accident or injury as a question for the jury.

- I. Introductory, 187.
- II. Where there is provision for notice as soon as reasonably possible, or qualification "unless not reasonably possible:"
  - a. Delay due to uncertainty as to extent of injury, 188.
  - b. Delay due to uncertainty as to whether injury or death was the result of accident, 189.
  - c. Delay due to incapacity to give notice, 189.
  - d. Delay due to insured's location and surroundings, 190.
- III. Where there is provision for immediate notice, or notice at once:
  - a. Delay due to uncertainty as to extent of injury, 190.

### III.—continued.

- b. Delay owing to uncertainty whether injury or death was the result of accident, 191.
- c. Delay due to incapacity to give notice, 192.
- d. Delay because of ignorance of policy, 192.
- e. Unexplained delays, 192.
- IV. Where policy provides for notice within specified number of days:
  - a. Delay due to uncertainty whether accident caused injury, 194.
  - b. Delay due to incapacity to give notice, 194.
  - c. Miscellaneous, 194.

**Scope.**

It is to be observed that this note is not concerned with the question of substantive law as to what amounts to a compliance with the requirements of the contract in regard to notice of accident or injury, but, with an occasional exception, is confined to cases in which the court expressly considers the point whether the question is for the court or the jury.

**I. Introductory.**

It is a general rule that where there are disputed facts and circumstances concerning the reasonableness of the giving of notice of accident or injury, or there are doubtful inferences from proven facts, the question is one for the jury; otherwise, the question is one of law for the court.

**United States.**—Travelers' Ins. Co. v. Nax (1905) 73 C. C. A. 649, 142 Fed. 653; METROPOLITAN CASUALTY INS. CO. v. JOHNSTON (reported herewith) ante, 175.

**Georgia.**—Columbian Nat. L. Ins. Co. v. Miller (1913) 140 Ga. 346, 78 S. E. 1079, Ann. Cas. 1914D, 408.

**Illinois.**—Higgins v. Midland Casualty Co. (1917) 281 Ill. 431, 118 N. E. 11.

**Indiana.**—Aetna L. Ins. Co. v. Fitzgerald (1904) 165 Ind. 317, 1 L.R.A. (N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551.

**Iowa.**—Lyon v. Railway Pass. Assur. Co. (1877) 46 Iowa, 631.

**Kentucky.**—Aetna L. Ins. Co. v. Bethel (1910) 140 Ky. 609, 181 S. W. 523.

**Maryland.**—Providence L. Ins. & Invest. Co. v. Martin (1869) 32 Md. 310; Maryland Casualty Co. v. Ohle (1913) 120 Md. 371, 87 Atl. 763.

**Massachusetts.**—Everson v. General Acci. F. & Life Assur. Corp. (1909) 202 Mass. 169, 88 N. E. 658.

**Michigan.**—Hummer v. Midland Casualty Co. (1914) 18 Mich. 386, 148 N. W. 413.

**Missouri.**—McFarland v. United States Mut. Acci. Asso. (1894) 124 Mo. 204, 27 S. W. 436; Roseberry v. American Benev. Asso. (1909) 142 Mo. App. 552, 121 S. W. 785.

**Nebraska.**—Woodmen Acci. Asso. v. Pratt (1901) 62 Neb. 673, 55 L.R.A.

291, 89 Am. St. Rep. 777, 87 N. W. 546.

**New York.**—Trippe v. Provident Fund Soc. (1893) 3 Misc. 445, 23 N. Y. Supp. 173, affirmed in (1893) 140 N. Y. 23, 22 L.R.A. 432, 37 Am. St. Rep. 529, 35 N. E. 816; Tromblee v. North American Acci. Ins. Co. (1916) 173 App. Div. 174, 158 N. Y. Supp. 1014, affirmed without opinion in (1919) 226 N. Y. 615, 123 N. E. 892.

**Ohio.**—Manufacturers' Acci. Indemnity Co. v. Fletcher (1891) 5 Ohio C. C. 633, 3 Ohio C. D. 308; Coldham v. Pacific Mut. L. Ins. Co. (1894) 2 Ohio S. & C. P. Dec. 314; EMPLOYERS' LIABILITY ASSUR. CORP. v. ROEHM (reported herewith) ante, 182.

**Pennsylvania.**—People's Mut. Acci. Asso. v. Smith (1889) 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605; Hughes v. Central Acci. Ins. Co. (1909) 222 Pa. 462, 71 Atl. 923; Curran v. National L. Ins. Co. (1916) 251 Pa. 420, 96 Atl. 1041; Dunshee v. Travelers' Ins. Co. (1904) 25 Pa. Super. Ct. 559.

**Texas.**—Fidelity & C. Ins. Co. v. Mountcastle (1918) — Tex. Civ. App. —, 200 S. W. 862.

**Vermont.**—Mellen v. United States Health & Acci. Ins. Co. (1910) 83 Vt. 242, 75 Atl. 273.

**Washington.**—Horsfall v. Pacific Mut. L. Ins. Co. (1903) 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028.

**Wisconsin.**—Foster v. Fidelity & C. Co. (1898) 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69; Sheafor v. Standard Acci. Ins. Co. (1918) 166 Wis. 498, 166 N. W. 4; Graves v. United Commercial Travelers (1917) 165 Wis. 427, 162 N. W. 425.

The court in Travelers' Ins. Co. v. Nax (Fed.) supra, said: "The only remaining matter to consider is, Should the question whether the stipulation for immediate notice had been complied with have been submitted to the jury, or should peremptory instructions to find for the defendant on this point have been given by the court? If in the trial in the court below there had been, as to this point, any disputed facts or doubtful inferences from proven facts, they should, of course, have been submitted to the determination of the jury; but where,

as in this case, there are no disputed facts, but simply an admitted failure of the insured, or of anyone on his behalf, to give the immediate written notice stipulated for in the policy, for a period of seventy-two days, without any satisfactory explanation of such failure, there was no question at all to be submitted to the jury, and the court, as a matter of law, should have found that the stipulation had not been legally complied with. This view of the situation should have been manifested by the court, by peremptory instructions to find for the defendant."

*II. Where there is provision for notice as soon as reasonably possible, or qualification "unless not reasonably possible."*

*a. Delay due to uncertainty as to extent of injury.*

It will be observed that in *EMPLOYER'S LIABILITY ASSUR. CORP. v. ROEHM* (reported herewith) ante, 182, where the accident policy provided that no claim should be valid on account of any injuries unless notice was given within thirty days from the date of injuries, unless such notice might be shown not to have been reasonably possible, and it appeared that the insured's eye was injured, but for ten months afterward he believed his injury to be trivial, and when he first became aware of its seriousness immediately gave notice, it was held that the question whether the notice was given within the time required by the policy was not one of law, but was a question for the determination of the jury.

And in *Fidelity & C. Ins. Co. v. Mountcastle* (1918) — *Tex. Civ. App.* —, 200 S. W. 862, where an accident policy provided for written notice of accidents as soon as reasonably possible, and a statute provided that a stipulation in a policy fixing the time for notice at less than ninety days should be void, it was held that the court could not say, as a matter of law, that under the circumstances the delay in giving notice of an accident was an unreasonable one, although written notice was not given for about sixteen months, there being evidence

that it was uncertain during this time as to the extent of the injury, and that shortly after the accident the insured gave verbal notice to the insurer's local agent, who agreed to make a report to the general agent of the company, and that some months afterward he again talked with the local agent about making a claim, but was dissuaded by the agent's statement that he probably could not get the policy renewed, at the insured's age, if he made a claim, and that subsequently, after a renewal, the agent stated that the company would pay the insured's doctor's bills if he would furnish the receipted bills, and these were furnished, and were paid by the company.

In *Sheafor v. Standard Acci. Ins. Co.* (1918) 166 Wis. 498, 166 N. W. 4, it was held, apparently as a matter of law, that notice was given as soon as reasonably possible within the requirements of a policy providing for notice of injuries within twenty days after the date of the accident causing the injury, unless it was shown not to have been reasonably possible to give such notice within the time provided, and that in such case notice should be given as soon as reasonably possible, it appearing that the insured sustained an injury to his eye which eventually caused the loss of the sight thereof, and that immediate notice was given as soon as the insured obtained knowledge that the injury was the result of the accident.

In *Maryland Casualty Co. v. Ohle* (1913) 120 Md. 371, 87 Atl. 763, where recovery for the loss of sight was sought under a policy providing for notice of injury "as soon as may be reasonably possible, of any injury for which a claim is to be made," and there was testimony that the insured, a physician, while performing an operation was infected, and that within two weeks the poison developed to some extent on his hand, and in about six months a disease of the eyes resulted, and about seventeen months after the injury he suffered the loss of the sight of one eye and the partial loss of the other, and then gave notice of the injury, a verdict returned by

the jury for the plaintiff was affirmed, the court stating that under the circumstances the notice was sufficient, but saying nothing expressly as to whether the question of the reasonableness of the notice was one of law or fact.

In *Hummer v. Midland Casualty Co.* (1914) 181 Mich. 386, 148 N. W. 413, where the policy provided for notice of accident as soon as possible, it was held that the court should have instructed the jury that the plaintiff did not give notice as soon as possible, and that it was not for the jury to determine whether notice was given as required by the policy, there being evidence that the insured delayed for nearly five months to give any notice that he had suffered an accidental injury to his eye, although he had notice before that time that the injury was serious, and after about a month was able to be about the house and look after some of his business affairs.

*b. Delay due to uncertainty as to whether injury or death was the result of accident.*

Where a policy provided for written notice of an accident as soon as reasonably possible, and it appeared that the insured accidentally fell into an excavation and sustained injuries which in course of time resulted in his being paralyzed, but for eleven months he was advised that his condition was due to disease instead of the accident, although he at all times attributed his condition to the accident, but failed to give any notice of its happening until eleven months thereafter, it was held as a matter of law that the notice was not given within the time provided for in the policy. *Hefner v. Fidelity & C. Co.* (1913) — Tex. Civ. App. —, 160 S. W. 330.

In *Tromblee v. North American Acci. Ins. Co.* (1916) 173 App. Div. 174, 158 N. Y. Supp. 1014, where there was a provision for notice of accident "as soon as may be reasonably possible," it was held that the court properly refused to hold as a matter of law that the notice was not timely, there being evidence that the beneficiary did not realize for some time that the insured's death resulted from the in-

jury, and that she mailed notice to the insurer's local agent about twenty days after the insured's death, and it was forwarded and admitted to be received by the company three days later.

*c. Delay due to incapacity to give notice.*

In *METROPOLITAN CASUALTY INS. CO. v. JOHNSTON* (reported herewith) ante, 175, where an accident policy provided for notice of any accident or injury within twenty-one days, unless the giving of such notice in such time should not be reasonably possible, in which event notice should be given as soon as reasonably possible, and there was evidence that the accident sustained by insured created a mental condition which made the giving of notice by him possible, and that no notice was given until eighteen months after the accident occurred and after the insured's death, the question of compliance with the provision was left to the jury, and a finding that it was not reasonably possible for the insured to give notice of his injury was held sustained by the evidence, and a verdict for the plaintiff was affirmed.

And in *Higgins v. Midland Casualty Co.* (1917) 281 Ill. 431, 118 N. E. 11, where the accident policy provided for written notice of accidents as soon as possible after their occurrence, and there was evidence that the insured suffered a sunstroke and shortly thereafter was confined to his bed, and later taken to a hospital, and as a result of the accident he suffered a complete physical and mental breakdown from which he never recovered, and that no notice of the accident was given for more than a year, when the insured's wife, who was appointed conservator, within ten days of her appointment gave notice of the accident, it was held a question for the jury as to whether or not the notice was given within a reasonable time, taking into consideration all of the facts and circumstances shown by the evidence, and that the court was not justified to direct a verdict by the jury upon this question.

And in *Columbian Nat. L. Ins. Co. v. Miller* (1913) 140 Ga. 346, 78 S. E. 1079, Ann. Cas. 1914D, 408, it was held

that the court could not say as a matter of law that notice had been given in accordance with a provision of an accident policy, providing for notice to the company as soon as reasonably possible after the occurrence of an accident causing bodily injury or death, but that the question was properly left to the jury as to whether the notice had been given as soon as reasonably possible under the circumstances of the case, there being evidence tending to show that prior to and immediately after the death of the insured, who was found dead in the bathroom, which was filled with gas, the plaintiff was sick and in a nervous state of health, and consequently did not give the notice for eighteen days.

*d. Delay due to insured's location and surroundings.*

In *Everson v. General Acci. F. & Life Assur. Corp.* (1909) 202 Mass. 169, 88 N. E. 648, where it appeared that the insured was injured at a lonely camp in New Brunswick by severely burning one of his hands in such a manner as to require its amputation two days later, that he was far from home and kindred, and that notice was sent on the fourth day after the injury, it was held sufficiently favorable to the defendant to leave it to the jury to say, in view of the circumstances and inferences reasonably to be drawn from them, whether the notice was sent "as soon as may be possible," within a requirement of the policy.

*III. Where there is provision for immediate notice, or notice at once.*

*a. Delay due to uncertainty as to extent of injury.*

In *People's Mut. Acci. Asso. v. Smith* (1889) 126 Pa. 317, 12 Am. St. Rep. 870, 17 Atl. 605, where the policy provided for immediate notice of injury, and there was evidence that the insured was struck in the eye by the lash of his whip, and was treated by several physicians for a month before he ascertained that he would lose the sight of his eye, and at the end of that time he gave notice of the injury, and made a claim for the loss of the sight of his eye, the question whether notice

was given within a proper time was left for the jury, the court said: "It is true the delay in such cases may be as great as to justify the court in ruling it, as a question of law. There was no such delay in the case at hand, however. The word 'immediate' in the contract must be construed to mean within a reasonable time thereafter under all the facts and circumstances of the case, and what is a reasonable time must be decided by the jury unless . . . the delay has been so great that the court may rule it as a question of law."

And in *Etna L. Ins. Co. v. Fitzgerald* (1905) 165 Ind. 317, 1 L.R.A. (N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551, where the accident policy involved required immediate notice of injury, and notice of an injury was not given until about thirty days after its happening, the question whether it was given within a reasonable time was held for the jury, in view of evidence that his injury resulted from placing his hand under his head while asleep, and gradually developed into a condition necessitating an operation and causing a protracted illness.

And in *Lyon v. Railway Pass. Assur. Co.* (1877) 46 Iowa, 631, where the policy provided for immediate notice of accidents, the question whether the insured gave notice within a proper time was held for the jury, there being testimony tending to show that after his injury the insured was treated at one place for eight or nine days, when he went to his home in another town, where he continued treatment for eight or ten days more, when he called in a physician who treated him from four to six weeks, and evidence that the disability continued for nine weeks. It was conceded in this case that the question of due diligence in giving notice is ordinarily one for the jury, but it was claimed that under the facts and circumstances, which were not in dispute, the question became one of law.

In *American Acci. Ins. Co. v. Norment* (1891) 91 Tenn. 1, 18 S. W. 395, where the policy provided for immediate written notice of an accident at

the home office of the insurer, it was held that a jury might find that the notice had been given within a reasonable time, there being evidence that the seriousness of an injury did not at once develop, and that notice was given to the insurer's local agent about six or eight weeks after the injury occurred, and that the agent gave the insurer written notice of the accident at its home office.

In *Young v. Railway Mail Asso.* (1907) 126 Mo. App. 325, 103 S. W. 557, where the policy provided for notice at once of any injury, the court stated that immediate notice means notice within a reasonable time, and that the evidence showed that notice was given in a reasonable time, there being testimony that at the time the plaintiff met with an accident he did not realize the seriousness of his injury, or that it would prevent him from following his occupation, until something like a week after it occurred, and that he then gave notice. There is nothing expressly said in this case, however, as to whether the question is one of law or one of fact.

*b. Delay owing to uncertainty whether injury or death was the result of accident.*

In *Hughes v. Central Acci. Ins. Co.* (1909) 222 Pa. 462, 71 Atl. 923, the question whether the insured had complied with a provision for immediate written notice of an accident was held for the jury, where there was evidence that while on a train a cinder struck his eye, causing temporary pain which disappeared in the morning, but that several weeks thereafter an impairment of the vision occurred, and a cataract followed, which, six weeks after the cinder struck his eye, the doctors determined resulted therefrom, and the insured then gave notice of his injury. The court said: "Appellant complains that the delay in notifying the company was so great that the court should have decided it as a matter of law adversely to the plaintiff. It has been repeatedly ruled, in actions under policies requiring immediate notice to be given of the accident, that the word 'immediate' is to be construed as meaning a reasonable

time after the accident, under the facts and circumstances of the particular case. Cases arise where the delay has been so great that the court is fully justified in ruling it as a matter of law; but this occurs only where the admitted facts and circumstances disclose nothing by way of extenuation or excuse. Where the facts are sufficient to account in some measure for the delay, without reflecting upon the diligence or good faith of the assured, it is for the jury to say whether the delay was reasonable or not under the circumstances."

In *Ewing v. Commercial Travelers' Mut. Acci. Asso.* (1900) 55 App. Div. 241, 66 N. Y. Supp. 1056, affirmed without opinion in (1902) 170 N. Y. 590, 63 N. E. 1116, where the policy contained a provision for immediate notice of accident or injury, with full particulars thereof, and there was evidence that the beneficiary, at the time of the insured's death, did not know the cause thereof, and it was not known that death resulted from accidental injury until after the report of a chemist, who made an analysis of the insured's organs, and that as soon as the result was made known, which was about two weeks after the insured's death, he immediately gave the insurer notice. The court stated that, assuming this evidence to be correct, it might properly be held as a matter of law that the notice given fully complied with the condition of the policy, and that as a question of fact the jury, which found a verdict for the plaintiff, seemed to have reached the right conclusion.

In *Ætna L. Ins. Co. v. Bethel* (1910) 140 Ky. 609, 131 S. W. 523, where the accident policy involved provided for immediate notice of any accident, it was held that a reasonable time was allowed in which to give notice, and that what is a reasonable time depends upon the circumstances in the case, and is a question of fact for the jury, and an averment by the beneficiary in this case was held sufficient, which stated that as soon as she learned of the cause of the insured's death and of the insurer's liability, she gave notice of the accident on a specified day,



which was about three months after the accident occurred.

In *Coldham v. Pacific Mut. L. Ins. Co.* (1894) 2 Ohio S. & C. P. Dec. 314, where the policy required immediate notice of an accident, and, although the beneficiary had knowledge that the insured fell upon an icy sidewalk and died two days later from the effects thereof, she did not know that the fall was accidental, and failed to give notice for thirteen months, and until she learned that the injury was accidental, it was held as a matter of law that such notice was not, under the circumstances, a compliance with the condition requiring immediate notice. The court stated that the words "immediate and forthwith," as used in provisions for notice of injury, are construed to mean, under all the circumstances of the case, a reasonable time, and that ordinarily what is a reasonable time is a question of fact for the jury, unless upon the undisputed facts the delay has been so great that the court can rule upon it as a matter of law.

*c. Delay due to incapacity to give notice.*

In *Manufacturers' Acci. Indemnity Co. v. Fletcher* (1891) 5 Ohio C. C. 633, 3 Ohio C. D. 308, where an accident policy provided for immediate notice of an accident or injury, and that a failure to give such immediate notice within ten days should invalidate a claim, and there was evidence that the insured, who sustained an accidental injury to his eye, was rendered delirious by his injury, and was kept under the influence of opiates for several weeks, and gave no notice to the insurer for about eight weeks, it was held that the question whether the insured had exercised due diligence in view of all the circumstances was a question of fact to be determined by the jury, and that, taking into consideration the condition of the insured, it could not be said that the jury were not justified in finding that immediate notice of the accident, in compliance with the provision, was given.

And the facts in *Curran v. National L. Ins. Co.* (1916) 251 Pa. 420, 96 Atl. 1041, were held not to warrant the court saying, as a matter of law, that

immediate written notice of an accident was not given, where the plaintiff testified that the policy was in the possession of the person injured, and that the plaintiff was so prostrated by the accident that for some time he thought nothing of insurance, and when he finally located the policy and determined that the loss was covered by it, which was about two months after the injury, he gave notice thereof.

*d. Delay because of ignorance of policy.*

In *American Acci. Co. v. Card* (1897) 13 Ohio C. C. 154, 7 Ohio C. D. 504, where the policy provided for immediate written notice of an accident, and it appeared that the insured's wife, who was the beneficiary and also his administratrix, had no knowledge of the existence of the policy for about four months after the accident and the insured's death, when she immediately gave written notice, it was held that the court should not, as a matter of law, have instructed the jury that upon the facts, immediate notice was not given within the meaning of the policy, and that the question whether the provision as to notice of the accident had been complied with was properly submitted to the jury.

*e. Unexplained delays.*

In *Travelers' Ins. Co. v. Nax* (1905) 73 C. C. A. 649, 142 Fed. 653, where the policy provided for weekly indemnities to the insured in case of accidental injury, and also for the payment of a certain sum to a named beneficiary if death resulted within a specified time, provided immediate written notice of any accident or injury should be given to the insurer, it was held as a matter of law that notice was not given within a reasonable time, and that a verdict in an action by the beneficiary should have been directed for the insurer, there being testimony that, although the insured was perfectly conscious and able to talk of his affairs, no notice of the accident was given by him or anyone during the seventy-two days between the occurrence of the accident and the date of his death. The court stated that if, in the trial of the case, there had

been any disputed facts or doubtful inferences from proven facts, they should have been submitted to the determination of the jury, but that where, as in the case at bar, there were no undisputed facts, but simply an admitted failure of the insured, or of anyone on his behalf, to give immediate notice as stipulated for in the policy, for a period of seventy-two days, without any satisfactory explanation of such failure, there was no question at all to be submitted to the jury, and that the trial court, as a matter of law, should have found that the stipulation had not been legally complied with.

And in *Dunshee v. Travelers' Ins. Co.* (1904) 25 Pa. Super. Ct. 559, where the accident policy involved provided for immediate written notice of any accident or injury, and the insured delayed for over four months giving notice of the injury, although he was able during this time to transact business and to have given notice, it was held, apparently as a matter of law, that notice was not given within a reasonable time, and that no recovery could be had on the policy.

And in *Hatch v. United States Casualty Co.* (1908) 197 Mass. 101, 14 L.R.A. (N.S.) 508, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290, where there was a provision for written notice within ten days of the event causing injury, and it appeared that although the insured, after he sustained an injury, was in his usual health for about a month, when he was confined to his bed and died four days after, he gave no notice of the injury, and that none was given until the beneficiary sent notice of death, it was held, apparently as matter of law, that there could be no recovery on the policy; that by failing to give notice according to his contract insured gave up his right to hold the company liable, and that after his death it was not within the power of the beneficiary to revive the right lost.

And in *Foster v. Fidelity & C. Co.* (1898) 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69, the court held, as a matter of law, that immediate notice of an accident was not given, where the evi-

dence showed that the beneficiary knew that the insured's death was accidental within twelve days after it occurred, but did not give notice for twenty-nine days thereafter. The court stated that, where the facts are uncertain or disputed and the inferences doubtful, the question whether timely notice was given is one for the jury under a proper instruction, but that, where the facts are not in dispute and the inferences are certain, it is a question of law for the court.

And in *Accident Ins. Co. v. Young* (1891) 20 Can. S. C. 280, it was held, apparently as a matter of law, that there was no compliance with a provision of a policy for immediate notice of any accident or injury, there being evidence that notice of an accident and death was not sent until one month and eight days after the accident, and sixteen days after the insured's death, and that it was not received at the insurer's home office until three days after it was sent.

And in *Myers v. Maryland Casualty Co.* (1907) 123 Mo. App. 682, 101 S. W. 124, the court stated that, without a showing of good cause therefor, the failure of the insured to give notice until six weeks after an injury, in law, constituted a breach of the condition requiring the giving of immediate notice.

And the complaint in *Railway Pass. Assur. Co. v. Burwell* (1873) 44 Ind. 460, was held defective, where the action was on an accident policy requiring immediate notice of injury, and the complaint alleged that notice was given six days after an injury was received, and there was no averment of any legal and proper excuse for not having given the notice sooner. Nothing was specifically said as to whether the question was one of law or a question for the jury.

In *Horsfall v. Pacific Mut. L. Ins. Co.* (1903) 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028, where the evidence showed that the beneficiary of an accident policy caused notice of the accident to be sent to the insurer on the twelfth day after the insured's death, it was held that the court properly submitted to

the jury the question whether notice was given within a reasonable time within a condition of the policy requiring immediate notice of an accident.

*IV. Where policy provides for notice within specified number of days.*

*a. Delay due to uncertainty whether accident caused injury.*

In *United States Casualty Co. v. Hanson* (1905) 20 Colo. App. 393, 79 Pac. 176, a failure to give notice of an injury for about eight months was held not to preclude a recovery because of noncompliance with a provision of the policy, requiring written notice within ten days of the event causing the accident, where it appeared from the facts that the insured believed that his trouble resulted from rheumatism, and gave prompt notice after he was informed by a physician that his illness resulted from the accident. The question was apparently decided as one of law, but without discussion.

In *Trippe v. Provident Fund Soc.* (1893) 3 Misc. 445, 23 N. Y. Supp. 173, affirmed in (1893) 140 N. Y. 23, 22 L.R.A. 432, 37 Am. St. Rep. 529, 35 N. E. 316, where the policy provided that notice of any accidental injury should be given within ten days from the date either of injury or death, and it appeared that insured was tenant in a building that fell, and that he was buried in the debris, and that his body was not discovered and taken from the fallen building for three days, and that notice of injury and death was given eleven days after the accident and eight days after the body was found, it was held that, the facts respecting the accident and death being undisputed, the question of what construction should be given to the provision was one clearly of law for the court, and a holding that the notice was sufficient was sustained.

*b. Delay due to incapacity to give notice.*

Where the insured was accidentally burned, and as a result was mentally incapacitated, and because of the necessary use of opiates was unconscious for nearly three weeks, when notice was given, it was held that the facts

were sufficient in law to excuse him from complying with a provision of the policy for notice within ten days. *Roseberry v. American Benev. Asso.* (1909) 142 Mo. App. 552, 121 S. W. 785.

In *Woodman Acci. Asso. v. Pratt* (1901) 62 Neb. 673, 55 L.R.A. 291, 89 Am. St. Rep. 777, 87 N. W. 546, where the policy required notice within ten days of the occurrence of an accident, and the evidence showed that the insured, by reason of an accidental fall, sustained a concussion of the brain, and for a period of three or four months was more or less deranged, and notice was not given of the accident for over forty days, the question whether it was given within a reasonable time was held to be properly submitted to the jury, and the evidence was held to be sufficient to sustain the jury's finding that notice was given within a reasonable time.

*c. Miscellaneous.*

In *Graves v. United Commercial Travelers* (1917) 165 Wis. 427, 162 N. W. 425, where the policy provided that in case of accidental injury the insured should, within ten days, send a written notice to the insurer, and that failure to send such notice should constitute a waiver of the claim, and it appeared that the insured sustained a slight injury, supposed at first to be trivial, but that on the ninth day after suffering the injury he knew that it was serious, and although he was able to give the notice within the ten days he failed to do so, it was held, apparently as a matter of law, that he could not recover on the policy.

In *Mellen v. United States Health & Acci. Ins. Co.* (1910) 83 Vt. 242, 75 Atl. 273, where the plaintiff's evidence tended to show that he sustained an accidental injury, and that a few days later he visited a certain doctor and asked him to notify the insurer of the injury, and that the doctor did so, it was held a question for the jury whether such notice was sent within twenty days from the date of the accident, as required by the policy, and that it could not, therefore, be disposed of by the court. J. T. W.

FANNIE B. HOWARD et al.  
v.  
CENTRAL AMUSEMENT COMPANY, Impleaded, etc.

*Massachusetts Supreme Judicial Court — May 25, 1916.*

(224 Mass. 344, 112 N. E. 857.)

**Landlord and tenant — liability of landlord for nuisance — fall of ornament from building.**

1. The owner of a building which has a continuing nuisance in the form of an unsafe ornament overhanging the sidewalk does not relieve himself from liability for injury to a pedestrian by its fall by letting the building to a tenant.

[See note on this question beginning on page 204.]

**Nuisance — ornament overhanging sidewalk.**

2. An ornament attached to the front of a building adjoining a sidewalk, which is constructed of materials which will disintegrate under the influence of the weather, and which is not properly fastened to the building, is a continuing nuisance.

[See 4 R. C. L. 408, 409; 20 R. C. L. 433.]

**Appeal — improper joinder of parties.**

3. Joining landlord and tenant in an action for injury to a pedestrian by

the fall of an ornament from the leased building is not reversible error if the tenant was eliminated from the case by the verdict of the jury.

**Parties — improper joinder — who may complain.**

4. The landlord against whom a judgment is entered for injury to a pedestrian by the fall of an ornament from his building cannot complain that his tenant was joined in the action.

[See 20 R. C. L. 707.]

EXCEPTIONS by defendant Central Amusement Company to rulings of the Superior Court for Essex County (Quinn, J.) made during the trial of actions brought to recover damages for personal injuries to the feme plaintiff, alleged to have been caused by defendants' negligence, which resulted in a verdict for the defendant operating company, and for plaintiffs against the excepting defendant. *Overruled.*

The facts are stated in the opinion of the court.

The rulings asked for by the defendant Central Amusement Company, and which the judge refused to make, were as follows:

"1. Upon all the evidence the plaintiff cannot recover in the above action.

"2. Upon the allegations in the plaintiff's declaration the plaintiff cannot recover in this action.

"3. Upon the evidence in the case the defendant was not negligent.

"4. If the jury find that the piece of stucco actually fell, as alleged, the cause of its falling, upon the evidence, is conjectural and is as consistent with due care on the part of

the defendant as with lack of due care."

"6. If the fall of the piece of stucco was caused by the lack of proper securing of the concrete ornaments on the wall, and the defendant had no notice of this, but had intrusted the work to a competent contractor, the defendant is not liable for the stucco work falling."

"9. The evidence introduced in the case does not sustain the allegations in the declaration."

Messrs. James T. Connolly, Damon E. Hall, and M. J. Mulkern, for defendant Amusement Company:

If the piece that broke contained a

sumed that the 2d and 9th requests should have been given, that affords the present defendant no ground for complaint. Nothing stands in the way of entering judgment in favor of the plaintiff against the present defendant. Where two or more are sued jointly and the action is not discontinued against any, "taking judgment against one not only operates as a discontinuance, but constitutes a bar to obtaining judgment against the others." *Cameron v. Kanrich*, 201 Mass. 451, 452, 87 N. E. 605. There is nothing in *Contakis v. Flavio*, 221 Mass. 259, 108 N. E. 1045, inconsistent with this conclusion. The technical difficulty about the entirety of a joint judgment has no application to proceedings before judgment. *Munroe v. Carlisle*, 176 Mass. 199, 201, 57 N. E. 332. It is not necessary to

Parties—  
improper  
joinder—who  
may complain.

consider whether Stat. 1913, chap. 716, is pertinent. The defendant has suffered no harm. *Smith v. Com.* 210 Mass. 259, 262, 96 N. E. 666, Ann. Cas. 1912C, 1236.

4. There were exceptions to portions of the judge's charge, and to the admission of evidence. It would serve no useful purpose to discuss these in detail; we have considered them and discover no reversible error.

Exceptions overruled.

#### NOTE.

The question considered in the reported case (*HOWARD v. CENTRAL AMUSEMENT Co.* ante, 195), as to liability for injury to person in street by fall of part of structure of completed building is considered in the annotation following *HOWARD v. REDDEN*, post, 204.

NELSON HOWARD, Admr., etc., Appt.,  
v.

WILLIAM H. REDDEN et al.

*Connecticut Supreme Court of Errors—July 16, 1919.*

(93 Conn. 604, 107 Atl. 509.)

#### Negligence — fall of cornice into street — liability of contractor.

1. A contractor who constructs a cornice upon a building is not liable for injury to a pedestrian by its fall onto the sidewalk beneath it through the negligence of the owner of the building in permitting the fastenings to rust and rot away.

[See note on this question beginning on page 204.]

#### Nuisance — cornice over sidewalk.

2. The construction upon a building of a cornice overhanging a sidewalk is not a nuisance because time may cause the fastenings to rust or rot and permit the cornice to fall upon the walk.

[See 13 R. C. L. 196, 197.]

#### Proximate cause — fall of cornice into street — injury to pedestrian.

3. The erection of a cornice over a sidewalk is not the proximate cause of injury to a pedestrian by its fall

because of the rusting and rotting of its fastenings.

[See 22 R. C. L. 140.]

#### Pleading — allegation of proximate cause — conclusion.

4. An allegation in a petition to recover damages for injuries that each and every act, omission, and neglect stated was a proximate cause of the injury, without the operation of which the injury would not have occurred, is a mere legal conclusion, and adds nothing to the allegations of fact in the petition.

**APPEAL** by plaintiff from a judgment of the Superior Court for New London County (Keeler and Maltbie, JJ.) in favor of defendant Gilbey, in an action brought to recover damages for the death of plaintiff's intestate by a falling cornice, for which defendants were alleged to be responsible. *No error.*

**Statement by Gager, J.:**

Action to recover damages for death caused by a falling cornice, brought against the builder Gilbey, and the owner Redden, to the superior court for New London county, and tried to the court, Keeler, J., upon demurrer of Gilbey to the substituted complaint. The demurrer was sustained, and, the plaintiff refusing to plead further, judgment was rendered in favor of the defendant Gilbey, from which judgment the plaintiff appealed.

The material facts, abbreviated from the substituted complaint, are alleged as follows:

Redden owned a four-story brick building fronting on Bank street, a much-used street in New London; the front wall of the building being built upon the boundary line between the lot and Bank street. Upon the top of the front wall was a wooden cornice 3 feet wide, and 36 feet long, overhanging the sidewalk, and weighing 800 pounds. The defendant Gilbey built this cornice for Redden. It was carelessly, negligently, and insecurely fastened to the wall, was unsafe and liable to fall by its own weight, and by reason of such liability was intrinsically dangerous to persons passing on Bank street. The defendants did not use beams and bolts of sufficient size and strength in fastening the cornice to the wall, but negligently nailed the cornice with wire and cut nails of small and insufficient size, to weak and insufficient furring strips, which strips were carelessly nailed to weak and insufficient pieces of timber built into the wall. The cornice was covered by a tin roof, carelessly flashed to the brick wall so that rainwater ran under it and rotted away the woodwork and furring strips, and rusted away the nails.

The cornice was so constructed by said Gilbey that it would, by natural action of the elements and from natural causes alone, and by reason of its own weight and insecure fastening, fall to the sidewalk.

The tin roof by natural causes became worn and rusted, and rainwater and other elements leaked into the cornice and rotted the woodwork and furring strips on the inner side of the cornice, and rusted away the nails by which the cornice was fastened to said furring strips and building.

The defendant Redden negligently and carelessly failed and neglected to inspect the cornice to determine its condition, and negligently and carelessly failed and omitted to remove the cornice from said building.

Because of the said negligences, acts, and omissions of the defendants, the cornice on September 16, 1917, fell from its place on the front of said building upon this plaintiff's intestate, then lawfully traveling on said highway in the exercise of due care and caution, and so injuring him that he died about an hour and a half after being struck.

The plaintiff further alleged:

Each of the acts, negligences, and omissions of the defendants contributed to the fall of said cornice, and each of said acts, negligences, and omissions was a proximate and efficient cause, without the operation of which the falling of the cornice would not have happened.

To this complaint the defendant Gilbey demurred for the following reasons:

(1) The defendant George Gilbey was under no duty to the plaintiff for the reason that his contract to build was with the owner of the land and building, William H. Redden, and said building and cornice were constructed and completed

long before the injury to the plaintiff.

(2) Because the negligence of the defendant George Gilbey was not the proximate cause of the injury to the plaintiff, but was consequential and remote.

(3) Because the defendant George Gilbey had made no representations to the plaintiff that said cornice was safe or properly constructed, had no contractual or other relations with him, and had no occupation of said building or control over it or duty toward it at the time of said accident, and for a long time prior to that.

(4) Because it appears that there is no causal connection between the negligence of the defendant George Gilbey and the injury to the plaintiff.

(5) Because it does not appear from the complaint that the defendant George Gilbey owed any duty to the plaintiff.

The demurrer was sustained, the plaintiff refused to plead further, and judgment was rendered in favor of the defendant Gilbey. The plaintiff appeals, assigning error in sustaining the demurrer.

Messrs. Hull, McGuire, & Hull, for appellant:

The creator of a public nuisance is liable for all injuries resulting therefrom, although the nuisance itself may be maintained by another.

*House v. Metcalf*, 27 Conn. 631; *Knight v. Foster*, 163 N. C. 329, 50 L.R.A.(N.S.) 286, 79 S. E. 614; *Longmeid v. Holliday*, 6 Exch. 767, 155 Eng. Reprint, 752, 20 L. J. Exch. N. S. 480.

Where the work is a nuisance per se, or where it is turned over by the contractor in a condition so negligently defective as to be imminently dangerous to third persons, the contractor is liable.

*Thomp. Neg.* § 686; *Herman v. Buffalo*, 214 N. Y. 316, 108 N. E. 451; *Plumer v. Harper*, 3 N. H. 88, 92, 14 Am. Dec. 883; *Carstesen v. Stratford*, 67 Conn. 428, 85 Atl. 276; *O'Brien v. American Bridge Co.* 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 47, 89 N. W. 830; *Pennsylvania Steel Co. v.*

*Elmore & H. Contracting Co.* 175 Fed. 176; *Thornton v. Dow*, 60 Wash. 622, 32 L.R.A.(N.S.) 972, 111 Pac. 899.

Mr. Nathan Belcher, for appellee Gilbey:

As there was no contractual or other relation between defendant Gilbey and the plaintiff's intestate, there was, therefore, no breach of duty on the part of the defendant.

*Wilmot v. McPadden*, 79 Conn. 373, 19 L.R.A.(N.S.) 1101, 65 Atl. 157; *Thomp. Neg.* p. 624, § 687; 6 Cyc. 62; 2 Cooley, Torts, 3d ed. p. 1486; 16 Am. & Eng. Enc. Law, 209; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444; *First Presby. Congregation v. Smith*, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; *Read v. East Providence Fire Dist.* 20 R. I. 574, 40 Atl. 761, 4 Am. Neg. Rep. 589; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; *Fanjoy v. Seales*, 29 Cal. 243; *Albany v. Cunliff*, 2 N. Y. 179; *Memphis Asphalt & Paving Co. v. Fleming*, 96 Ark. 442, 132 S. W. 222, Ann. Cas. 1912B, 709; *Galbraith v. Illinois Steel Co.* 2 L.R.A.(N.S.) 799, 66 C. C. A. 359, 133 Fed. 485; *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Vicksburg v. Holmes*, 106 Miss. 284, 51 L.R.A.(N.S.) 469, 63 So. 454; *Wood v. Sloan*, 20 N. M. 127, L.R.A.1915E, 766, 148 Pac. 512, 12 N. C. C. A. 562; *Du Bois Electric Co. v. Fidelity Title & T. Co.* L.R.A.1917C, 907, 151 C. C. A. 205, 238 Fed. 129; *Thornton v. Dow*, 60 Wash. 622, 32 L.R.A.(N.S.) 963, 111 Pac. 899.

The negligence of defendant Gilbey was not the proximate cause of the accident.

*Smith v. Connecticut R. & Lighting Co.* 80 Conn. 268, 17 L.R.A.(N.S.) 707, 67 Atl. 888; *Miner v. McNamara*, 81 Conn. 694, 21 L.R.A.(N.S.) 477, 72 Atl. 138.

Failure of the owner to inspect or to remove the cornice, and either to keep the cornice in repair or remove it from the building, is the proximate cause of the injury.

*Miner v. McNamara*, supra; *Casey v. Hoover Wrought Iron Bridge Co.* 114 Mo. App. 47, 89 S. W. 330.

The same rule applies in cases of nuisance as in cases of negligence.

21 Am. & Eng. Enc. of Law, 717; Thornton v. Dow, 60 Wash. 622, 32 L.R.A.(N.S.) 968, 111 Pac. 899; Albany v. Cunliff, 2 N. Y. 175; Joyce, Nuisances, p. 679; Sturges v. Theological Edu. Soc. 130 Mass. 415, 39 Am. Rep. 463.

Gager, J., delivered the opinion of the court:

The complaint is somewhat obscure, and it requires close inspection accurately to get at the real relation of the various acts set forth.

The only connection the defendant Gilbey had with the cornice is that at some time he constructed the cornice for defendant Redden, owner of the building. For some reason—probably because it would not help the plaintiff's case—the complaint contains no allegation of time, except that Redden owned the building on the day of the accident. The complaint necessarily imports, however, that at some considerable time prior to the accident Redden owned the building, and that he then employed Gilbey to construct the cornice. We do not think that counsel for the plaintiff would claim that in the climate of New London tin roofs and nails rust out and woodwork rots over night. It takes a considerable period of time, probably some years, for such rusting and rotting as to render these materials useless or insufficient for building purposes. At any rate, it appears, and is so alleged in the complaint, that the cornice remained in place until by natural causes, rainwater and other elements, the rusting and rotting took place, with the final result that, due to such rusting and rotting, the cornice fell; and it further appears, and is so alleged, that defendant Redden failed and neglected to inspect the cornice to determine its condition, and failed and neglected to remove the cornice. Whether Gilbey in doing the work was acting as independent contractor or as the servant of Redden does not clearly appear. We assume that it is intended to hold Gilbey as a contractor. It is not alleged that Gilbey had anything whatever to do with

the building after the construction of the cornice. The necessary inference of fact is that he did not. His is the ordinary case of a contractor or carpenter doing a job upon a building at the request of the owner, and thereafter having nothing to do with it. It is further to be presumed, from the acceptance and use necessarily implied from the other allegations of the complaint, that the cornice was constructed as the owner directed, or at least to his satisfaction. Whether the original contract was well done or not, it distinctly appears, and this is the controlling factor in the case, that the fall of the cornice was not due to the condition the contractor left it in, but to the neglect

Negligence—  
fall of cornice  
into street—  
liability of  
contractor.

of the owner Redden to inspect and guard against the result of rusting and rotting that inevitably takes place in every structure in which nails, tin, and wood are used. The structure stayed up as long as the materials did not rust and rot out.

The reasoning of *Miner v. McNamara*, 81 Conn. 690, 21 L.R.A. (N.S.) 477, 72 Atl. 138, is conclusive of the present case. In that case the Hubbell Company was alleged to have negligently constructed a warehouse. It was delivered to the owner, who knew the negligent construction, and that the building was unsafe. The owner leased to the plaintiff without disclosing the condition of the warehouse, and the building collapsed from its inherent weakness about a month after plaintiff took possession. This presents a much stronger case for the plaintiff than the present, for the collapse was due to conditions existing when the Hubbell Company turned over the building to the owner, and was not due to a supervening natural deterioration negligently allowed by the owner to proceed to the point of collapse, when reasonable inspection and care by the owner would have prevented it. Yet this court held that the Hubbell Company was not liable, on the ground that its negligence was not



the proximate cause of the collapse, but that the failure of the owner to notify the lessee of the defective condition was negligence, and the proximate cause of the collapse. The court said: "Whether this defendant (the Hubbell Building Company) is liable for the plaintiff's injury depends upon whether its negligent or unlawful act was the proximate cause of that injury. 'That only a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred.' *Smith v. Connecticut R. & Light Co.* 80 Conn. 268, 270, 17 L.R.A. (N.S.) 707, 67 Atl. 888. The last conscious agent in producing the injury is the party liable for it. 1 Beven, Neg. 3d ed. 53. The law does not search for the more remote agencies by which the injury was brought about or made possible."

It appears from the present complaint that the fall of the cornice was due to the action of rust and rot, and it is in terms alleged: "The defendant Redden negligently and carelessly failed and neglected to inspect the cornice to determine its condition, and negligently and carelessly failed and omitted to remove said cornice from said building."

A contractor or workman is surely not the insurer of the everlastingness of the materials of a cornice built by him. The owner, or occupier, as the case may be, is under obligation to give such inspection and make such repairs as will at least preserve the structure from the dangerous effects of natural causes,—wind, rain, dampness,—which no foresight of construction can guard against.

But the plaintiff contends that this is a case of a nuisance per se, and therefore the contractor is liable in any event. It is unnecessary to discuss the law in such cases, for the reason that the allegations do not show a nuisance per se, and do show a supervening

proximate cause. There is, to be sure, an allegation that the cornice was so constructed as to be a constant menace, as liable to fall by its own weight due to insecure fastening. Whether this was so or not, the fall which in fact occurred was of a structure quite different from that left by the builder. So long as it remained as left by him, it did not fall. The fall was due to rust and rot occurring from natural causes, and which the complaint says should have been guarded against by the owner by inspection and repair or removal, and which he neglected. The most alleged against Gilbey is negligence, and then it is shown that the subsequent negligence of the owner brought about the fall. There is no similarity between the facts of this case and of those cited by the plaintiff. *House v. Metcalf*, 27 Conn. 631, was the case of an overshot water wheel built near the road, uninclosed and uncovered, and calculated by its very nature to frighten horses. The danger was constant from the time the wheel was constructed, and it was that identical danger which caused the accident.

The bridge cases, of which *O'Brien v. American Bridge Co.* 110 Minn. 364, 32 L.R.A. (N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012, may be taken as an illustration, are cases where the very method of construction made the bridge liable to collapse at any time, and it did collapse because of the defects in its construction alone. The very danger left by the contractor, without any intervening cause, materialized in the collapse. We may apply to the claim of nuisance per se the words of Hobson, Ch. J., in *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 751: "But the doctrine of these cases is not to be applied to the fall of an elevator, which is charged to be due concurrently to its defectiveness, the unskilfulness of the operator, and his gross neglect in using it; for an elevator

Proximate cause—fall of cornice into street—injury to pedestrian.

Nuisance—cornice over sidewalk.

which, after being run for months, breaks down by reason of its being operated by an inexperienced and unfit person, and by reason of his gross negligence, cannot be said to be imminently dangerous to human life. Such an elevator cannot be distinguished from a defective steam boiler, a defective coach for the carriage of passengers, a defective wall, defective shelving in a storeroom, or a defective chandelier in a hotel, or the other things for which the maker has been held not to be responsible to third persons injured thereby."

A cornice is not per se a nuisance. There was no imminent peril involved in its ordinary use with ordinary care. The peril occurred because of the lack of ordinary care. *O'Brien v. American Bridge Co.* supra. The original negligent construction did not cause any harm, until the owner's negligence with respect to inspection and repair occurred, and the defendant Gilbey confessedly was in no way bound to anticipate or assume responsibility for this.

This ruling of our courts is amply supported by the authorities. In *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 221, 21 Atl. 244, a contractor was sued for damages caused by the defective construction of a porch built for a hotel company. Upon the point of liability of the contractor, the court cited with approval *Wharton on Negligence*: "The true rule, which we think applicable to it, may be found in *Wharton on Negligence*, 2d ed. § 438. It is as follows: 'There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negli-

gence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection.'"

The same section is cited with approval in the comparatively recent case of *Thornton v. Dow*, 60 Wash. 622, 32 L.R.A. (N.S.) 977, 111 Pac. 899.

By reason of the rule of proximate cause adopted, it will not be necessary to discuss further the general rule of nonliability of the contractor after having turned over the work to the owner, nor the few exceptions recognized in the cases. Although this rule has received attention, referring more especially to the cases collected in 14 R. C. L. p. 107, § 42, and the notes in 26 L.R.A. 504; 32 L.R.A. (N.S.) 968; and L.R.A. 1915E, 766, we find nothing that leads us to question the soundness of the rule above adopted. The reason for the general rule, stated in terms supporting our conclusion, is well stated in the note referred to in 32 L.R.A. (N.S.) 969, as follows: "'But the better reason,' says Mr. Justice Johnson, in *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 47, 89 S. W. 330, 'is that ordinarily in such cases there is found a break in the causal connection between the contractor's negligence and the injury. *Whart. Neg.* 368. It is the intervening negligence of the proprietor that is the proximate cause, and not the original negli-

gence of the contractor. By occupying and resuming possession of the work, the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof and to know of its defects; and, if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author. When he accepts work that is in a dangerous condition, the immediate duty devolves upon him to make it safe; and if he fails to perform this duty, and a third person is injured, it is his negligence that is the proximate cause of the injury. His liability may be incurred either from his substitution for the contractor, or from his neglect to repair."

But the plaintiff, referring to the doctrine of the "new conscious agent," as mentioned in *Miner v. McNamara*, 81 Conn. 690, 21 L.R.A. (N.S.) 477, 72 Atl. 138, says, in substance: "Redden is not a new conscious agent. He is one of the original wrongdoers, creators of a nuisance. His failure to inspect is an act of omission, not of commission. It is a concurring rather than a proximate cause of the injury."

This claim is hardly even plausi-

ble. Acts of omission, equally with acts of commission, are in law acts of a conscious agent. Even if Redden was an original wrongdoer, the injury was, by the terms of the complaint, due to his subsequent neglect as its proximate cause. The objection would have applied with equal force in *Miner v. McNamara*. Negligent omission to give notice was the act of the conscious agent on which that case turned.

Finally, the plaintiff says he has avoided the proximate cause doctrine by the allegations of the thirteenth paragraph of his complaint that each and every act, omission, and negligence stated was a proximate and efficient cause, without the operation of which the falling of the cornice would not have happened. We quite agree with the trial court that this

Pleading—  
allegation of  
proximate cause  
—conclusion.

is simply a statement of legal conclusions. It adds nothing to the previous allegations of fact. Further, the paragraph is a striking illustration of the not infrequent confusion of thought with reference to conditions and legal cause.

The court correctly sustained the demurrer of the defendant *Gilbey* upon the second and fourth grounds, and we have no occasion to consider the others.

There is no error.

The other Judges concur.

## ANNOTATION.

### Liability for injury to person in street by fall of part of structure of completed building.

- I. Introductory, 204.
- II. General rule, 205.
- III. Persons liable within rule:
  - a. Lessor, 210.
  - b. Lessee, 211.
  - c. Independent contractor, 211.
  - d. Executor or administrator, 212.
  - e. Trustee, 212.

#### I. Introductory.

The discussion in this note embraces the question of liability for the fall of part of the structure of a com-

#### III.—continued.

- f. Grantor or grantee, 212.
- g. Municipal corporation, 213.
- IV. Exceptions to rule:
  - a. Vis major, 213.
  - b. Act of third person, 214.
- V. Rule in Louisiana, 215.

pleted building adjoining the highway, by reason of which a traveler lawfully on the highway is injured. It does not include the fall of awnings,

signs, lamps, or other articles attached to the building, but which are not a part of the structure, and excludes cases where the building has been previously damaged by fire, or where the fall is caused by fire.

## II. General rule.

A building abutting on a highway must be so constructed and maintained that it will not fall and injure persons lawfully on the highway. While the owner or person in control of such a structure is not an insurer, he is bound to use reasonable care and skill in the construction and maintenance of the building, and he is obliged to inspect from time to time. If the building or any part thereof, when constructed or purchased, is in an inherently dangerous condition so that it is liable at any time to fall and injure persons in the highway, or if it becomes in such condition by reason of use or mismanagement, it is a nuisance, and the person whose duty it is to remedy the defect must do so within a reasonable length of time after the creation of the nuisance.

**District of Columbia.** — Woods v. Trinity Parish (1893) 21 D. C. 540.

**Georgia.**—Sinkovitz v. Peters Land Co. (1909) 5 Ga. App. 788, 64 S. E. 93.

**Iowa.**—Connolly v. Des Moines Investment Co. (1906) 130 Iowa, 633, 105 N. W. 400, 19 Am. Neg. Rep. 223.

**Kentucky.** — Mitchell v. Brady (1907) 124 Ky. 411, 13 L.R.A. 751, 124 Am. St. Rep. 408, 99 S. W. 266.

**Maryland.** — Murray v. McShane (1879) 52 Md. 217, 36 Am. Rep. 367.

**Massachusetts.** — Green v. Cariganis (1914) 217 Mass. 1, 104 N. E. 571; HOWARD v. CENTRAL AMUSEMENT Co. (reported herewith) ante, 195.

**Michigan.** — Wilkinson v. Detroit Steel & Spring Works (1889) 78 Mich. 405, 41 N. W. 490; Detzur v. B. Stroh Brewing Co. (1899) 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371; Bannigan v. Woodbury (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531.

**Minnesota.**—Ryder v. Kinsey (1895) 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94.

**Missouri.**—Butts v. National Exch.

Bank (1903) 99 Mo. App. 168, 72 S. W. 1083.

**New York.** — Uggla v. Brokaw (1902) 77 App. Div. 310, 79 N. Y. Supp. 244, subsequent appeal in (1907) 117 App. Div. 586, 102 N. Y. Supp. 857; Pearson v. Ehrich (1912) 148 App. Div. 680, 133 N. Y. Supp. 273; Mentz v. Schieren (1901) 36 Misc. 813, 74 N. Y. Supp. 889; Vincett v. Cook (1875) 4 Hun, 318; Scullin v. Dolan (1871) 4 Daly, 163; Mullen v. St. John (1874) 57 N. Y. 567, 15 Am. Rep. 530; Odell v. Solomon (1885) 99 N. Y. 635, 1 N. E. 408.

**Pennsylvania.**—Palmore v. Morris, T. & Co. (1897) 182 Pa. 82, 61 Am. St. Rep. 693, 37 Atl. 995, 3 Am. Neg. Rep. 597.

**South Dakota.**—Waterhouse v. Jos. Schlitz Brewing Co. (1900) 12 S. D. 397, 48 L.R.A. 157, 81 N. W. 725, subsequent appeal in (1902) 16 S. D. 592, 94 N. W. 587.

**Texas.** — O'Connor v. Andrews (1891) 81 Tex. 28, 16 S. W. 628; O'Connor v. Curtis (1892) — Tex. —, 18 S. W. 953.

**Ireland.**—Palmer v. Bateman [1908] 2 Ir. R. 393.

**Canada.** — Ferrier v. Trepannier (1895) 24 Can. S. C. 86; Roberts v. Mitchell (1894) 21 Ont. App. Rep. 433.

The case of Mullen v. St. John (1874) 57 N. Y. 567, 15 Am. Rep. 530, seems to be the leading case on this question. In that case it appeared that the plaintiff, while walking along the street, was injured by the falling of the walls of a building adjacent to the highway. It was held that the owners of the building were under a legal obligation to take reasonable care that the building, or any part of it, should not fall into the street and injure persons lawfully there, and that the question whether reasonable care had been used must depend on all the circumstances of the case. "Buildings properly constructed do not fall without adequate cause. If there be no tempest prevailing, or no external violence of any kind, the fair presumption is that the fall occurred through adequate causes, such as the ruinous condition of the building,

which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of negligence on his part, which may, of course, be rebutted. In the absence of explanatory evidence, negligence may be presumed."

In *Woods v. Trinity Parish* (D. C.) *supra*, a child who was standing in front of the defendant's church building, which adjoined the highway, was struck and severely injured by a shutter which fell from the building. It was contended by the defendant that as the plaintiff was not standing on the sidewalk proper at the time of the accident, but on a paved space between the sidewalk and the front building line of the church edifice, the defendant did not owe to her the duty owed to a traveler on the street. But the court held that as the whole space in front of the church was paved and uninclosed, and was commonly used by the public, it was a part of the public street, on which any one of the public had a right to be, and it was therefore immaterial on which part of it the plaintiff was standing at the time of the accident. It was held, further, that where the declaration alleged knowledge by the defendant of the defects of the shutter, it was not necessary to prove by a preponderance of testimony that the defendant knew of the unsafe condition of the shutter. It was said in this connection by the court: "This degree of knowledge was not essential in order to enable the plaintiff to make out her case. It was sufficient that, evidence of the want of security of the shutter in its fastening being given, the plaintiff should indicate, by evidence, notice to the defendant of such defect, or circumstances from which such notice could properly have been presumed."

In *Sinkovitz v. Peters Land Co.* (1909) 5 Ga. App. 788, 64 S. E. 98, it appeared that the plaintiff, while on the sidewalk in front of the defendant's building, was struck by a window pane which fell from the building. It was held that "when the plaintiff showed that the pane of glass which struck her fell out of the window of defendant's building, and that

its fall was not caused by the occupants of the suite of rooms or by the agency of any other person, she had made a *prima facie* case."

In *Connolly v. Des Moines Invest. Co.* (1906) 130 Iowa, 633, 105 N. W. 400, 19 Am. Neg. Rep. 223, it appeared that the plaintiff, while on the sidewalk in front of a building owned by the defendants, was struck and injured by a cast-iron window cap that fell from one of the upper windows of the building. It was held that when a building situated on a public street becomes dangerous from faulty construction, or other cause, a continuing duty of inspection exists; not such an inspection as shall make the owner an insurer of the safety of the building, but a reasonable inspection from time to time. And if the owner delegates to another the work of inspecting the building, he does not discharge his duty by exercising ordinary care in the selection of the inspector, but he is responsible for the negligent performance of the inspection.

In *Mitchell v. Brady* (1907) 124 Ky. 411, 13 L.R.A. 751, 124 Am. St. Rep. 408, 99 S. W. 266, it appeared that a child walking on a city street was killed by the falling of a water pipe constructed on the side of a building which abutted on the sidewalk. It was held that a person erecting a building on a city street is under a legal duty to use ordinary reasonable care that it shall not fall into the street and injure persons lawfully there. A ruinous wall or other structure likely to fall is a nuisance, and, if it falls and injures a person in the street after a reasonable time to repair or remove it has elapsed, the owner is liable to the person injured.

In *Murray v. McShane* (1879) 52 Md. 217, 36 Am. Rep. 367, it appeared that the defendant's building, which fronted on a public street, had become dilapidated and in a condition endangering the safety of passers-by. The plaintiff, passing the house, sat on the sill of the door, temporarily, to lace his shoe, his head being projected into the street, when a brick fell from the wall of the building, striking the head of the plaintiff and severely injuring

him. The defendant contended that the plaintiff was a trespasser, and not a traveler passing along the highway. But the court said: "The alleged 'locus in quo' in this case is partly in the highway, and partly on the property of the adjoining owner, the head of the plaintiff, which was injured, being within the lines of the highway, as alleged, and the body resting for a lawful purpose on the doorsill. He was not a trespasser 'quoad hoc;' if he had remained in that position longer than necessary, against the owner's will, he might have become so."

A stucco ornament which is negligently constructed of improper materials, attached to a building adjoining a public highway and allowed so to remain, is a continuing nuisance, and a person passing in the street who is injured by the falling of the ornament has a cause of action. *HOWARD v. CENTRAL AMUSEMENT CO.* (reported herewith) ante, 195.

In *Green v. Cariganis* (1914) 217 Mass. 1, 104 N. E. 571, a piece of slate falling from the roof of a building adjoining the highway struck and injured the plaintiff, who was passing along the street. There was some question whether the falling slate came from the roof of defendant's building. It was held that, in the absence of evidence of a wind at that particular time, the logical and reasonable inference would be that the falling slate would come down in a substantially perpendicular direction, and as the plaintiff was directly in front of defendant's building at the time of the accident, the jury was justified in finding that the slate fell from the defendant's building.

A declaration alleging that the glass windows in a building adjoining a city street were negligently permitted to become out of repair and unsafe, and that the glass in the windows had become loose, falling and striking the plaintiff, who was passing along the street, has been held to state facts sufficient to constitute a cause of action. *Bannigan v. Woodbury* (1909) 153 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531.

In *Detzur v. B. Stroh Brewing Co.*

(1899) 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371, it was shown that a piece of glass, falling from a window in a building adjoining a public street, struck and injured the plaintiff, who was passing in front of the building. There was evidence tending to show that the glass had for some time been in a shattered condition, and that there was no unusually high wind at the time of the accident. It was held that these facts supported a finding of negligence.

The law imposes a duty on a person erecting a building on premises adjoining a public highway so to erect it as to render it reasonably safe, and sufficiently strong not only to resist the strain on the supporting timbers of the roof, but also strong enough to support the roof at all seasons, in all ordinary weather. And where a person lawfully passing in the street is injured by being struck with a portion of the roof of the building, the defendant cannot excuse himself by proof that he employed an independent contractor to furnish the material and perform the work. *Wilkinson v. Detroit Steel & Spring Works* (1889) 73 Mich. 405, 41 N. W. 490.

In *Ryder v. Kinsey* (1895) 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94, it appeared that a small sign attached to a building adjoining the highway had become insecure and dangerous to persons passing in the street. A policeman attempted to remove the sign and called on the plaintiff's son to assist him, when part of the wall in the building fell, striking and injuring the plaintiff's son. The evidence showed that the fall of the wall was due to a latent defect in the construction of the building, and there was no evidence tending to connect such cause with the owner's negligence. It was held that in the absence of evidence tending to show that the defect might have been discovered and removed before the accident, by the exercise of ordinary care on the part of the owner, he would not be liable.

It was shown in *Butts v. National Exch. Bank* (1908) 99 Mo. App. 168,

72 S. W. 1083, that the plaintiff, while standing on the sidewalk in front of a building owned and occupied by defendant, was struck by a guard rail which fell from the building, and that the section of railing which produced the injury had, for a long time prior to the accident, been loose and insecure, although it appeared that the remaining spans of railing were bolted, and that after the accident this section was in like manner protected. It was held that no actual notice to, or proof of knowledge of, the imperfect and dangerous condition of the railing, was required, and that the proof entitled the question of negligence to be submitted to the jury.

In *Pearson v. Ehrich* (1912) 148 App. Div. 680, 133 N. Y. Supp. 273, it appeared that the plaintiff, while walking along a city street, was struck by a piece of glass which fell from a building owned and occupied by the defendant. The proof of these facts, it was held, established a prima facie case of negligence against the defendant, under the rule of "*res ipsa loquitur*," and it was then incumbent upon the defendant to explain the circumstances or otherwise establish his freedom from liability.

In *Ugla v. Brokaw* (1907) 117 App. Div. 586, 102 N. Y. Supp. 857, it appeared that a coachman, while driving a team of horses in a public highway, was struck by a piece of a skylight, which fell or was blown from a building which adjoined the highway. It was held that the doctrine of "*res ipsa loquitur*" applied, the incident itself being sufficient to raise a presumption of negligence. See to the same effect (1902) 77 App. Div. 310, 79 N. Y. Supp. 244.

In *Mentz v. Schieren* (1901) 36 Misc. 813, 74 N. Y. Supp. 889, it appeared that the plaintiff, while passing along a public street, was struck and injured by an iron guard which fell from a window of a building adjoining the highway. It was held that proof of the fall of the guard raised a presumption of negligence sufficient to call for an explanation, and that the explanation offered by de-

fendant was inadequate to rebut the presumption.

In *Odell v. Solomon* (1885) 99 N. Y. 635, 1 N. E. 408, it appeared that the plaintiff, while on a public highway, was injured by the falling of a window sash from a building adjoining the highway. It was held that the defendants were not liable, as there was no evidence that they had any reason to apprehend the existence of any such defect as that which was developed by the accident which occurred; and the simple fact that the premises were not kept in repair was not sufficient to establish negligence against the defendant. "It cannot be contended," the court said, "that the owner or occupant of a building is chargeable with the duty of constant inspection and extreme care which is required of railroad companies, and others managing dangerous machinery which is liable, from its nature, to become defective and cause injury. Reasonable care is all that the law requires, and what is reasonable care depends upon the nature of the property and the dangers in its use ordinarily to be apprehended."

The fall of a wall of a building abutting on a highway causing injury to a traveler implies negligence. The doctrine of "*res ipsa loquitur*" applies, and the defendant has the burden of proving that the building, at the time of the accident, was safe, so far as diligent examination would show. *Vincett v. Cook* (1875) 4 Hun (N. Y.) 318.

In *Scullin v. Dolan* (1871) 4 Daly (N. Y.) 163, it appeared that a piece of coping from the chimney on defendant's house fell and injured the plaintiff, who was passing along the sidewalk. It was held that the defendant was not liable, as he was not guilty of negligence either in the construction or maintenance of the chimney.

It appeared in *Palmore v. Morris, T. & Co.* (1897) 182 Pa. 82, 61 Am. St. Rep. 693, 37 Atl. 995, 3 Am. Neg. Rep. 597, that a child, while standing on the sidewalk in front of a large building, was struck and injured by a falling gate attached to the building. The

evidence showed that the gate was out of repair and was in a dangerous condition. It was held that there was evidence sufficient to justify the jury in finding that there was negligence on the part of him whose duty it was to repair.

In *Waterhouse v. Joseph Schlitz Brewing Co.* (1902) 16 S. D. 592, it appeared that the walls of a building adjoining a public highway suddenly collapsed, striking and injuring the plaintiff who was at the time standing in front of the building. Suit was brought against the owner of the building, and it was held that it is the duty of the owner of a building which adjoins a public highway to use ordinary care to discover any defect in the building, and the fact that the defendant did not construct the building, but purchased it from another, would not shift the liability. It was held, further, that it was not necessary to prove that the defendant had actual knowledge of the defective condition of the building.

In an earlier appeal in the same case (1900) 12 S. D. 397, 48 L.R.A. 157, 81 N. W. 725, it was held that a complaint which alleged that the building was owned by the defendant, and was negligently constructed of improper materials, stated a good cause of action, as the owner of a building is liable for its negligent construction. The fact that the building has stood for many years was said to afford very slight evidence of its proper construction, the court adding: "From the fact that the building fell of its own weight, without any external violence, a fair presumption would be that the fall occurred through adequate causes, one of the most natural of which would be the negligent and faulty construction of the building itself."

In *O'Connor v. Curtis* (1892) — Tex., 18 S. W. 953, the owner of a building adjoining a public street was held liable to a person lawfully in the street, who was injured by the falling of the cornice and part of the fire wall of the building. See, to the same effect, *O'Connor v. Andrews* (1891) 81 Tex. 28, 16 S. W. 628.

A person passing in the street who

is struck by a falling gutter from a building adjacent to a public highway cannot hold the owner of the premises liable, where it is shown that the owner had employed workmen at different times to examine and repair the gutter, and otherwise used reasonable care in inspecting and maintaining it, and where there is no evidence tending to show that the fall was due to any neglect or default on his part. *Palmer v. Bateman* [1908] 2 Ir. R. 393.

In *Ferrier v. Trepannier* (1895) 24 Can. S. C. 86, it appeared that the plaintiff's intestate, while passing along a public street, was killed by the falling of a window from the third story of a building adjoining the highway. It was held that the owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against.

In *Roberts v. Mitchell* (1894) 21 Ont. App. Rep. 433, it appeared that plaintiff, while walking on a public street, was struck by a cornice which fell from a building adjoining the highway. The defendant, who was the owner and occupant of the building, had never caused it to be inspected, although he had owned it for several years. It appeared that the building had been erected by a competent contractor several years before the defendant purchased it. In commenting on the duty to inspect, the court said: "The evidence in the present case shows that the building was put up in 1871, that the defendant bought it from the original owner and builder in 1882, and that from that time, at all events till the occurrence of the accident, no examination had been made of the condition of the cornice or brackets as to whether they continued to be fastened as firmly and were in as safe a state as it may be assumed they were when first put up, or as they were in 1882. Certainly it could not be assumed that they would last forever, or that the wood would not shrink or decay, or the fastenings rust or become loose from weathering or other



cause, and I think the jury or judge might well infer that if they had been examined from time to time the condition of this particular bracket and any other loose ones would have been discovered, and this defect remedied."

### III. Persons liable within rule.

#### a. Lessor.

The owner of a completed building which adjoins a highway is liable to a person passing in the street who may be injured by the falling of any part of the structure, although the premises are in possession and under exclusive control of a tenant, if the building by reason of faulty and negligent construction, or the use of improper and unsuitable materials, or for any other reason is, when leased, in such condition that it is liable at any time to fall of its own weight. Such a condition constitutes a nuisance, and it is not material that the building was not constructed by the owner or that the tenant has obligated himself to repair. If the fall is caused by defects which arose after the owner parted with possession to the lessee, but which do not in themselves constitute a nuisance, but are due to culpable negligence, the owner, as well as the tenant, is liable to third persons injured thereby if he has obligated himself to repair. If the building, or the part thereof which falls, is not under the exclusive control of any one tenant the owner is liable. *Mitchell v. Brady* (1907) 124 Ky. 411, 18 L.R.A. 751, 99 S. W. 266; *Howard v. Central Amusement Co.* (reported herewith) ante, 195; *Uggla v. Brokaw* (1907) 117 App. Div. 586, 102 N. Y. Supp. 857; *Waterhouse v. Joseph Schlitz Brewing Co.* (1900) 12 S. D. 397, 48 L.R.A. 157, 81 N. W. 725, subsequent appeal in (1902) 16 S. D. 592, 94 N. W. 587; *O'Connor v. Andrews* (1891) 81 Tex. 28, 16 S. W. 628; *O'Connor v. Curtis* (1892) — Tex. —, 18 S. W. 953.

Where a water pipe attached to a building adjoining the highway is allowed to become loose and out of repair, and is in such a condition as to be a constant danger to persons in the highway, it constitutes a nuisance,

and a person lawfully in the street who is injured by the falling of the pipe may hold that owner of the building liable, although the building is in possession of a tenant under lease, who has obligated himself to repair. *Mitchell v. Brady* (Ky.) supra.

A stucco ornament of improper and unsuitable material, negligently attached to a building by the owner, constitutes a nuisance, and the owner of the building is liable to a person in the street who is injured by the falling of the ornament, although the building is in the exclusive possession of a lessee. *Howard v. Central Amusement Co.* (reported herewith).

In *Uggla v. Brokaw* (1907) 117 App. Div. 586, 102 N. Y. Supp. 857, it appeared that the defendant leased a piece of property to a tenant, who constructed thereon a building which adjoined the highway. The defendant paid for the building and supervised its construction. Thereafter the tenant went into possession of the building under a second lease in which he obligated himself to make repairs. The plaintiff, while driving a team of horses along the highway, was struck by part of the skylight which was blown from the building. The court said: "If the building was not a nuisance, that is, in a condition to endanger the traveling public or adjacent property, or those lawfully thereon, at the time the defendant surrendered entire possession thereof to his tenant, he would not be liable if thereafter, by the act of the tenant or through his negligent omission to make repairs, they became dangerous and unsafe, but in such circumstances the tenant would be liable."

Where a building has become a nuisance, and is leased to a tenant, the owner is liable for any injury that may result from such nuisance to third parties, when such owner has not exercised ordinary care and diligence in discovering its condition, and it is immaterial that the lease contains no covenant to repair. *Waterhouse v. Joseph Schlitz Brewing Co.* (1902) 16 S. D. 592, 94 N. W. 587.

In *Waterhouse v. Jos. Schlitz Brewing Co.* (1900) 12 S. D. 397, 48 L.R.A.

157, 81 N. W. 725, it appeared that a building adjoining the highway collapsed, injuring a person in the street. Action was brought against the owner of the building, the complaint alleging that the building was under his control and that it was negligently constructed of improper material. It was held that as the owner of a building is liable for its negligent construction it was not necessary to allege that the defendant constructed the building; and as the complaint did not allege any decay or want of repairs the tenant was not a necessary party. The court said: "It seems to be the proper rule that the landlord is liable for the negligent construction, and the tenant for the negligent use, of the premises. If a dangerous or injurious structure is erected on the premises when he lets them to the tenant, the landlord is, of course, liable."

In *O'Connor v. Curtis* (Tex.) *supra*, it appeared that the building from which a water pipe fell was under lease to several tenants. The court held that the owner of the building was liable, as it did not appear that the portions falling were within the holding of any one tenant, and as no agreement to repair on the part of the tenants was shown. See to the same effect, *O'Connor v. Andrews* (1891) 81 Tex. 28, 16 S. W. 628.

#### *b. Lessee.*

The lessee of a completed building which adjoins a highway is *prima facie* liable to passers-by who may be injured by the fall of the structure, or any part thereof, if the building, or the part falling, is under his exclusive holding in the lease. And he owes a duty to the public to use ordinary, reasonable care in the management and use of the building. If the condition of the premises when leased is such as to constitute a nuisance, it is his duty to remedy the defects, and if he does not do so he is guilty of continuing a nuisance, and the tenant, as well as the landlord, is liable for any injuries which may be caused thereby to a person lawfully in the highway. *Mitchell v. Brady* (1907) 124 Ky. 411, 13 L.R.A. 751, 99 S. W. 206; *Green v. Carigianis* (1914) 217 Mass. 1, 104 N.

E. 571; *Odell v. Solomon* (1885) 99 N. Y. 635, 1 N. E. 408.

Where a water pipe attached to a building adjoining the highway is allowed to become loose and out of repair, and is in such a condition as to be a constant danger to persons in the highway, it constitutes a nuisance which should be remedied by the tenant in possession; and if he fails to do so, and a person lawfully in the highway is injured by the falling of the pipe, the tenant is liable in damages. *Mitchell v. Brady* (Ky.) *supra*.

In *Green v. Carigianis* (1914) 217 Mass. 1, 104 N. E. 571, action was brought against the lessee, who was at the time in possession and control of the building. In holding the defendant liable, the court said: "The entire building numbered 125 was in the exclusive control of the defendant as lessee; and hence it was his duty, as between himself and the public, to keep it in such safe condition that travelers on the highway should not suffer injury therefrom."

In *Odell v. Solomon* (N. Y.) *supra*, action was brought against the lessees, who were in exclusive possession of the building and were obligated under their lease to repair the premises. It was held that the plaintiff's recovery could not be sustained on the ground that the lessees failed to perform their covenant with the landlords, as the covenant did not inure to the benefit of a stranger who sustained an injury in consequence of its breach, but the plaintiff, to recover, must show culpable negligence on the part of the lessee, and as the lessee had used ordinary care and diligence in the maintenance of the building, he was held not liable.

#### *c. Independent contractor.*

An independent contractor engaged to construct or remodel a building which adjoins a public highway is not liable to third persons passing along the street who may be injured by the falling of any part of the structure, after the work has been completed and the building has been turned over to the owner. *Daugherty v. Herzog* (1896) 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457. And

see *HOWARD v. REDDEN* (reported herewith) ante, 198.

In *Daugherty v. Herzog* (Ind.) supra, it appeared that the plaintiff's intestate, while walking on a public thoroughfare, was killed by the falling of the wall of a building adjoining the highway. The defendant, an independent contractor, had been engaged to remodel the building, and had completed the work and turned the building over to the owner about two years before the accident. The plaintiff claimed that the work was done unskilfully and negligently, and that the fall of the wall was due to this fact. It was held that the defendant was not liable, as he owed no duty to the injured party. It was held, further, that there must be a causal connection between the negligence and the injury; and such causal connection must not be interrupted by the interposition, between the negligence and the injury, of any independent human agency.

*d. Executor or administrator.*

An executor or administrator is not liable in his representative capacity for injuries to a person in the street, occasioned by the fall of part of a building adjacent to the street, if the injury occurred after the death of the testator. He may, however, be held personally liable if the property is in his possession and under his control. *Bannigan v. Woodbury* (1909) 153 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531; *Ferrier v. Trepannier* (1895) 24 Can. S. C. 86.

In *Bannigan v. Woodbury* (Mich.) supra, action was brought against the defendant individually, and as administrator. It was held that he was not liable in his capacity of administrator, as the accident in question occurred after the death of the testator, and the heirs were not made parties to the action. It was held, however, that as he was in possession and control of the premises, he would be personally liable.

In *Ferrier v. Trepannier* (Can.) supra, the defendants were executors of an estate of which the building in question was a part, and were also trustees for the heirs to whom this

particular building had been bequeathed. Action was brought against the defendants personally, as well as in their representative capacity as executors and trustees. It was held that the defendants were not liable as executors of the general estate for the following reasons: (1) They were not in possession of the building as executors at the time of the accident, but were trustees of this particular property for specific devisees; (2) even if the executors had been in possession the corpus of the estate would not be liable for the plaintiff's damage; (3) even if the executors had been in possession, and assuming that the whole estate might be liable, action does not lie against the executors alone.

*e. Trustee.*

It has been held that a trustee holding the legal title to premises abutting on a highway is liable in his representative capacity to a person passing in the street, who is injured by the falling of part of a completed building. *Ferrier v. Trepannier* (1895) 24 Can. S. C. 86.

In that case the lower court held that the defendant trustees, who held the legal title to the premises, were liable in their representative capacity for injuries caused through a defect in a building adjoining a highway, by reason of which a traveler was killed. The question was not before the court on appeal, but it was intimated that, had it been involved, the holding of the lower court would have been affirmed.

*f. Grantor or grantee.*

A grantor of defective premises adjoining a highway, who has parted with the title and possession of the premises, is not liable to a person passing in the street who is injured by the falling of part of the building conveyed, although the grantor knew of the defect at the time he made the conveyance, provided the defect was so obvious as to be discoverable by careful inspection on the part of the grantee. In such cases it is the duty of the grantee to inspect the premises, and, if necessary, to make repairs, and if he fails to do so and persons lawfully in the street are injured, he, and

not the grantor, is liable. *Palmore v. Morris, T. & Co.* (1897) 182 Pa. 82, 61 Am. St. Rep. 693, 37 Atl. 995, 3 Am. Neg. Rep. 597, wherein the court said: "There may be a case where the grantor conceals from the grantee a defect in a structure known to him alone, and not discoverable by careful inspection, where the owner would be held liable, though out of possession; but that is not this case; the rotten gate, the testimony shows, was as obvious before the accident as afterwards, and the reasonable time for the purchaser to discover it was not limited to the twenty hours after he took possession, but to the weeks and months pending the negotiations, before the delivery of the deed."

But see *Kelly v. Washburn* (1917) 178 App. Div. 664, 165 N. Y. Supp. 891, wherein it was held that a person who sold a defective and dilapidated house to housewreckers was liable for injuries to a third person, who, while passing on the street, was struck by a foundation stone from the building, although title to the building had passed and it had become legally severed from the land at the time of the accident. It was also held that the owner of an undivided half interest in the land, who deeded his interest to another before the accident, does not escape liability where it was shown that the deed was not recorded until after the accident.

#### *g. Municipal corporation.*

A municipal corporation is not liable for the fall of any part of a completed building adjoining a public highway, whereby a traveler on the street is injured. The defect which causes the fall is a defect in the building and not in the highway. *Mitchell v. Brady* (1906) 124 Ky. 411, 13 L.R.A. 751, 124 Am. St. Rep. 408, 99 S. W. 266.

In that case it appeared that a child, while standing on a public street, was hit by a falling water pipe which was insecurely attached to a building adjacent to the highway. An attempt was made to hold the city liable on the theory that this pipe, which hung over the sidewalk, endangered

people passing in the street, and thus made that portion of the street a defective highway. There was no evidence tending to show notice on the part of the city of the dangerous condition of the spout, and as the danger came from the defective condition of the house, and not from any defect in the sidewalk, it was held that the city was not liable.

#### *IV. Exceptions to rule.*

##### *a. Vis major.*

An exception to the general rule imposing liability for the fall of a part of a building exists where the accident is caused by a superior force over which the defendant has no control. A building which adjoins a public highway must be so constructed and maintained that it shall withstand all storms and winds that are common or likely to occur in that particular locality, but it is not necessary to foresee storms of unusual violence. *Sinkovitz v. Peters Land Co.* (1909) 5 Ga. App. 788, 64 S. E. 93; *Detzur v. B. Stroh Brewing Co.* (1899) 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371; *Uggla v. Brokaw* (1907) 117 App. Div. 586, 102 N. Y. Supp. 857; *Vincett v. Cook* (1875) 4 Hun (N. Y.) 318.

In *Sinkovitz v. Peters Land Co.* (Ga.) *supra*, it was contended by the defendant that the fall of the window was caused solely by an extraordinarily high wind. It was held that the case should have been submitted to the jury to find whether the fall was attributable to such an extremely high wind as that the casualty might be considered an act of God; and that the plaintiff should have been allowed to file a proposed amendment showing that the defendant was negligent in failing to provide a windowpane capable of sustaining the force of the usual windstorms and flurries of wind to be expected in that particular city and in the locality where the building was situated.

In *Detzur v. B. Stroh Brewing Co.* (Mich.) *supra*, the evidence showed that the glass which fell from the building had for some time prior to the accident been in a shattered con-

ERNEST R. VADER et al., Respts.,  
v.

MINOR H. BALLOU, Appt.

*Wisconsin Supreme Court—January 7, 1913.*

(151 Wis. 577, 139 N. W. 418.)

**Contract — liability of member of committee.**

1. Members of a voluntary committee organized to promote the interests of a candidate for election are personally liable, jointly and severally, for expenses incurred with their knowledge for the furthering of the enterprise, which are appropriate to the purpose for which the organization was formed.

[See note on this question beginning on page 222.]

— effect of charging account against one member.

2. That one doing work for a voluntary committee organized to further the interests of a candidate for elec-

tion charged the work primarily to the one with whom the contract was made is not conclusive that he looked to him for payment, rather than to the members of the committee.

APPEAL by defendant from a judgment of the Circuit Court for Winnebago County (Burnell, J.) in favor of plaintiffs in an action brought to recover for work and labor performed, and materials furnished, in printing certain campaign literature. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Silas Bullard and D. K. Allen, for appellant:

There was no evidence of liability on the part of defendant for the indebtedness claimed in this action, either as having caused or created the debt, or as being responsible therefor in any capacity, or as having ratified and obligated himself for the payment of same.

Clark v. O'Rourke, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; Moody & M. Co. v. Methodist E. Church, 99 Wis. 49, 74 N. W. 572; Haswell v. Standing, 152 Iowa, 291, 132 N. W. 417, Ann. Cas. 1913B, 1326; Garlick v. Morley, 147 Wis. 397, 132 N. W. 601; Fredendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203, 26 Wis. 286; Sheehy v. Blake, 72 Wis. 411, 39 N. W. 479, 77 Wis. 394, 9 L.R.A. 564, 46 N. W. 537.

Messrs. Williams & Williams, for respondents:

The fact that the services were charged on the creditors' books to the agent is evidence, but is not conclusive, that credit was given to the agent.

Champion v. Doty, 31 Wis. 190; Bentley v. Doggett, 51 Wis. 228, 37 Am. Ren. 827, 8 N. W. 155.

He who would avail himself of the

advantages arising from the act of another in his behalf must also assume the responsibilities.

Meachem, Agency, § 148.

The questions as to whom credit was given, whether defendant had authorized or ratified what was done, were for the jury, and the judgment will not be reversed merely on the ground that the weight of evidence was against the verdict.

Fredendall v. Taylor, 26 Wis. 286, 23 Wis. 538, 99 Am. Dec. 203; Clark v. O'Rourke, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Eichbaum v. Irons, 6 Watts & S. 67, 40 Am. Dec. 540.

Timlin, J., delivered the opinion of the court:

In this action at law upon contract to recover for work and labor performed and materials furnished in printing letterheads and circulars for distribution to the electors in the effort to have Mr. S. A. Cook nominated for United States Senator at the primary election for the year 1910, the jury returned a verdict finding that the plaintiffs did the

work and furnished the materials upon the credit of, and relying for payment upon, a committee of which the defendant was one. That in ordering this printing and material one Cowling acted as agent of said committee, and that the printing was done and materials furnished with the knowledge and consent of the defendant, Ballou, who ratified the acts of Cowling in regard to the same.

The errors assigned go to the sufficiency of the evidence to support this verdict and to the sufficiency of the verdict to support a judgment for the plaintiff.

It appeared that the work and material in question were ordered by Mr. Cowling, delivered to him, and charged to him upon respondents' books of account. After the work was begun Mr. Cowling informed respondents that there was a committee to which matters of payment must be referred. It also appeared that Mr. Cowling was chairman of a voluntary campaign committee having charge of the active details of the campaign, and that Mr. Ballou, the appellant, was also a member of and the treasurer of that committee. The work done and materials furnished were appropriate to the purpose for which the voluntary organization was formed. There is evidence tending to show that Mr. Ballou knew of the contract with respondents and made part payment thereon out of the funds contributed to the committee. The verdict found that the plaintiffs did not do the printing and furnish the material upon the credit of or relying upon W. C. Cowling individually for payment. Upon the findings of fact by the jury, which we think are supported by evidence, the members of this committee would be liable to the plaintiffs for the demand in question. The fact that the plaintiffs charged up the account in the first instance

against Mr. Cowling, while an item of evidence, was not conclusive, and is disposed of by the finding of the jury above stated. *Champion v. Doty*, 31 Wis. 190. The members of the committee, including the defendant, Ballou, had knowledge that this work was being done and this material furnished, that it must be paid for, that it was adapted to the purpose for which they had organized themselves into a committee, and that it was a disbursement necessary to their effectual work. The only question is whether the plaintiffs could select one member of this committee and hold him liable for the whole amount. In other words whether the liability is joint and several. It may be that even this question is not presented because it was not raised by answer. *Derickson v. Whitney*, 6 Gray, 248. But the liability of the members of the committee is joint and several. *Fredendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203, s.c. 26 Wis. 286. Each member of a voluntary association is liable for the debts thereof, if incurred during his period of membership and contracted for the purpose of carrying out the objects for which the association was formed. *Sheehy v. Blake*, 72 Wis. 411, 39 N. W. 479; 4 Cyc. 311.

Judgment affirmed.

#### NOTE.

The question considered in the reported case (*VADER v. BALLOU*), ante, 216), as to the liability of the members of a voluntary association, not organized for personal profit, on contract with third person, is the subject of the annotation following *ROBBINS Co. v. COOK*, post, 222.

Contract—  
liability of  
member of  
committee.

—effect of charging account  
against one  
member.

## ROBBINS COMPANY, Respt.,

v.

W. C. COOK et al., Appts.

*South Dakota Supreme Court — June 25, 1919.*

(— S. D. —, 173 N. W. 445.)

**Voluntary association — liability of members.**

1. Members of voluntary associations organized for profit are individually liable for debts contracted in the name of the association by other members, while members of such associations organized without hope or expectation of benefit are liable only on contracts assented to or ratified by them.

[See note on this question beginning on page 222.]

**State — personal liability of persons acting on behalf of.**

2. Members of voluntary association acting by request of the governor of the state for the purpose of promoting an exhibit to advertise the

state at an exposition are personally liable on their contracts for supplies ordered by them in furtherance of the enterprise.

[See 25 R. C. L. 64.]

(Polley, J., dissents.)

**APPEAL** by defendants from a judgment of the Circuit Court for Brown County (Bouck, J.) in favor of plaintiff, and from an order denying a new trial, in an action brought to recover the agreed selling price of certain goods alleged to have been sold by plaintiff to defendants. *Affirmed.*

The facts are stated in the opinion of the court.

**Mr. E. E. Wagner, for appellants:**

In the absence of a clearly expressed agreement, the defendants cannot be held where the other party has knowledge of the limitations upon their authority, or where the person with whom they contract has the same means of knowing the extent of their authority, although in contracting they exceed it.

*Miller v. Ford*, 38 S. C. L. (4 Rich.) 376, 55 Am. Dec. 691; *McCurdy v. Rogers*, 21 Wis. 198, 91 Am. Dec. 470; *Martin v. Schuermeyer*, 30 Okla. 735, 121 Pac. 248; *Newport v. Smith*, 61 Minn. 277, 63 N. W. 734; *Thilmany v. Iowa Paper Bag Co.* 108 Iowa, 357, 75 Am. St. Rep. 259, 79 N. W. 261; *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782; *McCabe v. Goodfellow*, 133 N. Y. 89, 17 L.R.A. 204, 30 N. E. 728; *Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524, 72 N. W. 846; *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400; *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S. W. 434; *Winona Lumber Co. v. Church*, 6 S. D. 499, 62 N. W. 107; *Lynn v. Commercial Club*, 31 S. D. 401, 141 N. W. 471.

**Mr. T. J. Spangler, for appellant Ronald:**

The defendants are not individually liable under the evidence.

*Codding v. Munson*, 52 Neb. 580, 66 Am. St. Rep. 524, 72 N. W. 846; *Comfort v. Graham*, 87 Iowa, 295, 54 N. W. 242; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Button v. Winslow*, 53 Vt. 430; *McCabe v. Goodfellow*, 133 N. Y. 89, 17 L.R.A. 204, 30 N. E. 728; *Sizer v. Daniels*, 66 Barb. 432; *First Nat. Bank v. Rector*, 59 Neb. 77, 80 N. W. 269; *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147.

**Mr. C. O. Newcomb also for appellants.**

**Messrs. Campbell & Walton, for respondent:**

Defendants are liable to plaintiff for payment of the goods.

*Ash v. Guie*, 97 Pa. 493, 39 Am. Rep. 818; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911; *Sheehy v. Blake*, 72 Wis. 411, 39 N. W. 479, 77 Wis. 394, 9 L.R.A. 564, 46 N. W. 537; *Lawler v. Murphy*, 58 Conn. 294, 8 L.R.A. 113, 20 Atl. 457;

Willcox v. Arnold, 162 Mass. 577, 39 N. E. 414; Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107; Clark v. O'Rourke, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; Evans v. M. C. Lilly & Co. 95 Miss. 58, 48 So. 612, 21 Ann. Cas. 1087; Lynn v. Commercial Club, 81 S. D. 401, 141 N. W. 471; Alkahest Lyceum System v. Featherstone, 118 Miss. 226, 74 So. 151.

Whiting, J., delivered the opinion of the court:

Action brought to recover the agreed selling price of certain goods, wares, and merchandise alleged to have been sold by plaintiff to defendants. At the close of the trial, both parties moved for a directed verdict, the trial court withdrew the case from the jury, entered findings of fact and conclusions, and rendered judgment thereon in favor of plaintiff. From such judgment and an order denying a new trial the defendants have appealed.

The following facts found by the trial court are absolutely undisputed: The defendants voluntarily associated themselves together under the name and style of the South Dakota Panama-Pacific Exposition Commission for the purpose of promoting a suitable exhibit to advertise this state at the Panama-Pacific Exposition. One of the methods determined upon for raising money to finance such exhibit was through the purchase and sale of souvenir coins, pins, brooches, etc. Plaintiff, a corporation engaged in the manufacture of such goods, being notified of a prospective meeting of such association and requested to submit prices on coins, pins, and badges, sent a representative to such meeting. At this meeting these defendants were present. Believing that they could make a success of their contemplated scheme, defendants, through one of their number fully authorized by the others, entered into a contract whereby plaintiff was to and did furnish a large number of brooches, pins, and badges, for which defendants have refused to pay. No question is raised as to the good faith

of any of the parties. Defendants failed in their efforts to make a success of this plan for raising money, —they disposed of but a small part of the goods purchased of plaintiff.

It is the contention of defendants that they were acting "for the state in aid of a patriotic purpose," and that it was well known by all parties that they had no legal authority to bind the state. They have cited numerous authorities holding that one is not personally liable who purports to act as agent for and to bind a principal by contract where the party with whom he contracts knows that he is not such agent and has no authority to bind his alleged principal. And there can be no question but what if defendants had contracted in the name of the state of South Dakota, purporting to act as agents of such state, the plaintiff, if aware of their lack of authority, could not hold them personally liable; but this rule of law and the authorities cited have not the remotest bearing upon the situation presented by the facts of this case. It is the law fixing the liability of members of a voluntary association that governs under the facts of this case, and not the laws relating to liability of unauthorized agents. While it is true that the defendants were induced to organize as such association because of a request or so-called "appointment" of the then governor of this state, no claim is made that any party hereto understood that such appointment was authorized by any law of this state. The defendants are exactly in the same position as though they had acted entirely on their own initiative. The defendants, prompted by the best of motives, undertook to devise some means by which this state would be properly represented at such exposition; and to such end they contracted, not in the name of the state, but in the name that they had assumed for such voluntary association. It is certainly true that they fully expected, as undoubtedly did the plaintiff, that they, as had like



sented at the Panama-Pacific Exposition."

It is a further fact that, when the goods were shipped, they were shipped to Charles McCaffree, in care of the Panama-Pacific Exposition Commission. Mr McCaffree was the commissioner of immigration for the state of South Dakota.

From these undisputed facts, it is plain that defendants were acting solely in a representative capacity as members of the said commission, and with no intention of becoming personally liable; that plaintiff knew this fact; and that there is nothing in the circumstances of the transaction to disclose any intention on the part of the plaintiff, or of the defendants, that the latter should become personally liable.

It is said in the majority opinion that "there can be no question but what, if defendants had contracted in the name of the state of South Dakota, purporting to act as agents of such state, the plaintiff, if aware

of their lack of authority, could not hold them personally liable."

Yet this is exactly what they did do. Plaintiff admitted that it knew that the defendants were acting solely in their capacity as public agents; and plaintiff also knew, or is charged with knowledge, that the commission had no legal existence and could not make a contract that would be binding against the state.

It is clear to me that, when plaintiff shipped these goods, it had such unbounded faith in the success of the enterprise that it relied wholly upon the fund that was to be derived from the sale of said goods. It assumed the risk of the success of the enterprise, and now that that venture has proven a failure, it ought not to be allowed to compel the defendants to protect it against loss.

The judgment appealed from should be reversed, and the action dismissed, at plaintiff's cost.

## ANNOTATION.

### Personal liability of member of voluntary association not organized for personal profit on contract with third person.

#### I. Liability as principal:

##### a. Of member sanctioning contract:

1. General rule, 222.
2. Application of rule, 224.

##### b. Of member not sanctioning contract:

1. General rule, 229.
2. Application of rule, 230.

#### II. Liability as partner:

- a. In absence of statute, 232.
- b. Under statute, 233.

#### *I. Liability as principal.*

##### *a. Of member sanctioning contract.*

##### *1. General rule.*

It is held by the great weight of authority, that there is no implied liability of the members of a voluntary association not organized for profit on contracts of the association, and that the members are liable on the principle of actual agency only.

The members of a voluntary association, not organized for profit, are

jointly and severally liable as principals on contracts purporting to have been made by, for, or in the name of the association, when they have given either their assent or their subsequent ratification thereto.

Iowa.—*Lewis v. Tilton* (1884) 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911.

Kansas.—*Thompson v. Garrison* (1879) 22 Kan. 765.

Massachusetts.—*Newell v. Borden* (1879) 128 Mass. 31; *Wilcox v. Arnold* (1895) 162 Mass. 577, 39 N. E. 414.

Michigan.—*Clark v. O'Rourke* (1896) 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147; *Detroit Light Guard Band v. First Michigan Independent Infantry* (1903) 134 Mich. 598, 96 N. W. 934.

Minnesota.—*Ehrmanntraut v. Robinson* (1893) 52 Minn. 333, 54 N. W. 188.

Mississippi.—*Evans v. M. C. Lilly &*

Co. (1909) 95 Miss. 58, 48 So. 612, 21 Ann. Cas. 1087.

**Missouri.**—*Ferris v. Thaw* (1878) 5 Mo. App. 279, s. c. on appeal (1880) 72 Mo. 446; *Richmond v. Judy* (1879) 6 Mo. App. 465; *Heath v. Goslin* (1883) 80 Mo. 310, 50 Am. Rep. 505.

**New York.**—*Downing v. Mann* (1854) 9 How. Pr. 204, 3 E. D. Smith, 36; *Sizer v. Daniels* (1873) 66 Barb. 426; *Park v. Spaulding* (1877) 10 Hun, 128.

**Pennsylvania.**—*Ash v. Guie* (1881) 97 Pa. 493, 39 Am. Rep. 818; *Ridgely v. Dobson* (1842) 3 Watts & S. 118.

**South Dakota.**—*Lynn v. Commercial Club* (1913) 31 S. D. 401, 141 N. W. 471. And see *ROBBINS Co. v. COOK* (reported herewith) ante, 218.

**Texas.**—*Burton v. Grand Rapids School Furniture Co.* (1895) 10 Tex. Civ. App. 270, 31 S. W. 91; *Hardy v. Carter* (1914) — Tex. Civ. App. —, 163 S. W. 1003.

**Wisconsin.**—*Fredendall v. Taylor* (1870) 26 Wis. 286; *Sheehy v. Blake* (1888) 72 Wis. 411, 39 N. W. 479; *VADER v. BALLOU* (reported herewith) ante, 216; *Crawley v. American Soc.* (1913) 153 Wis. 13, 139 N. W. 784.

**England.**—*Delauney v. Strickland* (1818) 2 Starkie, 416, 20 Revised Rep. 706; *Lee v. Bissett* (1856) 4 Week. Rep. 233.

**Canada.**—*Cullen v. Nickerson* (1860) 10 U. C. C. P. 549; *Aikins v. Dominion Live Stock Asso.* (1896) 17 Ont. Pr. Rep. 303; *Pears v. Stormont* (1911) 24 Ont. L. Rep. 508, 20 Ont. Week. Rep. 23; *Rohl v. Pfaffenroth* (1915) 31 West. L. Rep. 197; *Austin v. Hober* (1917) — Sask. —, 3 West. Week. Rep. 994.

In Ohio it seems that members of a voluntary association not organized for profit are liable jointly on contracts of the association which have received their sanction. *Higdon v. Gardner* (1887) 2 Ohio C. C. 340, 1 Ohio C. D. 519.

In *Aikins v. Dominion Live Stock Asso.* (1896) 17 Ont. Pr. Rep. 303, it was held that where an obligation is incurred by an entity such as a club, those of its members who sanctioned the contract are liable jointly; but in a later Ontario case (*Pears v. Storm-*

*ont* (1911) 24 Ont. L. Rep. 508, 20 Ont. Week. Rep. 23), such liability seems to have been considered to be joint and several.

In *Richmond v. Judy* (1879) 6 Mo. App. 465, the court stated the rule as follows: "Associations and clubs, the objects of which are social or political, and not for purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by reason of the acts of such individuals or of their agents; and the agency must be made out,—none is implied from the mere fact of association."

And in *Ehrmanntraut v. Robinson* (Minn.) supra, it was said: "Of course, a benevolent or social club or association of this kind is not a partnership, in any proper sense of that term. The members are liable, if liable at all, for the acts of their associates, on the ground of principal and agent, and not of partnership. Hence, it is undoubtedly true that only those members who authorized or subsequently ratified the acts of these trustees in taking this lease would be bound by it."

In *St. Paul Typothetæ v. St. Paul Bookbinders Union* (1905) 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695, the court, in discussing the liability of a trade union on a contract, said: "Such an association is not a copartnership, and the members thereof are liable, if at all, on the contracts of the association on the law of principal and agent."

In *Reding v. Anderson* (1887) 72 Iowa, 498, 34 N. W. 300, wherein it appeared that an unincorporated association, a post of the G. A. R., had leased a hall, the court said: "The person making a contract in the name of such an association is personally bound thereby, and the members of the association assenting to the contract are bound in the same way."

In *Males v. Murray* (1902) 23 Ohio C. C. 396, in considering the liability of members of an unincorporated church, the court said: "In order to hold a member responsible for its debts, it must be shown that such

member in some way sanctioned or acquiesced in their creation."

In *Ash v. Guie* (1881) 97 Pa. 493, 39 Am. Rep. 818, the court said: "Those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the understanding, or subsequently ratified it."

In *Ray v. Powers* (1883) 134 Mass. 22, wherein the plaintiffs, members of a voluntary association, sought to compel fellow members to contribute their proportionate share of expenses incurred at an exhibition given by the association, the court said: "Mere membership would not bind anybody for any further payment than the initiation fee and annual assessment; but such members as participated in a vote to incur further expenses for an exhibition with premiums, or as assented to be bound by such vote, would be bound thereby."

As a reason for imposing individual liability on certain members of an association it has been pointed out that an unincorporated association is without legal existence, and that consequently its obligations must be placed on those of its members who are the real principals in the transaction. *Frendall v. Taylor* (1870) 26 Wis. 286.

So, in *Ferris v. Thaw* (1878) 5 Mo. App. 279, s. c. on appeal (1880) 72 Mo. 446, the court said: "Where members of a voluntary association authorize its officers to engage in a particular transaction in the name of the society, as they do not bind the society as a body, or give to persons interested a tangible third party against whom they can proceed, they are themselves the only persons that can be sued, and are, in fact, principals in the transaction."

And in *Clark v. O'Rourke* (1896) 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147, it was said: "Those of the society who were actually instrumental in incurring the liabilities for it are liable as either principals, or agents having no legal principal behind them."

An extension of the rule is seen in *Sizer v. Daniels* (1873) 66 Barb. (N.

Y.) 426, wherein the court remarked that "there are cases, doubtless, in which the act done is so clearly in furtherance of the objects for which the association was organized that all will be presumptively bound by it. When such is not the case, consent or ratification must be proved."

This doctrine was approved in *Richmond v. Judy* (1879) 6 Mo. App. 465, wherein it was said that "a person, by acting on a provisional committee, may authorize an agent to contract on his credit, if it appear from the nature and objects of the organization that a certain outlay is a necessary consequence."

In *Nelson Distilling Co. v. Loe* (1891) 47 Mo. App. 31, it appeared that the plaintiff company had sold and delivered goods, for which they claimed payment, to a club of which the defendants had been members. The by-laws of the club, signed by the defendants as members, stated that each member obligated himself to pay all such proper debts of the association as were contracted by the officers thereof. It was held that by reason of this provision of the by-laws the defendants might be held liable to the plaintiff on the ground that they held themselves out as partners.

## 2. Application of rule.

In *Lewis v. Tilton* (1884) 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911, a lessor brought an action on a lease against the members of the executive committee of a club which had occupied the leased premises. The lease was signed by the defendants as an "executive committee." It was held that the defendants were individually liable on the ground, *inter alia*, that all the members of an organization are liable when they have engaged in the enterprise, and "have assented to the undertaking, or have subsequently ratified it."

In *Thompson v. Garrison* (1879) 22 Kan. 765, an action by a minister to recover from the defendants money alleged to be due in payment of his salary, it appeared that the defendants, as elders of an unincorporated church, had issued a call to the plain-

tiff and had undertaken to pay his salary. The court said that if the defendants "were members of a voluntary association which invited plaintiff to perform services they are responsible as members; and it matters not that they were a committee or elders. Each member participating in the invitation is severally bound."

In *Newell v. Borden* (1879) 128 Mass. 31, an action to recover from the defendants, as members of a fire company, an amount due for fitting up their house, it was shown that the defendants authorized their fellow member Borden to act in respect thereto. It was held that oral testimony of the vote authorizing Borden's acts was "competent to show that the other defendants were jointly liable with him."

In *Willcox v. Arnold* (1895) 162 Mass. 577, 39 N. E. 414, an action brought on a contract for work done and material furnished for a college class book, it appeared that all of the defendants except one were present at a class meeting and voted to publish a class book, electing Arnold business manager of the publication. At a later meeting they voted to help make up the deficit to the plaintiff. It was held that all the members of the class who voted to publish the class book, or assented to the vote, were properly held liable to the plaintiff. The contract made by Arnold was within the scope of his employment.

In *Clark v. O'Rourke* (1896) 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147, it appeared that the defendants were members of the building committee of an unincorporated church, and that the plaintiffs sought to charge them for building material furnished for the church. It was held that the defendants could be held liable as members of an association who had authorized the transaction from which the debt arose.

In *Detroit Light Guard Band v. First Michigan Independent Infantry* (1908) 134 Mich. 598, 96 N. W. 934, it appeared that a band had been engaged by the commanding officer of the Independent Infantry to attend the encampment of the latter. The band sought to hold the commanding officer

liable for the fee stipulated in the contract which was signed by him for the Infantry Company. It was held that the commanding officer was bound as a member of the association. He was a co-contractor and a copromisor, and was "liable on the promise made by himself, for himself and others."

In *Ehrmanntraut v. Robinson* (1893) 52 Minn. 333, 54 N. W. 188, the action was on a lease to recover eight months' rent. Two of the defendants had signed the lease as trustees of an unincorporated social and benevolent society, the other defendants being members thereof. The lease was apparently made without authority, but the nonsigning defendants knew of the lease and the society occupied the premises. It was held that to hold the members of such an association it must be shown that, as principals, they authorized or subsequently ratified the acts of their agents. The court considered that the acts of the nonsigning members amounted to a ratification of the acts of the trustees, with the result that they were held liable therefor.

In *Evans v. M. C. Lilly & Co.* (1909) 95 Miss. 58, 48 So. 612, 21 Ann. Cas. 1087, it was sought to hold the defendants liable on a promissory note which they had signed as officers of an unincorporated association. It was held that the members signing the note were individually liable, and that their liability was not affected by the fact that they signed the note in an official capacity.

In *Ferris v. Thaw* (1878) 5 Mo. App. 279, an action to recover on a promissory note, it appeared that such note was a renewal of a note indorsed by all but one of the defendants, who were members of an unincorporated lodge. The defendants were present at the meeting which authorized and ratified the making of the note, and at the later meeting when the renewal of the note was ratified. The proceeds of the note were used for a legitimate purpose of the lodge. It was held that where members of a voluntary association expressly sanction and ratify the act of one of their officers in executing a note in the name of the as-

sociation, they will be liable on the note. The court said: "The act of a secretary of a voluntary association will not bind the board, if not authorized; but it will bind any members who were present at a meeting, and concurred in giving authority to the secretary."

In *Richmond v. Judy* (1879) 6 Mo. App. 465, it appeared that the plaintiff had been ordered to paint and post political bills and notices by one of the defendants, all of whom were members of a campaign committee. The plaintiff sought to recover for his work and material, the bills for which had been approved by some of the defendants. It was held that since there was evidence tending to show that the orders were given with the sanction of the committee, all the members thereof might be held liable for the goods and services. The court said: "Persons who organize as a campaign committee on the eve of an election may perhaps be supposed to know that their associates, in the name of the committee, will incur certain obvious expenses in giving public notice of political meetings, and to sanction such outlay by the very fact of their organization."

In *Heath v. Gaslin* (1883) 80 Mo. 310, 50 Am. Rep. 505, it seemed that a normal school was organized, but not incorporated, and put in charge of the defendants, a board of regents. The plaintiff was engaged as a teacher in the school, and sought to recover the portion of her salary which remained unpaid. It was held that, inasmuch as the plaintiff, with the knowledge of the defendants, looked to them for her salary, and since they had accepted and retained their office, the liability for the unpaid portion of the plaintiff's salary must be placed on them.

In *Downing v. Mann* (1854) 9 How. Pr. (N. Y.) 264, 3 E. D. Smith, 36, it appeared that the plaintiff, at the request of an agent of the defendant association, had furnished a supper at a ball conducted by the association. The names of all but one of the defendants was, with their consent, on a circular shown to the plaintiff at the time the contract was made, and the

remaining defendant later ratified the act of the agent in ordering the supper. It was held that since the defendants had by word and deed sanctioned the act of their agent in procuring a supper in the name of the association, they were liable therefor.

In *Sizer v. Daniels* (1873) 66 Barb. (N. Y.) 426, it appeared that the plaintiff had been engaged by a "county committee" to advance the interests of a political party, and that they had contracted to pay a certain sum for expenses incurred therein. It was held that liability to the plaintiff was incurred only by those members who had voted for the resolutions employing the plaintiff, unless those not voting had authorized the others to take such action. The committee were not relieved of liability by the expiration of their term of office. A committee succeeding the defendants were not bound by the obligations incurred by their predecessors.

In *Park v. Spaulding* (1877) 10 Hun (N. Y.) 128, it appeared that the defendants were members of a voluntary association known as the Worth Club, and that the steward of the club had made purchases of supplies for the club from the plaintiff, although by arrangement the steward had agreed to make such purchases on his own credit. One of the defendants, whom the plaintiff knew to be a member of the club, had withdrawn therefrom, but had not notified the plaintiff of his withdrawal. It was held that members of the association were jointly liable for any indebtedness incurred by the association, and that withdrawal from the organization would not release a member from liability unless the creditors were notified thereof.

In *Ridgely v. Dobson* (1842) 3 Watts & S. (Pa.) 118, it appeared that the plaintiff had sold books and periodicals to a voluntary association of which the defendants were members. The defendants were held to be liable on the ground that members of an unincorporated society are bound by any obligations incurred by the society in which they have concurred.

In *Ash v. Guie* (1831) 97 Pa. 493, 39 Am. Rep. 818, it appeared that a

lodge had erected a building and had obtained the funds therefor by the issue of certificates, on one of which the plaintiff brought suit against the defendants, a number of the members of the lodge. It was held that the members of a voluntary association not engaged in trade were not to be considered as partners, but that their liability depended on their authorization of the obligation on which it was sought to hold them; only those members being bound who sanctioned the creation of the building or the borrowing of the money.

In *Lynn v. Commercial Club* (1913) 31 S. D. 401, 141 N. W. 471, it appeared that the plaintiff, at the request of some of the members of the defendant association, performed services, etc., in the removal of certain buildings, for which services he sought to recover. It was held that although the transaction in question might have been beyond the scope of the association, nevertheless the defendants could be held liable, since it appeared that they had approved thereof.

In *Burton v. Grand Rapids School Furniture Co.* (1895) 10 Tex. Civ. App. 270, 31 S. W. 91, it appeared that the plaintiff sought to recover from the deacons and trustees of an unincorporated church. Two of the defendants had executed a note, as deacons, in payment of furniture delivered to the church by the plaintiff. It was held that while members of a trading association might be held liable as partners, the members of an unincorporated society not organized for profit were bound on the society's obligations only when sanctioned by them, and the defendants who signed the note were the only members shown to be liable.

In *Hardy v. Carter* (1914) — Tex. Civ. App. —, 163 S. W. 1003, it appeared that the defendants were members of a "railroad guaranty committee," which had undertaken to raise money for the building of a railroad; the constitution of the committee specifying that the directors should make loans binding on the committee only on order thereof, etc. Prior to the adoption of the constitution, however,

a number of the committee, including some of the defendants, executed several notes of which the one on which suit was brought was a renewal made by the directors some time after the adoption of the constitution. It was held that since the loan had been authorized at a mass meeting, and since the defendants knew that their contract with the promoter, calling for a loan, must be fulfilled, they were bound by the obligation incurred by some of the committee on the original note, and they were not exonerated therefrom by the later acts of the directors in borrowing to renew the first obligation; such acts were justified as coming within the scope of the association's business.

In *Fredendall v. Taylor* (1870) 26 Wis. 286, it appeared that the plaintiff performed services at the request of the defendants, officers and members of a voluntary association, and sought to recover from them therefor. It was held that the liability of the defendants was governed by the principles of agency, and that since they had ratified the acts of their committee, incurring the obligation, their liability was established; for although the transactions took place in the name of the association, the defendants were in law the real principal, there being no legal association which they could bind.

In *Sheehy v. Blake* (1888) 72 Wis. 411, 39 N. W. 479, it appeared that a parish priest, as agent for an unincorporated religious society, incurred numerous obligations, and that, on severing his connections with the church, the trustees and other duly empowered agents thereof stated an account with him which they undertook that the church should pay. It was held that the priest, in incurring the indebtedness, had acted within the scope of his agency, and that the trustees, in undertaking to settle the account with him, had done so with the assent of the members of the association, with the result that the members were personally liable therefor.

In *Vander v. Ballou* (reported herewith) ante, 216, the plaintiff sought to recover from the defendant, as a

member of a political committee, for printing done for the committee at the order of its agent. It was held that since the members of the committee were aware of the work that was being done, they were all liable to the plaintiff; and since the liability was joint and several, the defendant was bound on the obligation incurred in this case.

In *Crawley v. American Soc.* (1913) 153 Wis. 13, 139 N. W. 734, wherein the plaintiff, an organizer of societies, endeavored to recover from the directors of a voluntary association for services rendered, it was held that since the directors had voluntarily appeared, and since the liability of the members of such an unincorporated society was joint and several, the defendants could not complain that other members of the association had not been joined as parties defendant.

In *Delauney v. Strickland* (1818) 2 Starkie (Eng.) 416, 20 Revised Rep. 706, it appeared that the defendant was a member of a club to which the plaintiff had sold and delivered plate, the bill having been made out in the name of one of the managers of the club who was known to the plaintiff. The court directed that if the jury found that the defendant had sanctioned the order for the goods, he would be liable to pay for them.

In *Lee v. Bissett* (1856) 4 Week. Rep. (Eng.) 233, wherein it appeared that members of a club had paid \$60 down on an annual subscription of \$10, an indemnity having been agreed to be paid to such members wishing to resign, it was held that they were nevertheless liable to a member of the club whom the club had employed, the members having been parties to the resolution.

In *Cullen v. Nickerson* (1860) 10 U. C. C. P. 549, wherein it appeared that the defendants, as trustees for a church parsonage, had contracted with the plaintiff under seal for the erection of a building, it was held that where individuals, members of an unincorporated body, sign a deed as such collective body, they are liable individually thereon.

In *Aikins v. Dominion Live Stock*

*Asso.* (1896) 17 Ont. Pr. 303, the plaintiff sought to recover from the executive committee of a voluntary association for services rendered at their request. It was held that where one gives credit to an abstract entity, an unincorporated society, he may hold those jointly liable who incur or sanction the obligation.

In *Pears v. Stormont* (1911) 24 Ont. L. Rep. 508, 20 Ont. Week. Rep. 23, it appeared that the plaintiff sought to recover rent under a lease signed by an agent of the defendants, the executive committee of a voluntary association. It was held that since the Athletic Association, an unincorporated body, was not competent to contract, they must be held liable who obtained the lease and enjoyed its benefits; and so the defendants, the executive committee, were bound in this case, although it was declared by the court that all the members of the club who approved the lease might have been held liable.

In *Rohl v. Pfaffenroth* (1915) 31 West. L. Rep. (Can.) 197, it appeared that the plaintiff had built a church for an unincorporated religious society and sought to recover therefor from the members of the congregation. It was also shown that not all of the members voted for the erection of the building, but that some of them expressed their dissent, of which the plaintiff had knowledge. It was held that those members were liable who had voted for the new building, but that those defendants who had expressed a contrary opinion were not bound. And the liability of those who had assented to the contract was not affected by the expectation that a large sum would be raised by a mortgage, nor by the fact that it was intended that their individual liability should be decreased by such amounts as they had already contributed.

In *Austin v. Hober* (1917) 3 West. Week. Rep. (Sask.) 994, it appeared that the plaintiff had advanced money to a lodge, a voluntary association, at the request of the defendants, members thereof, one of whom signed a promissory note therefor, the other having been present when the money

was advanced and the note given. Both of these defendants were held liable, the one as maker of the note, and the other as a party to the whole transaction.

*b. Of member not sanctioning contract.*

*1. General rule.*

A member of a voluntary association, not organized for profit, is not bound by any obligation incurred by or on behalf of the association without his assent or subsequent ratification.

**Arkansas.**—*Little Rock Furniture Mfg. Co. v. Kavanaugh* (1914) 111 Ark. 581, 51 L.R.A. (N.S.) 406, 164 S. W. 289, Ann. Cas. 1916A, 848.

**Massachusetts.**—*Volger v. Ray* (1881) 181 Mass. 439.

**Michigan.**—*Burt v. Lathrop* (1883) 52 Mich. 106, 17 N. W. 716.

**Missouri.**—*Riffe v. Proctor* (1903) 99 Mo. App. 601, 74 S. W. 409; *Meriwether v. Atkin* (1909) 137 Mo. App. 32, 119 S. W. 36.

**Nebraska.**—*Hornberger v. Orchard* (1894) 39 Neb. 639, 58 N. W. 425; *First Nat. Bank v. Rector* (1899) 59 Neb. 77, 80 N. W. 269.

**New York.**—*McCabe v. Goodfellow* (1892) 133 N. Y. 89, 17 L.R.A. 204, 30 N. E. 728, reversing (1891) 61 Hun, 619, 21 N. Y. Civ. Proc. Rep. 65, 15 N. Y. Supp. 377; *Hosman v. Kinneally* (1904) 43 Misc. 76, 86 N. Y. Supp. 263; *Lightbourn v. Walsh* (1904) 97 App. Div. 187, 89 N. Y. Supp. 856.

**Ohio.**—*Devoss v. Gray* (1871) 22 Ohio St. 159.

**England.**—*Fleming v. Hector* (1836) 2 Mees. & W. 172, 150 Eng. Reprint, 716, 2 Gale, 180, 6 L. J. Exch. N. S. 43; *Re St. James Club* (1852) 2 De G. M. & G. 883, 42 Eng. Reprint, 920, 16 Jur. 1075; *Todd v. Emly* (1841) 7 Mees. & W. 427, 151 Eng. Reprint, 832, 10 L. J. Exch. N. S. 161, subsequent appeal in (1841) 8 Mees. & W. 505, 151 Eng. Reprint, 1138, 10 L. J. Exch. N. S. 262.

**Canada.**—*Rohl v. Pfaffenroth* (1915) 31 West. L. Rep. 197; *Austin v. Heber* (1917) — Sask. —, 3 West. Week. Rep. 994.

In *Re St. James Club* (1852) 2 De G. M. & G. 883, 42 Eng. Reprint, 920, 16 Jur. 1075, it was stated that "the

law, which was at one time uncertain, is now settled, that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen."

And in *Devoss v. Gray* (Ohio) *supra*, the court said: "A member of an unincorporated religious society cannot be held personally responsible for the debts of the society, unless it be shown that he in some way sanctioned or acquiesced in their creation."

The members of an unincorporated society will not be held liable on obligations of the society which were incurred without the authority of the members. *Volger v. Ray* (Mass.) *supra*.

Nor will the authorization to pledge the credit of the members be presumed except where the obligation is undertaken for the preservation of the association. *Hosman v. Kinneally* (1904) 43 Misc. 76, 86 N. Y. Supp. 263.

It may be shown in numerous ways that the members of an association did not intend that their personal credit should be extended to the contracts made for the association.

In some cases the existence of a fund created in various ways has been held sufficient to show that the members of an unincorporated society did not authorize any obligation to be incurred upon their credit. *McCabe v. Goodfellow* (N. Y.), *Riffe v. Proctor* (Mo.), and *Fleming v. Hector* (Eng.) *supra*.

Members of a political party cannot be considered to have pledged their personal credit for the obligations of the party paper. *Lightbourn v. Walsh* (N. Y.) *supra*; *Hosman v. Kinneally* (1904) 43 Misc. 76, 86 N. Y. Supp. 263.

The approval by a member of a society, of the minutes of a meeting thereof, at which the authorization of a contract was given, does not give that member's assent to the contract; it merely approves the minutes as correct. *Meriwether v. Atkin* (Mo.) *supra*.

Nor will a member be bound on an obligation which has been incurred in excess of the authority granted by



him. *Re St. James Club (Eng.) supra.*

*2. Application of rule.*

In *Little Rock Furniture Mfg. Co. v. Kavanaugh* (1914) 111 Ark. 575, 51 L.R.A.(N.S.) 406, 164 S. W. 289, Ann. Cas. 1916A, 848, it appeared that the plaintiff furnished supplies at the request of the defendants, members of a committee selected at a mass meeting to provide for a soldiers' reunion, and sought to recover a balance due and unpaid on these supplies. It was held that the defendants were acting in a capacity which was well known to the plaintiff, and that credit was not extended to them.

In *Volger v. Ray* (1881) 131 Mass. 439, the action was to recover premiums awarded to the plaintiff's birds at an exhibition held by an association of which the defendant was a member. It appeared that the exhibition had been held under the control of the executive committee appointed by the association, of which committee the defendant was not a member. It was held that since it was not shown that the committee had authority to offer premiums, the court could not say as matter of law that it had such authority; nor were the obligations and duties of members made clear. The defendant was held not to be liable.

In *Burt v. Lathrop* (1883) 52 Mich. 106, 17 N. W. 716, it was sought to hold the defendants liable as members of a voluntary association. The plaintiff had given his professional services as an attorney in the interests of the defendants. It was shown that the defendants were members of an association which bound them to pay a fee and assessments or lose the benefits thereof; the officers were to employ counsel. It was held that no authority had been given to anyone to make contracts which would be binding on the members personally, who were liable only for the assessments of the combination.

In *Riffe v. Procter* (1908) 99 Mo. App. 601, 74 S. W. 409, it appeared that the plaintiff, a Baptist minister, had been engaged as pastor of the church of which the defendants were

members, and that his salary had been unpaid for six months, which arrears he sought to collect from the defendants. It was held that while it was true that assenting members of a voluntary association are bound by the authorized acts of their officers, this principle was not applicable to the facts of this case. It was insisted by the defendants and accepted by the court that the defendants had never considered themselves jointly or severally bound for the plaintiff's salary, which was to be raised by voluntary contributions of the members; of this the plaintiff had knowledge.

In *Meriwether v. Atkin* (1909) 137 Mo. App. 32, 119 S. W. 36, the action was for the violation of a contract. The plaintiff planned to erect a building and sought to have a lodge, of which the defendant was a member and presiding officer, occupy the third floor. The defendant agreed to place the proposal before the lodge, which, by its committee and trustees, accepted in writing the plaintiff's offer. The defendant was not present at the meeting of the lodge when this acceptance was authorized, but was present when the minutes of a meeting were read and approved. It was held that while members of an association may be liable on the contracts thereof, when made with their concurrence or subsequent ratification, the defendant in this instance was not liable, since he had in no manner authorized the action of the committee in making the contract in question. His presence at the meeting when the minutes authorizing the contract were approved did not constitute such authority.

In *Hornberger v. Orchard* (1894) 39 Neb. 689, 58 N. W. 425, the plaintiff sought to charge the defendant, as a member of an unincorporated association, for goods furnished to the association. The defendant requested that the court charge that members joining the association after the obligations had been incurred were not liable therefor. It was held that this request was improperly refused. The court said: "No member of a voluntary unincorporated association is liable for any debts contracted by such

society, unless at the time the debt was incurred he was a member thereof, except by an express contract, based on a good consideration, all which must be alleged and proved."

In *First Nat. Bank v. Rector* (1899) 59 Neb. 77, 80 N. W. 269, it appeared that an unincorporated religious society purchased a tract of land from the plaintiff for which payment was never fully made. After foreclosure proceedings the plaintiff sought to subject the property of the individual members of the society "to the payment of the deficiency judgment." It was held that the members of a voluntary association are not liable for its debts unless they have authorized or ratified the obligation, and that the defendants in this case were not liable since there was no averment or proof of any such authorization or ratification.

In *McCabe v. Goodfellow* (1892) 138 N. Y. 89, 17 L.R.A. 204, 30 N. E. 728, reversing (1891) 61 Hun. 619, 21 N. Y. Civ. Proc. Rep. 65, 15 N. Y. Supp. 377, it appeared that the plaintiff was engaged as counsel by a voluntary association, a Law and Order League, to assist in the enforcement of the liquor laws, and that he sought to recover for his services from the defendant, the treasurer of the league. It was held that since the funds of the league were to be raised by collections and subscriptions, no authority was ever given to any agent of the league to bind the personal credit of the members, who were entitled to presume that all expenses would be paid from the funds so obtained.

In *Hosman v. Kinneally* (1904) 43 Misc. 76, 86 N. Y. Supp. 263, the plaintiff sought to recover for services performed on a newspaper, from the treasurer of a political party which conducted the paper. By statutory provision the plaintiff had no right of action against an unincorporated association unless he might have proceeded against all the members of the association. It was held that the members of the party had never contemplated or authorized the transaction of business on their credit, nor would such authorization be presumed

on the part of the members of an association except where the business transacted was necessary for the preservation of the association.

In *Lightbourn v. Walsh* (1904) 97 App. Div. 187, 89 N. Y. Supp. 856, wherein the plaintiff, an employee on a paper published by the political party of which the defendant was treasurer, sought to recover for his services, it was held that he could not recover, since it did not appear that authority had ever been given to the defendant to contract any debts in excess of the funds established by the payment of membership dues. No assumption could be made that the members of a political party pledged their personal credit for the business of the paper.

In *Devoss v. Gray* (1871) 22 Ohio St. 159, it appeared that the plaintiffs had erected a building for an unincorporated religious society, and it was sought to hold the deacons and trustees thereof liable for an unpaid balance due on the work. It was decided that to hold the deacons liable as principals, it would be necessary to show that, as members of the church, they had sanctioned or ratified the business transactions of the building committee which had ordered the work done. Since there was no averment or proof going to show such authorization on the part of the defendants, they could not be held liable.

In *Fleming v. Hector* (1886) 2 Mees. & W. 172, 150 Eng. Reprint, 716, 2 Gale, 180, 6 L. J. Exch. N. S. 43, it appeared that the defendant was a member of a club to which the plaintiff had sold a quantity of wine. The rules of the club provided that the members should pay cash for all services, and provided for a committee to manage the affairs of the club. It was sought to hold the defendant liable for the purchase of wine by the club. The court held that since the club had provided to finance its affairs a fund composed of the entrance and annual fees of the members, paid in ready money, for all services, there was no ground for taking the position that the members had authorized the committee to pledge

their credit when making purchases for the club.

In *Re St. James Club* (1852) 2 De G. M. & G. 383, 42 Eng. Reprint, 920, wherein it was sought to wind up the affairs of an insolvent club, the question arose as to the liability of the members thereof for the obligations incurred. The court said: "The law . . . is now settled that no member of a club is liable to a creditor except so far as he has assented to the contract in respect of which such liability has arisen." It was pointed out that those who concur in an expenditure become bound thereby, but that in this case the committee had exceeded the power given them when they undertook to issue debentures.

In *Todd v. Emly* (1841) 7 Mees. & W. 427, 151 Eng. Reprint, 832, 10 L. J. Exch. N. S. 161, subsequent appeal in (1841) 8 Mees. & W. 505, 151 Eng. Reprint, 1138, 10 L. J. Exch. N. S. 262, wherein the plaintiff sought to hold the defendants liable for wine purchased for a club by the steward, it appeared that the defendants were members of the committee for the management of the club, the members of which paid into a fund entrance fees and annual dues, all refreshments being paid for in cash. It was held that in order to hold the defendants liable, it would be necessary to show that the obligation was incurred with their knowledge.

In *Rohl v. Pfaffenroth* (1915) 31 West. L. Rep. (Can.) 197, wherein the plaintiff sought to recover on a contract for the erection of a church for an unincorporated religious society, it was held that those members who had evidenced their dissent from the building plan could not be held liable on the obligation.

In *Austin v. Hober* (1917) — Sask. —, 3 West. Week. Rep. 994, wherein the plaintiff sought to recover from the defendant, a member of an unincorporated society, a sum of money advanced thereto, it appeared that while he had signed an agreement concerning money, it was provided therein that it was to be subject to ratification by the lodge, and such acceptance had not been alleged or proved. Nor

had the defendant been present or a party to any of the later transactions. It was held that the defendant could not be held liable as a member of the association.

## II. Liability as partner.

### a. In absence of statute.

In at least two jurisdictions, in the absence of statute, members of a voluntary association not organized for profit are held to be liable as partners for the contracts entered into on behalf of the association. *Wilkins v. St. Mark's Church* (1874) 52 Ga. 351; *Thurmond v. Cedar Spring Baptist Church* (1900) 110 Ga. 816 36 S. E. 211; *Fetner v. American Nat. Bank* (1915) 15 Ga. App. 736, 84 S. E. 185; *Shiflett v. John W. Kelly & Co.* (1915) 16 Ga. App. 91, 84 S. E. 606; *Chick v. Trevett* (1841) 20 Me. 462, 37 Am. Dec. 68; *McKenney v. Bowie* (1900) 94 Me. 397, 47 Atl. 918.

In *Fetner v. American Nat. Bank* (1915) 15 Ga. App. 736, 84 S. E. 185, the court said: "The court did not err in not charging the jury that the defendants would not be liable unless they had, after joining the voluntary association, delegated to the signer of the note power and authority to bind them."

In *Nolan v. McNamee* (1914) 82 Wash. 585, 144 Pac. 904, the court, while not passing directly on the subject, held that each member of a voluntary association is individually bound for all the debts thereof, and that the liability is joint and several.

And in *Korstad v. Williams* (1914) 80 Wash. 452, 141 Pac. 881, it was held that a college fraternity, an unincorporated association, had been correctly specified in a pleading as a copartnership.

In *Wilkins v. St. Mark's Church* (Ga.) supra, wherein suit on a contract was brought against an unincorporated church, service having been made on its officers, the court said that if all the members had been served, they, the members, might have been held liable "as joint promisors, contracting through an agent, or as partners, contracting in a firm name."

*Thurmond v. Cedar Spring Baptist*

Church (1900) 110 Ga. 816, 36 S. E. 221, was an action against a church for money due on a contract to erect a building. The court held that a voluntary association such as the defendant could not be sued, but that its members were "liable on its contracts as joint promisors or partners."

In *Fetner v. American Nat. Bank* (1915) 15 Ga. App. 736, 84 S. E. 185, it was shown that the defendants were members of a social club, and had been present at the meeting when it was organized. It was held that they might properly be considered as partners in the undertaking, with the result that all might be bound by the acts of one when such acts were within the scope of the partnership business. Their belief that they would not be liable for the debts of the association was immaterial.

In *Shiflett v. John W. Kelly & Co.* (1915) 16 Ga. App. 91, 84 S. E. 606, wherein a suit was brought for liquor, it appeared that the goods had been purchased for a "locker club" of which the defendant was a member and also the treasurer and steward. It was held that "any of the individual members of the locker club could have been held liable on its contracts as general promisors or partners." The defendant was also liable as an agent of an irresponsible principal, an unincorporated association.

*Chick v. Trevett* (1841) 20 Me. 462, 37 Am. Dec. 68, was an action on an instrument signed by the defendants as trustees, whereby they promised to pay the plaintiff for building a parsonage. The defendants were members of a voluntary association formed for various purposes, including the building of the house. It was held that if the defendants were to be considered as representatives of a voluntary association, they might be held liable as members of that body. For nonjoinder of the other members, the defendants should have pleaded in abatement.

In *McKenney v. Bowie* (Me.) *supra*, the action was on a promissory note signed by the defendants as "trustees" and treasurer of the Durham Agricultural & Horticultural So-

ciety, which was an association including the defendants. The court said: "Not being incorporated, all of the associated persons were liable upon contracts lawfully made by the association. Those sued being associates, and not interposing the objection that others bound were not sued, cannot escape liability on the note, whether it is regarded as the note of the association or of the individual signers."

#### *b. Under statute.*

In Vermont, by statute, all the members of a voluntary association not organized for profit are individually liable to execution creditors for the amount of a judgment remaining unpaid after execution on the joint property. *F. R. Patch Mfg. Co. v. Capeless* (1906) 79 Vt. 1, 63 Atl. 938; *Harbell v. Gifford* (1906) 79 Vt. 369, 65 Atl. 80, later appeal in (1909) 82 Vt. 222, 72 Atl. 921, 17 Ann. Cas. 1143.

In *Tarbell v. Gifford* (1906) 79 Vt. 369, 65 Atl. 80, wherein it was sought to hold the defendants liable as members of an unincorporated association, it was held that, under the statute, an execution creditor might proceed for the amount of his judgment remaining unsatisfied after the sale of association property, against any one or more of the members thereof.

In *F. R. Patch Mfg. Co. v. Capeless* (Vt.) *supra*, it appeared that a judgment was obtained against an association of which the defendants were members. The judgment had not been satisfied, and the plaintiff endeavored to recover the amount unpaid thereon from the defendants as members of the association. It was held that, by operation of the statute, the members of the society were individually liable.

In *Tarbell v. Gifford* (1909) 82 Vt. 222, 72 Atl. 921, 17 Ann. Cas. 1143, the plaintiffs brought an action against the defendants as members of an agricultural society for professional services rendered the society as attorneys at law. The plaintiffs had recovered judgment against the society which had been satisfied only in part

by execution thereon. The court held that the judgment against the agricultural society was conclusive of the lia-

bility of those who were members when the liability merged in the judgment was created.  
R. S.

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WILLIAM RYAN, Appt.,  
v.  
SARAH H. KELSEY.

*United States Circuit Court of Appeals, Third Circuit — July 28, 1919.*

(259 Fed. 945.)

**Decedent's estate — suit to recover assets — parties.**

A mere creditor of a decedent's estate cannot maintain an action to recover assets owing to the estate.

[See note on this question beginning on page 237.]

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APPEAL by complainant from a decree of the District Court of the United States for the District of New Jersey (Rellstab, J.) in favor of defendant in a suit for an accounting for property alleged to have been wrongfully withheld from an estate. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, Woolley, and Haight, Circuit Judges.

Mr. E. A. Merrill for appellant.

Mr. Conover English, for appellee:

The administratrix of the estate is an indispensable party, without whom the case cannot proceed, and whose presence would oust the court of jurisdiction.

Groel v. United Electric Co. 132 Fed. 252; Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084, 7 Sup. Ct. Rep. 1066; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 611, 37 L. ed. 577, 580, 13 Sup. Ct. Rep. 691; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Waterman v. Canal-Louisiana Bank & T. Co. 215 U. S. 33, 54 L. ed. 80, 30 Sup. Ct. Rep. 10; Buchanan v. Buchanan, 75 N. J. Eq. 274, 22 L.R.A. (N.S.) 454, 188 Am. St. Rep. 568, 71 Atl. 745, 20 Ann. Cas. 91; Lake Street Elev. E. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 114.

The complainant, Ryan, has no standing to sue in the Federal court, or to prosecute this suit.

Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084, 7 Sup. Ct. Rep. 1066; Whitney v. Robbins, 17 N. J. Eq. 360; Mallory v. Kirkpatrick, 54 N. J. Eq. 50, 33 Atl. 205; Kinmouth v. White, 61 N. J. Eq. 358, 48 Atl. 952; Disborough v. Outcalt, 1 N. J. Eq. 298; Has-

ton v. Gastner, 31 N. J. Eq. 697;lauch v. De Socarras, 56 N. J. Eq. 524, 39 Atl. 381; Merchants' & M. Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272; First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092; Lanning v. Parker, 84 N. J. Eq. 429, 94 Atl. 64; Lilienthal v. Drucklieb, 34 C. C. A. 657, 92 Fed. 753; Huff v. Bidwell, 81 C. C. A. 43, 151 Fed. 563; Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117.

Woolley, Circuit Judge, delivered the opinion of the court:

In August, 1912, Equitable Life Assurance Society issued to David T. Finnie a policy of life insurance for \$5,000 on an annual premium of \$159.55. Finnie paid the first and second premiums and enough of the third to keep the policy alive until January 20, 1915. Until payment of the balance of the third premium on this date, the policy had no surrender value and was not entitled to participate in dividends; and unless full payment of the third premium were made on this date the policy lapsed. On payment of the balance of the premium, the policy acquired a surrender value of \$190.

The insured, being unable to pay

the premium and longer to carry the policy, offered to dispose of it to Sarah H. Kelsey, the defendant below, for a sum sufficient to pay the balance of the premium of \$120 and to yield him \$95. Kelsey accepted the offer. The transaction was completed by an assignment of the policy under circumstances which raised the question in this suit, whether the assignment of the policy was made as collateral security for a loan of \$215—\$120 premium balance and \$95 cash—or was absolute and was made for the outright sale of the policy in consideration of the money that passed.

The annual premiums subsequently maturing were paid by Kelsey until 1917, when Finnie died. Thereupon, Kelsey proved the death of the insured and collected from the society the principal of the policy.

Nelle E. Finnie, the widow of the insured, was in due course granted letters of administration of the estate of her husband. William Ryan, a creditor of the insured, and later the complainant in this action, instituted suit in a state court and recovered judgment against the administratrix, execution on which was returned unsatisfied. Ryan, a citizen of the state of New York, singly and alone, filed a bill of complaint against Sarah H. Kelsey, a citizen of New Jersey, in the district court of the United States for the district of New Jersey, to enforce his judgment, subsequently joining Nelle E. Finnie, as co-complainant, not in her capacity of administratrix, but "as sole distributee" of her husband's estate.

The scope of the bill of complaint is disclosed by its prayer, which is, in substance, that the assignment of the policy be declared to be a security only for such sums as the defendant advanced to the insured during his lifetime, together with interest thereon; that the defendant be declared a trustee of the balance of the insurance moneys for the benefit of the estate of the insured, and that the defendant make an accounting of this trust to Nelle E. Finnie, the

administratrix, and pay over to her as administratrix the balance which such accounting shall show remains in her hands, with interest.

Aside from answering the complainant's bill on the merits, the defendant challenged the right of Ryan, as creditor of the insured, to maintain this action on behalf of the estate of the insured, and also the right of Nelle E. Finnie to maintain this action as distributee of the estate, and challenged also the jurisdiction of the court on the ground that Nelle E. Finnie, in her capacity of administratrix, is a necessary party, and that, being also a citizen of New Jersey, her joinder would instantly oust the court of jurisdiction for lack of diversity of citizenship. The cause coming on to be heard, the court dismissed the bill on two grounds: "First, that the administratrix was a necessary party, and that if she be made a party there would be a lack of diversity of citizenship; second, that the evidence would not justify the changing of the assignment (which was absolute in its terms) into a collateral one."

We refer to *Finnie v. Walker*, 5 A.L.R. 891, — C. C. A. —, 257 Fed. 698, a case involving other insurance transactions of the same David T. Finnie and cited by both parties as sustaining their respective contentions, merely to dispose of it in a manner that will make certain that the decision in the instant case does not disturb that decision. That case, brought on other policies of insurance issued to the same insured and decided by the district court of the United States for the southern district of New York adversely to the plaintiff, prior to the argument before us, was cited by the defendant as ruling this case. As that decision has since been reversed by the United States circuit court of appeals for the second circuit, the decision of the latter court is now cited by the complainant with equal insistence as ruling the case in his favor. The case cited and mutually relied on was brought by the administratrix

of the insured to recover moneys paid by the Assurance Society on policies of insurance which had been assigned contemporaneously with their issuance, on the theory, finally sustained by the appellate court, that the assignees had no insurable interest in the life of the insured, and that the assignments were in consequence wagering contracts. *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, distinguished from *Grigsby v. Russell*, 222 U. S. 149, 56 L. ed. 133, 36 L.R.A.(N.S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863.

As the question in the Federal courts in the second circuit, though raised by the bill in this case, was not urged upon or decided by the trial court, and cannot in any sense extend to the question of jurisdiction on which we think this case turns, we are of opinion that the cited decision has no bearing on the matter before us.

There is no question that Nelle E. Finnie in her capacity of administratrix would be a proper party in an action in equity of the character of this one. Similarly, there is no question that if she were made a party in that capacity to such an action instituted in the district court of the United States for the district of New Jersey, she would, because of the identity of her citizenship with that of the defendant, instantly oust the court of jurisdiction. There being no question that she is a proper party, the question is whether she is a necessary party. This question is vigorously controverted by the parties to the action, and in support of their opposing contentions, both again cite the same authority or line of authorities, the leading one—and the only one we find necessary to discuss—being *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 22 L.R.A.(N.S.) 454, 138 Am. St. Rep. 563, 71 Atl. 745, 20 Ann. Cas. 91.

On authority of this decision, the position of the complainant is, that a creditor of a deceased debtor may,

alone and without the joinder of the debtor's personal representative, maintain an action in equity, even when no fraud is involved, to impress a trust in favor of a decedent's estate on property in the possession of another, on the theory that, when the parties before the court are such as to insure a fair trial to all, and when justice can be done to and as between the parties before the court without doing injury to absent persons, a court of equity will take jurisdiction. *Waterman v. Canal-Louisiana Bank & T. Co.* 215 U. S. 33, 54 L. ed. 80, 30 Sup. Ct. Rep. 10; *McArthur v. Scott*, 113 U. S. 340, 392, 28 L. ed. 1015, 1081, 5 Sup. Ct. Rep. 652. The complainant insists that the court of errors and appeals of New Jersey acted on these general principles in taking jurisdiction of and rendering a decision in *Buchanan v. Buchanan* when the administrator of the estate involved in the controversy was not a party. We do not regard *Buchanan v. Buchanan* as authority for this contention, for a reading of that decision shows very clearly that the court decided unequivocally that as a general rule a trustee is liable only to the legally qualified representative of the deceased whose estate has been misappropriated or is being unlawfully withheld. The exception to this rule, to which the court adverted, is the right of the next of kin, like the right of a cestui que trust in the case of a delinquent trustee, to maintain an action when the personal representative of the deceased, through collusion with the defendant or otherwise, refuses to bring the action himself. The complainant in this case endeavored to bring himself within this exception by an appropriate averment in the bill, but as he wholly failed to sustain the averment by any evidence, he stands within the general rule, on authority of *Buchanan v. Buchanan* and of the cases there abundantly cited, that in such an action as this the personal

Decedent's estate—suit to recover assets—parties.

representative of the deceased is not merely a proper party, but is an indispensable party. The court of errors and appeals of New Jersey in reversing the decree of the trial court for the nonjoinder of the personal representative of the deceased as a party, yet in retaining jurisdiction of the case,—the act on which the complainant mainly relies,—did so only to grant the complainant leave to apply for the appointment of a receiver to take possession of the property in dispute and hold it until an administrator could be appointed and an opportunity be afforded him to litigate the question involved. In doing this, the court

did nothing more than conserve the property in dispute, which was in danger of being lost; it expressly refused to decide or even consider the merits of the dispute.

We are of opinion that the administratrix of the insured is an indispensable party to this action. As her absence from the record deprives the court of jurisdiction, and as her presence would, because of identity of citizenship with that of the defendant, instantly oust the court of jurisdiction otherwise properly acquired, we affirm the decree dismissing the bill without discussing or deciding the merits of the controversy.

### ANNOTATION.

#### Right of creditors to maintain action in interest of decedent's estate.

This note lies in narrow compass as it excludes actions against the personal representative for an accounting and actions founded on frauds against creditors, such as creditors' bills, or cases where the representative is accused of collusion with a debtor of decedent.

It will be seen that in the reported case (RYAN v. KELSEY, ante, 284) it is held that a creditor could not, at least without making the administratrix a party, maintain an action requiring decedent's assignee of a life insurance policy to account to decedent's administratrix for the proceeds, on the ground that the assignment was not absolute, but as collateral, security.

"As a general rule, creditors cannot sue the debtors of an estate." Gilbert v. Thomas (1847) 3 Ga. 575.

Rumney v. Mead (1877) Finch, 308, 28 Eng. Reprint, 166, was a bill "to have a discovery of \$250 which was alleged to be due, and owing by the Defendant to the Estate of one Samuel Bulstrode, against whom the Plaintiff obtained a Judgment, in the Year 1665, for \$400 due to him from the said Bulstrode. The Defendant demurred, for that one Thomas Bulstrode is Administrator to the Intestate Samuel Bulstrode, to whom (if

any Thing is due) the Defendant ought to pay it; and that the Plaintiff is not capable to make a demand thereof, or to discharge the same." He also pleaded the Statute of Limitations. And the court allowed both the demurrer and the plea.

"Where, after the death of a debtor, certain of his personal property was taken possession of by a stranger, and on his death was taken possession of by his executor, who converted it to his own use, the right of action therefor is in the administrator of the debtor, and creditors cannot maintain a bill for an account against the second wrongdoer without showing some good reason why they sue instead of the administrator." Jones v. McCleod (1878) 61 Ga. 602.

In Buchanan v. Buchanan (1909) 75 N. J. Eq. 274, 22 L.R.A. (N.S.) 454, 138 Am. St. Rep. 563, 71 Atl. 745, 20 Ann. Cas. 91, cited in the reported case (RYAN v. KELSEY), which was not an action brought by a creditor, but by heirs at law and next of kin, the court said: "Heirs, next of kin, and creditors cannot, in their own names, prosecute actions at law or suits in equity to recover the unadministered estate of a decedent or to collect debts or other choses in action due him. Such suits can be maintained only by the quali-



fied personal representatives of the deceased."

*Bickley v. Donington* (1724) 2 Eq. Cas. Abr. 253., 22 Eng. Reprint, 214, was a "bill by Creditors of Testator, and one of the Residuary Legatees, against a Debtor to the Testator's Estate, the Executors and the other Residuary Legatee, to compel the Debtor to pay his Debt to satisfy their Demands. And per Lord Chan. The Bill is totally improper and inconsistent with the Principles of Law, and the Rules of this Court; contra by an Executor, the Representative of the Testator. The whole Management of the Estate belongs to the Executor, and the Right of it is vested in him, and not to be taken out of him by Creditors or Legatees. If he releases and is solvent, it is a Devastavit, and he is answerable himself for the Sum

released to the Creditors and Legatees. If Collusion and Insolvency, it may be proper to come here for Satisfaction against the Debtor, but it must be always upon some special Case, which is not pretended either by the Bill or at the Bar," and the bill was dismissed.

In *Re Franklin* (1750) 2 Eq. Cas. Abr. 264, 22 Eng. Reprint, 215, it was held that "where there are proper Persons to get in the Estate of another, Chancery will not suffer the Creditors of the Testator to bring a Bill in order to get in that Estate; but if the Executors will collude with a Debtor, there is no Doubt but a Creditor may bring his Bill in order to take Care of the Estate, and charge the Executors with such Collusion."

B. B. B.

EMMA J. MARTIN, Appt.,

v.

FARMERS' LOAN & TRUST COMPANY.

*Iowa Supreme Court — June 26, 1917.*

(180 Iowa, 859, 163 N. W. 861.)

**Dower — bar by division of property.**

1. A woman may bar her dower given her by a statute providing that on her husband's death she shall have one third of his real property, by an agreement between them looking to a separation, which is carried out in good faith, by which the property is conveyed by their joint signatures to a trust company and a portion of it reconveyed to her in fee, although the husband subsequently obtains an equitable interest in his share by a declaration by the trust company that it holds in trust for him.

[See note on this question beginning on page 243.]

**Husband and wife — division of property — deeds to trustee — effect.**

2. Where a man and wife, in order to divide their property between them, execute deeds to a trustee for the purpose of effectuating such division, each is immediately precluded from claiming any interest in the property which it is agreed shall belong to the other.

**Trust — direction to trustee — effect.**

3. The rights of husband and wife as established by deeds of their property to a trustee for the purpose of

dividing the property between them are not affected by subsequent instructions or directions given to the trustee as to the management, control, or disposition of the property.

**Estoppel — to assert dower interest in land.**

4. The joinder by a woman in deeds by her husband of property to a trustee, for the purpose of dividing the property between them, estops her from asserting a dower interest in the land intended for him.

**APPEAL** by plaintiff from a decree of the District Court for Plymouth County in favor of defendant in an action brought to establish a dower interest in certain land. *Affirmed.*

**Statement by Preston, J.:**

This is an action in equity in which plaintiff seeks to have set off to her a distributive share, or dower, in certain land transferred to the defendant by deed in which plaintiff and her deceased husband joined and in which plaintiff relinquished her dower interest. Defendant asked to have its title quieted as against plaintiff's claim. After a trial on the merits the trial court held that plaintiff was not entitled to dower, and dismissed her petition, and gave defendant a decree. The plaintiff appeals.

Messrs. C. A. Plank and C. E. Gantt for appellant.

Messrs. Shall, Gill, Sammis, & Stillwill and R. H. Burton-Smith, for appellee:

When a mutual understanding has been acted upon by both parties, each is estopped from thereafter asserting any dower interest in the land conveyed by the other.

*Manatt v. Griffith*, 147 Iowa, 707, 124 N. W. 753.

Preston, J., delivered the opinion of the court:

The general situation, in so far as we think it applicable to points presented, is substantially this, as set out by appellant in her statement of facts: That the plaintiff was married to Wilson B. Martin, now deceased, twenty-four years ago. That at that time deceased had five children by a former marriage, who are still living. One of these is Frank Martin. Plaintiff and deceased had three children, all now living, one of whom is Dwight. At about the time of their marriage they purchased 80 acres of land, referred to in the record as the home 80, and also the west 80. A year or so afterwards they purchased another 80 acres, referred to in the record as the hill 80 and the east 80. A part of the purchase price was taken care of by a mortgage, which was finally paid off by defendant, and under the agreement in which the transfer of the

land in suit was made to the defendant. In May, 1909, deceased executed a deed to plaintiff in which he attempted to convey the 160 acres before described. This was subject to a \$2,000 mortgage on the property, the payment of which plaintiff assumed. At the time of the execution of some of the instruments hereinafter referred to, June 2, 1915, plaintiff had not been well and did not recover for four or five weeks thereafter. On that date, June 2, 1915, the plaintiff, with her husband, the deceased, and his son Frank, went to defendant company and made application to obtain a loan on the real estate. At that time certain papers were signed for the purpose of making a division of the property between plaintiff and her husband. We may state here that there is testimony on behalf of defendant that the division of the property was in contemplation of a separation between plaintiff and her husband. This is denied by the plaintiff, but the evidence is, and the plaintiff herself so testifies, that thereafter they did live apart. The different instruments executed disposed of all the property of the parties, and also made provision for the payment of debts. Continuing the statement of counsel for appellant, they say that on said 2d of June deceased was seventy-four years of age; and had been sick and quite feeble for about five years; that he died soon afterwards; that is, the next September. That under the plan of the division, which was carried out, plaintiff received the home 80, the personal property, and a lease on the hill 80 for 1915, her husband receiving the hill 80. In addition, there were two insurance policies on Mr. Martin's life, one of which, under a subsequent arrangement, was to go to plaintiff and one to his estate. Certain debts were to be taken care of by each of the parties giving the mortgage for \$2,000 on the 80 received by each, which money was to

be turned over to defendant to be paid out by it on these debts, and the balance, if any, to be divided equally between plaintiff and deceased. On the date before referred to, June 2, 1915, deeds were given to the defendant as trustee by plaintiff and deceased. Exhibit 10 was a warranty deed conveying the home 80 to defendant. And on the same date (June 2, 1915) a memorandum was given by defendant to the plaintiff by which defendant acknowledged that it held the same land in trust for plaintiff and agreed to manage, control, and convey the same as plaintiff should by will or deed direct. Soon after said June 2d plaintiff employed Mr. Plank to look after the matter of division of property. Some changes were made and some additional papers executed; that deed, exhibit 10 just referred to, was destroyed and a new deed of the home 80 made to Dwight Martin, a son of plaintiff and deceased. We may say parenthetically here that appellee contends that the effect of this was to prevent plaintiff's husband from receiving dower in the 80 acres which went to her in case she should predecease her husband. At the same time, June 2d, the deceased, Wilson B. Martin, and his wife, the plaintiff, executed a warranty deed to the defendant to the hill 80. In this deed both deceased and plaintiff respectively relinquished all contingent rights, including all their right of dower, homestead, or distributive share in the land so conveyed. This instrument is known in the record as exhibit 1. At the same time defendant gave to the deceased a writing, known in the record as exhibit 14, and which is as follows:

Sioux City, Iowa, June 2, 1915.  
Wilson B. Martin,  
Westfield, Iowa.

Dear Sir:—

We hereby acknowledge that we hold in trust for you the following described property; to wit, The east one half (E.  $\frac{1}{2}$ ) of the southeast quarter (S. E.  $\frac{1}{4}$ ) of section twenty-six (26), township ninety-two (92),

range forty-nine (49), and agree to manage, control, and convey the same as you shall by will or deed direct.

Very truly yours,  
Farmers' Loan & Trust Company,  
By R. H. Burton-Smith, Atty.

About twelve days thereafter, and on June 14, 1915, a trust agreement was entered into between deceased, Wilson B. Martin, and the defendant, in regard to the 80 acres of land deeded to plaintiff's husband, now deceased. This agreement is as follows:

#### Trust agreement.

This agreement entered into this 14th day of June, 1915, by and between Wilson B. Martin, of Westfield, Plymouth county, Iowa, party of the first part, and the Farmers' Loan & Trust Company, of Sioux City, Woodbury county, Iowa, party of the second part, witnesseth:

That whereas the party of the first part has deeded to the party of the second part all his right, title, and interest in the following described property, to wit, the east one-half (E.  $\frac{1}{2}$ ) of the southeast quarter (S. E.  $\frac{1}{4}$ ) of section twenty-six (26) township ninety-two (92), range forty-nine (49), situated in Plymouth county, Iowa, in consideration therefor the said second party agrees as follows:

(a) To pay the net income from said property annually to said first party.

(b) In case such net income shall not be sufficient to keep said first party in comfortable circumstances, the said second party agrees to sell said property and, from time to time, to pay over to the said first party such portion of the net returns from said sale as may be necessary to the comfort of said first party, keeping balances at interest.

(c) Whatever property or money shall remain in the hands of the said second party upon the death of said first party shall first be charged with the expenses of the last illness and funeral of said first party and with a reasonable charge for the services

rendered by said second party, and the said second party agrees to pay one thousand dollars (\$1,000), share and share alike, between Dwight Martin, Grace Waterbury Martin, and Auriel Marie Martin, children by his present wife, Emma J. Martin, if such a sum shall remain in its hands, and to divide any balance equally, share and share alike, among the five children of said first party by his first wife, Mary Martin, or among their children per stirpes.

Signed the 14th day of June, A. D. 1915.

Wilson B. Martin,  
Farmers' Loan & Trust Company,  
By James F. Toy,  
By F. W. Kammann.

By his will, Wilson B. Martin gave to his wife, this plaintiff, the home 80, which had theretofore been deeded to her, and provided that such provision in his will was to be in lieu of dower, homestead exemptions, and distributive share. Another provision of his will is that he makes no provision for his three children by his second wife, the plaintiff, as he expected her to provide for them out of the property set off to her. There are other provisions in the will which we shall not set out.

On the last-named date deceased executed a bill of sale to plaintiff to certain personal property, horses, colts, cows, hogs, machinery, grain, etc., being all the personal property. On that same date the plaintiff and deceased gave to the defendant a paper reciting that, an application having been made for a loan of \$2,000, the defendant was authorized: First, to pay the usual and necessary expenses; second, to place the remaining proceeds of said loan into a common fund belonging to both of the subscribers; third, to pay out of said fund all household, medical, or professional bills or debts heretofore contracted by either of the parties; and the remainder to be divided equally, one half to plaintiff and one half to her husband. A schedule of notes and claims was given defendant. On the same day plaintiff executed a written instrument to de-

fendant to execute in blank and deliver to her a deed to the home 80. On the same date plaintiff executed to the defendant the following paper:

The Farmers' Loan & Trust Company, Sioux City, Iowa.

Gentlemen:—

I have executed the assignment herewith delivered to you, being an assignment of Policy No. 66537, in the Northwestern Mutual Life Insurance Company, in consideration of an agreement that Wilson B. Martin shall make, execute, and deliver to you the last will or deed of trust in which there shall be devised and bequeathed to Dwight Martin, Grace Waterbury Martin, and Auriel Marie Martin the sum of one thousand dollars (\$1,000), share and share alike, in said sum of one thousand dollars (\$1,000), and upon delivery to you of said will or deed of trust you may deliver to Wilson B. Martin, or anyone whom he shall direct, the assignment hereby turned over to you.

And in another paper she relinquished all her right and interest as beneficiary in said insurance policy. Other papers were executed, but it is perhaps unnecessary to set them out, since appellant contends, and in this appellee seems to acquiesce, that the case turns upon the three exhibits before referred to; that is to say, exhibit 10, the deed from plaintiff and her husband to the defendant, exhibit 14, the paper in which defendant acknowledges that it holds the hill 80 in trust for plaintiff's husband, and exhibit 15, the trust agreement.

Appellant states that the greater part of the testimony consists of a review of the actions and consultations of the parties in fixing up a division of property between plaintiff and her husband, and that, while it establishes the fact that such a division was made, it is thought that it has no bearing on the case, which is solely a question as to whether plaintiff is entitled to dower in the hill 80 conveyed to the defendant, and appellee concedes that the testimony

introduced is important, as it bears upon the intention and purposes of the parties. In so far as there may be any conflict in the testimony, we are satisfied with the conclusions of the trial court and deem it unnecessary to refer to the evidence in detail, in view of the fact that the case seems to turn upon the interpretation of some of the written instruments before referred to.

Appellant's propositions are that under § 3366 of the Code, which provides, in substance, that one third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right, shall be set off to her if she survive him, that plaintiff's dower interest in the real estate in controversy is not a subject of contract between her and her deceased husband, and that therefore her interest in the property in controversy was not divested by the division of the property between them; that such division, being a void contract, cannot be the basis of an estoppel preventing plaintiff from claiming dower in the land. The real basis for plaintiff's claim is that though plaintiff and her husband on June 2, 1915, executed to the defendant the warranty deed, exhibit 10, before referred to, wherein she relinquished her dower therein, the paper thereafter and on the same day executed by defendant, or given to deceased by the defendant, acknowledging that it held the land in controversy in trust for plaintiff's husband, vested an equitable title in deceased which was not divested by the trust agreement thereafter executed by her husband and the defendant, the plaintiff not having joined therein.

Cases are cited by appellant in support of the different propositions, but we think the case is ruled by our holding in the case of *Manatt v. Griffith*, 147 Iowa, 707, 124 N. W. 755, though, of course, the facts are not precisely the same. Appellant

seems to place much reliance upon the case of *Re Kennedy*, 154 Iowa, 460, 135 N. W. 58, and prior cases similar thereto. But we think the facts in the instant case are essentially different from those involved in the cases cited by appellant. In the *Kennedy Case* it was held, at page 467 of 154 Iowa, that the fact was that the subject of the contract alleged was her inchoate interest in his real estate. The transaction was based upon an oral agreement between a husband and wife whereby the wife agreed to abide by the last will and testament of her husband in consideration of real estate and personal property conveyed to her, and in that case the court held that, under § 3154 of the Code, following prior cases, one spouse has no interest in property owned by husband and wife which is the subject of contract between them. In the *Kennedy Case* there was no claim, as in the *Manatt Case* or in the instant case, that the transactions involved were entered into for the purpose of making a division of the property of the husband and wife, to enable them to control and dispose of their lands free from any dower right of the other therein, or that the mutual understanding and division had been acted upon by both of them.

The court was justified in finding from the evidence that plaintiff and her husband mutually agreed to a full and complete division of their property, with a view to thereafter living apart, and that they both in good faith undertook to carry out such agreement and that it was carried out. The parties were competent to contract, and there was no fraud perpetrated or attempted when the agreement was executed. Appellee contends that after the deeds to defendant had been executed, on June 2d, plaintiff was trying to so arrange matters that if plaintiff's husband should be the first to die, as it was thought he would because of his poor health, that plaintiff might claim dower in his 80, while if she died first he would be cut off from any interest in her

80. Nothing occurred after June 2d to indicate any change of purpose on the part of either plaintiff or her husband, or that plaintiff had any intention of departing from the original plan of a separation and division of property as carried out on June 2d. We think that when plaintiff and her husband by the two separate deeds executed June 2d conveyed all their land to defendant, they were each immediately precluded from claiming any interest in the property which it was agreed should belong to the other.

Husband and wife—division of property—deeds to trustee—effect.

The agreement and its execution, at least so far as the land was concerned, was completed when the deeds passed. The contract was fair and equitable to plaintiff. At that time there could have been no claim that the deeds were invalid. It seems to us that, whatever may have been done by either of the parties subsequent to June 2d, with respect to giving instructions or directions to defendant as to the management, control, or disposition of the land, could not affect what had previously been agreed upon and executed. After the parties conveyed the lands to the trust company, their rights to their respective properties became fixed, and any arrangement thereafter made would not revest either with a title or interest in the land after they had parted with all their interest therein. This is especially so as to the land, and in all the transactions thereafter there was no effort made to undo what had been done. Subsequent negotiations had to do more especially with the insurance policies.

Trust—direction to trustee—effect.

It is thought by appellee that de-

ceased could not have been compelled to give the \$1,000 to her children, since this had not been taken into consideration by either party in the earlier stages of the transaction. It is thought by appellee that when deceased acceded to plaintiff's demand in regard to this, the question arose as to how the payment of this sum to plaintiff's children at the death of her husband was to be made. It is shown that his will had already been made, and that the parties knew of that fact, and that it did not contain a bequest of this character. True, the will could have been changed, but the parties seem to have provided for the payment of this \$1,000 at Mr. Martin's death by a provision in the trust deed. That there may be a conflict between the will and the trust agreement with reference to the payment of this \$1,000 need not be considered here, we think, because the question is as to plaintiff's right to dower in the land.

We think that the statement by defendant after the execution of the deeds, to the effect that it held the husband's property in trust for him, did not have the effect of revesting plaintiff with an interest in her husband's land, of which interest she had previously divested herself by the deed. Under the authority of *Manatt v. Griffith*, supra, we think plaintiff is estopped from now asserting any dower interest in the land in controversy.

Dower—bar by division of property.

Estoppel—to assert dower interest in land.

It follows, therefore, that the decree of the District Court must be and it is affirmed.

Gaynor, Ch. J., Weaver, and Stevens, JJ., concur.

## ANNOTATION.

### Barring dower by conveyance to trustee.

#### General rule.

A voluntary conveyance by a husband of property to a trustee does not

bar the wife's dower therein if the husband retains the beneficial interest. *Davis v. Logan* (1839) 9 Dana (Ky.)

185; *Radley v. Radley* (1905) 70 N. J. Eq. 248, 62 Atl. 195; *Goodheart v. Goodheart* (1902) 63 N. J. Eq. 746, 53 Atl. 135; *Meyer v. Barnett* (1906) 60 W. Va. 467, 6 L.R.A.(N.S.) 1191, 116 Am. St. Rep. 894, 56 S. E. 206; *Powdrell v. Jones* (1854) 2 Smale & G. 407, 65 Eng. Reprint, 457, 24 L. J. Ch. N. S. 123, 18 Jur. 1111, 3 Eq. Rep. 63, 3 Week. Rep. 32.

Compare *Baker v. Syfritt* (1910) 147 Iowa, 49, 125 N. W. 998, and the reported case (*MARTIN v. FARMERS' LOAN & T. Co. ante*, 238).

Where the husband, prior to his marriage, makes a conveyance to a trustee, reserving the beneficial use to himself or his assigns, he remains seised of such an equitable estate in fee as to entitle his widow to dower therein. *Meyer v. Barnett* (1906) 60 W. Va. 467, 6 L.R.A.(N.S.) 1191, 116 Am. St. Rep. 894, 56 S. E. 206, wherein it appeared that prior to his marriage to the petitioner a man conveyed four parcels of land to his son by a former marriage, in trust for himself. It was provided in the deed of trust that the trustee would make such conveyance as the grantor should require. There was also a provision in the deed, making a certain disposition of the property in case the grantor died without requiring a conveyance. On being petitioned for an assignment of dower in the land, the court held that the grantor, being seised of an equitable estate in fee simple, his widow was entitled to dower in that estate.

And where a husband and wife execute a deed of trust to a third person, the husband reserving the sole benefit to himself, his heirs, executors, administrators, or assigns, the husband is seised of such an equitable estate in fee simple as to entitle the widow to dower therein, though in the deed of trust she expressly relinquishes all claims. *Radley v. Radley* (1905) 70 N. J. Eq. 248, 62 Atl. 195; *Goodheart v. Goodheart* (1902) 63 N. J. Eq. 746, 53 Atl. 135; *Powdrell v. Jones* (Eng.) *supra*.

In *Radley v. Radley* (N. J.) *supra*, it appeared that a husband and wife executed a deed conveying a portion of his property to a trustee. The purpose

of the deed, as recited therein, was to place the title in the trustee free and clear of the wife's dower, which she thereby released. The trustee was to hold the property for the sole benefit of the husband and his heirs, executors, administrators, and assigns. The trustee subsequently executed a declaration of trust to the husband, covenanting, among other things, to convey the property to the husband, on written demand. In a bill for dower there was no question raised as to the validity of the agreement, but only what effect it had on the widow's dower right. The court held that while the deed would bar the widow's dower in the legal estate, it would not bar her dower in the equitable estate which was thereby created in her husband, though the trustee, in his declaration of trust, covenanted to reconvey to the husband free and clear of her dower.

In *Goodheart v. Goodheart* (1902) 63 N. J. Eq. 746, 53 Atl. 185, it appeared that a husband and wife who were living apart entered into an agreement whereby each conveyed their separate property to a trustee for their own benefit. The wife joined in the deed of the husband. The trustee was bound to convey to any person the husband should designate. Subsequently the husband died and the widow brought a bill for an assignment of her dower. It was held that the husband was seised of such an equitable estate of inheritance as to entitle the widow to dower therein, though the trustee conveyed the property after his death.

In *Powdrell v. Jones* (1854) 2 Smale & G. 407, 65 Eng. Reprint, 457, it appeared that copyhold land was purchased by the petitioner's husband. It was surrendered to the use of him and his assigns for life and after his decease to such use as he by will should surrender or devise. The wife joined the husband in the surrender. The husband was admitted in fee and by his will devised the copyhold to a trustee on trial for sale. It was a custom of the manor that the dower of a wife could be destroyed only by her voluntary surrender. Holding that the

widow was entitled to dower, the court said: "This, therefore, is a case in which, the husband having been seised of the fee simple and inheritance of this copyhold during the coverture, the widow is, I think, entitled to her free bench according to the custom of the manor, as proved by the evidence."

But in *Baker v. Syfritt* (1910) 147 Iowa, 49, 125 N. W. 998, an action by a widow for an assignment of dower in the estate of her deceased husband, it appeared that the husband had made a joint will with his former wife, whereby the survivor was to hold the property to his or her use during their life, and other provisions after the survivor's death were therein made. On the question of the relinquishment of dower the court held that if husband and wife execute a joint instrument, whether a deed, a will, or any other instrument, creating a trust for the benefit of a third person, the wife's dower is thereby relinquished.

The reported case (*MARTIN v. FARMERS' LOAN & T. Co.* ante, 238), holds that when a husband and wife execute a deed of all their property to a third person with the view of living apart, the wife is barred from claiming dower in that land portioned off to her husband even though it appear that the third person holds the property in trust for the husband.

#### Exceptions to rule.

If the trustee of a husband conveys the property in accordance with the directions of the husband during his lifetime, the right to dower therein is lost. Thus, in *Goodheart v. Goodheart* (N. J.) supra, stated at length in the preceding subdivision, the court held that the right to dower was lost in property which was conveyed by the trustee by order of the husband, in his lifetime.

But in *Davis v. Logan* (1839) 9 Dana (Ky.) 185, it appeared that by a parol partition of the property of a decedent by his heirs, a certain lot was allotted to the plaintiff's husband, who was then married. Subsequently the heirs conveyed this property allotted to

them to a trustee to facilitate a conveyance to purchasers. The trustee thereupon sold the lot with two others to the defendant. In an action for the assignment of dower the court held that the widow was entitled to dower in the lot allotted to her deceased husband.

Where a husband was a stockholder in a corporation which conveyed its property to a trustee to convey to the trustees of an association, and he conveyed whatever interest he had therein to the same trustee for the same purpose, a subsequent relinquishment of dower by his wife to the trustee was held to be effectual to bar her dower therein, though the title had then passed out of the trustee. *Hull v. Glover* (1889) 126 Ill. 122, 18 N. E. 198. In that case it appeared that several persons in contemplation of forming a corporation advanced money to one of their number to purchase land. The land was purchased in this person's name, and, on the incorporation of the company, he made a declaration of trust in its favor. Certificates of stock were issued to those who had advanced the money. Later the stockholders agreed to form a private association. On the formation of the association it was agreed that three trustees were to hold the land for the association. The corporation executed a deed of the land to one of their number. Each of the stockholders and his wife conveyed whatever interest he had therein to the designated person, who conveyed to the trustees. It appeared, among other things, that the wife of one of the stockholders did not release her dower in her husband's interest until some time after he had executed the deed of conveyance of his interest. It was contended that, the trustees having parted title, the release did not operate to release her dower. The court held, however, that the release was effective to bar her dower, since such interest might be released to the owner of the fee or to anyone in privity with the fee as to a warrantor of the title for the benefit of the grantee. R. C. L.



M. B. GOLDMAN

v.

DANIEL FEDER &amp; COMPANY, Plff. in Err.

*West Virginia Supreme Court of Appeals — September 30, 1919.*

(— W. Va. —, 100 S. E. 400.)

**Landlord and tenant — covenant not to sublet — effect of assignment.**

1. A covenant in a lease not to sublet the premises, the terms of which are not enlarged by anything in the context, nor otherwise, accompanied by a forfeiture and re-entry clause, is not broken by an assignment of the lease.

[See note on this question beginning on page 249.]

— statutory covenant against assignment.

2. The statute, § 21, chap. 72, Code (§ 3800), providing a short and simple form of covenant against assignment,

Headnotes 1 and 2 by POFFENBARGER, J.

does not enlarge a covenant against subletting.

— covenant against subletting — waiver.

3. A lessor cannot waive a covenant against subletting after he has parted with title to the premises.

**ERROR** to the Circuit Court for Kanawha County to review a judgment in favor of plaintiff in an action of unlawful detainer brought to recover possession of certain premises, and damages for the detention thereof. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morton & Mohler, for plaintiff in error:

No demand for possession of the premises in dispute having been made by plaintiff upon defendant, the peremptory instruction asked for by it should have been given.

Bennett v. Hollinger, 66 W. Va. 387, 66 S. E. 502.

Any competent evidence tending to prove that defendant lawfully held possession of the storeroom known as No. 25 Capitol street should have been allowed to go to the jury without qualification or restriction of its force or purpose by the trial court.

Wigmore, Ev. § 10; Lyons v. Fairmont Real Estate Co. 71 W. Va. 754, 77 S. E. 525; Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614, 11 Ann. Cas. 870.

The court will presume, in the absence of evidence to the contrary, that the defendant is in possession under an assignment of the lease in question.

Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394; 1 Taylor, Land. & T. § 6, p. 5.

A lease for a term of years is always assignable, if not forbidden by some stipulation contained therein.

1 Taylor, Land. & T. § 402, p. 508; 2 Taylor, Land. & T. § 426, p. 1; 1 Minor, Real Prop. § 371, p. 446.

A covenant in a lease, providing that the lessee will not sublet the premises without the written consent of the lessor, is not violated by an assignment of said lease without the consent of the lessor, there being no covenant, or stipulation, prohibiting an assignment of the lease, contained therein.

1 Minor, Real Prop. § 417, note 3, §§ 420, 1200, 1224; 1 Tiffany, Real Prop. §§ 46, 48, pp. 106, 113, notes 227, 250; 24 Cyc. 974, notes 66-68; 16 R. C. L. §§ 820, 329; Wainwright v. Bankers' Loan & Invest. Co. Ann. Cas. 1913B, 890, note; West Shore R. Co. v. Wenner, 70 N. J. L. 233, 103 Am. St. Rep. 801, 57 Atl. 408, 1 Ann. Cas. 790; 1 Taylor, Land. & T. § 403, p. 509; Field v. Mills, 38 N. J. L. 254; 2 Minor, Inst. 2d ed. p. 167.

Messrs. Morgan Owen and E. B. Dyer, for defendant in error:

A covenant not to underlet or sublet restrains assignment, and a cove-

nant not to assign restrains a subletting.

Kanawha-Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 52 L.R.A. (N.S.) 968, 80 S. E. 781, Ann. Cas. 1916E, 786; Den ex dem. Bockover v. Post, 25 N. J. L. 285; Greenaway v. Adams, 12 Ves. Jr. 395, 33 Eng. Reprint, 149; Bemis v. Wilder, 100 Mass. 446; Shattuck v. Lovejoy, 8 Gray, 204; Shumway v. Collins, 6 Gray, 227; Austin v. Harris, 10 Gray, 296; Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96; Gulf, C. & S. F. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228; Matthews v. Whitaker, — Tex. Civ. App. —, 23 S. W. 538.

An underlease operates as a breach if the lease contains a proviso that it shall be void.

Doe ex dem. Holland v. Worsley, 1 Campb. 20; Woodfall, Land. & T. 9th ed. 553; Platt, Covenants, 408; Roe ex dem. Gregson v. Harrison, 2 T. R. 425, 100 Eng. Reprint, 229, 1 Revised Rep. 513; Louisville Gunning System v. Parks, 126 Ky. 532, 18 L.R.A. (N.S.) 587, 104 S. W. 331; Greenl. Ev. § 328; Jackson ex dem. Church v. Brownson, 7 Johns. 227, 5 Am. Dec. 258; Archbold, Land. & T. 102.

In West Virginia and Virginia there is no distinction made as to the breach of a covenant not to assign and one not to sublet.

Kanawha-Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 52 L.R.A. (N.S.) 968, 80 S. E. 781, Ann. Cas. 1916E, 786; Wainwright v. Bankers' Loan & Invest. Co. 112 Va. 630, 72 S. E. 129, Ann. Cas. 1913B, 887; O'Keefe v. Kennedy, 3 Cush. 325.

Poffenbarger, J., delivered the opinion of the court:

The judgment now under review is one for the plaintiff in an action of unlawful detainer, commenced in a justice's court, in which the defendant prevailed. On an appeal in the intermediate court of Kanawha county, the plaintiff prevailed, and the circuit court of said county refused a writ of error to the judgment.

The plaintiff having acquired the title to the premises in question, within the term prescribed by a lease thereof executed by his grantor, two years, commencing March 1, 1917, and while the lessee was in possession, on or about May 1, 1917, proceeds upon the theory of a for-

feiture of the lease, occasioned by an assignment thereof by the lessee, executed April 3, 1918. It contains a covenant not to sublet the premises without the written consent of the lessor, but no covenant not to assign. The claim is that the assignment constitutes a breach of the covenant against subletting.

The lessor was U. G. Young; the lessee, Adleberg & Berman, Incorporated; the purchaser of the property, M. B. Goldman; and the assignees of the lease, Daniel Feder & Company. The premises are described as the store at 25 Capitol street, in the city of Charleston.

Failure of the plaintiff to disprove consent to the assignment by his grantor is relied upon by the defendant, as a defect in the case made by the evidence. Such consent, given long after the grantor had parted with his title, would have been unavailable. Such a covenant is for the benefit of the lessor and his assigns. The former no longer has any interest in it; wherefore he clearly has no right to give assent to an assignment of the lease or a subletting of the premises.

The vital question in the case is whether the assignment constituted a breach of the covenant not to sublet, and, as to it, there is some conflict in the authorities. That it does has been distinctly held in at least two cases. Greenaway v. Adams, 12 Ves. Jr. 395, 33 Eng. Reprint, 149; Den ex dem. Bockover v. Post, 25 N. J. L. 285. But the latter was overruled in Field v. Mills, 33 N. J. L. 254. It is claimed that Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96, asserts this doctrine, and there are some expressions in the opinion that seem to countenance it; but the covenant not to sublet was read in connection with other provisions of the lease, which, in the opinion of the court, broadened its scope. In conclusion, the court said: "The purpose of the restrictive clause appears to have been, not so much to control the sale of the cottage, as to

Landlord and tenant—  
covenant  
against sub-  
letting—waiver.

prohibit the lessee, his heirs and assigns, from making an assignment of the lease without first obtaining the consent of the lessor, his heirs and assigns."

Hence the covenant was construed to be one not to assign as well as one against subletting. In *Boston, C. & M. R. Co. v. Boston & D. R. Co.* 65 N. H. 893, 23 Atl. 529, the covenant was not to assign, and the court held it had been broken by an assignment, not an underletting. In *Berry v. Taunton, Cro. Eliz.* pt. 1, p. 331, 78 Eng. Reprint, 581, the tenant devised the term, and the question was whether his act violated a covenant not to demise for more than from year to year. The court merely held that a devise was within the meaning of the word "demise." In *Roe ex dem. Gregson v. Harrison*, 2 T. R. 425, 100 Eng. Reprint, 229, 1 Revised Rep. 513, the covenant was against both subletting and assignment, wherefore either constituted a breach. In *Doe ex dem. Holland v. Worsley*, 1 Campb. 20, the covenant was not to assign or otherwise part with the premises. It obviously included both, as the court held. In *Shattuck v. Lovejoy*, 8 Gray, 204, the covenant by its terms went beyond a mere subletting. The tenant bound himself not to permit any other person or persons to occupy or improve the premises, without written consent of the lessor. Such, also, was the character of the covenant in *Austin v. Harris*, 10 Gray, 296. Under a statute providing that, "if lands or tenements are rented by the landlord to any person or persons, such person or persons renting said lands or tenements shall not rent or lease said lands or tenements during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney," both assignment and underletting, without consent, are forbidden. *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228. This conclusion was arrived at by application of the liberal rule of construction, which is generally held to

be inapplicable to statutes imposing forfeitures.

Against this meagerness of authority for the proposition that an assignment is within the meaning of a covenant not to sublet, there stands a very considerable array of authority holding the contrary. *Field v. Mills*, 33 N. J. L. 254; *Lynde v. Hough*, 27 Barb. 415; *Tiffany, Land. & T.* § 48; *Taylor, Land. & T.* § 403. Covenants against assignments and against underletting are both strictly construed, because they are penal in character, working forfeitures, and because they are restraints upon alienation. 16 R. C. L. p. 832; *Tiffany, Real Prop.* § 46; *Minor, Real Prop.* § 417. To be within the operation of such a covenant, the thing done must fall within its terms, its letter, as well as within its spirit or purpose. This is the rule of strict construction. Besides, there is a vast difference in principle between an assignment and a sublease, as well as between <sup>covenant not to sublet—effect of assignment.</sup> their legal results. These differences render it impossible to say an assignment is within the terms of a covenant against subletting.

In the argument submitted for the defendant in error, § 21 of chapter 72 of the Code (§ 3800), defining the scope and effect of a covenant not to assign without leave, is invoked; but it clearly has no application. It does not define a covenant not to sublet. It merely provides a short and convenient form of the common-law covenant against assignments, or a substitute therefor; <sup>—statutory covenant against assignment.</sup> and all of its terms fall within the meaning of "assignment," not "demise" or "sublet." Though *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 73 W. Va. 427, 52 L.R.A. (N.S.) 968, 80 S. E. 781, Ann. Cas. 1916E, 786, involved a lease containing a covenant not to sublet, and an assignment seems to have been treated by the parties as a pos-

sible breach, a decision as to its effect can hardly be said to have been rendered, since the case turned upon an issue as to waiver, and the court did not enter upon any inquiry as to the interpretation and effect of the covenant.

Under the principles and conclusion stated, there was no breach of the covenant, and the plaintiff was not entitled to recover. Hence the judgment must be reversed, the verdict set aside, and the case remanded.

## ANNOTATION.

### Assignment of lease as breach of covenant against subletting.

**View that assignment is not breach of covenant.**

On the theory that a sublease and an assignment of a lease are so distinct that the mention of one does not include the other, it is held in some jurisdictions that an assignment of the lease is not a breach of a covenant against subletting. *Field v. Mills* (1869) 33 N. J. L. 254; *Lynde v. Hough* (1857) 27 Barb. (N. Y.) 415; *Re Dole* [1899] 1 Ir. R. 113. And see the reported case (*GOLDMAN v. DANIEL FEDER & Co. ante*, 246).

Thus, in *Field v. Mills* (N. J.) *supra*, it appeared that the lessee held the premises under a covenant "not to let or sublet the whole or any part of said premises" without the written consent of the lessor. The lessee, without such consent, later assigned the premises, and the court held that such assignment was not a breach of the covenant, saying: "The usual rule of construction, and one which cannot be too sedulously guarded, is, that the intentions of parties to contracts must be gathered from the words used by them. The question never is, what purpose they intended to express, but what purpose they have expressed."

Now, an underletting is an entirely distinct thing from an assignment; and if, by construction, the one is to be held to embrace the other, it certainly must be by the application of a principle entirely anomalous. The rule thus introduced would seem to be this, if by the use of clear terms the doing of a certain thing is prohibited, and if in consequence thereof it seems very strange that something else was not likewise prohibited, that in such case we are to regard the latter act as within the prohibition. The ad-

mission of such a principle would seem to unsettle the entire system regulating the construction of contracts."

But in *Den ex dem. Bockover v. Post* (1855) 25 N. J. L. 285, it appeared that a lease contained a covenant by the tenant that he would not underlet the premises without the consent of the landlord. The tenant, without such consent, assigned the premises, and the assignee thereof in turn sublet them to the plaintiff. On a vacation of the premises by the assignee, the landlord re-entered the same and took possession. The assignee thereupon brought an action against the landlord to obtain the premises. It was held that while the assignment was a breach of the covenant against subletting, nevertheless, the breach gave the landlord no right of re-entry in the absence of a stipulation making a breach work a forfeiture or determination of the tenant's estate. In commenting on that decision and its apparent accord with the English case of *Greenaway v. Adams* (1806) 12 Ves. Jr. 395, 33 Eng. Reprint, 149, the court in *Field v. Mills* (N. J.) *supra*, said: "In *Den ex dem. Bockover v. Post* (1855) 25 N. J. L. 291, in the opinion delivered in this court, the case of *Greenaway v. Adams* was referred to with apparent approval, so as to justify, if not necessitate, the ruling made at the circuit in the present case. But in the reported case, this question, now presented, was only incidentally involved, and I do not understand that any matured opinion was intended to be expressed on the subject now decided. Indeed, from the studied caution displayed in the expressions used touching this doc-

trine, my inference is that it was left, *ex industria*, open for future consideration."

In *Lynde v. Hough* (1857) 27 Barb. (N. Y.) 415, an ejectment proceeding brought by the landlord against an assignee of the term, it was held that an assignment of the term by the lessee without the landlord's consent was not a breach of a covenant providing that the tenant would not let or underlet the whole or any part of the demised premises without the written consent of the landlord under the penalty of forfeiture and damages. The court said: "I cannot entertain any doubt that in an action of ejectment for the breach of a condition we must hold that the words 'let and underlet' mean a demise or underletting, and not an assignment, of the whole interest. . . . It seems plain to me that the literal meaning of the word 'let' does extend to an assignment of the term, and if so we have no right to speculate upon the question whether it would be reasonable or otherwise for a landlord to forbid an underlease, and not an assignment. It is enough that by a strict and literal interpretation of this covenant, it does not include such an assignment as was proved on the trial."

In *Re Doyle* [1899] 1 Ir. R. 113, it appeared that a lessee held the premises under a covenant not to let or demise the premises without the lessor's consent. The lessee assigned the premises. The assignee then sold the premises to a purchaser who refused to take them until the assignee obtained the lessor's consent to the assignment. It was held that the premises of the covenant restrained subletting only, and hence it was unnecessary for the assignee to obtain the lessor's consent to make title.

**View that assignment is breach of covenant.**

In some jurisdictions the rule appears to be that an assignment of a lease is a breach of a covenant against subletting. The cases upholding this view disclose, however, that in comparatively few was the exact point raised and decided, the holdings being

in the main argumentative or by way of dictum or controlled by the peculiar terms of the covenant. *Shattuck v. Lovejoy* (1857) 8 Gray (Mass.) 204; *Austin v. Harris* (1858) 10 Gray (Mass.) 296; *Harmon v. Dickerson* (1916) — Mo. App. —, 184 S. W. 139; *Upton v. Hosmer* (1900) 70 N. H. 493, 49 Atl. 96; *Gulf, C. & S. F. R. Co. v. Settegast* (1891) 79 Tex. 256, 15 S. W. 228; *Greenaway v. Adams* (1806) 12 Ves. Jr. 395, 33 Eng. Reprint, 149.

The leading case in support of this view is *Greenaway v. Adams* (Eng.) *supra*. In that case it appeared that the lessee, without the consent of the landlord, agreed to sell her leasehold interest in a public house to the plaintiff, but the offer was rejected on the ground that she had no power to assign because of a covenant in her lease that she would not "let, set, or demise" the premises or any part for all or any part of the term without the written consent of the lessor. The lessee thereupon assigned to another, whereupon the first purchaser brought an action to compel the lessee to keep her agreement. It was held that an assignment was a breach of the covenant against subletting, hence specific performance would not lie. The court said: "It would be very strange if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest. Clearly, both according to the letter and the spirit, this covenant did restrain assignment without license."

In *Shattuck v. Lovejoy* (1857) 8 Gray (Mass.) 204, wherein a landlord sought to recover possession of the premises from the agent of the assignee, the case hinged on the remedy which the landlord should pursue for a breach of the covenants in the lease. It was held therein that where the lessee assigned the premises without the landlord's knowledge or consent, and in direct violation of the covenant that he would not "lease, underlet, nor permit any other person or persons to occupy" the premises,—an assignment was not by itself a termination of the estate, but that the

landlord must re-enter in order to cause the estate to revert.

In *Austin v. Harris* (1858) 10 Gray (Mass.) 296, it appeared that a lessee held the premises under a lease providing that the lessee would not "lease nor sublet nor permit any other person or persons" to occupy the premises without the written consent of the landlord. The lessee, without the written consent of the landlord, assigned the premises to a purchaser, but the purchaser refused to take the same until the lessee had obtained the landlord's consent to the assignment. The lessee thereupon brought an action against the purchaser to recover the price agreed upon for the assignment. The court held that the assignment operated to terminate the lessee's estate, and hence it conveyed no title to the purchaser.

In *Harmon v. Dickerson* (1916) — Mo. App. —, 184 S. W. 189, it was held that the lessee could forfeit the estate of a sublessee for making an assignment of the lease in violation of the covenant that he would not "sublet or allow any other tenant to come in with or under him without the written consent" of the landlord.

In *Upton v. Hosmer* (1900) 70 N. H. 493, 49 Atl. 96, it appeared that the lease, in addition to the covenant that the lessee would not "underlet to any person unless with the consent" of the landlord, further provided that the lessee and his heirs would have the right at any time to remove a cottage which the lessee had built on the premises, but that the lessee should not "sell" the property to remain on the premises without the consent of the landlord. The court construed these provisions together and held that they restrained an assignment, saying: "Besides the lessee's covenant not to underlet without the lessor's consent, the lease provided that the lessee and his heirs should have the right at any time . . . to terminate their lease and remove his cottage; also that 'with the consent of the lessor' they might 'sell . . . the same, to be occupied on the premises.' No restrictions were placed upon the

sale of the cottage after removal, upon a termination of the lease; but the lessee, his heirs and assigns, were not permitted to make a sale of it, to remain upon the premises, without the consent of the lessor; his heirs and assigns. The purpose of the restrictive clause appears to have been not so much to control the sale of the cottage, as to prohibit the lessee, his heirs and assigns, from making an assignment of the lease without first obtaining the consent of the lessor, his heirs and assigns."

But see *Spear v. Fuller* (1885) 8 N. H. 174, 28 Am. Dec. 391, where the lease provided that the lessee should not "lease nor underlet" the premises without the landlord's consent, and reserved no right of re-entry in case of a breach. The court held that an unauthorized assignment by the lessee did not work a forfeiture, but merely gave the landlord an action for damages.

In *Gulf, C. & S. F. R. Co. v. Settegast* (1891) 79 Tex. 256, 15 S. W. 228, it was held that an assignment, though not strictly within the letter, was nevertheless within the spirit of a statute (Rev. Stat. § 3122) providing as follows: "When lands or tenements are rented by landlords to any person or persons, such person or persons . . . shall not rent or lease said lands or tenements during term of said lease to any other person without first obtaining the consent of his landlord." Hence it was held that the landlord could cancel a lease made by him to one railroad company which was later, without his knowledge or consent, assigned to another. The court said: "The language employed in this article leads us to the conclusion that the person who framed it did not have in mind the technical distinction between an assignment and an underlease, and that it was not the intention to prohibit the one and allow the other. Both are equally within the evil which was sought to be remedied; and while an assignment does not come strictly within the letter it is within the spirit of the statute." M. T. McC.

## PEARL MCCREERY JOHNSTON et al., Appts.,

v.

I. E. BEE et al.

*West Virginia Supreme Court of Appeals — September 23, 1919.*

(— W. Va. —, 100 S. E. 486.)

**Witness — knowledge of handwriting through possession.**

1. Grandchildren who have obtained their knowledge of their grandmother's handwriting only by inspection and repeated readings of letters from the grandmother to their mother, preserved by the family for a long period of time for sentimental reasons, are qualified to testify to their opinions as to the genuineness of the grandmother's signature.

[See note on this question beginning on page 261.]

— to handwriting of deceased person.

2. The handwriting of a deceased person is not necessarily nor always a personal transaction or communication between such person and another living and claiming rights under or against a document purporting to have been signed by the former; and if the latter knows the handwriting of the former, and has obtained his knowledge thereof otherwise than by observation of the deceased person's act of writing, or some other personal transaction, he is competent to express his opinion as to genuineness of the signature in question.

[See 11 R. C. L. 620.]

**Evidence — opinion — handwriting.**

3. The opinion of a witness as to the genuineness of a signature, based upon limited opportunities for knowledge of the handwriting of the person whose signature is in question, may have but little probative value, but it is admissible.

[See 11 R. C. L. 621-622.]

— necessity of experts.

4. As the opinions of nonexpert witnesses testifying merely from comparison of signatures, as to the genuineness of a particular signature, are entitled to no greater weight than the opinions of the jurors or the judge, only experts can so testify.

[See 11 R. C. L. 621.]

**Witness — handwriting expert. — what constitutes.**

5. To be competent for such purpose, however, a witness need not be a professional handwriting student, critic, or expert. It suffices that in some way he has acquired peculiar knowledge and skill respecting the determi-

nation of the genuineness of written instruments and signatures,—more of such skill and knowledge than men ordinarily have. Bank cashiers are handwriting experts within the meaning of the rule.

[See 11 R. C. L. 620.]

**Evidence — handwriting — standards for comparison.**

6. Ancient letters, shown by the testimony of members of a family to have been written by the person whose signature is in question to her daughter, and preserved, for sentimental reasons long after the daughter's death, and ancient deeds, purporting to have been signed by such person and found in a public office in which they were lodged for recordation, may be used as standards of comparison on the issue as to the genuineness of the signature.

[See 10 R. C. L. 995; 11 R. C. L. 622.]

**— investment — declaration of intent.**

7. A written and sealed, but unacknowledged, declaration by a married woman of her intention to invest a trust fund in her hands in a certain tract of land then owned by her and her husband jointly, reciting the source of the fund, the previous conveyance of the land, and intent thereafter so to invest the fund, is not sufficient to prove actual investment of the fund in the land.

**Husband and wife — covenant by wife to stand seised.**

8. Being unable to dispose of or encumber her real estate, without the joinder of her husband in a deed or other contract respecting it, in the manner prescribed by law, a married woman cannot alone covenant to stand seised of her land to the use of an-

other, nor declare a trust in it. Though she may bind her equitable separate estate by her sole contract so as to make it liable in equity, her separate statutory estate stands upon a different footing, and cannot be so bound.

[See 13 R. C. L. 1325.]

— effect on separate estate.

9. While a declaration of intent to create a trust in property, made by a feme sole or other person having unlimited power of disposition of his property, may be binding upon him as a covenant to stand seised, or as a bargain and sale of the property, if founded upon a valuable consideration, a married woman is incapable of binding her separate statutory real estate in such manner.

[See 13 R. C. L. 1271.]

Trust — declaration of intention to create.

10. A mere declaration of intention to invest a trust fund in certain property does not create a trust therein. Impression of a trust upon the property requires actual investment of the fund in it.

(Williams, J., dissents in part.)

**APPEAL** by plaintiffs from a decree of the Circuit Court for Mercer County, in Chancery, dismissing on final hearing a bill filed for the enforcement of an alleged express executed trust in certain real estate. *Reversed as to dismissal of bill.*

The facts are stated in the opinion of the court.

Messrs. P. H. M. Patterson, R. D. Bailey, and French & Easley, for appellants:

Mrs. Bee having received the money which represented her dower in the land belonging to her first husband's estate, and having agreed to invest it in land at Princeton and receive the rents and profits of said land during her lifetime, in lieu of interest on the money, she is presumed to have acted in good faith and performed that duty, and not to have committed a breach of trust.

McCreery v. First Nat. Bank, 55 W. Va. 663, 47 S. E. 890; Crumrine v. Crumrine, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341.

Mrs. Bee, having received the one third of the proceeds from land representing her dower interest, with the understanding and agreement that she invest same in Princeton land and hold it as her dower land, is regarded in equity as having done so, and the

**Pleading — prayer at bar of court.**

11. Under the prayer for general relief in a bill seeking enforcement of an alleged trust in land, praying specially therefor, disclosing prima facie liability for a sum of money on the part of the alleged trustee, but failing as to the trust in the land, for lack of proof of investment in the fund in the land, there may be a decree for the trust fund, upon a prayer therefor at the bar of the court. But if the bill has been dismissed without the interposition of such a prayer in the court below or the award of such relief, the decree will be reversed in so far only as it dismissed the bill, and the cause remanded, with leave to the plaintiff to ask a decree for the amount of the trust fund.

[See 10 R. C. L. 422.]

**Costs — award on appeal.**

12. In such case, costs in the appellate court will be awarded to the appellants, as the parties substantially prevailing.

[See 7 R. C. L. 800.]

principle is the same as though she had stated she had actually invested the money in the Princeton land and held same as her dower in lieu of the Loudoun county land.

Pom. Eq. Jur. 3d ed. §§ 364, 365; Atwood v. Shenandoah Valley R. Co. 85 Va. 966, 9 S. E. 748; 10 R. C. L. p. 383, § 133; Com. v. Martin, 5 Munf. 117.

The money received by Mrs. Bee never lost its identity as real estate, and there was merely a substitution of the Princeton land for the Loudoun county land as her dower, or, in short, the Loudoun county land was exchanged for the Princeton land.

Crumrine v. Crumrine, 50 W. Va. 225, 88 Am. St. Rep. 859, 40 S. E. 341; Tabb v. Cabell, 17 Gratt. 160; Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. 997; Marshall v. Hall, 42 W. Va. 641, 26 S. E. 300; Pom. Eq. Jur. 3d ed. § 364; Com. v. Martin, 5 Munf. 117; Aston v. Kendrick, 90 Va. 825, 20 S. E. 827.



The writing executed by Mrs. Bee, leaving out of consideration the source from which the money was received, created an express trust which could not afterwards be revoked.

*Crumrine v. Crumrine*, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341; *Tabb v. Cabell*, 17 Gratt. 160; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *McCandless v. Warner*, 26 W. Va. 754; *Campbell v. O'Neill*, 69 W. Va. 459, 72 S. E. 732; *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300.

Messrs. Hugh G. Woods and John M. McGrath, for appellees:

The witnesses, being plaintiffs and heirs at law of Mary L. Bee, are incompetent to testify to any "personal transaction or communication" with Mary L. Bee, who is deceased.

*Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 498; *Carter v. Gill*, 47 W. Va. 504, 35 S. E. 828.

Testimony as to deceased's handwriting is testimony as to a "personal transaction or communication" within the meaning of chapter 50, § 23, of the Code.

*Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *Anderson v. Cranmer*, 11 W. Va. 562; *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363.

The witnesses, D. Howe Johnston and E. M. Payne, being husbands of two of the plaintiffs, are incompetent on the principle that where one consort is incompetent the other is also incompetent.

*Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *Bailey v. Bee*, 73 W. Va. 291, 80 S. E. 454.

The witnesses, E. M. Senter, Alethia Prince McCreery Keatley, and Mrs. M. A. Lacy, had never seen Mary L. Bee write, and had no opportunity of knowing her handwriting, and were, therefore, incompetent to testify as to her signature.

*Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870.

Evidence of certain witnesses, comparing the signature to the paper relied on as a declaration of trust, with the alleged signature of Mary L. Bee to certain deeds found in the clerk's office, is incompetent.

1 Greenl. Ev. §§ 576-578; 3 Wigmore, Ev. § 1997.

The paper in question, on its face, or by its terms, does not create an express trust, and there is no evidence in aid of it.

1 Perry, Trusts, § 82; 2 Pom. Eq. Jur. § 1009; 28 Am. & Eng. Enc. Law,

865; *Smith's Estate*, 144 Pa. 428, 27 Am. St. Rep. 641, 22 Atl. 916.

The paper could not create a resulting trust, because executed after the conveyance of the land on which the trust is alleged to have been impressed.

1 Perry, Trusts, § 188; *Bright v. Knight*, 35 W. Va. 40, 13 S. E. 63; *Gilbert Bros. v. Lawrence*, 56 W. Va. 281, 49 S. E. 155.

The declarations of Mary L. Bee, now deceased, that she did not, in fact, invest the money mentioned in the paper in the land therein referred to, but that she spent it on her son, A. J. Lacy, is competent evidence as one of the exceptions to the hearsay rule. It is admissible as being against interest and on the principle of necessity.

1 Greenl. Ev. §§ 109, 147; 1 R. C. L. p. 500, §§ 41-43; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 26 Am. St. Rep. 482, 28 N. E. 651; *Halvorsen v. Moon & K. Lumber Co.*, 87 Minn. 18, 94 Am. St. Rep. 669, 91 N. W. 28; *Overton v. Davison*, 1 Gratt. 211, 42 Am. Dec. 544; *Stewart v. Doak Bros.*, 58 W. Va. 173, 52 S. E. 95.

Title to the land in controversy had vested in Mary L. Bee two months before the date of the paper, and she could only divest herself of that title by a deed or in a court of record.

*Crawford v. Workman*, 64 W. Va. 19, 61 S. E. 322.

If Mary L. Bee had, in the most formal way, attempted to impress a trust on the land in controversy then owned by her and her husband, her act would have been absolutely void, because, in 1875, all contracts or bonds of a married woman were absolutely void at law and also in equity, except as to her separate estate.

*Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997; *Shumate v. Shumate*, 78 W. Va. 576, 90 S. E. 824.

The one-half interest of Mary L. Bee in the land in controversy in this case was not "separate estate."

*Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997; 25 Am. & Eng. Enc. Law, 397.

Poffenbarger, J., delivered the opinion of the court:

The decree complained of dismisses on final hearing a bill filed for enforcement of an alleged express executed trust in real estate, founded upon a valuable consideration.

The relationship of the parties is unquestioned. If there is such a trust as is set up and claimed in the bill, the plaintiffs are entitled to the benefit thereof. They are the heirs at law of M. H. Lacey, who departed this life intestate prior to the year 1865, and at the date of his death owned a tract of land in Loudoun county, Virginia, containing 160 acres. On his death the title to this land vested by descent in his two children, Mollie K. McCreery, who died in 1887, leaving several children, and her brother, Andrew J. Lacey, who died intestate in 1906, subject to the dower right of Mary L. Lacey, the widow, who afterwards married Dr. Isaiah Bee, of Mercer county, and became a resident of Princeton, West Virginia. She died in 1907, leaving as her survivors her second husband and a son by him. The former died in November, 1912. The plaintiffs are the children of Mrs. McCreery and Andrew J. Lacey, claiming under the alleged declaration of trust made by their grandmother, Mrs. Mary L. Bee, in 1875, and the defendants are the representatives of the estate of Dr. Isaiah Bee, and the devisees under his wife's will. Before his death, Dr. Bee conveyed to his son, I. E. Bee, and his daughter-in-law valuable real estate and gave them the balance of his estate by will. Mrs. Bee gave all of her estate to her husband, in trust for a little girl reared by the family, and known in this record as Nellie Bee Campbell.

The bill proceeds upon the theory of a substitution of certain real estate at or near Princeton, in Mercer county, for one third of the Loudoun county land, to the rents and profits of which the widow was entitled for the period of her natural life. By a deed dated January 11, 1875, Andrew J. Lacey, Mrs. McCreery, and her husband, and Mrs. Bee and her husband, conveyed the Loudoun county tract of land to John Riticor for a cash consideration of \$1,600. Of this sum two thirds belonged to

the heirs absolutely, and they owned the other third, subject to the right of the widow to have the interest on it for and during her natural life. The bill charges that this one third, less its pro rata share of the expenses of sale, was invested by Mrs. Bee in a tract of 180 acres of land, situated at or near Princeton, in Mercer county, and conveyed to her and her husband by a deed dated March 8, 1875, and executed by William A. Wiley and Rhoda V. Wiley, his wife. The deed conveying the Loudoun county tract of land was admitted to record March 8, 1875, and the one conveying the Mercer county land March 10, 1875. The former was acknowledged on the day of its date, and the latter on the day after that of its date. After an unavailing effort to set aside the will of Mary L. Bee, and after the death of the late Senator John W. McCreery, the plaintiffs found among his papers, between June 1 and June 15, 1917, a paper relied upon as a written declaration of the trust claimed by the bill. Senator McCreery had been a lawyer, a business man, and, no doubt, the legal adviser of Mrs. Bee in the sale of the Loudoun county land. The paper in question reads as follows:

"\$523. Recd of John W. McCreery the sum of Five hundred & twenty three dollars, one-third of the amount realized from the sale of Laceyville, (a tract of 160 acres of land lying in the County of Loudoun, in the State of Virginia, which belonging to the estate of my late husband Dr. M. H. Lacey Deed.) after deducting costs and expenses for selling said land, total sum \$1569, which said sum of five hundred and twenty three 00/100 Dollars, one third of the \$1569, I am going to invest in a tract of land, lately bought of Wm. Wiley & wife, lying near Princeton & containing 180 acres & receive the rents and profits of said land, during my lifetime in lieu of interest on said sum (said land was conveyed by said Wiley & Wife to Dr. I. Bee & myself

March 3rd /75, & recorded in Deed Book No. 7.

"Witness my hand and seal,

"[Seal] Mary L. Bee.

"May 5th 1875."

The principal grounds of defense were: (1) Nonexecution by Mary L. Bee of the paper relied upon as a declaration of trust; (2) lack of actual investment of the said sum of \$523 in the Mercer county land; and (3) legal inability or incapacity of the alleged declarant to carry the trust into execution, her right and title in the land having been irrevocably fixed, it is claimed, by the deed from Wiley and wife before the date of the declaration of trust. On the trial the court below found for the plaintiffs on the first issue thus tendered, and for the defendants upon the second. This result rendered it unnecessary, in the opinion of the court, to enter upon any inquiry as to the soundness of the third position taken by the defendant. A contention of the plaintiffs is that the instrument relied upon creates an executed trust, since a court of equity regards what a party has agreed to do as having been done.

The objection interposed to the evidence of some of the plaintiffs as to the handwriting of the signature to the declaration of trust on the ground of incompetence by reason of interest is not well founded, if we are to be governed by the weight of authority. Of course, none of these parties would be competent as witnesses to prove the actual signing of the paper by Mrs. Bee, nor to qualify themselves by observation of her act of signing any paper; for that would have been a personal transaction within the meaning of the law. *State ex rel. Peoples v. Maxwell*, 64 N. C. 313; *Rush v. Steed*, 91 N. C. 226; *Wilber v. Gillespie*, 127 App. Div. 604, 112 N. Y. Supp. 20. A decided weight of authority affirms the right of an interested person or party to testify to the handwriting of a signature purporting to be that

of a deceased person, if he is otherwise qualified, even though he would be an incompetent witness to testify to the act of signing. In Iowa, Massachusetts, New York, North Carolina, Texas, and Wisconsin the courts hold that such testimony involves no more than a matter of opinion, and does not relate to a personal transaction or communication between the witness and the decedent. 40 Cyc. 2327; *Ware v. Burch*, 148 Ala. 529, 42 So. 562, 12 Ann. Cas. 669, note 671; 25 Am. & Eng. Enc. Law, 261. On the other hand, the contrary has been held in Alabama, Georgia, Kentucky, Missouri, and Pennsylvania, as will be seen by reference to the books already cited. The intermediate court of appeals of Indiana has apparently held both ways as to such testimony. *Merritt v. Straw*, 6 Ind. App. 360, 33 N. E. 657; *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629. The decisions adopting the minority rule take the view that, inasmuch as proof of the signature authenticates or validates the document constituting the basis of the action, it virtually covers the whole case, and impliedly proves the entire transaction represented by the document. If, however, the ultimate effect of evidence admitted against the estate of a deceased person were the sole test of admissibility, much evidence not relating to personal transactions or communications would be inadmissible. Much authority and the terms of the statute deny that it is the true test. As to facts not amounting to or involving such transactions or communications, interested witnesses are competent. This is an unqualified and unlimited implication arising from the very words of the statute. There is no proviso saying they are competent only in the event that the fact has only limited probative force respecting the right involved or none at all. The statutory test is whether the fact in question is a personal transaction or communication or involves one. *Davidson v. Browning*, 73 W. Va. 276, L.R.A.1915C, 976,

Witness-to  
handwriting of  
deceased person.

80 S. E. 363. The chief purpose of the statute is to prevent the living party to a transaction from testifying because the other, being dead, cannot be produced to contradict him, in case of false swearing. Denial of right to the former to testify puts them on an equality. Faulkner v. Thomas, 48 W. Va. 148, 35 S. E. 915. If so, its reason does not apply here. One party cannot very well contradict another's mere opinion. Whether the witnesses in question were competent depends upon the means by which they obtained the knowledge of the handwriting of the decedent, constituting the basis of their opinions. They are not disqualified by reason of the nature of the fact to which their testimony relates.

The witnesses now under consideration, parties plaintiff, derived their knowledge of the handwriting of Mrs. Bee from letters written by her to their mother, in their early childhood, preserved by their mother until her death, and by them afterwards, for sentimental reasons, and frequently read and perused. These letters were not communications between them and Mrs. Bee, and they make no claim to any other source of knowledge of her handwriting.

Their inspection of these letters also qualified them to express opinions as to the genuineness of the signature in question.

There could scarcely be a better index to the genuineness of the letters than their preservation as heirlooms, tender remembrances, or sacred relics for more than forty years. Besides, it is clearly revealed by their contents,—messages of solicitude, advice, and love from mother to daughter. What is better calculated to make an impression on the minds of grandchildren than the written messages of their living grandmother to their dead mother? An administrator, having examined the papers of his intestate, may testify to his signature. Sharp v. Sharp, 2

Leigh. 249; Tucker v. Kellogg, 8 Utah, 11, 28 Pac. 870. A clerk through whose hands the correspondence of a deceased person with his employer has passed may testify as to the signature of the decedent. Rex v. Slaney, 5 Car. & P. 213; Reid v. Hodgson, 1 Cranch, C. C. 491, Fed. Cas. No. 11,667; Reyburn v. Belotti, 10 Mo. 597; Titford v. Knott, 2 Johns. Cas. 211. A member of a family is qualified by reason of his knowledge of family correspondence in which he had no part. Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475.

Disqualification for lack of knowledge is charged against S. F. Cleghon and E. M. Senter, the former having had business transactions with Mrs. Bee in 1886, 1887, and 1888, and the latter having received two letters from her in 1890 or 1891. On the question of admissibility, the extent of the knowledge of the witness is not controlling. However limited it may be, he is entitled to express his opinion. **Evidence—  
opinion—hand-  
writing.**

Meagerness of knowledge or limitation of opportunity goes only to the weight of the evidence. Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 870; Pepper v. Barnett, 22 Gratt. 405; Cody v. Conly, 27 Gratt. 313; Rogers v. Ritter, 12 Wall. 322, 20 L. ed. 419; 25 Am. & Eng. Enc. Law, 259, 262.

The clerk of the county court of Mercer county, after having produced and filed five deeds dated in the years 1882, 1883, 1892, and 1893, and purporting to have been executed by Mary L. Bee, was permitted to testify, from his comparison of the signature in question with those found on the deeds, that said signature was, in his opinion, genuine. He did not claim to know the signature of Mrs. Bee, nor did it appear that he had had any extensive experience in any business requiring particular attention to signatures. Ten witnesses, holding positions in banks, most, if not all, of whom were cashiers, though admitting themselves not to be experts,

—knowledge of  
handwriting  
through possession.

were permitted to give their opinions, based upon comparison, that the signature was genuine. Their business involved and required close attention to signatures, but they did not deem themselves to be experts. Our statute permitting comparison of writings (§ 21a, chap. 130, Code [§ 4877]) does not in terms require witnesses testifying from comparison to be experts. It provides that genuine writings may be used with or without the testimony of witnesses, for the purpose of comparison. In some jurisdictions it is held,

—necessity of experts.

under similar statutes, that only experts can testify

from comparison. Nonexperts are excluded because the members of the jury or the judge is as capable of making the test in that way as they are. *Griffin v. State*, 90 Ala. 596, 8 So. 670; *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Wimbish v. State*, 89 Ga. 294, 15 S. E. 325; *Woodman v. Dana*, 52 Me. 9; *First Nat. Bank v. Lierman*, 5 Neb. 247; *McKay v. Lasher*, 42 Hun. 270; 25 Am. & Eng. Enc. Law, 276; *Wigmore*, Ev. § 1997; *Greenl. Ev.* §§ 576, 578; *Lawson*, Expert & Op. Ev. p. 445. But such experts need not follow the profession of determining the genuineness of handwritings, nor possess anything more

Witness—hand-writing expert—what constitutes.

than peculiar or exceptional skill and knowledge of the subject of hand-

writing. It suffices that they are better qualified to express opinions on that subject than men usually are. *Lawson*, Expert & Op. Ev. p. 453; *State v. Webb*, 18 Utah, 441; 56 Pac. 159; *Com. v. Nefus*, 135 Mass. 538; *Fairbank v. Hughson*, 58 Cal. 314; *State v. David*, 131 Mo. 380, 33 S. W. 28; *Sweetser v. Lowell*, 33 Me. 446; *Tower v. Whip*, 53 W. Va. 158, 63 L.R.A. 937, 44 S. E. 179; *Clay v. Alderson*, 10 W. Va. 53. The bank officials, testifying as witnesses, come within this definition. It is a part of their daily business to pay out money on their belief in the genuineness of signatures, where-

fore they devote more attention to handwriting than laborers, farmers, merchants, or men engaged in the ordinary professions, and obtain more knowledge and skill respecting signatures. They were competent witnesses, but the clerk of the county court, not having shown any evidence of more than ordinary knowledge of signatures, was not competent.

The objection that the deeds used as standards of comparison are not sufficiently authenticated is not well taken. They are solemn instruments, carefully prepared and executed, and

Evidence—handwriting—standards for comparison.

taken from the files of a public office in which they were lodged as muniments of title, some of them more than thirty years before this controversy arose, and when Mrs. Bee still possessed the health and strength incident to middle age. Similar standards were admitted for comparison in *Luco v. United States*, 23 How. 515, 541, 16 L. ed. 545, 550. A deed more than thirty years old, and recorded, is presumed to be genuine. *Geer v. Missouri Lumber & Min. Co.* 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; *Webb v. Ritter*, 60 W. Va. 193, 233, 54 S. E. 484.

The evidence thus produced by the plaintiffs, tending to prove the genuineness of the signature, is as full, complete, and satisfactory as they could be expected to make it under the circumstances, and is equally as reliable as that adduced by the defendants. The trial court's finding on this issue must, therefore, be permitted to stand.

The record discloses no direct or positive evidence of actual investment of the money received by Mrs. Bee from her first husband's estate in the Mercer county land. And the alleged declaration of trust says, by implication, that she did not pay that money for the land at or before the conveyance of one half thereof to her. The two land transactions were completed in March, 1875, and the paper declaring her intention to

invest trust money in it and make it a trust subject was not executed until May 5, 1875, almost two months later. That declaration was prospective in its terms. Her language was, "I am going to invest in a tract of land lately bought," etc. This implies that she had not then invested it, and says the land had been bought. The paper adds, agreeably to the fact, that it had been conveyed to herself and her husband. The title had already vested in her without any qualification or limitation of any kind, and, according to competent evidence, the cash payment of \$730 had been made by the husband alone, in live stock, and the deferred payments, amounting to \$470, had not been paid as late as 1878 or 1879. It may be that the two land transactions were intended to be one, and to effect a substitution of the Mercer county land for the other; but this is indicated only by some of the circumstances, the ownership of the Loudoun county land, Mrs. Bee's right and duty, and the relation of the two transactions in point of time. On the other hand, the money received from the estate does not seem actually to have been invested. It was not equal in amount to half of the purchase money of the land, and two months after the land had been conveyed and the cash payment made Mrs. Bee declared it to be her intention to invest the money in that land. If resort could be had to surmise and conjecture, it might be said Dr. Bee made her a present of a half interest in the tract, or that he made the cash payment in live stock, expecting her to reimburse him to the extent of one half of the payment. But such guesses are altogether uncertain, and for that reason cannot be indulged in the disposition of a controversy of this kind.

Besides, there is an insuperable legal obstruction to the view that she could, by this declaration, impress a trust upon land the title to which had previously vested in her.

She could neither convey nor encumber such land otherwise than by an instrument executed in the manner prescribed by law. She could only do so by means of a deed or contract signed, sealed, and acknowledged by herself and her husband. *Graham v. Long*, 65 Pa. 383. This was not a separate estate which she might have bound in equity by her contract. It was her absolute property, which she could not charge, either at law or in equity, except by the joint action of herself and her husband and in the prescribed manner. *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

The argument submitted under the invocation of the maxim that equity regards what ought to be done, or what parties have agreed to do, as having been done, accords a scope to that doctrine much wider than any text-writer or reported decision indicates or warrants. If Mrs. Bee had actually bought the land in question with the trust fund she had in her hands, declaring her intention to take and hold it in trust, but had in fact taken an absolute conveyance to herself, equity would treat her as if she had done what she had declared it to be her intention to do. It would make her a trustee, and compel her to perform the trust in disregard of the terms of the deed. But her failure to invest the money in the land left her only a trustee of the

Husband and wife—effect on separate estate.

Trust—declaration of intention to create.

money. She could become a trustee of the land only by actual investment of the money in it. Mr. Pomeroy states the doctrine clearly in his work on *Equity Jurisprudence*, 4th ed. vol. 2, § 587, as follows: "Whenever a trustee or other person standing in fiduciary relations, acting apparently within the scope of his powers, has trust funds in his hands which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the purposes of the trust, and he does purchase property with such funds, but takes

the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the original cestui que trust or other beneficiary. Equity imputes an intention to fulfil the obligation resting upon the trustee; and, independently of any element of fraud, it regards the trustee as intending to perform the obligation,—as intending to act in accordance with his fiduciary duty, and not in violation thereof. It therefore treats the purchase as made for the benefit of the person beneficially interested. This doctrine is one of wide operation, of great efficiency, and is applied to every variety of persons occupying fiduciary relations."

In § 422, vol. 1, of the same work, emphasis is laid upon actual investment as an essential element of creation of the trust. It says: "Whenever a trustee or other person in a fiduciary position, acting apparently within the scope of his powers,—that is, having authority, by virtue of his trust or other fiduciary relation, to do what he does do,—purchases land or personal property with trust funds, or funds in his hands impressed with the fiduciary character, and takes the title to such property in his own name, without any declaration of a trust, a trust with respect to such property at once results in favor of the original cestui que trust or other beneficiary; the purchaser becomes, with respect to such property, a trustee. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud or fraudulent design, because it assumes that the purchaser intended to act, and was acting, in pursuance of his fiduciary duty, and not in violation thereof. This doctrine is one of wide operation, and is used by courts of equity with great efficiency in maintaining and protecting the beneficial rights of property. It has been applied to trustees proper, to executors and administrators, directors and managers of corpora-

tions, guardians of infant wards, guardians or committees of lunatics, agents using moneys of their principals, partners using partnership funds, husbands purchasing property with funds belonging to the separate estate of their wives, and to all persons who stand in fiduciary relations towards others. In order that this rule may apply, however, it must be made to appear with reasonable certainty that trust or other fiduciary funds were actually used in making the purchase. A court of equity, in order to raise a resulting trust, will not assume, from the mere fact that the purchaser had or might have had trust moneys in his hands, that he used them in paying for the property purchased, in the absence of evidence clearly showing such use by him."

The effort to make a distinction here on the ground of the character of the declaration fails, because it was one of unexecuted intention only. If the instrument had actually created a trust, the rights of the parties would have been governed strictly by the terms of the declaration. It would have defined the trust. But it admits no more than a trust in the money received. It shows on its face the title to the land had vested in Mrs. Bee while she still held the money. No trust in the land had been created, and it was legally impossible for her to impress a trust upon it, without prescribed co-operation of her husband. The argument erroneously assumes the existence of an express trust in the land.

Husband and wife—covenant by wife to stand seised.

Our concurrence in the view of the trial court that actual investment of the money in the land is essential to the establishment of the trust claimed, and that there is a total lack of proof of such investment, renders it unnecessary to enter upon an inquiry as to the admissibility of evidence of declarations of Mrs. Bee, admitted as matter of explanation of her possession, and as tending to prove she had spent

all of the money she received from her husband's estate in the education of her son and payment of his expenses. The defendants prevail without the aid of that testimony. It is manifestly not admissible merely to prove payment of the money to the heirs.

Under the prayer of the bill for general relief, there might have been a decree for the money Mrs. Bee received as shown by her receipt and declaration of trust, but without interest for any time prior to her death. But the plaintiffs did not ask for such a decree and their right to the fund was in no way litigated. If demanded, it might be paid, or defenses of some kind might be set up against such demand. For this reason there can be no decree here for the money, though prima facie right to it is disclosed by the record. To decree it here might work surprise and injury. Under such circumstances, the practice is to remand the cause for the award of such relief, upon a proper application and successful resistance of any defense that may be set up. *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511; 3 Enc. Pl. & Pr. 349.

**Pleading—**  
prayer at bar of the court.

Failure of the trial court to award such relief or afford the plaintiffs an opportunity to claim it constitutes

an error for which the decree, in so far only as it dismisses the bill, must be reversed. Costs will be awarded to the appellants as the parties substantially prevailing.

**Williams, J., dissenting in part:**

I concur in all of the foregoing opinion except so much of it as remands the cause for entry of a decree by the lower court. The case is one which, in my opinion, calls for entry by this court of such decree as the lower court should have entered. Having reached the conclusion that plaintiffs had failed to establish a trust in the land in the hands of Mrs. Bee for their use, and seeing that they had proved a clear case entitling them to a decree against her separate estate for the money, the court should have given them such a decree, with interest thereon from the time of her death, and made it a lien upon her lands in the hands of her devisees. Her interest in the Princeton land, having been conveyed to her since the creation by statute of separate estates of married women, was her separate estate, and is liable, in equity, for her just obligations. Such decree is consistent with the special relief prayed for, and is such relief as ought to be accorded under the prayer for general relief, and I would enter such decree here.

## ANNOTATION.

**Knowledge derived from family correspondence as qualifying one to testify as to genuineness of handwriting.**

Research has disclosed but few cases passing on the question indicated by the above title. The reported case (*JOHNSTON v. BEE*, ante, 252) holds, seemingly with sound reason, that family correspondence, preserved by the family for a long period of time for sentimental reasons, may form the basis of knowledge of handwriting by a member of the family who has frequently perused it.

The doctrine that knowledge derived from family correspondence in

which he had no part may be sufficient to qualify a member of the family to testify as to the genuineness of handwriting is supported also by the decisions in *Tuttle v. Rainey* (1887) 98 N. C. 513, 4 S. E. 475, and *Sweigart v. Richards* (1848) 8 Pa. 436.

It was held in *Tuttle v. Rainey* (N. C.) supra, that the handwriting of a deceased grantor might be proved by testimony of his nephew, who, though he had never seen his uncle write, derived knowledge of his handwriting



from numerous letters purporting to come from his uncle to his father about family matters and family business with which no one else was familiar, from newspapers to his father directed in the same handwriting, and from an autograph photo of his uncle which hung for years on the wall of the family home.

And on a question of boundaries, to prove that field notes were in the handwriting of the deputy surveyor, it was held that his grandson, who had never seen him write, might testify that the handwriting was genuine, where his knowledge was derived by comparison with the handwriting of the grandfather in entries in the family Bible, admitted to be his by all the family, and from many letters in his mother's possession purporting to have been written by her father, the decedent. *Sweigart v. Richards* (Pa.) *supra*. It was said: "It is true that this court have decided that the witness who testifies from a comparison of handwriting must have the highest evidence of the authenticity of the standard paper, which would usually be that of some person who had seen the person write it, or evidence of equal authority. Now it appears to me that the family record, admitted and received by all the descendants as his genuine handwriting, is of as high authority and verity as a standard or test as the evidence of a person would be who testified to the standard paper from having seen it written."

On an issue whether a family pedigree was, as it purported to be, in the

handwriting of the claimant's ancestor, it was held, in *Fitzwalter v. Peerage* (1843) 10 Clark & F. 193, 8 Eng. Reprint, 716, that one who had been the family solicitor for many years, and testified that he had acquired a knowledge of the handwriting of the ancestor from his acquaintance with a great number of title deeds, account books, and other instruments purporting to have been written by him, was competent to testify as to the genuineness of the handwriting in question.

But where a witness had not seen a lost letter for more than fifteen years, and her only familiarity with the handwriting of the person whose signature the letter purported to bear was derived from her having seen him write his name in an autograph album about a year before she had seen the letter and about nineteen years before the trial, when the witness was only thirteen years old, it was held that the court rightly declined to base its judgment as to the genuineness of the signature on her testimony. *Murphy v. Murphy* (1910) 146 Iowa, 255, 125 N. W. 191.

And in *Carr v. Carr* (1904) 138 Mich. 396, 101 N. W. 550, it was held that the wife of a mortgagee was not competent to testify to the handwriting of the deceased mortgagor, her husband's brother, whom she had never seen, although both she and her husband testified that the mortgagor had frequently acknowledged the debt in letters which he had sent to them and which had been destroyed.

R. E. H.

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B. F. BUSH, Receiver of St. Louis, Iron Mountain, & Southern Railway Company, et al., Appts.,

v.

JOEL A. TAYLOR.

*Arkansas Supreme Court — October 22, 1917.*

(130 Ark. 522, 197 S. W. 1172.)

**Damages — for destruction of property — cost of reproduction.**

1. The measure of damages for destruction of property, the value of which depends upon its connection with the soil, is the difference in the value of the land before and after the destruction, and for the destruction

or injury of property that can be replaced in substantially the condition in which it existed before injury, the measure is the cost of so replacing it.  
[See note on this question beginning on page 277.]

**Evidence — origin of fire — cause of other fire.**

2. Upon the question whether or not a fire was set out by the locomotive of a railroad company, which, if it was so set out, would, under the statute, render the railroad company liable for

the value of the property destroyed without regard to the question of its negligence, evidence is admissible that another fire was set out on the same lot a day or two before the one in question, by railroad engines.  
[See 11 R. C. L. 996.]

**APPEAL** by defendants from a judgment of the Circuit Court for Clay County (Driver, J.) in favor of plaintiff in an action brought to recover damages for destruction of plaintiff's property by fire alleged to have been set out by defendants' negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Daniel Upthegrove, J. R. Turney, Hawthorne & Hawthorne, Troy Pace, and Gordon Frierson, for appellants:

The rule with reference to reception in evidence of testimony as to other fires at different times is that, where the engine is identified, such evidence is inadmissible unless it be shown that such former fires were set out by the particular engine in question, and within a reasonably close time to the occurrence of the fire sued upon.

*Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co.* 52 C. C. A. 95, 114 Fed. 133, 11 Am. Neg. Rep. 523; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661; *East Tennessee, V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828; *Illinois C. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833; *Chicago, I. & L. R. Co. v. Gilmore*, 22 Ind. App. 466, 53 N. E. 1078; *Albert v. Northern C. R. Co.* 98 Pa. 816; *Shelly v. Philadelphia & R. R. Co.* 211 Pa. 160, 60 Atl. 581; *San Antonio & A. P. R. Co. v. Home Ins. Co.* — Tex. Civ. App. —, 70 S. W. 999; *Boyce v. Cheshire R. Co.* 42 N. H. 97; *Chandler v. Rutland R. Co.* 140 App. Div. 68, 124 N. Y. Supp. 1046; *O'Reilly v. Erie R. Co.* 72 App. Div. 228, 76 N. Y. Supp. 171; *Wheeler v. New York C. & H. R. Co.* 67 Hun, 639, 22 N. Y. Supp. 561; *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521; *Gibbons v. Wisconsin Valley R. Co.* 58 Wis. 335, 17 N. W. 132; *Sprague v. Atchison, T. & S. F. R. Co.* 70 Kan. 359, 78 Pac. 828; *Atchison, T. & S. F. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 236; *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595.

It was error to instruct the jury that

the measure of the damage was the difference in the value of the land immediately before and immediately after the fire.

*St. Louis & S. F. R. Co. v. Jones*, supra; 8 R. C. L. § 46, p. 484; 33 Cyc. 1389; *Fitz Simons & C. Co. v. Braum*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; *Hide v. Thornborough*, 2 Car. & K. 250; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802, 3 Am. Neg. Rep. 699; *Anderson v. Miller*, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; *Cincinnati, N. O. & T. P. R. Co. v. Falconer*, 30 Ky. L. Rep. 152, 97 S. W. 727; *Central R. & Bkg. Co. v. Murray*, 93 Ga. 256, 20 S. E. 129; *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147; *White v. Chicago, M. & St. P. R. Co.* 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146; *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051; *Hartshorn v. Chaddock*, 135 N. Y. 116, 17 L.R.A. 426, 31 N. E. 997.

Messrs. L. Hunter and Holifield & Harrison for appellee.

Smith, J., delivered the opinion of the court:

The Iron Mountain Railway Company ran certain of its freight trains over the tracks of the Cotton Belt Railway Company through the town of Rector, one of which, according to the contention of appellee, set fire to his mill and destroyed it. On appellee's part there was proof of the absence of any cause for the fire except from

sparks thrown out by a passing engine. It was shown that a heavy train of seventy or eighty cars stopped at a tank, at a distance of twenty or thirty car lengths from the mills, to take water, and that fifteen or twenty minutes thereafter the mill was discovered afire, and that at the nearest point the track was only 80 feet from the mill, and that a strong wind was blowing at the time in the direction to carry the sparks from the engine to the mill.

Over appellant's objection, evidence was admitted showing that other fires had been set out by railroad engines in the vicinity of the fire involved in this suit. But there was no evidence that the particular engine, or any engine of the Iron Mountain Railway Company, had previously set out a fire. Nor was there any evidence that this engine was equipped with a spark arrester differing in any manner from those used by other engines on either the Iron Mountain or the Cotton Belt Railway.

The complaint itemized the property destroyed by fire and alleged its value, and witnesses testified as to the value of the various articles so destroyed. Among other property destroyed were seven or eight thousand laths, some gum logs, 2,000 feet of gum box boards, 2,000 feet of cypress, and 1,500 feet of poplar lumber, together with various kinds of saws, and the engine, boiler, and other fixtures, together with the building under which these things were housed. Other witnesses were permitted to testify to the difference in the value of the land before the fire and afterwards.

Over appellant's objection, an instruction was given which told the jury that the measure of damages was the difference in value of the land immediately before and immediately after the fire, whereas appellant asked the court to charge the jury on that subject as follows: "The plaintiff is limited in his recovery in this action to the reasonable market value of the property

entirely destroyed, and to the difference between the reasonable market value of the property destroyed, immediately before the fire, and the sum it would cost to restore the damaged property to its original condition, and the value of the use of property until it could be restored with ordinary care."

We presume that the last part of this instruction refers to property partially destroyed.

In the case of *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595, it was said: "And it was inadmissible to show that other engines had set fire to materials on or near the right of way, as a circumstance to show that the engine which caused the fire on this occasion, or its appliances, were defective or in bad condition. For such purpose the proof would have to be confined to fires caused by the engine that is said to have caused the fire that burned the appellant's meadow."

The language of that opinion must be read, however, in connection with the issue there being considered. It was there sought to be shown that the railway company had negligently set out a fire, and in that connection it was said that it could not be shown that other engines had set out a fire as a circumstance to show that the engine which caused the fire in question was equipped with defective appliances, but that for such purposes the proof would have to be confined to fires caused by the engine which set out the fire in question. In this opinion, however, it was said: "The evidence that other fires had occurred on the line of the railroad than the one which destroyed the plaintiff's meadow was improperly admitted, as it was not shown that these fires were caused by the engines of the railroad, or that they occurred from the operation of its trains. If this had been shown, it might have been admissible as a circumstance tending to show that the condition of the right of way of the railroad was such that a fire might have occurred from sparks

escaping from its engines, and igniting the dry grass and inflammable material on its right of way. But the fact that other fires had occurred, without proof that they were caused by the railroad, was inadmissible."

The question of negligence is not involved in this case, and the jury was required only to find the origin of the fire, and if that responsibility was placed on the railroad company, liability for the damage resulting attached without regard to the question of negligence. Act 141 of the Acts of 1907, page 336.

This evidence was offered "as a circumstance tending to show . . . that a fire might have occurred from sparks escaping from the engine" which passed the mill shortly before the fire occurred. Of course, there must be such substantial similarity of conditions in the proof of other fires as to make it reasonable and probable that the same cause existed to produce the same result. This similarity of condition existed here, as the testimony objected to related to a fire set out in grass near the mill "within a morning or two of the fire which destroyed the mill." And no attempt was made to show that any difference existed in the equipment of the engines to arrest the emission of sparks.

The identical question here raised was considered and decided by the supreme court of Missouri in the case of *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936. There the testimony objected to was that other fires, both before and subsequent to the one in question, at different places on the line of defendant's railroad, had been started by sparks from some of defendant's engines. Here we have a much closer similarity of conditions as a predicate for the admission of the questioned testimony, for here both fires were set out in the same lot and within a day or two of each other. But under the facts stated, the supreme court of Missouri, upon a review of the authorities, held the

evidence admissible. Among other cases cited and quoted from was the case of *Grand Trunk R. Co. v. Richardson*, 91 U. S. 470, 23 L. ed. 362, as follows: "Mr. Justice Strong, who wrote the opinion of the court, says: 'The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire.' He follows this statement of the law by a number of citations, both English and American, including the case of *Sheldon v. Hudson River R. Co.* 14 N. Y. 228, 67 Am. Dec. 155. Further on in the same opinion the judge says: 'The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage.' To the same effect are the following cases: *Smith v. Boston & M. R. Co.* 63 N. H. 25; *Chicago, St. P. M. & O. R. Co. v. Gilbert*, 3 C. C. A. 264, 10 U. S. App. 375, 52 Fed. 711; *Thatcher v. Maine C. R. Co.* 85 Me. 509, 27 Atl. 519."

The supreme court of Missouri concluded its review of the authorities cited with the following statement: "We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible, and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would

have been inadmissible under the decisions of this court. *Coale v. Hannibal & St. J. R. Co.* 60 Mo. 227; *Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 56 Am. Rep. 446. But in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issues." See also *Little Rock & M. R. Co. v. Harrell*, 58 Ark. 455, 25 S. W. 117, 11 Am. Neg. Cas. 144.

We concur in the reasoning of that court as applied to the facts of this case, and hold that no error was committed in the admission of the testimony objected to.

We think the court should have instructed the jury on the question of the measure of damages in accordance with the contention of appellant. Here a portion of the property destroyed was lumber and logs and laths, and certain other personal property, the value of which and the damage to which was in no wise dependent upon the value of the land or the damage to it.

It is true this court held, in the case of *Kansas City Southern R. Co. v. Wilson*, 119 Ark. 143, 171 S. W. 484, where a fire set out in a pasture burned the grasses and grain growing thereon, and the fence inclosing it, that the measure of damages was the difference in the value of the pasture before the fire and after the fire. And the same measure of damages was approved in the case of *Missouri & N. A. R. Co. v. Phillips*, 97 Ark. 54, 133 S. W. 191, where the property destroyed was an orchard. But these cases must, of course, be read in the light of the facts there recited, and we must have in mind the character of the property there destroyed.

In the case of *St. Louis, I. M. & S. R. Co. v. Ayres*, 67 Ark. 371, 55 S.

W. 159, it was said that the measure of damages for the destruction of trees on the land by fire was the difference between the value of the land with the trees unburned and with the trees burned. After announcing this measure of damages, the court gave as a reason therefor that the trees were a part of the freehold, and could not be replaced in a short time, and only at considerable expense, and that "the destruction of the trees was a depreciation in the value of the land, of which they were a part."

In 8 R. C. L. page 484, the measure of damages for the destruction of property attached to the realty is discussed. It is there said: "Section 46. Property Attached to Realty.—In cases of injury to real estate the courts recognize two elements of damage: First, the value after separation from the freehold, if any, of the thing taken, injured, or destroyed; and, second, the damage to the realty, if any, occasioned by the severance. The measure of damages in such cases depends to some extent on the character of the property taken or destroyed,—a distinction being often made between property whose chief value consists in its connection with the soil and its incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the ground on which they rest. Thus, if the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate from and independent of the real estate, or if the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it. On the other hand, the value of the property destroyed, or the cost of restoring or replacing such property, is the proper measure of damages for the destruction of buildings, fences, and other improvements, which may at once be replaced, where the exact

Evidence—  
origin of fire—  
cause of other  
fire.

cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself. Added to this, the right is generally given to recover for the loss of the use of the property. Some courts hold that where property attached to the realty is destroyed, the owner has his election to sue either for the value of the thing destroyed or for the injury to the freehold, or, in other words, he may seek to recover the value of the destroyed property in its detached form or its value as a part of the realty. If recovery is sought for the value of the property destroyed in its detached form, the measure of damages is its market value when so detached; but if recovery is sought for the injury to the freehold by reason of the taking or destruction of property attached thereto, the measure of damages is the difference between the value of the land before and after the injury. There is considerable conflict of authority in the application of the foregoing rules to cases where a recovery is sought for the destruction of growing crops. In some cases it is held that the proper measure of damages is the value of the crop at the time and place and in the condition it was in when it was destroyed, and in others that it is the difference in the value of the land on which the crop is growing. A similar conflict exists in the case of trees, some courts holding that the measure of damages is the difference in the value of the land before and after the injury; while others hold that the value of the trees destroyed is the proper measure of damages. It has been held that damages caused by the destruction of fruit trees may be measured by estimating either their value as a distinct part of the land, or the difference in value of the land before and after their destruction; and that, where both methods are resorted to in the same case, the damages must be ascertained by the jury from all the evidence."

In the note to the text quoted many cases are cited bearing upon this subject, several of which are annotated cases.

In a suit for damages for the destruction of a house by fire, the supreme court of Iowa, in holding that the measure of damages was the value of the house, said: "The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and in order to give satisfaction, measured in money, such rules are formulated as are thought best adapted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined apart from the ground on which they rest." *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147.

In 33 Cyc. pages 1389-1391, many cases are cited which deal with the measure of damages for property destroyed by fire, and in the text of this article it is said: "Where buildings are injured or destroyed it is ordinarily held that they are capable of a separate valuation, and that the measure of damages is the value of the property at the time of its destruction."

All of the cases cited in the note to this text supported it, and none approved a different measure of damages.

We think our own cases, when construed in connection with the facts to which the principles there announced were applied, result in the following statement of the law: That, if the value of the property destroyed depends upon its connection with the soil, the measure of the damages is the difference in the

value of the land before and after the fire. But, if the property destroyed could be replaced in substantially the condition in which it existed before the fire, then the measure of the damages is the cost of so replacing it.

The case of *Dodd v. Read*, 81 Ark. 13, 98 S. W. 703, is not in conflict with this view, but is in harmony with it. That was a suit for damages for the value of a building, and it was there said that the true inquiry was as to the cash market value of the building, and the opinion recites the evidence of the carpenter who was the only witness for the plaintiff on the subject of value, and who testified that the house was worth only \$200, and a remittitur was ordered of the part of the judgment in excess of that sum. See also *St. Louis & S. F. R. Co. v. Shore*, 89 Ark. 418, 117 S. W. 515, 16 Ann. Cas. 939; *Kansas City Southern R. Co. v. Boles*, 88 Ark. 533, 115 S. W. 375; *Dwight v. Elmira, C. & N. R. Co.* 132 N. Y. 199, 15 L.R.A. 612, 28 Am. St. Rep. 563, 30 N. E. 398.

The facts of this case show not only the wisdom and justice, but the necessity, for the rule we now approve. Much of the property destroyed was not even fixtures, and, under the measure of damages given by the court, the jury could not

properly have allowed compensation for its destruction. No contention was made that the land itself had sustained any damage; but the property destroyed was a sawmill, with the building which housed it, and the numerous articles of purely personal property used in connection therewith, the value of which was testified to by the witnesses, and which included, among other things, some lumber which had been manufactured on the very day of the fire. The plaintiff was entitled to compensation for this property, although the measure of damages given would not have warranted its assessment; yet, according to appellant, these damages were allowed, together with damages which exceeded the value of the property destroyed when estimated under the rule here approved; and, as we cannot affirmatively say that such is not the case, we must reverse the judgment and remand the cause for a new trial.

Petition for rehearing denied.

#### NOTE.

The cost of a building, or the repairs thereto, as a necessary or proper element in fixing damages for its destruction or injury, is considered in the annotation following *KENNEDY v. TRELEAVEN*, post, 277.

C. W. ADAMS et al., Doing Business as Adams & Sullivan et al., Appts.,  
v.

PHILIP SENDEL.

*Kentucky Court of Appeals — November 2, 1917.*

(177 Ky. 535, 197 S. W. 974.)

**Damages — Injury to property — cost of restoring.**

1. The measure of damages to a building caused by blasting operations is a sum sufficient to restore the property to substantially the condition it was in prior to the injury, and such further sum as will compensate the owner for the diminution in the value of the use of the property during

the continuance of the injury if it is occupied by the owner, or diminution in rental value if it is rented.

[See note on this question beginning on page 277.]

**Public improvement — liability for injury to private property.**

2. One performing work under contract with a city for a public improvement is not absolved from liability for injury inflicted upon private property on the theory that he is acting as agent of the municipality in performing a function of government.

**Pleading — damages — supplemental petition.**

3. The damages for injury to a building by blasting must be limited to those claimed in the petition, although a supplemental petition is filed claiming damages arising after the filing of the petition, if the latter are not separated from other items of injury.

**Trial — instructions — measure of damages.**

4. Instructions upon measure of damages for injury to personal property must specify the damages to

which plaintiff is entitled, not merely state that he is entitled to such damages as would fairly and reasonably compensate him for the injury.

[See 8 R. C. L. 661.]

**Damages — injury to lumber.**

5. The measure of damages for injury to lumber and staves is the difference in its market value immediately before and immediately after the injury, at the place of injury.

[See 8 R. C. L. 487-489.]

**Appeal — instructions given by consent.**

6. There can be no objection to an instruction given by consent.

[See 14 R. C. L. 815.]

**Blasting — liability for injury — negligence.**

7. One is liable for injuries caused by casting debris on another's property by blasting, regardless of the question of his negligence.

[See 11 R. C. L. 673.]

**APPEAL** by defendants from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, in favor of plaintiff, and from an order overruling a motion for new trial, in an action brought to recover damages for injuries to plaintiff's property alleged to have been caused by defendants' blasting operations. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Dallam, Farnsley, & Means, for appellants:

The injury and the nuisance were both temporary, and the instructions should have been given on this point only.

Madisonville v. Hardman, 29 Ky. L. Rep. 253, 92 S. W. 930; Madisonville, H. & E. R. Co. v. Graham, 147 Ky. 604, 144 S. W. 737.

When the court told the jury to find whether the injury was permanent or temporary, it was error not to define the two kinds of injuries.

Hobson, B. & C. Instructions to Juries, § 41; Madisonville, H. & E. R. Co. v. Thomas, 140 Ky. 143, 130 S. W. 975; Chicago Veneer Co. v. Jones, 143 Ky. 21, 135 S. W. 430; Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 820, 139 S. W. 1073; Turner v. King, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405; East Tennessee Teleph. Co. v. Cook, 155 Ky. 649, 160 S. W. 166; Caldwell's Judicial Dict. 3360; Shrout v. Chesapeake & O. R. Co. 157 Ky. 1, 162 S. W. 97; Louis-

ville & N. R. Co. v. Whitsell, 125 Ky. 433, 101 S. W. 334.

The court erred in giving any instruction covering permanent injury.

Louisville & N. R. Co. v. Whitsell, supra; Louisville & N. R. Co. v. Foard, 104 Ky. 456, 47 S. W. 842.

Unless negligence was shown, recovery should not have been allowed.

12 Am. & Eng. Enc. Law, 508; Benner v. Atlantic Dredging Co. 134 N. Y. 166, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; Dodge v. Essex County, 3 Met. 380; Brown v. Providence, W. & B. R. Co. 5 Gray, 35.

When a contractor for a municipality is doing work and commits a tort for which the municipality could not be held if it had been doing the work and had committed the tort, the contractor cannot be held, because he was performing a governmental function.

Downing v. Mason County, 87 Ky. 208, 12 Am. St. Rep. 473, 8 S. W. 264; Layman v. Beeler, 113 Ky. 221, 67 S. W. 995; Schneider v. Cahill, — Ky.



—, 27 L.R.A.(N.S.) 1009, 127 S. W. 143; *Moberley v. Carter County*, 5 Ky. L. Rep. 694; *Hite v. Whitley County*, 91 Ky. 168, 11 L.R.A. 122, 15 S. W. 57; *Wheatly v. Mercer*, 9 Bush, 704; *Hardwick v. Franklin*, 120 Ky. 78, 85 S. W. 709; *Moss v. Rowlett*, 112 Ky. 121, 65 S. W. 153, 358; *Blue Grass Traction Co. v. Grover*, 135 Ky. 685, 135 Am. St. Rep. 498, 123 S. W. 264; *Ockerman v. Woodward*, 165 Ky. 752, L.R.A.1916A, 1005, 178 S. W. 1100; *Coleman v. Eaker*, 111 Ky. 131, 63 S. W. 484.

The measure of damages for a permanent injury to a building is the reasonable cost of putting it into the condition it was before the injury, also the loss of the use thereof during the time of the injury:

*Louisville v. Donahue*, 140 Ky. 502, 131 S. W. 285; *Wallingford v. Maysville & B. S. R. Co.* 32 Ky. L. Rep. 1049, 107 S. W. 782.

No instruction should have been given referring to permanent injury at all, as there was no permanent injury in the case.

*Louisville v. Donahue*, supra.

Messrs. Kohn, Bingham, Sloss, & Spindle, for appellee:

The failure of the court to define the words "temporary" and "permanent" used in the instructions is not reversible error; and in no event can appellants complain thereof.

*Kentucky Utilities Co. v. McCarty*, 170 Ky. 543, 186 S. W. 150; *Kleiderer v. Aldridge*, 160 Ky. 638, 170 S. W. 23; *Russell v. Cincinnati R. Co.* 4 Ky. L. Rep. 906; *Louisville & E. R. Co. v. Vincent*, 29 Ky. L. Rep. 1049, 96 S. W. 898; *Bugg v. Holt*, 29 Ky. L. Rep. 1208, 97 S. W. 29; *South Covington & C. Street R. Co. v. Brown*, 81 Ky. L. Rep. 1072, 104 S. W. 703.

The action of the court in failing to submit any question of negligence to the jury was eminently proper.

*Allegheny Coke Co. v. Massey*, 163 Ky. 792, 174 S. W. 499.

The governmental function doctrine is applicable only to suits for personal injuries, and constitutes no defense whatever to property damage, whether inflicted by the municipality itself or by a contractor under the municipality.

*Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Louisville v. Hehemann*, 161 Ky. 523, L.R.A.1915C, 747, 171 S. W. 165.

Plaintiff is entitled to recover either

the difference between the value of the property immediately before and immediately after the injury, or the cost of repair where it is necessary to make repairs, and the difference in the value of the property immediately before the injury and immediately after the repairs, if in fact the property as repaired is not worth as much as it was worth before the injury.

*Federal Ins. Co. v. Hiter*, 164 Ky. 743, L.R.A.1915E, 575, 176 S. W. 210.

Hurt, J., delivered the opinion of the court:

In August, 1914, the appellants, John H. Cahill, C. W. Adams, and John L. Sullivan, partners, doing business under the firm name of Adams & Sullivan, under a contract with the city of Louisville for that purpose, undertook to open out and widen the bed of Bear Grass creek, at a point within the corporate limits of the city, and where a lot owned by the appellee, Philip Sengel, adjoined the creek. There were situated upon appellee's lot, in close proximity to the creek, several buildings, two of which appellee was wont to let to rent, and another in which he kept an office, and another was a cooper shop newly built, in which was machinery used in the business of a cooper, and also upon the lot was a considerable quantity of staves to be manufactured into barrels. The appellants in their operations did a large amount of blasting in order to remove the rocks and possibly other obstructions from the stream, and, in so doing, continued the blasting at intervals, from time to time, for several months. The appellee claims that the blasting was extremely heavy, and cast showers of stones, some of considerable weight, and dirt, and other debris upon the ground and buildings and staves. The stones, falling upon the roofs of the buildings, perforated the roof in many places, and, falling upon his staves, split and otherwise injured them, while the concussion from the force of the blasting blew in his windows, split the wall of one building, and shook the plaster from the walls and ceiling, thereby tearing

the paper from the walls and rooms of the houses, and frightened away his tenants, and caused his dwelling houses to be unoccupied for several months. The damages necessitated the repairing of the roofs and buildings, generally, and required the services of tinner, carpenters, plasterers, and glaziers. These matters the appellee complained of in a petition which he filed on the 22d day of April, 1915, and, in an amended petition which he thereafter filed, setting up and seeking damages which he had suffered after the filing of the original petition. In all, he claimed damages in the sum of \$2,500. The appellants denied all the allegations of the petition and amended petition, and as a further defense, in a second paragraph of the answer, alleged that while engaged in the opening, widening, and adjusting the creek and its banks, they were engaged, as agents of the city, in performing and carrying out a function of government, and hence are not liable to appellee for any of the alleged damages. The court sustained a general demurrer to the second paragraph of the answer. When a trial was had of the action, the verdict of the jury fixed the appellee's damages at the sum of \$1,500, and a judgment was rendered by the court in accordance with the verdict.

The appellants' motion for a new trial being overruled, they have appealed to this court, and insist as errors of the trial court which were to their substantial prejudice, the giving of the instructions, 1, 2, 3, 4, 5, 6, and 7, by the court to the jury, and the sustaining of the demurrer to the second paragraph of the answer, to all of which they objected and saved exceptions.

(a) Touching the action of the court in sustaining the demurrer to the second paragraph of the answer, but little doubt can be entertained of the correctness of the judgment of the court. The cities and other municipalities may construct sewers and other similar improvements, and do so, as an exercise of their

governmental functions, but it would scarcely require any citation of authority to establish that the city itself would not have authority, in the construction of a street, sewer, or other improvement, to destroy or injure the property of its citizens, without making just compensation, and one with whom the city contracts to do a public work is certainly not immune from damages for injuring or destroying private property in the

Public improvement—liability for injury to private property.

prosecution of the work, as he could enjoy no more favored position than the city. Section 242 of the Constitution provides that municipal corporations, which have the right to take private property for public use, may not do so unless they make compensation for the property taken, injured, or destroyed, and the compensation shall be made or secured before the property is injured or destroyed. *Pickerrill v. Louisville*, 125 Ky. 213, 100 S. W. 873; *Mt. Sterling v. Jephson*, 21 Ky. L. Rep. 1028, 53 S. W. 1046; *Henderson v. McClain*, 102 Ky. 402, 39 L.R.A. 849, 43 S. W. 700; *Ludlow v. Detweiler*, 20 Ky. L. Rep. 894, 47 S. W. 881; *Ewing v. Louisville*, 140 Ky. 726, 31 L.R.A. (N.S.) 612, 131 S. W. 1016; *Hay v. Lexington*, 114 Ky. 665, 71 S. W. 867; *Louisville v. Sauter*, 149 Ky. 721, 149 S. W. 1029; *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981; *Clayton v. Henderson*, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 667; *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930; *Louisville v. Hehemann*, 161 Ky. 523, L.R.A. 1915C, 747, 171 S. W. 165; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *O'Gara v. Dayton*, 175 Ky. 395, L.R.A. 1917E, 574, 194 S. W. 380.

The appellee by the amended petition specifically alleged the damages which he had incurred, claiming separate amounts for the damages suffered by reason of the injuries from the blasting to his cooper shop and factory; the dam-

ages from the blasting and subsequent injuries to the cottage which he held for renting, to the building used as an office, and the shed thereto, and the damages for the injuries to his lumber and staves. The damages claimed in the particular amounts set out in the amended petition were those which had been sustained at the time of the filing of the petition. The amended petition also claimed damages which had been suffered after the filing of the petition, in the same way and for the same character of injuries as alleged in the petition, but the damages to the various pieces of property were not separated, but alleged to be of the gross sum of \$500.

The first instruction submitted to the jury the question whether the injury done to the factory and cooper shop was permanent or temporary in character.

The second instruction directed the jury, that if the damages to the factory and cooper shop were permanent in character, to find for the plaintiff such a sum as would reasonably represent the difference between the fair market value of the factory and cooper shop immediately before the injury was done by the blasting, and its fair market value immediately after the injury, not exceeding \$452.60, and such a sum as would fairly and reasonably compensate the appellee for the reasonable cost of putting the roofs of the factory and cooper shop in substantially the same condition as they were before the injury, not exceeding on that account the sum of \$297.45.

The third instruction directed the jury, that if it believed that the injuries to the factory and cooper shop were temporary, to find for appellee such a sum as would reasonably compensate him for the diminution in the value of the use of the factory and cooper shop, caused directly by the blasting, during the period which was reasonably necessary for making the repairs, not exceeding \$462.50, and such sum as would

fairly compensate him for the cost of putting the roofs of these buildings in substantially the same condition they were in before the injury, not exceeding \$297.45.

The \$297.45 mentioned in the instructions was the amount which appellee claimed that he had expended in repairs upon the factory and cooper shop because of the injuries resulting from the blasting, up to the filing of the petition, and the \$462.50 was what he claimed was the difference between the value of the roof immediately before the blasting, and its value after the repairs to it had been made by him. The fault in these three instructions is the error in submitting to the jury any question of a permanent injury to the buildings, and it is not in accordance with the measure of damages adopted in this state for injuries to buildings arising from blasting operations. There is not such a permanent injury to the buildings as could not be repaired. The measure of damages to a house, caused by blasting operations, is a sum Damages—  
injury to prop-  
erty—cost of  
restoring. sufficient to restore the property to sub-

stantially the condition it was in prior to the injury, and such a further sum as will compensate the owner for the diminution in the value of the use of the property during the continuance of the injury, if it is used or occupied by the owner, or, if let to rent, the diminution in the rental value of the property during the continuance of the injuries. *Lexington & E. R. Co. v. Baker*, 156 Ky. 431, 161 S. W. 228; *Southern R. Co. v. African M. E. Church*, — Ky. —, 121 S. W. 972; *Pickerrill v. Louisville*, 125 Ky. 229, 100 S. W. 873; *Wallingford v. Maysville & B. S. R. Co.* 32 Ky. L. Rep. 1049, 107 S. W. 781; *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930; *Hutchison v. Maysville*, 30 Ky. L. Rep. 1173, 100 S. W. 331; *Louisville & N. R. Co. v. Carter*, 25 Ky. L. Rep. 759, 76 S. W. 364; *Bannon v. Rohmeiser*, 17 Ky. L. Rep. 1879, 34 S. W. 1084, 35 S. W. 280.

The damages claimed on account of the factory and cooper shop, however, should not exceed \$759.95, the amount claimed in the petition up to the filing of the original petition.

Pleading—  
damages—  
supplemental  
petition.

In place of instruction 4, which directed the jury to find for the appellee such a sum as would fairly and reasonably compensate him for the reasonable cost of repairing the damages, as resulted directly from the blasting, to the office building and shed, not exceeding \$790.25, the instruction should have fixed the measure of damages for the injuries to that building and shed, as is directed with reference to the damages to the factory and cooper shop. The instruction as given does not include any damages on account of the diminution in the value in the use of the building, and the appellee was entitled, in addition thereto, to such a sum as would be reasonably necessary to restore the building to the condition it was in immediately before the injury.

Instruction number 5, with reference to the damages claimed on account of the injuries to the cottages on Lampton street, is not subject to criticism, and fairly stated the measure of damages to which the appellee was entitled.

Instruction number 6, which directed the jury to award the appellee such a sum in damages as would fairly and reasonably compensate him for any damages to his lumber and staves, resulting directly from the blasting, not exceeding the sum of \$115, has the fault of not setting out and directing the jury as to the measure of damages to which appellee was entitled. The measure of damages to such personal property as lumber and staves is the difference between the fair market value of the staves immediately before the injury and their market value immediately thereafter, at the place of the injury. Southern R. Co. v.

Trial—instruction—measure of damages.

Damages—  
injury to  
lumber.

Kentucky Grocery Co. 166 Ky. 94, 178 S. W. 1162; Weil v. Hagan, 161 Ky. 292, 170 S. W. 618; Cincinnati, N. O. & T. P. R. Co. v. Sweeney, 166 Ky. 360, 179 S. W. 214; Paris v. Baldwin Bros. 169 Ky. 802, 185 S. W. 144.

Instruction number 7, which directed the jury to allow the damages sustained by the appellee by reason of the blasting, after the filing of the original petition, on April 22, 1915, does not give the jury any measure of damages to control it in arriving at a verdict, but left it to fix the measure of damages upon any rule which might occur to it as furnishing the appellee fair and just compensation. The instruction should have directed a measure of damages, as applied to the different species of property, as heretofore indicated in this opinion.

Instruction number 8 was given by agreement of the parties, and no objection can be heard to it here.

Appeal—instruction—given by consent.

The contention of appellants that the question of negligence on their part ought to have been submitted to the jury is not tenable. The blasting in the instant case resulted

Blasting—liability for injury—negligence.

in a direct trespass upon appellee's premises, and where such results in such direct trespass, by the casting of rocks or soil or other debris upon one's premises, the liability then becomes absolute, and no question of negligence or want of skill is involved. Langhorne v. Turman, 141 Ky. 809, 34 L.R.A. (N.S.) 211, 133 S. W. 1008; Lexington & E. R. Co. v. Baker, 156 Ky. 431, 161 S. W. 228.

For the reasons above stated, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

Petition for rehearing denied, December 21, 1917.

#### NOTE.

The holding in the reported case (ADAMS v. SENDEL, ante, 268) that

the cost of restoring the property is properly to be considered in determining the damages for an injury to property is in harmony with the

weight of authority, as is shown in division III. of the annotation following *KENNEDY v. TRELEAVEN*, post, 277.

### J. L. KENNEDY

v.

L. G. TRELEAVEN, Receiver of the Consumers' Light, Heat, & Power Company, Appt.

*Kansas Supreme Court — November 9, 1918.*

(103 Kan. 651, 175 Pac. 977.)

#### Damages — cost.

1. The cost of property destroyed, less a deduction for deterioration, is a proper element for consideration in fixing its value in some cases; but where the building burned had been erected more than twenty-six years before the fire occurred, when the cost of material and labor which entered into it differed greatly from the present cost of the same, evidence of the original cost is not essential.

*[See note on this question beginning on page 277.]*

#### — burning of building.

2. The measure of damages for the negligent destruction of a building by fire, where there is no malice or wilful wrongdoing, is the fair and reasonable value of the building at the time and place of its destruction.

*[See 8 R. C. L. 484, 490.]*

#### — value of building.

3. To arrive at the damages sustained, where the building burned had no market value, resort may be had to

any facts which fairly tend to show its actual value when it was destroyed, and a permissible method of proof is by showing the cost of replacing the building, less any depreciation from age, use, utility, or condition.

*[See 8 R. C. L. 485.]*

#### Appeal — instructions.

4. No error is found in the instructions of the court, and the evidence is deemed sufficient to support the verdict.

Headnotes by JOHNSTON, Ch. J.

APPEAL by defendant from a judgment of the District Court for Shawnee County (Whitcomb, J.) in favor of plaintiff in an action brought to recover damages for the alleged negligent destruction of a building by fire. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. L. S. Ferry, T. F. Doran, and M. F. Cosgrove, for appellant:

In an action for the recovery of the value of a building destroyed by fire, in order to make evidence as to the cost of rebuilding the same competent there must also be produced evidence showing the original cost and the depreciation from use, age, and other causes.

Chicago, R. I. & P. R. Co. v. Galvin, — Okla. —, 158 Pac. 1153, L.R.A. 1917A, 365.

The measure of damages is the difference between the market value of a house and lot before and after a fire in which the house is destroyed.

Pacific Exp. Co. v. Smith, — Tex. —, 16 S. W. 998; Pacific Exp. Co. v. Lasker Real Estate Asso. 81 Tex. 81, 16 S. W. 792.

The circumstantial evidence produced by plaintiff is too remote and speculative a guess, and compels an unwarranted presumption upon which to found a judgment.

Heinz v. Consumers' Light, Heat & P. Co. 81 Kan. 266, 105 Pac. 527.

It was error for the court to direct the attention of the jury to only a part of the evidence, and instruct them to return a verdict in favor of plaintiff.

Schick v. Warren Mortg. Co. 82 Kan. 90, 107 Pac. 536; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151; Busalt v. Doidge, 91 Kan. 37, 136 Pac. 904.

As there was no evidence to show the original cost of the building, the admission of evidence as to the reproduction cost was improperly admitted.

Chicago, R. I. & P. R. Co. v. Galvin, — Okla. —, L.R.A.1917A, 365, 158 Pac. 1153; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 641, 47 Pac. 526, 1 Am. Neg. Rep. 48.

Messrs. Eugene S. Quinton and Douglas D. Mote, for appellee.

The measure of damages for the burning of a building is the reasonable cost of restoring it, less deterioration.

Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 38 S. W. 615; Highland v. Houston, E. & W. T. R. Co. — Tex. Civ. App. —, 65 S. W. 649; Matthews v. Missouri P. R. Co. 142 Mo. 645, 44 S. W. 802, 3 Am. Neg. Rep. 699; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Missouri, K. & T. R. Co. v. Lycan, 57 Kan. 641, 47 Pac. 526, 1 Am. Neg. Rep. 48; Atchison, T. & S. F. R. Co. v. Arthurs, 68 Kan. 408, 65 Pac. 651, 10 Am. Neg. Rep. 275; Chicago, R. I. & P. R. Co. v. Mosher, 76 Kan. 602, 92 Pac. 554; St. Louis & S. F. R. Co. v. Noland, 75 Kan. 693, 90 Pac. 278.

Johnston, Ch. J., delivered the opinion of the court:

This was an action to recover damages for the negligent destruction of a building. A judgment in favor of the plaintiff was recovered, from which the defendant appeals.

J. L. Kennedy, the plaintiff, owned a residence in Oakland estimated to be worth \$2,000, which had been insured for \$1,000, and he only asked judgment for \$1,000. The defendant company had been supplying gas for the residence during its occupancy by a tenant who had just moved out of the building, and when he did so notice was given the

defendant of the vacancy, and it was asked to come and cut off the gas. In pursuance of the notice, an agent of the defendant obtained the key and entered the building, when he read the meter and undertook to cut off the gas, but negligently left it open so far as to allow gas to escape. A neighbor who was present when the agent was in the building called his attention to the fact that gas seemed to be escaping, and in order to test it the agent touched a match to the gas at the end of a pipe that had been disconnected from a stove. The gas was ignited and burning, but the agent stated that there was no more gas escaping than there was in the pipe above the cut-off. He left the gas burning and shortly afterwards the building was consumed by fire.

The principal question on this appeal is whether or not the plaintiff established the extent of the loss by competent and sufficient proof. The question was raised by an objection to evidence and an instruction of the court as to the character of evidence by which plaintiff's damages might be measured. There was sufficient evidence as to the origin of the fire, and that it resulted from the negligence of the defendant to uphold the verdict. Testimony was offered as to the size, plan, material, finish, and condition of the building burned. There was also testimony in regard to the cost of constructing a house of the kind burned, and also as to the deterioration of the building from the time it was erected until it was destroyed. The house had been built of white pine, which witnesses said was better and more enduring than the pine now obtainable, but that white pine was no longer on the market, and hence their opinions were based on merchantable pine which was now on the market at this place. Defendant contends that the evidence mentioned was not receivable, in the absence of proof of the original cost of the building.

Generally speaking, it may be

said that from one who negligently destroys the property of another he is entitled to recover the actual loss sustained. There being no malice nor intentional wrongdoing, compensation is the proper measure, and hence the defendant was liable for the reasonable value of the building burned at the time and place of its destruction. There is no universal test for determining the value of property injured or destroyed, and the mode and amount of proof must be adapted to the facts of each case. 4 Sutherland, *Damages*, 3d ed. § 1015. It is frequently said that the market value of the property described at the time and place of the fire is a proper measure, and this is true if the property in fact has a market value. If there be no market value,

—value of building.

then another criterion of value must be found, and the best evidence which can be obtained must be produced to show the elements which enter into the real value. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Kansas City & S. W. R. Co. v. Ehret*, 41 Kan. 22, 20 Pac. 538. All know that there is no market value for property like that for which a recovery is sought, and therefore it was proper to invoke the aid of all the facts bearing upon the actual value at the time of the fire. Defendant insists that the exclusive method of establishing the damage was proof of the cost of construction, with a proper deduction therefrom for deterioration. The cost of a structure is sometimes a proper element for consideration in determining the amount of damages, but it can have little force, where, as here, the building was erected more than twenty-six years ago. The cost of building material and labor changes, and if the cost of material and labor twenty-six years ago was twice as much as at the present time, the original cost, less deterioration, would be a very imperfect criterion for meas-

uring the present value. The cost of replacing the building, making a proper deduction for its age, utility, use, and condition, is a better measure of what the property was fairly and reasonably worth at the time it was destroyed. Some authorities have approved the rule, insisted on by the defendant, that the cost of the property is an essential element of proof; but even these authorities recognize that this rule is not always applicable and that other elements are sufficient to establish the loss. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 65, 9 So. 661; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270.

Our own court has adopted and applied a different rule. In *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315, where the value of a building that had been burned was in question, it was said: "One method of arriving at such loss is by estimating the cost of replacing the building, less any depreciation from use, age, or otherwise; and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins." (p. 301).

In the same case an exception was taken to the testimony of the owner of the building, giving the cost of it, and in holding the testimony improper the court said: "Evidence of the cost of a building, however, can hardly be said to be evidence of its value at a particular time. Sometimes, from the necessities of the case, it may be proper to inquire as to the cost of an article, as tending to establish its value; but there is no such necessity here, and Payne ought not to have been permitted to testify that the house cost about \$25,000." (p. 301.)

The defendant has no cause to complain of the rule —cost. for measuring the damage laid down by the trial court.

An objection is made that the court, in its instructions did not present defendant's theory of the

case as fully as that of the plaintiff, but we think that the issues were sufficiently presented, and that no prejudice could have

Appeal—  
instructions.

resulted to the defendant from the instructions.

We find no error in the record, and therefore the judgment is affirmed.

### ANNOTATION.

**Cost of building or repairs thereto as necessary or proper element in fixing damages for its destruction or injury.**

- I. Introductory, 277.
- II. Original cost of building:
  - a. General rule, 277.
  - b. Limitations of rule, 280.
- III. Cost of repairing or restoring building:
  - a. Majority rule, 281.
  - b. Application of majority rule:
    1. Injury not susceptible of being repaired without rebuilding, 282.
    2. Injury susceptible of being repaired without rebuilding, 287.
  - c. Limitations of majority rule, 294.
  - d. Minority rule, 297.
- IV. Original cost and cost of repairing or replacing considered together, 300.

#### I. Introductory.

There is considerable confusion in the statement by the courts of the measure of damages for destruction of or injury to a building, the rule of most general application apparently being that the value of property destroyed, or the decrease in its value in case of injury, is the measure of damages. See 8 R. C. L. title Damages, pp. 481 et seq. This note, avoiding any general discussion of the measure of damages, is confined to the question whether the original cost of a building, or the cost of reproducing or repairing it, is a proper element to be considered in determining the amount of injury inflicted on the owner by the destruction of the building or an injury thereto. The cases holding that the cost of replacement or repair is, of itself, the proper measure of damages, are of course included.

#### II. Original cost of building.

##### a. General rule.

The original cost of a building

which has been injured or destroyed, while not the standard of its value at the time of destruction or injury, is a proper element to be considered in fixing the damages, on the theory that the cost, less an allowance for depreciation from age, usage, and other like causes, is a fair criterion of present value.

United States.—Chicago & E. R. Co. v. Ohio City Lumber Co. (1914) 131 C. C. A. 57, 214 Fed. 751.

Alabama.—Southern R. Co. v. Slade (1915) 192 Ala. 568, 68 So. 867.

California.—Linthorpe v. San Francisco Gas & E. Co. (1909) 156 Cal. 58, 103 Pac. 320, 19 Ann. Cas. 1230.

Florida.—Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. (1891) 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

Kansas.—KENNEDY v. TRELEAVEN (reported herewith) ante, 274.

Michigan.—Close v. Ann Arbor R. Co. (1912) 169 Mich. 392, 135 N. W. 346; Roach v. Blair (1916) 190 Mich. 11, 155 N. W. 696; Fite v. North River Ins. Co. (1918) 199 Mich. 467, 165 N. W. 705.

Missouri.—Matthews v. Missouri P. R. Co. (1898) 142 Mo. 645, 44 S. W. 802, 8 Am. Neg. Rep. 699; Conner v. Missouri P. R. Co. (1904) 181 Mo. 397, 81 S. W. 145.

Pennsylvania.—Lucot v. Rodgers (1893) 159 Pa. 58, 28 Atl. 242.

In Chicago & E. R. Co. v. Ohio City Lumber Co. (Fed.) supra, it was said: "No hard and fast rule, applicable to all cases, can be laid down as to the measure of the loss suffered by the destruction of buildings by fire. In some instances it may be their value detached from the land and separated from the use made of them. In others, where an active market is shown to



exist, the market value may be the fair measure of loss. In still others, the cost of reconstruction, after deducting depreciation from age and other causes, may fairly recompense the owner. Usually, however, the real or ordinary value of a building, based upon and determined from its cost, age, condition, location, and the uses to which it has been put, furnishes a fair measure of the loss occasioned by its destruction."

In *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* (Fla.) *supra*, the court said: "In actions of this kind where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original market cost of the property, the manner in which it has been used, its general condition and quality, the percentage of its depreciation since its purchase or erection, from use, damage, age, decay, or otherwise, are all elements of proof proper to be submitted to the jury to aid them in ascertaining its value."

In *Southern R. Co. v. Slade* (Ala.) *supra*, in an action against a railroad company for the burning of the plaintiff's buildings, it was held that while the cost of a burned building was not the standard of its value, evidence thereof, with evidence showing the depreciation due to usage and age, was permissible. The court said: "While the reasonable cost of the burned building, or of similar new buildings, is not the criterion of value, yet evidence thereof is relevant in support of opinion evidence as to actual value, in connection with evidence showing the extent of depreciation from use and age."

In *Illinois C. R. Co. v. Elliott* (1919)

— *Ala. App.* —, 82 So. 582, the instruction which was held erroneous allowed the difference between the value of the house and lot just prior to, and the value just after, the injury, and also whatever the proof showed it cost to repair the house after the injury. The court said that the charge would have been correct if the latter element had been omitted, observing that the plaintiff was not entitled to both the difference in the value of the property and the cost of repair.

In *Linforth v. San Francisco Gas & E. Co.* (Cal.) *supra*, it appeared that an apartment house was injured by a gas explosion. In an action for the damages caused thereby, evidence of the original cost of the building was held to be proper. It was said: "Evidence of the original cost of the building was admitted. Under the circumstances it was proper so to do. This evidence of original cost, standing alone, would, of course, have slight or no weight in determining the award of damages. It would be of value only in determining whether restoration could be made at a reasonable allowance by way of damages. As the award of damages would be based upon the amount necessary to restore the building to its condition before injury, evidence of the original cost would not at all tend to show what that condition was. But, taken with other evidence in the case, such as was here introduced, it did tend to show the condition of the building at the time of the injury. There was the evidence of a painter who repainted and overhauled the building less than two months before the explosion, and who testified to its condition then, to the effect that he found it 'then practically as good as when it was new.' The evidence was not admissible as a criterion of damage, and was not admitted for that purpose. But it was admitted, and was admissible, as a bit of data which, taken with other evidence, tended to enable the jury to formulate their conclusion upon the condition of the building at the time of the injury."

In *Close v. Ann Arbor R. Co.* (1912) 169 Mich. 392, 185 N. W. 346, in an

action for the destruction of an elevator by fire, communicated from locomotives of the defendant railroad, evidence as to the cost of the elevator was introduced. The court held that where property destroyed had no market value, the real or ordinary value, based on its cost, the uses to which it was put, its age, condition, location, and the like, should be determined.

In *Fite v. North River Ins. Co.* (1918) 199 Mich. 467, 165 N. W. 705, no testimony as to the cost of a hotel destroyed by fire was introduced, but there was evidence of the price at which the owner contracted to sell it. The court said: "It seems to be conceded that there is no market value for such property in the place where it is situated, and therefore its real or ordinary cash value at the time of the fire should be ascertained, if it can be, from all the testimony as to the cost, uses it has been put to, its age, condition, and location."

In *Roach v. Blair* (1916) 190 Mich. 11, 155 N. W. 696, in an action for damages caused by the destruction of a building by fire, communicated by a railroad locomotive, it appeared that evidence was admitted as to the cost of the building, its age, the materials with which it was built, and its size and location. The trial court instructed the jury that if the plaintiff was found entitled to recover, it was "entitled to recover from the defendants as damages such as will fairly compensate it for its loss by reason of said fire, which sum is measured by the fair cash value at said time and place of said property which was destroyed by said fire, and the diminution in value of property injured and not destroyed, caused by said fire, not exceeding the amount claimed by the plaintiff. . . . There has been evidence here as to the price paid by the plaintiff for the real property—and by that it means the building or the land on which the building stood—and evidence of repairs and remodeling of the interior of such building, and there has been evidence as to the amount of material in the construction of the building at the time of the said fire, and the worth and value of the

materials, if new, and evidence as to the labor and material required to replace such a building, and also evidence as to the fair cash market value of the building. All these matters have been received as bearing on the one question of its fair cash value at the time and place of the fire." Holding that such instructions were proper, the court said: "The plaintiff offered testimony that a building, the character of the one which was destroyed, had no market value in Hart, and, relying upon this showing, the plaintiff proceeded to show that it had a true cash value, and introduced testimony of its size, location, the materials with which it was built, its age, for the purpose of enabling the jury to determine what the actual cash value was. The instructions appear to be in accord with the general rule applicable to such cases."

In *Conner v. Missouri P. R. Co.* (1904) 181 Mo. 397, 81 S. W. 145, in an action for the destruction of a mill by fire which was communicated by one of defendant's locomotives, it appeared that testimony relating to the original cost of the mill and the cost of a new mill was admitted. In upholding such admission the court held that, in order to ascertain the value of the mill at the time of its destruction, it was proper to admit testimony as to its original cost. It was said: "It is also insisted that the court committed error in the admission of testimony by plaintiff as to the original cost of the mill and the cost of a new mill. The court, in its instructions, confines the consideration of this testimony to its legitimate purpose; it told the jury that 'the estimate made by the witnesses as to the cost of a new mill on September 6, 1899, can only be considered by the jury in determining the reasonable market value of the mill, burned as it stood on said date, September 6, 1899.' Upon this proposition the court in *Matthews v. Missouri P. R. Co.* (1898) 142 Mo. 666, 44 S. W. 802, 8 Am. Neg. Rep. 699, said: 'For the purpose of ascertaining the value of the barn at the time of its destruction, plaintiff was entitled to put the jury in possession of all the

facts bearing upon the question. There was, therefore, no error in permitting witnesses to testify to the original cost, though materials should then have been more costly than when the building was burned. Defendant had the right to show the difference in the cost and the depreciation in value by use and natural causes.' This is decisive of that question; there was no error in the admission of the testimony complained of."

In *Lucot v. Rodgers* (1893) 159 Pa. 58, 28 Atl. 242, an action to recover damages for injuries to plaintiff's house caused by the deposit of soil in a street, whereby water collected and soaked through the ground and undermined a retaining wall and the foundation of plaintiff's house, an instruction that the cost of the building was some evidence of its value was sustained.

*b. Limitations of rule.*

Since the cost of a building is merely an element in estimating its value at a later date and in a different condition, a considerable lapse of time or change of condition has led courts to declare the proof of cost to be irrelevant. *Springfield F. & M. Ins. Co. v. Payne* (1896) 57 Kan. 291, 46 Pac. 315; *Kansas City v. Frohwerk* (1900) 10 Kan. App. 120, 62 Pac. 432; *Ohio Valley Electric R. Co. v. Scott* (1916) 172 Ky. 183, L.R.A.1917C, 1038, 189 S. W. 7.

In *Ohio Valley Electric R. Co. v. Scott* (Ky.) *supra*, it appeared that a building had been deposited on the tracks of the defendant company by a flood. In abating this nuisance the company wrecked and tore down the building. The court held that testimony of its cost was incompetent, as it did not tend to throw light on the value of the building as it stood on the tracks. It was said: "As to the third ground urged, that the verdict is flagrantly against the evidence as to its size, we find considerable room for the contention. It is shown that the stack chimney in the house had fallen down, knocking out the window sash and perhaps some of the doors, tearing down some of the partition walls, and breaking holes through the floors; that the house was very cheaply built, and

was covered with mud, both inside and out, and in its position was warped and twisted so that many of its parts had become unfastened. Since the flood the lot upon which the house stood, and an adjoining lot upon which stands a similar house in size and value, has been sold for \$125, and there is other proof of a very convincing nature that the house as it stood when left upon the railroad track was of but little, if any, value, although there is testimony produced by the plaintiff that its value was even more than that fixed by the jury. Some of this testimony, however, we regard as incompetent, particularly that as to the cost of the property, and what it cost to build the house. None of this could throw any light upon the value of the house as it stood just before being removed. Of course, in combating the defendant's contention that the house could not have been removed, the length of time that it had been constructed might be shown, but what it cost to build it has no place in this record, according to our conception."

In *Springfield F. & M. Ins. Co. v. Payne* (1896) 57 Kan. 291, 46 Pac. 315, the owner of a house which was destroyed by fire was allowed to testify as to the original cost of the building. The court held that one method of arriving at a loss was by considering the value of the building at the time of the injury, and therefore it was error to allow such testimony, since the cost of a building could not ordinarily be said to be evidence of its value at a particular time, though it might be considered if the necessity arose. It was said: "Evidence of the cost of a building, however, can hardly be said to be evidence of its value at a particular time. Sometimes, from the necessities of the case, it may be proper to inquire as to the cost of an article as tending to establish its value; but there is no such necessity here, and *Payne* ought not to have been permitted to testify that the house cost about \$25,000."

In *Kansas City v. Frohwerk* (1900) 10 Kan. App. 120, 62 Pac. 432, the plaintiff introduced evidence as to the

cost of the property and the rent he received for the building before and after the injury. Holding that it was error to admit such evidence, as it was not the way to prove damages, the court said: "The plaintiff, over the objection and exception of the defendant, introduced evidence as to the cost of the property and the rent he received for it before and after the damages, and that in the fall of 1889 and spring of 1890 it was worth between \$8,000 and \$9,000, and in 1891 it was worth about \$1,800. This is not the way to prove damages, and we cannot say that the jury were not prejudiced thereby."

While the original cost of a building is sometimes a proper element in the measurement of damages, if the material cost more at the time the building was erected, it is an imperfect criterion. Thus *KENNEDY v. TRELEAVEN* (reported herewith) ante, 274, holds that the original cost of construction of a building is sometimes a proper element in the consideration of the proper amount of damages. When, however, the building was built in a period when the material might have cost much more than at the present time, it is an imperfect criterion.

But in *Matthews v. Missouri P. R. Co.* (1898) 142 Mo. 645, 44 S. W. 802, 3 Am. Neg. Rep. 699, testimony was admitted tending to show the original cost of a barn which was destroyed by fire alleged to be set out by a locomotive. The court held that it was proper to permit testimony relating to the original cost, even though the material at that time was more costly than at the time of the fire. It was said: "For the purpose of ascertaining the value of the barn at the time of its destruction, plaintiff was entitled to put the jury in possession of all the facts bearing upon the question. There was, therefore, no error in permitting witnesses to testify to the original cost, though materials should then have been more costly than when the building was burned. Defendant had the right to show the difference in the cost and the depreciation in value by use and natural causes."

It is improper to admit testimony relating to the cost of a finished building when the injury is done to an unfinished building. *Bennett v. Clemence* (1863) 6 Allen (Mass.) 10. In that case an action of tort for breaking and entering plaintiff's close, and tearing down, carrying away, and destroying an unfinished building, certain testimony relating to the cost of the building when finished was admitted. The court held that it was improper to admit such evidence, as the measure of damages was for the injury to the building as it then was.

### *III. Cost of repairing or restoring building.*

#### *a. Majority rule.*

The reasonable cost of repairing or restoring an injured or destroyed building to its former condition may be taken into consideration in the measurement of the damages caused by the injury or destruction.

*United States.*—*Chicago & E. R. Co. v. Ohio City Lumber Co.* (1914) 181 C. C. A. 57, 214 Fed. 751.

*Alabama.*—*Alabama G. S. R. Co. v. Johnston* (1900) 128 Ala. 283, 29 So. 771.

*Arkansas.*—*BUSH v. TAYLOR* (reported herewith) ante, 262.

*California.*—*Cleland v. Thornton* (1872) 43 Cal. 437; *Linforth v. San Francisco Gas & E. Co.* (1909) 156 Cal. 59, 103 Pac. 320, 19 Ann. Cas. 1230.

*Florida.*—*Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* (1891) 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

*Georgia.*—*Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320; *Empire Mills Co. v. Burrell Engineering & Constr. Co.* (1916) 18 Ga. App. 253, 89 S. E. 580.

*Illinois.*—*Fitz Simons & C. Co. v. Braun* (1902) 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; *Cooper v. Kankakee Electric Light Co.* (1911) 164 Ill. App. 581.

*Iowa.*—*Freeland v. Muscatine* (1859) 9 Iowa, 461; *Graessle v. Carpenter* (1886) 70 Iowa, 166; *Watson v. Mississippi River Power Co.* (1916) 174 Iowa, 23, L.R.A. 1916D, 101, 156 N. W. 188, 18 N. C. C. A. 873.

**Kansas.**—Springfield F. & M. Ins. Co. v. Payne (1896) 57 Kan. 291, 46 Pac. 315; **KENNEDY v. TRELEAVEN** (reported herewith) ante, 274.

**Kentucky.**—Ætna Ins. Co. v. Johnson (1874) 11 Bush, 587, 21 Am. Rep. 223; Louisville & N. R. Co. v. Home Ins. Co. (1912) 146 Ky. 281, 142 S. W. 398; Lexington & E. R. Co. v. Baker (1913) 156 Ky. 431, 161 S. W. 228; Kentucky Traction & Terminal Co. v. Bain (1914) 161 Ky. 44, 170 S. W. 499; **ADAMS v. SENZEL** (reported herewith) ante, 268; Cincinnati, N. O. & T. P. R. Co. v. Falconer (1906) 30 Ky. L. Rep. 152, 97 S. W. 727.

**Louisiana.**—Lambert v. American Box Co. (1919) 144 La. 603, 3 L.R.A. 612, 81 So. 95.

**Maryland.**—Brown v. Werner (1874) 40 Md. 15.

**Massachusetts.**—Hopkins v. American Pneumatic Service Co. (1907) 194 Mass. 582, 80 N. E. 624.

**New York.**—Austin v. Hudson River R. Co. (1862) 25 N. Y. 334; Barrick v. Schifferdecker (1890) 123 N. Y. 52, 25 N. E. 365, reversing (1888) 48 Hun, 355, 1 N. Y. Supp. 21; Slaven v. State (1897) 152 N. Y. 45, 46 N. E. 321.

**Oklahoma.**—Silva v. McAlester (1915) 46 Okla. 150, 148 Pac. 158.

**Pennsylvania.**—Helbling v. Allegheny Cemetery Co. (1902) 201 Pa. 171, 50 Atl. 970; Keats v. Gas Co. (1905) 29 Pa. Super. Ct. 480.

**Tennessee.**—Southern Oil Works v. Bickford (1885) 14 Lea, 651; Anderson v. Miller (1896) 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615.

**Utah.**—Marks v. Culmer (1890) 6 Utah, 419, 24 Pac. 528.

**England.**—Hide v. Thornborough (1846) 2 Car. & K. 250; Newcastle v. Broxtowe (1832) 4 Barn. & Ad. 273, 110 Eng. Reprint, 458, 1 Nev. & M. 598.

*b. Application of majority rule.*

*1. Injury not susceptible of being repaired without rebuilding.*

If the injury to a building is not susceptible of being repaired without reproducing the building on the same location, the reasonable cost is a proper element to be taken into considera-

tion in the measurement of the damages.

**United States.**—Chicago & E. R. Co. v. Ohio City Lumber Co. (1914) 131 C. C. A. 57, 214 Fed. 751.

**Alabama.**—Alabama G. S. R. Co. v. Johnston (1900) 128 Ala. 283, 29 So. 771.

**Arkansas.**—BUSH v. TAYLOR (reported herewith) ante, 262.

**California.**—Cleland v. Thornton (1872) 43 Cal. 437.

**Florida.**—Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. (1891) 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

**Kansas.**—Springfield F. & M. Ins. Co. v. Payne (1896) 57 Kan. 291, 46 Pac. 315; and **KENNEDY v. TRELEAVEN** (reported herewith) ante, 274.

**Kentucky.**—Ætna Ins. Co. v. Johnson (1874) 11 Bush, 587, 21 Am. Rep. 223; Louisville & N. R. Co. v. Home Ins. Co. (1912) 146 Ky. 281, 142 S. W. 398.

**Louisiana.**—Lambert v. American Box Co. (1919) 144 La. 603, 3 A.L.R. 612, 81 So. 95.

**New York.**—Austin v. Hudson River R. Co. (1862) 25 N. Y. 334.

**Oklahoma.**—Silva v. McAlester (1915) 46 Okla. 150, 148 Pac. 158.

**Tennessee.**—Southern Oil Works v. Bickford (1885) 14 Lea, 651.

**Utah.**—Marks v. Culmer (1890) 6 Utah, 419, 24 Pac. 528.

In *Chicago & E. R. Co. v. Ohio City Lumber Co.* (Fed.) supra, an action against a railroad company for damages caused by the destruction of the plaintiff's mill, including certain buildings and other property, testimony was held to have been properly admitted which tended to show the reasonable value of the buildings, taking into consideration, among other things, the cost of their reconstruction. The court said: "In this case it appears that these buildings were located in a small village, and had little, if any, market value. The use made of them in connection with the other property destroyed materially affected their value. Under such circumstances, it cannot be said that their market value, detached from the land and separated from the use to

which they had been put, fairly represented the loss suffered by plaintiffs in their destruction. No error was committed in permitting the witness to testify as to the fair and reasonable value of these buildings, taking into consideration their age, depreciation, the cost of reconstruction, and their use in connection with the other property destroyed by the same fire."

In *Alabama G. S. R. Co. v. Johnston* (Ala.) *supra*, an action for the value of a building which was burned, evidence as to the cost of a new house of the kind burned was admitted. The court said: "Though the cost of building new houses of the kind burned was not the criterion by which to measure the damages caused by their destruction, evidence of such cost was relevant, as tending to throw light on their value."

In *BUSH v. TAYLOR* (reported herewith) *ante*, 262, it appeared that certain lumber, engines, saws, boilers, and other fixtures, together with the buildings which housed them, were destroyed by fire caused by sparks from a locomotive belonging to a company of which the defendant was receiver. In an action against the receiver, the court instructed the jury that the proper measure of damages was the difference in value of the land immediately before and immediately after the fire. In reversing this judgment the court held that where the property destroyed depends on its connection with the soil, the measure of damages is the difference in value of the land before and after the fire, but if the property destroyed could be replaced in substantially the same condition, the measure of damages was the cost of replacement. It was said: "We think our own cases, when construed in connection with the facts to which the principles there announced were applied, result in the following statement of the law. That, if the value of the property destroyed depends upon its connection with the soil, the measure of the damages is the difference in the value of the land before and after the fire. But, if the property destroyed could be replaced in substantially the condition in which it existed

before the fire, then the measure of the damages is the cost of so replacing it."

But in *Dodd v. Read* (1906) 81 Ark. 13, 98 S. W. 703, in an action to recover damages caused by destruction of plaintiff's house by fire, testimony was given that the building was worth a certain sum, and a carpenter testified that it was worth that, but it would cost double that sum to rebuild it. The jury returned a verdict of three fourths of what it would cost to rebuild. The court held that it was erroneous for the jury to base their verdict on the cost of rebuilding the house, deducting for the depreciation due to age and decay. It was said: "It is further contended by appellant that the evidence is insufficient to sustain a verdict for more than \$200. The house was totally destroyed, and several witnesses stated their opinions to be that it was worth about \$200. One witness—the only one introduced by the plaintiff on the question of value—testified that he was a carpenter, was familiar with the house, and that, in his opinion, it would cost at least \$400 to rebuild it. He gave it as his opinion that the house was worth about \$200 at the time it was destroyed. Other witnesses testified that the house was in good condition at the time it was destroyed, and they undertook to describe its condition in detail to the jury. Now, the true inquiry was as to the cash market value of the building, or rather the difference between the market value of the property before and after the destruction of the house; and the witnesses who undertook to state the value placed it at \$200. It is manifest, however, that the jury disregarded this testimony, and based the amount of the verdict upon the cost of rebuilding the house anew, less the depreciation on account of age and decay. They either did this, or they arbitrarily rejected the opinions of the witnesses as to the value, and substituted their own judgment. In either event they exceeded their powers and rendered a verdict inconsistent with the evidence. It was competent for the witnesses to state their

several opinions with reference to the cash value of the building; stating the facts upon which they reached their conclusions. *St. Louis, I. M. & S. R. Co. v. Lyman* (1893) 57 Ark. 512, 22 S. W. 170. None of the witnesses who testified on this subject showed any special knowledge of the value of property in that locality, and the testimony, on that account, is far from satisfactory, but the burden was upon the plaintiff to prove the amount of the damages, and the defendant alone reaps all the benefit from the weakness of the testimony. There was no evidence at all that the building was worth \$300—all the evidence showed that it was worth only \$200—and the jury could not substitute their own judgment for the testimony of witnesses on this point."

In *Cleland v. Thornton* (1872) 43 Cal. 437, an action for damages caused to buildings by fire, evidence as to the cost of new buildings to replace those burned was admitted. The court held that the evidence was admissible, not as affording a criterion of damages, but merely as furnishing some data by which the court would be enabled to estimate approximately the value of the old buildings. It was said: "There was no error in the ruling of the court, admitting the evidence as to the cost of new buildings to replace those which were burned. The evidence was admissible as furnishing some data by which the court would be enabled to estimate approximately the value of the old buildings; and it is evident from the opinion and order of the court that it was received and considered for this purpose only, and not as affording a criterion of damages."

In *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* (1891) 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, an action for damages caused by the burning of a hotel and other buildings, evidence of the cost of replacing the buildings was admitted. The court held that if the destroyed property had no market value, evidence of the cost of replacing the property was proper. It was said: "To fix the market value of a thing, it seems to

us that there must be a selling of things of the same kind. If there had ever been a sale of a hotel, or of any other building in Tavares, we are not informed, and we have no judicial knowledge, nor does the record inform us, that hotels have a market value there. Yet, though there is no market value or standard value, the plaintiff should not be allowed more than the property destroyed by fire on the 9th of April, 1888, was reasonably worth in Tavares. To do this it is proper to invoke the aid of all facts calculated to show its value, and we are unable to perceive that the circuit judge erred in admitting the evidence of the cost of replacing the building on the day of the fire. It was a fact tending to show, and to be considered with others by the jury in determining, what amount of money would put the plaintiff in the position in which he was at the time. If there were any other facts incident to the condition of Tavares, considered in a business or other point of view, calculated to affect the value of this or any other property there, and which would qualify or outweigh the items of the cost of restitution, and such facts do not appear in the record, we are not responsible. It must be assumed there were none other existing. By saying the testimony was admissible, we do not say what weight should be given it, nor do we come into conflict with the Tennessee and Illinois cases last mentioned. The evident meaning of those cases is that the cost of restitution or of the materials is not the measure of damages governing the jury, and not that such facts can never be considered in arriving at the true value or measure of damages. If an article has no market value, its value may be shown by proof of such elements of facts affecting the question, as exist. Recourse may be had to the items, and its utility and use."

In *Springfield F. & M. Ins. Co. v. Payne* (1896) 57 Kan. 291, 46 Pac. 315, it was held that one method of arriving at the amount of loss from injury to a building was by estimating the cost of replacing the building, less any depreciation from use, age, or other-

wise, the court saying: "The policy required the insurance company to make good unto the assured the amount of loss or damage, to be estimated according to the cash value of the property at the time of the loss, not exceeding \$4,000. One method of arriving at such loss is by estimating the cost of replacing the building, less any depreciation from use, age, or otherwise; and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins. If witnesses as to the worth of the building are shown by cross-examination to have little knowledge upon the subject, this would be proper matter of argument to the jury as affecting the weight of their testimony, but it should not be excluded on that account."

KENNEDY v. TRELEAVEN (reported herewith) ante, 274, holds that the better method of measuring what the property was reasonably worth at the time it was destroyed by fire is to take the cost of replacing the building and deduct a proper amount for its age and condition.

In *Louisville & N. R. Co. v. Home Ins. Co.* (1912) 146 Ky. 281, 142 S. W. 398, an action for damages sustained by reason of the burning of a building, evidence was admitted as to the cost of rebuilding a house like the one burned. The court held that the plaintiff was entitled to recover the loss sustained, and in proving such loss any relevant matter which would throw light upon its value was admissible. It was said: "It is next insisted that the court erred in admitting evidence as to what it would cost to build a house like the one burned, and in excluding from the jury evidence of the market value of the house at the time it was destroyed. What the plaintiff was entitled to recover, if anything, was the loss he sustained by the destruction of his house. This measure of recovery would compensate him, and it was clearly proper to allow him to prove what it would cost to replace the house that was destroyed, and it was also admissible to give in evidence every relevant fact that would throw light upon its value, and aid the jury in

ascertaining the amount of the loss the plaintiff had sustained; such, for example, as the value of the land where the house stood before it was destroyed, and its value afterwards. But we do not understand how it would be practicable for any person to say what the market value of a house was, detached from the land on which it stood, unless it was intended to remove the house to another place or tear it down, as, ordinarily, houses have little value separate from the land upon which they are located. They are regarded as a part of the land, and when we speak of the market value of a building, it is generally understood to include the ground on which the building is located."

In *Ætna Ins. Co. v. Johnson* (1874) 11 Bush (Ky.) 587, 21 Am. Rep. 228, it appeared that a building, together with other articles, was insured against loss by fire. In an action against the insurance company for loss by fire of the house and the other articles, the court held that, in determining the value of the building destroyed, the value of the building at the time of the fire and of a new building of the same kind and dimensions should be taken into consideration. It was said: "The only question of difficulty on this branch of the case arises in determining the mode of ascertaining the cash value of the building destroyed. If the appellees are allowed the original cost of the building, or a sum sufficient to erect a new one, this criterion would give them doubtless a much larger sum than they are entitled to recover; nor is it proper, in fixing the value, to ascertain the difference in the value of the lot with the building upon it and its value with the building destroyed, as by reason of the peculiar character of the building or the location of the lot for building purposes, the latter might sell for as much, or nearly so, without the building as with it; and to determine its value by inquiry from witnesses as to its marketable value, to be removed from the premises, would necessarily result in lessening its real value to the owner. It seems to us that the just mode of fixing the value,



although the rule may not be of universal application, would be the value of the building as it stood upon the ground on the day it was destroyed, as compared with a new building of the same kind and dimensions. If the building was old and dilapidated by use and decay, its value in that condition is what the appellees should recover. The instructions given on this branch of the case directed the jury to ascertain the actual cash value of the property, and left without explanation the mode of ascertaining this value. The jury, as we must conclude from the proof in the case, gave to the appellees as damages the cost of erecting another building."

In an action for the negligent handling of a motor truck, whereby its trailer destroyed a gallery over a sidewalk, it appeared that the lower court allowed recovery for a new gallery. The court held that plaintiff was entitled to recover what it would cost to build a gallery as good as the one destroyed. It was said: "Counsel further argue that the lower court erred in allowing recovery for a new gallery, when only an old one was destroyed. The obligation of defendant, however, is to indemnify plaintiff—to put him in the position that he would have occupied if the injury complained of had not been inflicted on him. It goes further than that of an insurer against loss by fire, who takes no risk against personal effort and inconvenience. And yet, so far as we know, those who are engaged in the insurance business do not undertake to build an old house, by way of indemnifying the assured for the loss of an old house, and no suggestion is here made as to the manner in which that can be done. According to the evidence of plaintiff's contractor, the broken material of which the gallery in question was constructed, and which, at the time of the trial, was lying in a confused heap on plaintiff's premises, could not again be utilized in the construction of a gallery, and it is not pretended that it could be so utilized, save by matching and welding the broken bits of iron, patching the flooring, and supplying missing

parts of both with new material, all of which, when done at an expense not estimated, would result in the production of a gallery composed of matched, patched, and welded material, which would not be the gallery that was destroyed, or which plaintiff is bound to accept by way of indemnity for that which was destroyed. Defendant alleges in its answer that it had declined to have anything to do with the debris in question, sets up no claim for salvage, and has offered no evidence that the debris is of any value, or would compensate plaintiff for its occupancy of his premises. We therefore find no reason for making any change in the judgment appealed from, on account of any possible salvage that he may realize." *Lambert v. American Box Co.* (1919) 144 La. 603, 3 A.L.R. 612, 81 So. 95.

In *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334, an action for a negligent excavation on adjoining property whereby the walls of plaintiff's warehouse were destroyed, by reason of water washing the soil away from the foundations, the jury were charged that if plaintiff was entitled to recover at all, he was entitled to recover the amount of damages actually sustained, plus the loss of rent. The court held that the plaintiff was entitled to recover the cost of putting the building in as good a condition as it was before the injury, saying: "The judge charged that if the plaintiffs were entitled to recover at all, they were entitled to recover the amount of damages they had actually sustained, including loss of rent from the Syracuse & Oswego line. It is not seriously questioned that the plaintiffs were entitled to recover as damages, the cost of repairing and putting the building in as good condition as it was before the injury. The defendants recognized their obligation to pay the plaintiffs for their repairs; and the plaintiffs acted on this recognition in making them. It was not in the nature of a contract between the parties, but of an admission by the defendants of the extent of the damage to the building, and of their liability for the injury. But if there had been no rec-

ognition by the defendants of their obligation to pay for the repairs, the plaintiffs would have been entitled to recover from them the cost of putting the building in as good condition as it was before it was injured by their negligent acts. These were damages that the plaintiffs had actually sustained."

In *Silva v. McAlester* (1915) 46 Okla. 150, 148 Pac. 150, a suit to enjoin the destruction of certain buildings, on the ground that there was no adequate remedy at law, in that the damages were not susceptible of measurement, the court held that the damages were susceptible of measurement, the measure being what it would cost to replace them, not exceeding the value of the entire property.

In *Southern Oil Works v. Bickford* (1885) 14 Lea (Tenn.) 651, an action for the recovery of damages for the destruction of two adjoining houses by reason of the wrongful usage of one by a tenant, the court admitted testimony relating to the cost of rebuilding both houses. Holding that, where the value of a building must be gathered from opinion, the cost of replacing is a proper element in its determination, the court said: "There is testimony in the record describing fully the two houses thus destroyed, showing their dimensions, the kind of material used in building them, the character of the work, and the time when built. Bickford also proved that he was getting for his house a monthly rent of \$51, and that the damage sustained by the destruction of each house was about \$6,000. He also testified that he had rebuilt both houses within ten months after the accident. He was then asked: 'What was the cost of rebuilding each house?' The defendant's counsel objected to this question as irrelevant and incompetent. The court overruled the objection, and the witness stated that it cost \$5,400 for each house. The referees report that the court erred in admitting this testimony. We are unable to concur in this opinion. This court held in *Memphis v. Kimbrough* (1873) 12 Heisk. (Tenn.) 140, which was a suit to recover damages for the

loss of a steamer by reason of the negligence of the corporate authorities of the city of Memphis, that it was not error to instruct the jury that in estimating the damages they might look, as a circumstance, to the cost of the boat, the jury having been fully instructed by the trial judge that it was not the cost, but the value of the boat at the time of the accident, which they were to ascertain. And it is laid down by text-writers that in actions against insurance companies for the recovery of the value of property lost, where the property has not a 'ready' market value, the cost of replacing the thing is an element proper to be considered. 3 Sutherland, Damages, 87. The absence of a ready market value makes it competent to prove value by the opinions of witnesses who have the requisite knowledge. 1 Sutherland, Damages, 798; Whart. Ev. § 450. And where the value must be gathered from opinion, the cost of replacing would undoubtedly aid the jury in coming to a correct verdict."

In *Marks v. Culmer* (1890) 6 Utah, 419, 24 Pac. 528, an action for the destruction and demolition of a building by defendants, it was held that when a building can be readily reproduced the plaintiff is entitled to recover what it will cost to reproduce it, and the value of its use while that is being done.

*2. Injury susceptible of being repaired without rebuilding.*

If the injuries to a building are susceptible of being repaired without rebuilding, the reasonable cost of such repairs as will put the building in the same condition as it was immediately preceding the injury, is a proper element to be considered in the measurement of damages.

California.—*Linforth v. San Francisco Gas & E. Co.* (1909) 156 Cal. 59, 103 Pac. 320, 19 Ann. Cas. 1230.

Georgia.—*Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320; *Empire Mills Co. v. Burrell Engineering & Constr. Co.* (1916) 18 Ga. App. 253, 89 S. E. 530.

Illinois.—*Fitz Simons & C. Co. v. Braun* (1902) 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9;

Cooper v. Kankakee Electric Light Co. (1911) 164 Ill. App. 581.

Iowa.—Freeland v. Muscatine (1819) 9 Iowa, 461; Graessle v. Carpenter (1886) 70 Iowa, 166, 30 N. W. 392; Watson v. Mississippi River Power Co. (1916) 174 Iowa, 23, L.R.A. 1916D, 101, 156 N. W. 188, 13 N. C. C. A. 873.

Kentucky.—Lexington & E. R. Co. v. Baker (1913) 156 Ky. 431, 161 S. W. 223; Kentucky Traction & Terminal Co. v. Bain (1914) 161 Ky. 44, 170 S. W. 499; ADAMS v. SENGEL (reported herewith) ante, 268; Cincinnati, N. O. & T. P. R. Co. v. Falconer (1906) 30 Ky. L. Rep. 152, 97 S. W. 727.

Maryland.—Brown v. Werner (1874) 40 Md. 15.

Massachusetts.—Hopkins v. American Pneumatic Service Co. (1907) 194 Mass. 582, 80 N. E. 624.

New York.—Barrick v. Schifferdeck-er (1890) 123 N. Y. 52, 25 N. E. 365, reversing (1888) 48 Hun, 355, 1 N. Y. Supp. 21; Slavin v. State (1897) 152 N. Y. 45, 46 N. E. 321.

Pennsylvania.—Helbling v. Allegheny Cemetery Co. (1902) 201 Pa. 171, 50 Atl. 970; Keats v. Gas Co. (1905) 29 Pa. Super. Ct. 480.

Tennessee.—Anderson v. Miller (1896) 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615.

England.—Hide v. Thornborough (1846) 2 Car. & K. 250; Newcastle v. Broxtowe (1832) 4 Barn. & Ad. 273, 110 Eng. Reprint, 459, 1 Nev. & M. 598.

Under a California statute (Civ. Code, § 3333) the measure of compensation allowed is the cost of the restoration of the building to its original condition, when this can be done at a reasonable expense, plus compensation for the loss of the use of the property. Applying that act it was said in Linforth v. San Francisco Gas & E. Co. (Cal.) supra: "The jury awarded plaintiff \$10,000 damages for injuries to the building, and \$800 damages, loss of rents. The measure of damages in cases such as this is well settled, and is thus expressed by Joyce on Damages: 'Where a building has been injured by a trespasser, it has been determined that the measure of dam-

ages in an action against him therefor will be the cost of repairing or restoring the building to its former condition, where the injury is of such a character that this may be done at a reasonable cost, an allowance also being made for loss of rental during the reasonable time required to make such repairs.' This rule has met with general acceptance. . . . This rule, allowing compensation for the cost of restoration to the original condition when this can be done at a reasonable expense, together with compensation for the loss of the use of the property, is in precise accord with § 3333 of the Civil Code."

In Harrison v. Kiser (Ga.) supra, an action for damages because of injuries to plaintiff's house caused by the careless and negligent excavation of adjoining property, it was held that if plaintiff was entitled to recover at all, it would be a sum sufficient to put the house in the same condition as before the injury. The court said: "Complaint is made that the court erred as to the measure of damages, having charged the jury on this subject that the measure of damages was the difference between the value of the property before the injury was done, and its value after it was done. We do not think this was a correct measure of damages in this case, but, on the contrary, we are of the opinion that if the plaintiff was entitled to recover any damages, he would be entitled to recover whatever sum it would take to put the house in the condition in which it was before it was injured. The complaint is that the plaintiff's house was injured, not that his land was injured; and we know of no better rule than that which we have stated."

In Empire Mills Co. v. Burrell Engineering & Constr. Co. (Ga.) supra, an action for the breach of a construction contract, the defendant claimed damages for injuries by the improper construction of a building, to a brick building adjoining. The jury were instructed that the proper measure of damages was the difference in the value of the building immediately before and immediately after the injury. In reversing the judgment, the court held

that when the injury to the property is separable from the freehold, the measure of damages is the cost of restoring or replacing the property destroyed. It was said: "The other question that we deem it necessary to discuss to some slight extent is that raised by the 14th ground of the amendment to the motion for a new trial, in which it is alleged that the court erred in charging the jury that the measure of damages for the injury to the boiler house of the defendant would be the difference in value between the boiler house in its condition at the time of the injury, if injury were made to it, for any purpose for which the building, the boiler house, was used or might be used, and for which it might have a value, and its value for the same purpose after the injury wrought by the defendant company's breach of its contract in constructing the elevator had been—after that injury had been effected." "As a general rule the measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises. . . . In some cases the cost of repair or restoration has been adopted as the measure of damages [Harrison v. Kiser (Ga.) *supra*, and several other cases]; but in such event the cost of repair must be reasonable and bear some proportion to the injury sustained." 13 Cyc. 150, 151. "The value of the property destroyed, or the cost of restoring or replacing such property, is the proper measure of damages for the destruction of buildings, fences, and other improvements which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself." 8 R. C. L. 485. . . . Of course, if recovery is sought for injury to the freehold itself by reason of the taking or destroying of the property attached thereto, the measure of damages should be the difference between the value of the land before and its value after the injury. 8 R. C. L. 485, and cases there cited. The only fair construction that can be placed on the

claim of the defendant for damages on account of the injury to its boiler house, as set forth in the petition in this case is that damages are sought for the destruction of the building itself, and not for an injury to the freehold by reason of the destruction of the building. This being true, the court erred in giving to the jury the measure of damages complained of and above set forth in full."

In *Fitz Simons & C. Co. v. Braun* (1902) 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9, an action for damages caused by injuries to a building due to an explosion of dynamite while excavating a tunnel, the jury were instructed that the proper measure of damages was the cost of repairing the building so that it would be in as good condition as it was before the injury. Holding that the instructions were correct, the court, on appeal, said: "The instructions advised the jury to adopt as the measure of damages the cost of repairing the building so that it would be in as good condition as it was before it was damaged by the explosions. It is insisted the proper measure of damages was the depreciation in value of the property resulting from the injuries. We think the cost of repairing the building and restoring it to its proper condition was the true measure of the damages. It was so held in *Hide v. Thornborough* (1846) 2 Car. & K. (Eng.) 250, and in *Shrieve v. Stokes* (1848) 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401, in which cases the injuries were occasioned by excavations made on adjoining lots, to those on which the buildings injured were situate. Mr. Sutherland, in his work on Damages (vol. 3, § 1018), says: 'And that valuation should be adopted which will be most beneficial to the injured party, for he is entitled to the benefit of the premises intact and to the value of any part separated. The damages for injury done to a house are measured by the cost of restoring it to its previous condition.'"

In *Cooper v. Kankakee Electric Light Co.* (1911) 164 Ill. App. 581, an action to recover damages for the partial destruction of a building by fire,

caused by currents of electricity being allowed to escape, evidence was admitted as to the rental value of the property. This was objected to on the ground that the true measure of damages was the cost of repairing and restoring the building to the condition it was in before the injury. The court held that, for an injury to property which might be readily repaired or reproduced, the measure of recovery was the cost of repairing it, together with the value of its use while that was being done, saying: "Appellants insist 'that the plaintiff should not have been permitted to testify as to the rental value of her property, as the true measure of damages in a suit for injuries to a building is the cost of repairing and restoring the building to the condition it was in before the damage,' and rely upon *Fitz Simons & C. Co. v. Braun* (1902) 199 Ill. 390, 59 L.R.A. 421, 85 N. E. 249, 13 Am. Neg. Rep. 9, affirming (1901) 94 Ill. App. 533, as authority for their contention. In that case the measure of damage is said to be the cost of restoring the house to its previous condition. The loss of the use of the building while being repaired was not claimed or referred to. The question of a recovery for loss of rental was not involved; the injury there sued for did not prevent the use of the building while it was being repaired. It cites § 1018 of *Sutherland on Damages* as authority for the recovery of the cost of repairs. In this case the house was only partially destroyed, and was not and could not be used while it was being repaired. For an injury to property, such as a house, that may readily be repaired or reproduced, the measure of recovery has been held to be the cost of repairing it, together with the value of its use while that was being done."

In *Watson v. Mississippi River Power Co.* (1916) 174 Iowa, 23, L.R.A. 1916D, 101, 156 N. W. 188, 13 N. C. C. A. 873, in an action for damages to a building caused by blasting rock, it was said: "The court instructed the jury that, if found entitled to recover, the plaintiff's measure of damages was the reasonable cost of

restoring the injured buildings to the condition they were in immediately before the injury thereto. This is said to be an incorrect statement, and that the true measure is the difference between the fair value of the property immediately before and immediately after such injury. The measure of damage for injury to real property is not invariable, and there may be circumstances under which either of the rules stated would be applicable. The rule stated by appellant is more often applied where the damage is permanent, or cannot well be expressed in specific items of injury capable of easy repair or remedy, but does affect in some substantial degree the value of the entire property as a unit. But where the injury is susceptible of remedy at moderate expense, and the cost of restoring it may be shown with reasonable certainty, the rule given the jury by the trial court is entirely proper."

In *Graessle v. Carpenter* (1886) 70 Iowa, 166, 30 N. W. 392, it appeared that an owner of a piece of property had entered on adjacent property without the owner's consent, and laid water pipes through it to his property. The house on the adjacent property was thereby injured. The court held that where a building has been injured by a wrongful act, but the injuries are not permanent or incapable of being repaired, the owner is entitled to recover an amount sufficient to put the property in as good a condition as it was prior to the injuries.

In *Freeland v. Muscatine* (1859) 9 Iowa, 461, an action to recover damages sustained by the removal of soil or earth below the established grade, whereby the plaintiff's house was injured, the court held that there was no error in instructing the jury that, in estimating the damages, the cost of rebuilding or repairing was proper to be taken into consideration.

In *ADAMS v. SENDEL* (reported herewith) ante, 268, it was held that the proper measure of damages to a building injured by blasting operations was a sum sufficient to restore the property

to substantially the condition it was in prior to the injury.

In *Kentucky Traction & Terminal Co. v. Bain* (1914) 161 Ky. 44, 170 S. W. 499, the jury were instructed that the plaintiff was entitled to recover such sum in damages as it would have reasonably cost her, immediately after the accident, to have placed the house in as good a condition as it was before. The court held that, where the injury to the building is such that it can be repaired and placed in as good a condition as before, such is the rule.

In *Lexington & E. R. Co. v. Baker* (1913) 156 Ky. 431, 161 S. W. 228, it appeared that while constructing a roadbed of a railroad dynamite and other explosives were used. Large quantities of rock were thrown on the plaintiff's residence and barn. In an action to recover damages for the injuries, the court instructed the jury that the measure of damage was the difference between the value of the house and barn before and after the injury. The court held that where the injury is not permanent the measure of damages is a sum sufficient to restore the property to the condition it was in prior to the injury, and such further sum as would compensate for the diminution in the value of the use of the property during the continuance of the injury.

In *Cincinnati, N. O. & T. P. R. Co. v. Falconer* (1906) 30 Ky. L. Rep. 152, 97 S. W. 727, it appeared that three frame houses were destroyed by fire caused by flying cinders from locomotives. In an action to recover damages the court held that if the property was injured, but not destroyed, the measure of damages would ordinarily be that sum which would restore the property to its former condition, if it was susceptible of being repaired, saying: "The defendant insists that the measure of the plaintiff's damages is the difference between the value of her lot on which the buildings stood, as it was just before the fire, and its market value immediately afterward. Market value is not always the measure of damage to property. The Century Dictionary defined the term 'damages' as 'the value in money of what

is lost or withheld; the estimated money equivalent for detriment or injury sustained; that which is given or adjudged to repair a loss.' Compensation is the bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position, is the purpose of allowing a money equivalent of his property which has been taken, injured, or destroyed. If the thing taken or destroyed can be replaced in the market, then obviously that sum of money which will buy another like it will repair the injury. So if property is injured, but not destroyed, ordinarily the measure of damages, where the property can be repaired so as to be as it was before, is that sum that will restore the former condition."

In *Cumberland Teleph. & Teleg. Co. v. Foster* (1904) 117 Ky. 389, 78 S. W. 150, it appeared that a telephone company sank a log anchor for the support of its poles and wires on the plaintiff's lot, adjacent to her brick building, whereby the natural lateral support of the wall was weakened, causing the foundation to give way and the walls to crack. In an action for damages, the jury returned a verdict of \$400, based on the testimony of the builders that it would cost between \$400 and \$600 to repair and restore the building to its former state. The defendant introduced testimony that it could be restored for \$50. The court held that the award of \$400 was not excessive, saying: "As to the first ground, it is sufficient to say that all the witnesses for appellee testified fully and intelligently as to the nature and extent of the injury to her building. Some of them were the builders of the house, and many of them testified that the cost of repairing and restoring it to its former state would amount to \$600, and others to not less than \$400, the sum allowed by the jury. And practically all of them agreed in their testimony as to the fact that the work of appellant's servants in digging the hole and placing the anchor near the foundation of the building had produced the injury complained of. It is true that the witnesses introduced in behalf of the ap-

pellant testified to the effect that the building was defectively constructed, and that its defective construction, together with a violent windstorm, caused the injury complained of; furthermore, that the cost of replacing it would fall far short of the amount fixed by the appellee's witnesses. In fact, some of appellant's witnesses fixed the cost of repairing the building as low as \$50. It will be seen, therefore, that the evidence was conflicting. But it was the province of the jury to reconcile it, and to determine the weight and effect to be given to the testimony of each set of witnesses, or any one or more of them; and, besides, they were permitted to view the building and premises in charge of an officer of the court, whereby they were the better enabled to arrive at a correct verdict. But while the evidence was conflicting as to the cause of the injury to appellee's building, there can be no doubt that it was injured to such an extent as to render it unsafe for occupancy."

In *Hopkins v. American Pneumatic Service Co.* (1907) 194 Mass. 582, 80 N. E. 624, an action for damages to certain land and a building, caused by the digging of a trench on adjoining land, whereby the building settled, thereby damaging it and depreciating it in value, it appeared that evidence of the cost of restoring the building to its condition prior to the injury was introduced. The court held that while such evidence was ordinarily not a true criterion for measuring damages, it might be resorted to in some cases, saying: "The cost of restoration of the property to its former condition does not necessarily furnish a true criterion for determining damages. Sometimes to make such a restoration would be an uneconomical and improper way of using the property. It might involve a very large and disproportionate expense to relieve from the consequences of a slight injury. In many cases the cost of repairs would be an accurate measure of the damages. To incur the cost is often the best way of dealing with the property. In the present case evidence was introduced of what this cost would

be, and the jury were permitted to consider it in determining the diminution of the market value."

Likewise, in *Brown v. Werner* (1874) 40 Md. 15, an action to recover damages for injuries done to a building by the careless and negligent manner in which the adjoining house was improved, the court held that plaintiff was entitled to recover such damages as would be sufficient to reinstate the wall and house in as good condition as they were prior to the injury. It was said: "The action was for a tort, and the plaintiff was entitled to recover for all damages naturally or necessarily flowing from the wrongful acts of the defendants; and if his house was injured by the careless and negligent manner in which the appellants improved the adjoining house, he was entitled to recover such damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury."

In *Knoche v. Pratt* (1916) 194 Mo. App. 300, 187 S. W. 578, the evidence showed that it would cost \$1,034.70 to restore a wall which fell, owing to the entry of the defendant on the plaintiff's property and the excavation of a part thereof. The court held that a verdict of \$950 was not excessive, it being conceded that the proper measure of damages was the reasonable cost of restoring the plaintiff's building to substantially the same condition it was in before the wall fell.

In *Slavin v. State* (1897) 152 N. Y. 45, 46 N. E. 321, the board of claims awarded the plaintiff an amount sufficient to compensate him for his actual outlay only. The plaintiff's building had been damaged by reason of water from a canal leaking through its walls and running into the cellar. The court held that where there was an injury to a building which admitted of reparation at a reasonable cost, and this would be the ordinary method of remedying the injury, the cost of such reparation was the measure of compensation.

In *Barrick v. Schifferdecker* (1890) 123 N. Y. 52, 25 N. E. 365, reversing (1888) 48 Hun, 355, 1 N. Y. Supp. 21, the action was to recover damages for

injuries alleged to have been sustained by reason of an adjoining landowner using the building on his premises as an ice house, whereby plaintiff's residence was rendered damp and the building damaged. The court held that the plaintiff was entitled to recover for the rental value and the necessary cost of repairing the building, and also a sum necessary to put it in a condition which would prevent future injuries.

In *Helbling v. Allegheny Cemetery Co.* (1902) 201 Pa. 171, 50 Atl. 970, it appeared that the plaintiff's house was injured by water which, during rainstorms, accumulated at the opening of a sewer. This accumulation and flooding of water were caused by the act of the defendant in allowing large quantities of brush, weeds, and cut grass to flow into the sewer, thereby causing the crib to become clogged. The court held that, as the injury was not permanent, the proper measure of damages was the cost of restoring the property to its former condition.

In *Anderson v. Miller* (1896) 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615, the jury were instructed that the measure of damages would be the reasonable cost of restoring property which had been partially destroyed by fire, communicated to it by a fire on adjoining premises, to its former condition. The court held that the instructions were correct, since they meant that the building, as replaced, should be of equal value to that destroyed, taking into consideration depreciation due to age. It was said: "In regard to the measure of damages, the charge of the court was correct in directing the jury that it would be the reasonable cost of restoring the property to its former condition. This does not mean, as argued by counsel, that it was the cost of a new building, the same as that destroyed, and the jury could not have so understood it, but the proper construction was that the building, as restored, should be of equal value to that destroyed, taking age and depreciation into consideration."

In *Hide v. Thornborough* (1846) 2 Car. & K. (Eng.) 250, it appeared that

a part of a house fell, owing to an excavation on adjoining land. In an action for damages caused thereby, the court instructed the jury that the plaintiff was entitled to an amount sufficient to put him in the same state he was in prior to the injury, since he should not be given a new house for an old one.

In *Newcastle v. Broxtowe* (1832) 4 Barn. & Ad. 273, 110 Eng. Reprint, 459, in an action to recover damages for the partial demolition of plaintiff's castle, the court held that the proper measure of damages was that sum of money which would repair the injury done, and would replace the house in the same condition as before the injury. It was said: "This question is peculiarly for the consideration of a jury, and nothing has been said to induce us to think that they have proceeded on an erroneous principle of calculation; certainly, if that principle had been pursued which was contended for by the learned counsel who moved for the rule, it would have been so; for the jury would have done wrong to take into their consideration whether the castle was an ancient possession of the noble family of the plaintiff, or not, whether the plaintiff was likely to reside there, and whether the neighborhood was suitable to such a residence. The true question is, What sum of money will repair the injury done by the mob? What will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable?"

If the municipal requirements at the time of repairing the injured building provide for a larger size brick than that used originally, in building the kind damaged, the defendant cannot object to evidence of the cost of repairing the building according to such requirements, since the municipal ordinances must be obeyed. *Jesel v. Benas* (1913) 177 Mo. App. 708, 160 S. W. 528. In that case the action was to recover for damage to a wall from the piling of lumber so as to cause rain and melting snow to be discharged on and against the wall. Testimony which tended to show the cost



of building a new wall made of a different brick than the old wall, but required by a city ordinance, was admitted. It was also shown that the brick which was to be used would not cost more than the other. The court held that the evidence was admissible, as the wall would necessarily have to be built according to municipal requirements. It was said: "The first assignment is to the admission in evidence, over the objection and exception of appellant, of the testimony of a witness as to what would be the cost of building a new wall on the north of respondent's buildings, the wall to be rebuilt 18 inches thick and of new pressed brick, whereas the old wall was only 9 inches thick and of handmade brick. It is true that that witness testified that to rebuild the wall he would use new brick, and that the wall he was figuring on was a 13-inch wall. His attention being called to the fact that the old wall was a 9-inch wall of handmade brick, he stated that the city ordinances do not allow the construction of a brick building of the height of the one in controversy with a wall of less than 13 inches in thickness. He further testified that it would cost as much to replace it with old brick as with new brick, provided you could get old brick, which was not always the case. We see no error in the admission of this testimony, to the prejudice of appellant. Necessarily the wall, if rebuilt, would have to be in conformity with the requirements of the city ordinances, and we know of no rule of law that would require plaintiff to replace old brick with old brick, assuming that they could be had. This is especially so when, according to this witness's testimony, one could not always obtain old brick, and if they did manage to secure them, they would cost as much as new brick, he testifying that it did not cost any more for the 13-inch than the 9-inch brick, because to lay the 9-inch would cost more than for laying the 13-inch brick."

*c. Limitations of majority rule.*

The cost of restoring an injured building to the same condition it was in before the injury is the proper

measure of damages, when the injuries can be repaired for less than the amount of depreciation in value. *Bates v. Warrick* (1909) 77 N. J. L. 387, 71 Atl. 1116. In that case testimony relating to the probable cost of repairs to a house which was damaged by the falling of a tree against it was admitted. The court held that where injuries to a building could be repaired without greater expense than the amount of depreciation in value would be if no repairs were made, the cost of restoring the building to the same condition it was in prior to the injury would be the measure of damages. It was said: "The defendant also complains of the admission of testimony tending to show the cost of further repairs, the plaintiff not having completed the repairs required to put the building in the same condition in which it was at the time of the injury, because it did not appear that the plaintiff intended to make such further repairs. There is nothing in this objection, nor does appellant undertake to support it by any authority. The plaintiff would be entitled to the damage she suffered if she never made any repairs, for it is a question of damage, not of restoration. The defendant also insists that the evidence of cost of repair should not have been admitted, because the true measure of damage is the depreciation in value resulting from the trespass. We are of opinion that, in a case like this, where manifestly the injury to a building can be repaired without greater expense than the amount of depreciation in value would be if no repairs were made, the cost of restoring the house to the same condition it was in before the injury would be the measure of damages (*Hale, Damages*, 359), but aside from this, the probable cost of repairs required to restore the building to its former condition was a proper element to be considered in ascertaining the diminution in value of the realty. The injury in the present case was slight, and there is no pretense that the repairs enhanced the property beyond its value at the time of the injury, and it also appears that the building was not available without

the repairs. Under such conditions the cost of the repairs was some evidence of depreciation in value."

Likewise the cost of the repairs must not exceed the value of the property. *Keats v. Gas Co.* (1906) 29 Pa. Super. Ct. 480, wherein it was held to be error for the court to charge the jury that the damages were merely the cost of remedying the injury to the real and personal property, as the true measure of damages, when the injury was not permanent, was the cost of restoring the property to its former condition, together with proper compensation for the loss of its use, unless such costs would exceed the value of the property when such value was the proper measure. The court said: "The defendant presented several points for charge, all of which were practically affirmed, with the exception of the first and second, the second being: 'Second, the measure of damages to plaintiff's premises, the injury not being shown to be permanent, is the cost of restoring it to its former condition, together with compensation for the loss of its use.' This point was negatived by the court. It is practically admitted by the appellee that it could properly have been affirmed, as containing the proper measure of damages, but it is averred that practically the same rule as to the measure of damages was laid down in the general charge, and that the appellant was not injured, because the point was not read, and that, therefore, the jury was not informed in any way as to the character of the ruling. We do not agree with this contention. It is not necessary to argue that the point contained the proper measure of damages, nor is it necessary to cite authorities upon the subject. In this charge the trial judge, in commenting upon the province of the jury, finished the paragraph by saying: 'The cost of remedying the injury to the real and personal property is the true measure of damages.' This is the only reference to the subject, which was a vital question and called for specific instructions. Whilst the remark of the trial judge was correct so far as it went, it did not cover the entire sub-

ject, nor was it emphasized in such a way as to call the particular attention of the jury to it. The true rule, as laid down in 13 Pepper & L. Dig. col. 22, 773, is: 'Where an injury to a house is not of a permanent character, the measure of damages is the cost of restoring the property to its former condition, together with compensation for the loss of its use, unless such costs should exceed the value of the building, in which case such value would be the measure of damages.'"

Where the building is old, dilapidated, or in a weakened condition, and the new building would be better than before the injury, the cost of repairing or rebuilding is not a proper criterion of the damage from the injury. *Chicago & N. W. R. Co. v. Davis* (1898) 78 Ill. App. 58. In that case, an action of trespass on the case for damages sustained by the destruction of a building by fire, it appeared that the building was old and in a dilapidated condition. The admission of evidence of the cost of new material and the cost of construction was held to be error, the court saying: "Complaint is made as to the admission of so-called expert testimony as to the value of the building destroyed. The plaintiff did not claim to own any portion of the building which stood on the railroad right of way, even if it be conceded he owned that part which stood on his own land, which is disputed by appellant. It is clear, therefore, he could not recover for the loss of the building as a whole, and he only insisted upon a right to recover for the value of that portion he claimed to own. Yet the witnesses were allowed to make and testify to their estimates on the cost of new lumber, and also to include in their estimates the cost of labor in construction. This was error. The proofs show the building was old and dilapidated, having stood for an ice house for some twenty-two years, that it was in a tumbling-down condition, and a preponderance of the competent evidence is that it was worth no more than it would cost to take it down. Evidence as to the cost of new mate-

rial, and the cost of construction, based upon the estimates of witnesses, some of whom did not know the building, could not fail to be highly injurious to appellant, and was certainly calculated to mislead the jury and enhance the damages. We think it was error to admit this evidence."

In *Shrieve v. Stokes* (1848) 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401, it appeared that the wall of a building fell because of the removal of the earth from an adjoining lot. In an action to recover damages, evidence of the probable cost of rebuilding the wall was admitted in evidence. The court held that inasmuch as the fallen wall was exceedingly weak and defective, and as the erection of a new wall would put the house in a better condition than before, the cost of a new wall could not be a criterion of the amount of damage, saying: "The evidence of the probable cost of rebuilding the wall was admissible as one of the elements which might be taken into consideration in estimating the damages sustained by the plaintiff from the falling of the old wall, if the loss of the wall was not otherwise supplied. But as the old wall was exceedingly weak and defective, and as, by the erection of a new wall, the house would be put in a much better condition than before, it is clear that the cost of a new wall could not form the proper criterion, nor in fact any criterion, for determining the loss of the plaintiff. The court, therefore, erred in the remarks to the jury on this subject, importing that there could not be a better criterion, under the circumstances, to ascertain how much it would take to put the plaintiff in as good a condition as before. And moreover, if in point of fact the plaintiff's house was put in as good or a better condition than before, without the cost of building a new wall, but by the use of the defendant's wall, as is estimated by the evidence, the cost of a new wall had nothing to do with the estimation of the damages, but rather the cost, if any, of the accommodation afforded by the defendant. The error on this point is deemed substantial and prejudicial."

If a lessee by the terms of his lease has the right to make alterations, "provided the same did not injure the premises," the proper measure of damages in an action against the lessee for the making of injurious alterations is not the cost of restoring the premises to their former condition, but the diminished value of the premises. *Agate v. Lowenbein* (1875) 6 Daly (N. Y.) 291.

In that case an instruction to the jury that they might take into consideration the decrease in the rental value and the reasonable cost of restoring the premises to their former condition, in an action against lessees for damages on account of injuries to the leased premises, caused by the removal of certain walls, partitions, gas fixtures, etc., was held to be erroneous, the court saying: "The charge was erroneous in respect to permitting the jury to take into consideration the value or the expense of restoring the premises to their former condition. The lessees and their assignees, the defendants, had the right, under the lease from plaintiff, to make any inside alterations to said premises, as he and they may think proper, 'provided the same did not injure the premises.' The defendants had the right to make alterations, so that in no event were they bound to deliver up the premises at the expiration of their term in the same state and condition and shape as when the term began, and they cannot be held liable for the cost of restoring the premises to their former condition. The lease contains no such provision, but a license, on the contrary, to make inside alterations. The premises were originally fitted up as a hotel or lodging house, the upper floors being divided into many apartments and closets by partitions with doors; the defendants tore down and destroyed all these partitions and doors, throwing each whole floor into one large loft or apartment for the purposes of a printing business, electrotyping establishment, etc. But as the lease containing the license for alterations restricted them to such as should not injure the premises, defendants became liable to respond in

damages for any injury to the property inflicted by making such changes."

Evidence of the cost of repairs as estimated, two years after the injury, is incompetent unless considered with other testimony. *Keats v. Gas Co.* (1905) 29 Pa. Super. Ct. 480. In that case, an action to recover damages for injuries to plaintiff's dwelling house caused by the overflow of a stream across which a dam was formed by debris being carried downstream against the gas pipe of defendant, which crossed the stream beneath a bridge which spanned it, evidence as to the cost of repairs necessary to restore the property to its former condition was given by a witness who had made the estimate two years after the flood. The court held that, while such evidence was incompetent of itself, it was competent when taken in connection with other evidence, saying: "The first is as to the admission of the testimony of a witness of the plaintiff who testified as to the damages sustained by the plaintiff, based upon the cost of the repairs necessary to restore the property to its former condition. The testimony of this witness would, of itself, have been incompetent, inasmuch as he made the estimate after the repairs had been made, and two years from the time of the flood had elapsed. Taken in connection, however, with the testimony of the plaintiff, we think it was competent. The testimony was submitted in connection with that of the plaintiff. The jury could, therefore, first determine whether the testimony of the plaintiff as to the condition of the property after the flood was credible, and, assuming it to be true, whether or not the testimony of the witness, based upon information furnished by her, was to be believed. Full opportunity for cross-examination was given, and upon a careful examination of the testimony we can see no error in its admission."

#### *2. Minority rule.*

In a few jurisdictions, however, the cost of rebuilding or repairing is not a proper element to be considered in the measurement of damages to a building. *Morton v. Washington*

*Light & Water Co.* (1915) 169 N. C. 468, 86 S. E. 294; *Ulrick v. Dakota Loan & T. Co.* (1891) 2 S. D. 285, 49 N. W. 1054; *Pacific Exp. Co. v. Lasker Real Estate Asso.* (1891) 81 Tex. 81, 16 S. W. 792.

In *Ulrick v. Dakota Loan & T. Co.* (1891) 2 S. D. 285, 49 N. W. 1054, an action to recover damages caused by an excavation on the defendant's property, whereby a building on contiguous property was damaged, the court held that the proper measure of damages was the diminution of the value of the building, and not the cost of repairing it. It was said: "The negligence of appellant in making such excavation being established, the court adopted and gave the jury the proper rule as to damages, to wit, the diminution of value of the property injured as the direct and legitimate result of such negligence and want of care. Where the excavation is made carefully, and with proper regard for the rights of the adjoining owner, and injury ensues, the measure of damages is the diminution of the value of the land in consequence of such excavation, not the cost of restoring the lot to its former condition. 3 *Sutherland, Damages*, 878; *McGuire v. Grant* (1855) 25 N. J. L. 356, 67 Am. Dec. 49; *Gilmore v. Driscoll* (1877) 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37. And where, in consequence of the added element of negligence in making the excavation, the damages recoverable extend to buildings as well as soil, we think the rule of damages should be the same, to wit, the diminished value of the property injured, and not the cost of repairing it."

In *Morton v. Washington Light & Water Co.* (N. C.) *supra*, an action for damages for the destruction of a building by fire because of an insufficient supply of water to extinguish same, the defendant contended that the plaintiff had erected since the fire a more valuable building than the old one, and therefore he was not damaged by the fire. The court held that the cost of the new building could be used neither to enhance nor to reduce the damages. It was said: "Excep-

tions 1, 2, 3, 4, 5, 8 and 9 are to the admission by the court, of evidence contrasting the value of the new building with the old. Exception 16 is to the charge of the court, which submitted to the consideration of the jury a contrast of the value of the two buildings based upon the above evidence. It seems to us that these exceptions are well taken. The plaintiff was suing for damage to the building that was destroyed by fire. The defendant's theory, based on the above evidence and charge, was that the plaintiff had erected on the lot since the fire a more valuable building than the old one, and that therefore he was not damaged by the fire. The cost of doing this was irrelevant. If the plaintiff had seen fit to erect in the place of the old building a cheaper one, this would not have enhanced the plaintiff's damage. Nor could the fact that he had erected a more valuable one, if he did so, reduce the damages. It may be that he made a good bargain in getting the new building erected cheaply, or a bad bargain in getting it erected at too great a cost. The insurance company, or the defendant, might have put back the building. Not having done so, the sole question is, 'What was the value of the building that was destroyed?'

In *Pacific Exp. Co. v. Lasker Real Estate Asso.* (Tex.) *supra*, an action for the recovery of damages caused by the partial destruction of a building by fire due to negligence on the part of the defendant's servant, the court instructed the jury that the proper measure of damages was an amount sufficient to restore the building to its condition immediately preceding the fire. Holding that this was erroneous, the court said: "The house was not entirely destroyed, and over defendant's objection the court permitted a witness to state what sum, in his opinion, it would have been necessary to expend in order to place the house in as good condition as it was before the fire. The court found that the negligence of appellant's servant was the cause of the fire, and that it would take \$750 to place the house in the same condition it was before the

fire, and for this sum, with interest, rendered a judgment. On the measure of damages the court found as follows: 'The measure of damages which plaintiff is entitled to recover is the amount which would have been necessary at the time and place of the damage to restore said house to its condition immediately preceding the fire, with interest on such sum at 8 per cent per annum from the date of damage to date of trial.' The evidence objected to was introduced for the purpose, evidently, of enabling the court to apply the measure of damages which the court assumed was the true measure. There was no evidence tending to show the value of the property before its destruction, other than that showing what it would cost to erect such a house, and we are of the opinion that the measure of damages applied by the court was not the correct one. The purpose in every case is to compensate the owner for the injury received, and the measure of damages which will accomplish this in a given case ought to be adopted. In the case before us there was no evidence on which the court could assess the damages according to any other measure than that adopted, and the burden of producing such evidence as would enable the court to properly assess the damages was on the plaintiff. Cases may arise in which the measure of damages adopted by the court would be equitable, but this would not be so in all cases. If a house was old it would be difficult to apply this measure, for in addition to the deterioration in value of the material in such a case there would necessarily be much dilapidation in the structure itself, and it would be impracticable, in the nature of things, to reconstruct in the same form and dimensions, without betterment, both in material and structure, and the cost of this would fall on a defendant. A business house, residence, or house adapted to any other purpose, when erected in a given locality, may then have a value by reason of the adaptation of the place where it is built to the use for which it is intended, which it ceases to have in after time by the change of busi-

ness, residence, or other centers, whereby, at the later period, the property could not be sold with the land on which it stands for one fourth of what it would cost to reconstruct it, if destroyed. In such a case, to give to the owner of a house what it would cost to rebuild it, if partially or entirely destroyed, would be to give to him more than would be just compensation. In this time of rapid improvement in means of transportation and in all other directions, it is no unusual thing for a town to spring up rapidly at a place which for a time is the terminus of a railway, and for persons engaged in trade to erect expensive houses for business purposes, but in a short time the railway is constructed beyond that point and business goes with it, and then comes depreciation in value at the point which has ceased to be a business center; and houses then will not sell for anything like what it would cost to rebuild or repair if partially or wholly destroyed. In such a case the measure of compensation applied in this case would be manifestly unjust."

But in *Galveston, H. & S. A. R. Co. v. Ware* (1887) 67 Tex. 635, 4 S. W. 13, an action for injuries to a house caused by the flow of water upon the premises due to the improper construction of a railroad, the court held that plaintiff was entitled to recover such sum as would be reasonably necessary to put the house in as good condition as it was before the overflow, saying: "The right to recover for any injury to the house caused by the negligence of the appellant, and the measure of damages, were fixed by facts existing long before the storm came which destroyed it, and the appellee would have been entitled to recover such sum as would have been necessary to put the house in as good condition as it was before the overflow, with reasonable compensation for any interruption in its use while in course of repair, or to the difference between the value of the house before and after it was injured, with compensation for any deprivation of its use necessarily suffered while it was being repaired."

And in *Hooper v. Smith* (1899) —

Tex. Civ. App. —, 53 S. W. 65, an action to recover damages for the injury to plaintiff's house, the court held that the rule of damages applicable to the injuries to the house was the reasonable cost of repairing the injuries.

Likewise in *Highland v. Houston, E. & W. T. R. Co.* (1901) — Tex. Civ. App. —, 65 S. W. 649, an action for the recovery of damages because of the destruction of a barn and other property by fire, set out by the defendant's engines, the plaintiff testified as to the cost of a new building of like character as the one destroyed, and the extent to which the old building had deteriorated by reason of age and usage. The court held that the jury could determine the intrinsic value of the building in the absence of market value, from the facts testified to by plaintiff, saying: "Plaintiff also complains of the part of the main charge in which the court limits the recovery by plaintiff for the destruction of his barn to the difference between the market value of the real estate on which it was situated immediately before and immediately after the fire. The point made is that the evidence showed, without dispute, that the real estate had no market value, and the jury were thus left with no measure by which to determine the amount of damage as to that particular item. We notice this assignment and one other only in view of another trial, as, in our opinion, the error did not influence the verdict rendered; the jury having decided in favor of the defendant on the question of general liability. It is disclosed by the record that there was no proof of the market value of the real estate, and it was fairly shown that it had none. Facts and circumstances as to the costs of a new building of like character as the one destroyed, and the extent to which the old building had deteriorated by reason of age and use, were testified to by plaintiff; and from these the jury could have fairly determined the extent of his intrinsic loss, in the absence of market value. That measure of damage should be adopted in each case which will most nearly compensate for the loss sustained, and where

the existence of a market value before and after the loss is shown, the measure given by the court for the guidance of the jury was the proper one. *Pacific Exp. Co. v. Lasker Real Estate Asso.* (1891) 81 Tex. 81, 16 S. W. 792. But to allow this measure to control in a case like the present one would be to deny to plaintiff compensation for his loss, however clearly the liability of the defendant might be made to appear. Damages to real estate for which there might happen to be no market would be an irretrievable loss, however grave the wrong which caused the injury. Upon a like state of the evidence upon another trial, the court should allow recovery for the intrinsic loss in case liability in other respects is established."

*IV. Original cost and cost of repairing or replacing considered together.*

The original cost of an injured or destroyed building, and the reasonable cost of repairing or restoring it to the same condition it was in just prior to the injury, may be considered together, in the measurement of damages. *State Ins. Co. v. Taylor* (1890) 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 338; *Wall v. Platt* (1897) 169 Mass. 398, 48 N. E. 270; *Dammann v. St. Louis* (1899) 152 Mo. 186, 53 S. W. 982; *Kilgore v. Lyle* (1912) 30 Okla. 596, 120 Pac. 626; *Chicago, R. I. & P. R. Co. v. Galvin* (1915) — Okla. —, L.R.A. 1917A, 365, 158 Pac. 1153.

In *State Ins. Co. v. Taylor* (Colo.) *supra*, it appeared that a building and its contents were insured against loss by fire. While the policy was still in force the building was destroyed by fire. In an action to recover such loss the court held that in order to assist the court in ascertaining the amount of loss, the original cost, the cost of constructing a like building at the time of the trial on the same land, and the difference in value between the building destroyed and a new one, were all proper elements to be taken into consideration. It was said: "It follows that the original cost of the building, the cost of constructing a like building at the time of trial, on the same land, and the difference in value between the building destroyed,

by reason of its age and use, and a new one, were all proper inquiries to assist the court in arriving at a just conclusion in regard to the loss sustained; and the admission of evidence upon these points was not erroneous, as supposed by appellant."

In *Wall v. Platt* (1897) 169 Mass. 398, 48 N. E. 270, an action against the receivers of a railroad for damages for setting fire to the plaintiff's building, the auditor assessed the amount of damages in regard to the buildings by taking into consideration the original cost, the depreciation due to the use, the condition, and the cost of replacing them. The court held that, in the assessment of damages to buildings destroyed by fire, it was correct for the auditor to take into consideration the original cost of depreciation due to usage, age, and other like causes, and the cost of replacing, saying: "The supplemental report states the amount of damages if the rule of market value is to be applied, and how it was arrived at in the case of the buildings. In the report the auditor states that, in estimating the value of the buildings, he has 'taken into consideration the original cost, the depreciation consequent upon the use to which they had been put, the condition in which they were, and also the cost of replacing them by other buildings of the same character, with a proper allowance for the differences between new buildings and the condition of the buildings in question on the day of the fire,' and on that basis he finds the damages to be \$5,250. Their fair market value in connection with the land he finds to be \$3,250.

... Ordinarily, in determining the market value of buildings, they are valued either for the purpose of removal, or, as was the case here, in connection with the land on which they stand. The first manifestly would not afford just compensation in the present instance. In the second case, the value depends on the location and other considerations entering into the value of the land, and therefore would not necessarily constitute a just criterion of the loss actually sustained by the destruction of the buildings.

Sutherland, Damages, § 821. Buildings adapted to the land on which they stand are not bought and sold in the market separate from the land. We think that the manner in which the auditor arrived at the damages approaches more nearly the correct rule in cases like the present. We understand him to have assessed them according to the real value of the buildings at the time of the fire, and to have ascertained that by taking into account the original cost and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, required. We think that this was correct."

In an action for damages caused by the collapse and fall of plaintiffs' house due to the bursting of a water main in front of the house, testimony relating to its cost and the condition it was in at the time of the accident was admitted. Evidence was also admitted which tended to prove how much it would cost to restore the building to its original condition. The court held that there was sufficient evidence on which to predicate a charge given by the trial court to the effect that the measure of damages was the difference in the value of the building before and its value after the injury. It was said: "The objection to instruction number 3, given for the plaintiffs, is that there was no evidence tending to show the value of the building immediately before, and immediately after the accident, and hence there was no evidence upon which to base this instruction. No objection is made to the standard laid down in this instruction for the measurement of plaintiffs' damages, and while no expert witness was called to give his opinion as to the value of the building just before and just after the accident, yet it appeared from the evidence that the building was erected some time after March 11th, 1893, and at the time of the accident could not have been more than two years old. It further appeared how and of what materials it was constructed, what it cost, and in what condition it was at the time of the accident, the effect of

the accident upon it and the condition in which it was left afterward, and evidence tending to prove how much it would cost to restore the building to its original condition. Surely here was evidence upon which to predicate this or any other proper instruction as to the measure of plaintiffs' damages." *Dammann v. St. Louis* (1899) 152 Mo. 186, 53 S. W. 932.

In *Chicago, R. I. & P. R. Co. v. Galvin* (1916) — *Okla.* —, L.R.A.1917A, 365, 158 Pac. 1153, an action for the recovery of the value of a building which was destroyed by fire, testimony relating to the cost of replacing the building was admitted. The court held that when evidence as to the cost of replacing a building destroyed by fire was admitted, further evidence must also be admitted to show the original cost of the building and its depreciation, due to age, usage, and other causes, saying: "The principal assignment of error relates to the admission of certain testimony as to cost of rebuilding the destroyed house. A witness for plaintiff testified that the actual cash value of the building, on the date of its destruction, was \$900. *Fire Asso. of Philadelphia v. Farmers' Gin Co.* (1913) 89 *Okla.* 162, 134 Pac. 448. There is no objection raised to the qualification of this witness or the admission of his testimony on this point. But another witness was permitted to testify that it would cost \$1,200 to rebuild the destroyed building with new material, and it is against this testimony that the main claim for reversal is predicated. This witness testified as to the cost of rebuilding only, and defendant insists that such testimony, standing alone, was incompetent, and that in order to make the same competent there must have been further testimony as to the original cost of the building and as to its depreciation from use, age, and other causes. This contention seems to be supported by all the authorities. Sutherland on Damages, 3d ed. vol. 4, p. 2967, says: "The real value of a building is to be ascertained by taking into account the original cost, and the cost of replacing it, and making



allowance for depreciation from use, age, and other like causes.'"

In *Kilgore v. Lyle* (1912) 30 Okla. 596, 120 Pac. 626, in an action by a landlord against a tenant to recover damages because of the wrongful removal from the land of certain fixtures, which consisted of a windmill, fences, guttering around the house, and lightning rods erected by the tenant, evidence as to the cost of the fixtures was introduced. The court held that the measure of damages for a destroyed or damaged building is the value of the building, and that the real value of a building should be ascertained from the original cost, and the cost of replacing it, making proper allowances for depreciation by reason of age, usage, and other causes. It was said: "The court admitted evidence tending to show the value of the fixtures removed, and in so doing evidence of their cost was introduced. The defendant claims that this was erroneous in two respects—one in that the measure of damages was the difference between the market value of the land before and after the fixtures were removed; and the other in that, if the value of the fixtures was the proper measure of damages, then it was incompetent to show their cost, but that the testimony should have been limited to their value at the time of their removal. We think the defendant is wrong in both particulars. In 4 *Sutherland on Damages*, 3d ed. ¶ 1015, p. 2967, it is said: 'If the thing destroyed, although it is part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. By value, in such a case, is meant the actual, not the market, value. The real value of a building is to be ascertained by taking into account the original cost and the cost of replacing it, and making allowance for depreciation from use, age, and other like causes, as the condition in which it was required.' In such cases evidence of the cost of im-

provements is competent as a means of ascertaining their value, as is indicated by the quotation from *Sutherland on Damages*, just made."

While, when the original cost of a building injured or destroyed, and the cost of replacing or repairing, is taken into consideration, allowance should ordinarily be made for depreciation due to age, usage, and other like causes, when the building or that part of it destroyed is practically new, and the deduction for wear and tear would be small or nominal, the wear and tear need not be shown.

*Hearn v. McDonald* (1911) 69 W. Va. 435, 71 S. E. 568. In that case evidence was given showing what it would cost for new roofs to replace same which were greatly damaged by reason of rocks being cast on them from blasting. There was no evidence given as to the amount to be allowed for wear and tear. The court said: "The only point involved in the case is this: The plaintiff gave evidence showing what new roofs for the houses would cost, and gave no evidence to show what amount should be allowed for wear and tear of the roofs during the three or four years of their life, and claimed that a recovery of the cost of new roofs, without abatement for use and wear, is erroneous. The argument is that recovery could be only for the value of the roofs at the time of their destruction; that it should have been shown what was the depreciation from the cost of new roofs owing to wear and tear; that from the cost of new roofs there should have been proven a specific sum for such wear and tear, and that deducted from the cost of new roofs; and on this basis the claim is there was no measure of damages fixed. We do not deny the legal proposition that where a building is destroyed the value is to be ascertained by taking into account the original cost and the cost of replacing it, and making an allowance for depreciation from use, age, and other like causes as the condition in which it was required. *Sutherland, Damages*, 2967; *Wall v. Platt* (1897) 169 Mass. 398, 48 N. E. 270. But upon

the evidence in this case we find that the roofs were as good as new, practically, that they had been on but a short time, and had been well preserved by being kept painted, and were prac-

tically as good as new. Under the evidence such deduction would be small or nominal. It seems a small matter upon which to reverse a decree and protract litigation." R. C. L.

TRIANGLE FILM CORPORATION, Appt.,  
v.  
ARTCRAFT PICTURES CORPORATION.

*United States Circuit Court of Appeals, Second Circuit—March 4, 1918.*

(163 C. C. A. 281, 250 Fed. 981.)

**Contract — securing breach — Liability.**

1. No action lies against one who persuades another's employee to leave his employment after the terms under which he is bound to continue the employment have ceased.

*[See note on this question beginning on page 305.]*

**Injunction — against enticing employee.**

2. Injunction does not lie against the offering by one employer of better terms to secure the services of an em-

ployee of another, not bound by contract to remain with him, on the theory that he is thereby injuring complainant in his good will.

*[See 14 R. C. L. 385 et seq.]*

**APPEAL** by complainant from an order of the District Court of the United States for the Southern District of New York, denying its motion for an injunction pendente lite to restrain defendant from inducing an employee of complainant to breach his contract of employment with it. *Affirmed.*

**Statement by Learned Hand, District Judge:**

Appeal from an order denying the plaintiff's motion for an injunction pendente lite. The jurisdiction of the court depended upon diverse citizenship. The plaintiff is a Virginia corporation engaged in manufacturing, distributing, and exhibiting moving pictures, and on the 26th day of March, 1917, entered into a contract with one William S. Hart, of Los Angeles, California. By this contract the plaintiff engaged Hart as an actor, to perform in motion picture productions, "which are to be manufactured by the employer under the supervision of Thomas H. Ince." Hart accepted the employment "under the supervision of the said Thomas H. Ince." The contract recited that it was intended to be superseded by one in more elab-

orate form, and both parties acknowledged that Hart could not be replaced. It concluded as follows: "This contract is made upon the condition and with the understanding that the employee will be supervised in his acting and work hereunder by Thomas H. Ince." On the day mentioned Ince was in the employ of the plaintiff as manufacturing producer at its studio in Culver City, California, and held an interest in its stock, but on June 12, 1917, he sold out all this interest and severed his relations with it. Hart, upon learning these facts, terminated his relations with the plaintiff, and both Hart and Ince went into the employ of the defendant. It may be assumed that the defendant offered to take Hart in, and, indeed, that it persuaded him to accept. It may also be assumed that the defendant

knew of the contract between the plaintiff and Hart. Ince, however, violated no contract between himself and the plaintiff in selling out his stock interests in it, or terminating his relations, nor is there undisputed evidence that, having done so, he attempted to dissuade Hart from continuing in the plaintiff's employ.

Argued before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge.

Messrs. Alfred S. Barnard and Walter N. Seligsberg for appellant.

Messrs. Elek John Ludvigh and Harold M. Pitman for appellee.

Learned Hand, District Judge, delivered the opinion of the court:

This case depends either on *Lumley v. Gye*, 2 El. & Bl. 216; 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, or upon a strangely misconceived extension of that doctrine. *Lumley v. Gye*, supra, a wholesome and widely accepted case, we not only accept on principle, but we should in any case be bound to treat it as law upon authority. *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240. And in that aspect the case stands upon the question whether Hart violated his contract. He so clearly did not that we hardly feel justified in any discussion of the question. He had, in substance, stipulated that his term should not last beyond Ince's connection with the plaintiff, and no one suggests that Ince had no right to sell out his interest and leave. Assuming, then, that the defendant did induce him to leave, it did not run counter to the doctrine of *Lumley v. Gye*, supra.

Realizing the danger of such a conclusion, the plaintiff then stands upon another leg, which is this: The reasonable expectation of an employer that his employees will continue with him is a part of his

"good will," as we say, and anyone who hurts him in that "good will" does him an "injury," even though there be no contract broken and the employee might leave at pleasure. Lord Bowen put the doctrine as well as anybody in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613, that intentional damage to one's property or trade without "just cause" is actionable. Moreover, the Supreme Court in *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283, and *Hitchman Coal & Coke Co. v. Mitchell* (December 10, 1917) 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461, has said that in such cases there may be a right of action, though the person persuaded does not break a contract in leaving.

Yet it is clear that the real question turns upon what is "just cause" ("Privilege, Intent, and Malice," *Oliver Wendell Holmes, Jr.*, 8 Harvard L. Rev. 1), and that in effect it makes slight difference whether one asks in respect of what "cause of action" the plaintiff suffered his damage, or whether the defendant had "just cause" for inflicting the damage, though it does make a good deal of difference in the development of the law. Nobody has ever thought, so far as we can find, that, in the absence of some monopolistic purpose, everyone has not the right to offer better terms to another's employee, so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as <sup>Injunction—</sup> could use the em- <sup>against enticing</sup> <sup>employee.</sup> ployee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition.

That such a doctrine should be supposed to follow from *Truax v. Raich*, supra, or *Hitchman Coal & Coke Co. v. Mitchell*, supra, somewhat surprises us. In the first case the defendant had threatened to use illegal means to induce the employer to discharge the plaintiff. In the

second, a labor union had determined to compel a mine to operate as a closed shop, and that, too, by fraud. It was held that, since the union was not seeking to redress wrongs of which any of the plaintiff's employees complained, but intervened only for the purpose of preventing any open shops which might compete with closed shops elsewhere, they had no "just cause" for the ensuing damage. That pur-

pose—i. e., to compel the whole industry to operate closed shops—was held to be illegal, and the illegality depended upon the supposedly meddling character of the intervention. That nobody in his own business may offer better terms to an employee, himself free to leave, is so extraordinary a doctrine, that we do not feel called upon to consider it at large.

The order is affirmed.

## ANNOTATION.

### Right to hire one who violates no contract in leaving another's employment.

- I. In general, 305.
- II. Hiring after expiration of contract, 306.
- III. Hiring employee engaged on piece work, 306.

#### I. In general.

One who hires a person who is in the employment of another, but violates no contract in leaving that employment, is held in the reported case (TRIANGLE FILM CORP. v. ARTCRAFT PICTURES CORP. ante, 303) to be acting within his legal rights, and cannot be held liable therefor. In that case it appeared that the employee was relieved of his obligations under the contract, by the failure of the employer to carry out the terms thereof, and it was consequently held that the defendant was acting within his legal rights in hiring the employee.

The three following cases, while not within the scope of this note, contain dicta directly in point: In the much cited case of Walker v. Cronin (1871) 107 Mass. 555, the court said: "Thus everyone has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services." In Beekman v. Marsters (1907) 195 Mass. 205, 11 L.R.A. (N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332, it was

said: "If a defendant by an offer of higher wages induces a laborer who is not under contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights." And in Driver v. Smith (1918) 89 N. J. Eq. 339, 104 Atl. 717, the court said: "And it is likewise true that an employee at will may at any time leave his employer, and that a stranger may, by an offer of higher wages, induce him to leave his employment and become employed with the stranger. A stranger may not, however, interfere with the employment for no justifiable reason."

But in Salter v. Howard (1871) 43 Ga. 601, the court, while considering the contract of employment as incomplete, decided that, since the employees were at work in pursuance of the agreement, such relationship of master and servant was constituted thereby as might not be interfered with.

In Peters v. Lord (1846) 18 Conn. 337, where the plaintiffs sought to hold the defendant liable for enticing and harboring their servant, a minor, it appeared that the servant had left the service of the plaintiffs two weeks before he was employed by the defendant, who was consequently held not liable. The court said by way of dictum: "Had the defendant seduced the minor from the service of the plaintiffs, they might, according to the cases, have treated him as their servant de facto, and recovered of the defendant."

And in *Cox v. Muncey* (1859) 6 C. B. N. S. 376, 141 Eng. Reprint, 503, it was sought to hold the defendant liable for enticing an apprentice, but it was held that there was no valid contract of apprenticeship. The court, however, said obiter: "But we incline to think that, if the action had been brought on the footing of the youth being the servant of the plaintiff, the defendant would have been liable, there being evidence of enticement."

In each of the following cases, wherein it appeared that one in the service of another left that service without the violation of a contract, the defendant was charged with, but not held liable, for enticing the servant of the plaintiff, and it was not shown that the defendant hired or attempted to hire the servant, so that the cases are not strictly within the scope of this note: *Parsons v. Trask* (1856) 7 Gray (Mass.) 473, 66 Am. Dec. 502; *Campbell v. Cooper* (1856) 34 N. H. 49; *Poston v. Lyerly* (1916) 105 S. C. 37, 89 S. E. 392. See also *Morgan v. Smith* (1877) 77 N. C. 37; *Trebilcock v. Burton* (1904) 3 Ont. Week. Rep. 314. Compare *Duckett v. Pool* (1890) 33 S. C. 238, 11 S. E. 689.

### II. Hiring after expiration of contract.

One may lawfully hire the employee of another, provided the service is not to commence until after the expiration of the prior employment. *Boston Glass Manufactory v. Binney* (1827) 4 Pick. (Mass.) 425; *Nichol v. Martyn* (1799) 2 Esp. (Eng.) 734, 5 Revised Rep. 770.

In *Nichol v. Martyn* (Eng.) *supra*, "it was suggested in the course of the cause, that the defendant," who was intending to engage in business for himself similar to that of the plaintiff, "had seduced some of the servants of the plaintiff to quit their service, and to enter" his own. The court said "that seducing a servant, and enticing him to leave his master while the master by the contract had a right to his services, was certainly actionable; but that to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, al-

though the servant had no intention at the time of quitting his master's service, was not the subject of an action."

In *Boston Glass Manufactory v. Binney* (Mass.) *supra*, it appeared that the plaintiffs had in their employ certain workmen who were not under contract with them, but might leave on a fortnight's notice, and that the defendants had employed certain of these men, who were to begin work for them only after the expiration of the term, after notice given. The plaintiffs charged the defendants with enticing their servants, but the court said: "The defendants had a legal right to make a contract with the plaintiff's laborers, to take effect after the expiration of their term of service with the plaintiffs."

### III. Hiring employee engaged on piece work.

The English courts seem to hold that one who hires the employee of another is liable therefor, though the employee is not bound by contract for a certain period, but is engaged on piece work. *Anonymous* (1774) Loft, 493, 98 Eng. Reprint, 764; *Hart v. Aldridge* (1774) Cowp. pt. 1, p. 54, 98 Eng. Reprint, 364; *Gunter v. Astor* (1819) 4 J. B. Moore (Eng.) 12, 21 Revised Rep. 733.

In *Anonymous* (1774) Loft, 493, 98 Eng. Reprint, 764, an action wherein it appeared that the plaintiff sought to recover from the defendant on the ground that the defendant had enticed and hired a shoemaker who had been employed by the plaintiff to work by the piece, *Aston, J.*, said: "If a servant be retained for any special work, and departs from this unfinished, an action will lie against any who seduces him to depart."

In *Gunter v. Astor* (1819) 4 J. B. Moore (Eng.) 12, 21 Revised Rep. 733, it appeared that the plaintiff was a piano manufacturer, employing a number of workmen who worked by the piece, and whom the defendant enticed away and hired. The jury awarded the plaintiff damages in the amount of £1,600, two years' profit, and this finding was upheld by the court.

In *Hart v. Aldridge* (1774) Cowp.

pt. 1, p. 54, 98 Eng. Reprint, 964, it appeared that two journeymen shoemakers, who had been employed by the plaintiff to work by the piece, had been persuaded by the defendant to leave plaintiff's service while some work was yet unfinished, and to enter the service of the defendant. The plaintiff sought to recover from the defendant in an action of trespass on the case for enticing away his servants. Lord Mansfield considered that the gist of the action was "that the defendant had enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited," and that the men were "attached to this particular master." And Ashton,

J., said: "It is clear that a master may maintain an action against anyone for taking and enticing away his servant, upon the ground of the interest which he has in his service and labor. And even supposing, as my Lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant quoad hoc, and though the seducer and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone." R. S.

PETER WEISSENGOFF, Plff. in Err.,

v.

GEORGE R. DAVIS, Admr., etc., of Donald P. Davis, Deceased.

*United States Circuit Court of Appeals, Fourth Circuit — July 1, 1919.*

(260 Fed. 16.)

**Death — caused by resisting arrest — liability.**

1. The driver of an automobile, who, after being lawfully placed under arrest by the sheriff who stepped upon the running board of the car, attempts to escape by increasing the speed of the car and struggling with the sheriff for its control, and kills the sheriff by driving the car against an obstacle, is liable in damages for his death.

[See note on this question beginning on page 313.]

**Conflict of laws — enforcement of action for death in other state.**

2. An action to recover damages for death, right to maintain which is conferred by the statutes of the state where the death occurred, may be maintained in any other state the statutes or public policy of which are not inconsistent with the statute conferring the right of action.

[See 8 R. C. L. 736.]

**Arrest — right to kill to effect.**

3. A sheriff may not kill or imperil life in an effort to arrest a person charged with a misdemeanor or to prevent his escape after arrest.

[See 2 R. C. L. 473.]

**— how effected.**

4. An arrest is effected by the sheriff stepping upon the running board of an automobile with a warrant for arrest of the person driving it, and announcing to him that he is under arrest.

[See 2 R. C. L. 445.]

**— struggle to resist arrest.**

5. The attempt of one in charge of an automobile to drive it across the state line after the sheriff, with a warrant for his arrest, has stepped upon the running board and informed him that he is under arrest, is an unlawful struggle to wrest the machine from lawful control of the sheriff.

[See 2 R. C. L. 470.]

**ERROR** to the District Court of the United States for the District of Maryland (Rose, District J.) to review a judgment in favor of plaintiff in an action brought to recover damages for the death of his intestate alleged to have been caused by defendant's negligent, wrongful, and unlawful act. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Pritchard, Knapp, and Woods, Circuit Judges.

Messrs. M. M. Neely and William L. Marbury, for plaintiff in error:

The sheriff under proper circumstances has the right and duty to use all the force or violence necessary to effect the arrest of a party charged with felony, but not so in the case of a misdemeanor.

State use of Johnson v. Cunningham, 107 Miss. 140, 51 L.R.A.(N.S.) 1179, 65 So. 115; United States v. Clark, 31 Fed. 713.

Messrs. Harry G. Fisher, George A. Finch, and Albert A. Doub, for defendant in error:

A recovery can be had by the administrator for the wrongful act, neglect, or default which caused the death.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Northern P. R. Co. v. Babcock, 154 U. S. 197, 38 L. ed. 960, 14 Sup. Ct. Rep. 978; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 358, 58 L. ed. 997, 999, L.R.A.1916D, 685, 34 Sup. Ct. Rep. 587; St. Bernard v. Shane, 135 C. C. A. 399, 220 Fed. 853, reversing 201 Fed. 453; Lauria v. E. I. Du Pont De Nemours & Co. 241 Fed. 687; Connor v. New York, N. H. & H. R. Co. 28 R. I. 560, 18 L.R.A.(N.S.) 1252, 68 Atl. 481, 13 Ann. Cas. 1033; Florida C. & P. R. Co. v. Sullivan, 61 L.R.A. 410, 57 C. C. A. 167, 120 Fed. 799; 18 Cyc. 1239; Hanlon v. Frederick Leyland & Co. 223 Mass. 438, L.R.A.1917A, 36, 111 N. E. 907; Dodge v. North Hudson, 177 Fed. 987; Southern R. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678; Missouri P. R. Co. v. Larussi, 88 C. C. A. 230, 161 Fed. 66; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 261; Baltimore & O. R. Co. v. Evans, 110 C. C. A. 156, 188 Fed. 6.

Woods, Circuit Judge, delivered the opinion of the court:

On June 27, 1917, Donald P. Davis, sheriff of Mineral county, West Virginia, in the execution of a

warrant he held for the arrest of the defendant Peter Weissengoff, stepped upon the running board of defendant's automobile as he was driving through the town of Piedmont, West Virginia. The car was not stopped, but continued in somewhat rapid motion until it struck an abutment of the Potomac bridge between Piedmont, West Virginia, and Westernport, Maryland, and killed Davis. In this action for damages for his death, brought by the administrator in the district of Maryland, the question on the merits was whether the accident was due either to the defendant's unlawful resistance of arrest or attempt to escape after arrest, carried into effect by refusal to stop the car and relinquish its actual control to the sheriff, or by running it at a reckless or dangerous rate of speed; or to wanton and unlawful conduct of Davis in seizing the wheel and struggling with the defendant for the control of the car, and in the struggle moving the accelerator and increasing the speed, and pulling on the wheel so as to drive it against the bridge.

A demurrer to the jurisdiction was overruled, and the jury found a verdict of \$10,000 for the plaintiff. In support of the demurrer to the jurisdiction defendant relies on *Ash v. Baltimore & O. R. Co.* 72 Md. 144, 20 Am. St. Rep. 461, 19 Atl. 643, holding that the statute of West Virginia, conferring a right of action for wrongful death, is not enforceable in the court of Maryland, the Maryland statute on the subject being similar, but not identical. That case was decided in 1876, and it does not seem that the court of Maryland has been called on since to review the question. But it is now settled beyond debate by the Supreme Court of the United States that, when the statute of one state

takes away the common-law obstacle to a recovery for an admitted tort, an action for the tort committed in that state may be maintained in any state where the statute of the state in which the cause of action arose is not in substance inconsistent with the statute or public policy of the state in which the right is sought to be enforced. The question is one of general law, and the decisions of the Supreme Court are binding in this court. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Farrugia v. Philadelphia & R. R. Co.* 233 U. S. 353, 58 L. ed. 996, 34 Sup. Ct. Rep. 591.

Conflict of laws—enforcement of action for death in other state.

The defendant knew the sheriff had a warrant for his arrest for the misdemeanor of selling liquor in West Virginia. There was testimony on behalf of plaintiff that Davis stood in front of the moving car in which the defendant had four of his children, and waved to defendant to stop, telling him he had a warrant for him and that he was under arrest; that defendant refused to stop, and increased the speed of the car, saying to Davis he would see him some other time; that Davis jumped on the running board of the car, and again said, "Pete, you are under arrest." The defendant denied that Davis signaled him to stop or said anything until he jumped on the running board; but he knew Davis had a warrant for him, and the evidence leaves no doubt that defendant knew that Davis by his action meant to arrest him. The defendant gave this account: "Front of the bank building and I passed down this way, and he just jumped on my car, and this way, some way (indicating), and grabbed that wheel, and I guess pushed that throttle on, and the ma-

chine started to zigzag. I hold, and children scared, one fall down on my feet, and another grab me (indicating) and hollering, 'Papa, Papa.' Machine come close to sidewalk, and I hold on as I could so get in road and find myself on bridge, and that is all I know. This throttle stand here (indicating). Stick out, like you jump and grab with left hand wheel, and then grab that right-hand wheel (indicating), and shove my hands down on bar. I had my hands on bar, and he had his hands on top, and started gas, and the machine started to run fast."

Other testimony on behalf of defendant was to the effect that he and Davis were struggling for control of the wheel, and talking loudly to each other, about 275 yards from the bridge, and that the struggle and loud talking continued until the car struck the bridge—Davis pulling one way and defendant the other. One of the witnesses testified that Davis gave a pull on the wheel toward the girder post before the car struck.

The distance from the bank building where Davis got on the machine, to the bridge, is 820 feet. The car was driven at a speed of 20 to 25 miles an hour from the bank to the bridge, and turned in its course two curves, one very sharp. This turn, it seems, would have been impossible if Davis had been then seriously interfering with the course of the car. Two other facts are evident from the testimony, beyond reasonable controversy: Defendant alone had access to the brakes, and could have stopped the car at once; defendant continued to run the car in defiance of the sheriff's authority, to escape arrest by getting into Maryland.

The case turns on the soundness and applicability to the evidence of the following request of defendant, refused by the district judge: "The jury are further instructed that the offense with which the defendant stood indicted at the time when it is alleged that the sheriff, Donald P. Davis, attempted to arrest him, is a misdemeanor, and that in making



an arrest for the committing of a misdemeanor the sheriff, or other officer of the law, is not justified in taking human life, or in employing any method or means in making such arrest as will expose the person to be arrested, or those accompanying him, to serious risk or deadly injury, unless the party whom such officer is attempting to arrest resists such arrest in some manner more serious than by attempting to run away from such officer; and even if the jury believe from all the evidence that the defendant attempted to avoid arrest at the hand of the sheriff by simply fleeing from said sheriff, and that said sheriff attempted to make such arrest of the defendant in such a reckless manner as not only greatly to endanger the life of the defendant and his four children, who were in the defendant's automobile, but in such a reckless manner that the automobile in which the defendant was then and there riding was wrecked as a result of such recklessness on the part of the said sheriff, thereby causing the death of said sheriff, then the plaintiff is not entitled to recover in this case, and the verdict of the jury should be for the defendant."

The law of the case was given to the jury in these two propositions—the first at request of plaintiff, and the second at request of defendant:

(1) "The jury are instructed that, under the uncontradicted evidence in this case, Donald P. Davis, deceased, on the 27th day of June, 1917, was sheriff of Mineral county, West Virginia, and had in his possession a warrant for the arrest of the defendant, and on said date saw the defendant driving on Child's avenue, in the town of Piedmont, West Virginia, in his motor car, and the said defendant then and there knew that the said Donald P. Davis had a warrant for his arrest; and if the jury believes from the evidence that the defendant understood that the said Donald P. Davis then and there wanted to arrest him, and that the said defendant while driving said car on Child's avenue saw the

said Donald P. Davis approach his car, as he believed, for the purpose of arresting him, but that the said defendant then and there made an effort to escape from arrest by speeding up his automobile, and further find that the said Donald P. Davis thereupon stepped on the running board of the said automobile in order effectually to place said defendant under arrest, and further find that the said defendant then and there had his car under control, and could have stopped his car, but, on the other hand, increased the speed of the said automobile for the purpose of escaping from arrest, and further find that in his effort to escape arrest the car of the said defendant was driven at a dangerous, reckless, and unlawful speed by the defendant, and so negligently and recklessly that the said car was run against one of the iron supports of the bridge leading from Piedmont, West Virginia, to Westernport, Maryland, and that as a result thereof the said Donald P. Davis was so seriously injured that from the effects thereof he died soon thereafter, then the verdict of the jury shall be for the plaintiff."

(2) "The jury are instructed that unless they shall find by a fair preponderance of the evidence that the defendant, in a wilful attempt to escape arrest, intentionally increased the speed of his automobile with a view of escaping from the state of West Virginia, or, with such intent, failed to use means (if such were accessible to him) which a reasonably prudent and law-abiding person would, under the circumstances, have used to stop the car, then the plaintiff cannot recover, and your verdict should be for the defendant."

We think this was a fair statement of the law applicable to the facts, and that the request refused was <sup>Arrest—right to kill to effect.</sup> not applicable. A sheriff may not kill or imperil life in the effort to arrest a person charged with a misdemeanor or to prevent his escape after arrest. 2 R. C. L. 471; Thomas v. Kinkead, 55

Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; Brown v. Weaver, 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388; State use of Johnson v. Cunningham, 107 Miss. 140, 51 L.R.A. (N.S.) 1179, 65 So. 115.

In this case there can be no doubt that the act of the sheriff in stepping on the car by the side of defendant with his warrant indicat-

—how effected. ed to defendant the purpose to take him into custody as distinctly as if the sheriff had walked up to him on the street and touched him on the shoulder with the announcement of arrest, and was a complete arrest. 2 R. C. L. 445; Rhodes v. Walsh, 55 Minn. 542, 23 L.R.A. 632, 57 N. W. 212. The arrest not only conferred legal control and custody of the body of the defendant, but, as a necessary incident, the legal custody and control of the automobile in which he was riding. The fallacy in the request refused was in assuming that defendant had legal control of the car, and asking the submission to the jury of the question whether the defendant was resisting the arrest in some manner no more serious than by simply attempting to run away and attempting to avoid arrest by simply fleeing from the sheriff. The conduct of defendant was much more than a mere attempt to escape. It was aggressive resistance. After the sheriff stepped on the car and made the arrest, the struggle for

—struggle to resist arrest.

control of the machine between him and the defendant was an unlawful struggle, initiated not by the officer, but by the defendant, to wrest the machine from lawful control, asserted and taken by the officer. By initiating and persisting in the effort to wrest the control of the car from the sheriff, the defendant took the risk of his unlawful and aggressive action. It was the duty of the sheriff to overcome this active resistance by force proportionate to it. Hawkins v. Com. 61 Am. Dec. 161, note; State v. Evans, 84 Am. St. Rep. 696, note;

State v. Krakus, 5 Boyce (Del.) 326, 93 Atl. 554; Leger v. Warren, 51 L.R.A. 215, note; 2 R. C. L. 470. The principle stated has been applied in analogous cases.

After demanding the opening of the doors of a man's dwelling house, it is the duty of an officer with a warrant charging a misdemeanor to break the doors, and if the accused resists, and in the struggle injures or kills the officer, he is a wrongdoer. 5 C. J. 426; Farmer v. Sellers, 89 S. C. 492, 72 S. E. 224.

An officer has the right to stop a train or stagecoach to effect an arrest. St. Johnsbury & L. C. R. Co. v. Hunt, 60 Vt. 588, 1 L.R.A. 189, 6 Am. St. Rep. 138, 15 Atl. 186; Brunswick & W. R. Co. v. Ponder, 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254. Inevitably it follows that if, in the exercise of the duty to stop the train and make the arrest, the officer steps on the engine, and the engineer initiates a struggle with the officer to wrest the temporary control of the engine from him, he is liable for the consequences of the struggle. It would hardly be disputed that if defendant, after arrest, had pointed a gun at the sheriff as a means of effecting his escape, and in the struggle for the possession of the gun it had been accidentally discharged and killed the sheriff, the defendant would be civilly liable. It is true that, if in such a struggle initiated by the defendant the officer does a wanton or malicious act resulting in injury to the defendant, he, and not the defendant, would be responsible. 2 R. C. L. 470; 5 C. J. 424. But in this case, even if the sheriff, in the excitement of the struggle initiated by the defendant, did so move the wheel that the car struck the bridge, it would be beyond all reason to say that the jury could find he maliciously or wantonly ran a car going 20 to 25 miles an hour against the bridge, when he knew that the impact would almost certainly result in his own death or serious injury.

Death—caused by resisting arrest—liability.

The overwhelming presumption is against such an inference. Viewing the testimony most favorably to the defendant, the only reasonable inference is that the defendant, after his arrest and after the sheriff had assumed legal control of the car, undertook to wrest it from the sheriff's legal custody, and in consequence of the struggle thus begun by the defendant the car was unintentionally driven against the bridge.

Davis was an officer of the state of West Virginia, executing its warrant for the arrest of the defendant. His duty to enforce that warrant and the duty of the defendant not to resist within that state fall within the principle thus forcefully laid down by Justice Bradley in *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717:

"Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? . . .

"The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

Under these circumstances the

first request of the defendant granted by the court was as favorable as the defendant had the right to ask, especially when it is considered with the conditions of recovery set out in plaintiff's first request.

The defendant had been tried in the state court under a criminal charge of responsibility for the death of Davis. By stipulation, "that either the plaintiff or the defendant may read from a copy of the record in said criminal case as testimony, to the jury, the evidence of any of the witnesses who testified in said criminal case, from the record in said criminal case, without the personal attendance of any of the said witnesses, and said testimony, when read to the jury, is to have the same effect as if the said witnesses were present in court and so testified, so far as the same may be admissible in evidence." Under this stipulation the defendant offered, as tending to prove that defendant was not attempting to escape, the statement of Mr. Whitworth, one of defendant's counsel in the state court, which had been offered in the criminal trial there, but rejected as incompetent. This statement was to the effect that, under Mr. Whitworth's advice, defendant was ready to give bond for his appearance, and thus avoid formal arrest by the sheriff under the warrant held by him. As this was not the evidence of any witness who testified in the criminal case, it is not covered by the stipulation. But, waiving that, its exclusion was harmless, in view of the conclusive evidence that defendant was trying to escape.

Affirmed.

Petition for writ of certiorari denied by the United States Supreme Court, November 10, 1919 (U. S. Adv. Ops. 1919-1920, p. 65) — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 54.

## ANNOTATION.

**Civil liability for killing or injuring one who was attempting to make an arrest.**

The question considered in the reported case (*WEISSENGOFF v. DAVIS*, ante, 307), of civil liability for killing an officer or person attempting to make an arrest or to execute a search warrant, seems to have arisen in only a few cases. Damages for death under these circumstances were recovered in the *WEISSENGOFF CASE*, and also in *Young v. Young* (1910) 141 Ky. 76, 132 S. W. 155, and *Farmer v. Sellers* (1911) 89 S. C. 492, 72 S. E. 224.

In *Farmer v. Sellers* (S. C.) supra, damages were recovered for the killing by the defendant of a constable who was attempting to enter the defendant's house to search for contraband liquor, the questions considered being whether the constable was an officer whose authority to execute a search warrant the defendant was bound to respect, or was a mere trespasser, and whether the search warrant was sufficient. The court stated that the defendant asked the court to lay down as the law the utterly untenable proposition that the defendant could treat the constable as a mere intruder in the office of constable and a bald trespasser on his premises, because of certain alleged irregularities in his appointment and qualifications as a constable. It was held also that the delay of forty-eight days in serving the warrant was not sufficient, as matter of law, to destroy its force, but that the question whether the execu-

tion of the warrant had been unreasonably delayed had been properly submitted to the jury. And this conclusion, the court said, made unnecessary the consideration of the question whether the defendant would not have shot at his peril in resisting an officer demanding admittance under a search warrant, even after the expiration of a reasonable time from the date of its issuance.

The questions considered in *Young v. Young* (1910) 141 Ky. 76, 132 S. W. 155, where a lunatic shot and killed a deputy sheriff who was attempting to take him into custody, are not entirely peculiar to the subject under consideration. It was held that the fact of lunacy would not relieve from civil liability for death on the theory that the lunatic was not responsible for his acts, or on the ground that the statute could not apply to him in that it gave to the widow and minor child of the person killed by "the careless, wanton, or malicious" use of firearms, not in self-defense, an action against the person who committed the killing. The court said that while it might be true that carelessness or malice could not be imputed to a lunatic, the word "wanton" applied aptly to the facts of the case. It was held also that allegations in the petition were sufficient that the killing was "unlawful and wrongful," and not in self-defense.

R. E. H.

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**RE ESTATE OF JOHN A. McNAMARA, Deceased.**

**JOHN HAMILTON McNAMARA, by Guardian, Respt.,**

**v.**

**MARY JEANETTE McNAMARA et al., Appts.**

*California Supreme Court (In Banc) — August 25, 1919.*

(— Cal. —, 183 Pac. 552.)

**Bastard — exceptional period of gestation — presumption of legitimacy.**

1. The conclusive presumption of legitimacy does not prevail where a

child was born an exceptional time after separation of husband and wife, although the period was a possible one.

[See note on this question beginning on page 329.]

**Appeal — rehearing — time of allowance.**

2. That an order granting a rehearing was not filed within the time allowed by the Constitution for granting rehearings is immaterial if the order was actually passed within the required time.

— **correction of record.**

3. The date upon an order granting a rehearing on appeal will be corrected to make it speak the truth, where it indicates that the order was not within the time allowed by the Constitution.

**Bastardy — presumption of intercourse.**

4. Upon the question of bastardy, intercourse between husband and wife when they were last together with opportunity for intercourse will be conclusively presumed.

[See 3 R. C. L. 728.]

— **weighing of probabilities between husband and another.**

5. In cases where only usual or normal periods of gestation are involved, there will be no guessing or weighing of probabilities as to the fatherhood of a child, where the husband and another person both had access to the mother during such period.

[See 3 R. C. L. 738, 739.]

**Evidence — judicial notice — period of gestation.**

6. The court may take judicial notice that 304 days is greater than the usual or normal period of gestation, and for that purpose may seek information outside the records in the case before it.

— **statutory presumption of legitimacy.**

7. The statutory presumption that children born within 10 months after dissolution of a marriage are legitimate is merely prima facie.

— **making presumption conclusive.**

8. A statutory declaration that children born within 10 months after dissolution of a marriage shall be presumed to be legitimate does not declare a policy which will require the court to make the presumption conclusive.

**Bastard — statutory presumption of legitimacy — months.**

9. The 10 months mentioned by a

statute raising a presumption of legitimacy of children born within 10 months after dissolution of a marriage must be taken to be months of 30 days.

**Evidence — presumption of legitimacy — overcoming.**

10. The prima facie presumption of legitimacy of every child born in wedlock can be overcome only by clear and satisfactory evidence.

[See 3 R. C. L. 725.]

— **bastardy — sufficiency.**

11. A finding of bastardy is supported by evidence that a woman left her husband and cohabited with another, had a full menstrual period after so doing within a normal period after which the child was born, but after an abnormal period after the separation, and that all parties concerned regarded the child as that of her paramour.

**Parent and child — adoption — sufficiency of evidence.**

12. Sufficient acknowledgment of an illegitimate child to constitute adoption is shown by the father's signing the birth certificate, acknowledging the child to be his, and receiving the child into the father's family, caring for it as his child.

[See 3 R. C. L. 741.]

— **family — establishment.**

13. A man may establish a family consisting of himself, a woman with whom he is living without marriage, and their illegitimate child, so as to effect the adoption of the child by caring for it in such family.

[See 3 R. C. L. 742.]

**Evidence — of wife — nonaccess of husband.**

14. A wife may testify to nonaccess by her husband after separation from him, in a controversy over the legitimacy of her child, under statutes permitting evidence of facts from which those in dispute are logically inferable, and making all persons, without exception, who can perceive and make known their perceptions to others, witnesses.

[See 3 R. C. L. 732.]

— **declarations of paternity.**

15. Declarations of a man that he is father of a child are admissible for

the purpose of proving acknowledgment and adoption of it.

—declarations of pedigree.

16. Declarations of one since deceased that he was father of a child are admissible on the question of pedigree.

[See 1 R. C. L. 502-504; 3 R. C. L. 735.]

—absence of negative evidence of paternity.

17. Evidence of declarations of a man that he was father of a child born to another man's wife after the parties had separated is not inadmissible, because it had not been shown that the husband was not the child's father.

(Melvin, J., dissents.)

—declarations as to destination of husband.

18. Upon the question of paternity of a child born to a woman who has separated from her husband, declarations of the husband after the separation that he was going to a certain place, where his wife was not, are admissible.

Appeal — admission of inadmissible evidence — nonprejudicial error.

19. A case will not be reversed for the admission of inadmissible evidence if its bearing upon the real dispute is so slight that it is impossible that prejudice could have resulted from its admission.

[See 2 R. C. L. 250.]

**APPEAL** by objectors from an order of the Superior Court for Los Angeles County (Rives, J.) awarding partial distribution of the estate of John A. McNamara, decedent, to petitioner. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Daniel M. Hunsaker, Boyd C. Barrington, and Hunsaker, Britt, & Edwards, for appellants:

When it appeared by petitioner's evidence that the child was born during lawful wedlock of the Bettencortes, husband and wife, and that there was access of the husband within 10 months next previously, and no proof of his impotency, and hence that, according to the laws of nature, Antonio F. Bettencorte might have been the father of the child, the court should have received no further evidence.

Hemmenway v. Towner, 1 Allen, 209; Re Walker, 176 Cal. 402, 168 Pac. 691; Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Reprint, 457, 15 L. J. Ch. N. S. 280; Banbury Peerage Case, 1 Sim. & Stu. 153, 57 Eng. Reprint, 62; Gordon v. Gordon, L. R. [1903] P. 141, 72 L. J. Prob. N. S. 33, 89 L. T. N. S. 73; Kennedy v. State, 117 Ark. 113, L.R.A.1916B, 1052, 173 S. W. 842, Ann. Cas. 1917A, 1029; Foote v. State, 65 Tex. Crim. Rep. 868, 144 S. W. 275, Ann. Cas. 1916A, 1184.

It was manifest error to allow Mrs. Bettencorte to give testimony tending to show nonaccess of her husband.

Re Mills, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91; Mink v. State, 60 Wis. 583, 50 Am. Rep. 386, 19 N. W. 445; Bell v. Territory, 8 Okla. 75, 56 Pac. 853; People v. Case, 171 Mich. 282, 137 N. W. 56; Foote v. State, 65

Tex. Crim. Rep. 368, 144 S. W. 275, Ann. Cas. 1916A, 1184; Wallace v. Wallace, 137 Iowa, 87, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761; Kennedy v. State, 117 Ark. 113, L.R.A.1916B, 1052, 173 S. W. 842, Ann. Cas. 1917A, 1029; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Powell v. State, 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660; Flint v. Pierce, 136 N. Y. Supp. 1056.

The court erred in admitting evidence of the declarations of John A. McNamara indicative of his opinion that the infant called John Hamilton McNamara was his child.

Scanlon v. Walshe, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498; Hemmenway v. Towner, 1 Allen, 209; Grant v. Mitchell, 83 Me. 23, 21 Atl. 178; Powell v. State, 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660; Montgomery v. Montgomery, 3 Barb. Ch. 132; Bethany Hospital v. Hale, 64 Kan. 367, 67 Pac. 848.

The court erred in allowing testimony of the declaration of Antonio F. Bettencorte about an intended journey to Redding.

Wallace v. Wallace, 137 Iowa, 87, 14 L.R.A. (N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761.

There was no competent evidence to sustain the findings that ever since December 24, 1913, husband and wife

had no intercourse and no communication of any kind until about the month of May, 1914.

*Van Aernam v. Van Aernam*, 1 Barb. Ch. 375; *Banbury Peerage Case*, 1 Sim. & Stu. 157, 57 Eng. Reprint, 64; *Re Walker*, 176 Cal. 402, 168 Pac. 691; *Powell v. State*, 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660.

There never was any receiving or adoption of said child by John A. McNamara "into his family," within the meaning of § 230, Civil Code.

*Re Jones*, 166 Cal. 108, 135 Pac. 288.

Mr. Joseph L. Lewinsohn also for appellants.

Mr. John W. Carrigan for respondent.

Olney, J., delivered the opinion of the court:

Preliminary to the discussion of this appeal it is advisable to correct the record of this court regarding it. It was decided by us in department on December 18, 1918. A petition for rehearing in banc was duly filed, and on January 17, 1919, an order was signed by the chief justice and two associate justices directing a rehearing. This was within thirty days after the judgment in department, and therefore within the time prescribed by the Constitution within which rehearings may be granted. It appears, however, that the order was given the date of January 18, 1919, which was thirty-one days after the department decision, and not within the prescribed time. The order was also marked by the clerk as filed on January 18, 1919.

The fact that the paper on which the signed order was written was not marked by the clerk as filed until after the expiration of the period of 30 days from the time of the department decision is not material to the validity of the order. The joint action or concurrence of four associate justices or of the Chief Justice and two associate justices "is the thing required to constitute the action of the court" (Const. art. 6, § 2), and, in contemplation of law, this joint action is taken when the required number of justices "have, in writing, declared their concurrence in the order with intent to make it an

order." "The filing of the order in the clerk's office within the prescribed time was not essential to its validity," if it was regularly made within that time by the necessary number of justices. *People v. Ruef*, 14 Cal. App. 624, 626, 114 Pac. 48, 54; *Niles v. Edwards*, 95 Cal. 47, 30 Pac. 134; *Von Schmidt v. Widber*, 99 Cal. 515, 34 Pac. 109. It is therefore unnecessary, as matter of law, to correct the entry as to the time of filing, or to order a filing nunc pro tunc as of January 17, 1919. But as the date of the order makes it appear that it was made after the expiration of the 30

Appeal—  
rehearing—  
time of  
allowance.

days, contrary to the fact, and might tend to cast doubt on the validity of further action by the court in the case, we deem it advisable to correct the order in that respect.

It is therefore ordered that the order heretofore made in this case vacating the judgment previously entered herein in department, and directing a hearing thereof before the court in banc, be, and the same is hereby, corrected as to its date by striking out the words "January 18th, 1919," as written therein, and inserting instead thereof the words "January 17th, 1919," the same being the true date of the making of said order.

Passing now to the consideration of the appeal itself, it appears that the decedent, John A. McNamara, died May 10, 1916, unmarried and without a valid will. In the course of the administration of his estate, one John H. McNamara, a minor, through his guardian, presented a petition for partial distribution of the estate to him, alleging that he was the illegitimate child of the decedent, and that he had been legitimated by adoption in the manner prescribed by § 230 of the Civil Code. The section mentioned provides for legitimation rather than for adoption in the ordinary sense, and, in order that the petitioner's right of heirship be established, it

—correction  
of record.

was necessary for him to show that he was in fact the illegitimate son of the decedent, and also that he had been adopted by the decedent in the manner specified by the Code section. The heirs of the decedent, if the child were not his heir, were two sisters, and these sisters filed objections to the child's petition, and in particular took issue with the allegations of the petition as to both of the two elements required by the Code section for legitimation; that is, as to the petitioner being in fact the offspring of the decedent, and as to his having been adopted by him. There were other issues made, but the two issues mentioned were the real issues and alone need to be considered. The cause was tried without a jury, the lower court found for the child upon both issues, and made an order of partial distribution in his favor. From this order the sisters appeal, and urge that the findings of the lower court in the child's favor is not supported by the evidence as to either issue. Certain rulings in the admission of evidence are also complained of. The chief contention is over the finding of paternity, and will be first considered.

The salient facts are that the petitioner is the child of a Mrs. Bettencorte. She was quite a young woman, and had married one Antonio F. Bettencorte in July, 1913, and lived with him, occupying the same apartment, up to and through the night of December 23d of the same year. On the morning of the following day she went with her husband to the city of San Jose, a few miles from where they resided, and there left him about noon to go immediately with McNamara, the decedent, with whom she lived practically continuously thereafter until his death. She never saw her husband again but once, and then under circumstances that preclude the possibility of intercourse between them. As throwing some light on the relations of the parties and the character of the mother, it may be mentioned that she had been engaged to

McNamara, had had some quarrel with him, and had immediately married Bettencorte. She seems to have found herself very unhappy in her marriage, never to have lost her affection for McNamara, and in her unhappiness to have turned to him. She had no illicit relations with McNamara prior to her finally leaving her husband, and there is in the record no evidence, in fact no breath of suspicion, that she had illicit relations with anyone but McNamara.

On October 24, 1914, just 10 calendar months, or 304 days, after Mrs. Bettencorte left her husband, the child was born. No question seems ever to have occurred to anyone until after McNamara's death but that the child was his. Certainly no question occurred to him. No physician was present at the birth, and McNamara himself made out and signed the birth certificate, specifying himself as the father. In letters to the child's mother he addresses her as his wife, and speaks of her as such and of the child as their child. He endeavored to make a will leaving his property to "Rosalie A. Bettencorte, the mother of my son, and with whom I have been living as my lawful wife for the past year pending the securing of a divorce by her. She is to have all and everything that I die possessed of for the benefit of herself and her child." He also directs Mrs. Bettencorte, in case of his death, to communicate with his sister, one of the appellants here, saying that she will see that his wishes are carried out. The will failed because not witnessed and not entirely written in McNamara's own hand. The child and the mother lived with him, accompanied him on trips away, and he supported them both. So far as appears, the relations between the three were the usual relations of a family of father, mother, and child.

In addition to the foregoing Mrs. Bettencorte testified (and in view of the court's finding her testimony must be taken as true, if competent) that she had her regular menstrual period commencing December 20,



1913, four days before she left her husband, and ending the day she left, and that she had another regular and full period commencing January 23d or 24th following, and that she had another menstruation, apparently shorter, in February. She also testifies that she first suspected she was pregnant in March or April. It also appears that the child when born was a fully developed and normal baby. It was not weighed, but the mother testified that her mother said at the time it was born that it weighed about 11 pounds. Another witness testified that it weighed 8 or 9 pounds. If the child did in fact weigh 11 pounds at birth, it was exceptionally large, and this fact might be a slight indication of a prolonged pregnancy. But estimates as to the weight of a new-born baby are proverbially unreliable, and the most that can be said is that the child was full sized. On the other hand, there was no unusual circumstance accompanying either the pregnancy or the birth, and the fact of the mother's safe delivery without a physician may be a slight indication that the child was not of unusual size. The only medical evidence introduced was that of a physician called by the appellants, who testified that a period of gestation of 304 days or more was possible and not *very* unusual.

Upon the foregoing facts and evidence the point most strongly urged upon us on behalf of the appellants is that the question of the child's paternity is determined by a conclusive presumption of legitimacy. It is urged that it appearing that Mrs. Bettencorte and her husband were together on the night of December 23d, it must be presumed, as a matter of law, that intercourse took place between them at that time, and it further appearing that a child was born of Mrs. Bettencorte 304 days thereafter, and that this period is within the period of possible gestation, there is a conclusive presumption of law that the child is legitimate; that is, is the offspring

of Mrs. Bettencorte's husband and not of the decedent.

That it must be assumed, as urged by appellants' counsel, that the husband and wife had intercourse on the night of December 23d, when they were together, cannot be doubted. That such is the rule in cases where the issue of legitimacy is involved is established in this state by *Re Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91. The question, therefore, presented by appellants' contention is this, Is there a conclusive presumption of legitimacy when it appears that the mother has had intercourse with her husband 304 days before the birth of the child, but not subsequently?

The presumption of legitimacy is discussed in *Re Walker*, — Cal. —, 181 Pac. 792. It is there said that if it appear that it is possible by the laws of nature for the husband to be the father of the child,—that is, if he had intercourse with his wife during the period of possible conception,—he is conclusively presumed to be the father, that the law will permit no guessing or weighing of probabilities as between the husband and some other man, when both have had intercourse with the mother during the critical time, and either may in fact be the actual progenitor. This rule

in cases where only a usual and normal period of gestation is involved is thoroughly well established, and the reasons of policy upon which it is based are so strong that it is the rule of both the civil and the common law. There was, however, no attempt in the *Walker* Case to do more than state the rule in a general way. Nothing more was necessary, as the evidence of intercourse with the husband there relied on to prove legitimacy was of intercourse during the time when, according to the usual operation of the laws of nature, the children involved must have been conceived. The applica-

*Bastardy—  
presumption  
of intercourse.*

*—weighing of  
probabilities  
between hus-  
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another.*

tion of the rule to such a case is not open to doubt.

But in the present case it appears conclusively that the husband did not have intercourse with his wife for a period of 304 days preceding the birth of the child. This period, if not exceeding, at least approaches an exceeding of the usual and normal period of gestation. Two questions, therefore, present themselves, neither of which was presented in the Walker Case or there determined. The first of these is, Is the period of 304 days greater than the usual or normal—not merely the average—period of gestation,—that is, is it contrary to the usual operation of the laws of nature? This is a pure question of fact. The second question is one of law, namely, Does the conclusive presumption of legitimacy apply where the period of gestation necessary in order that the husband be the father is not an impossible one, but is yet exceptional, and not according to the usual operation of the laws of nature?

The first question, while one of fact, is one as to the operation of natural laws, and therefore as to a fact of which the court may take judicial notice, and as to which it is not confined to the evidence in the record, but may seek information elsewhere, and in particular in published technical works and articles by those recognized as authorities in this branch of human knowledge. An examination of recent medical text-books and articles leaves no doubt as to two points: First, that 304 days is a possible period of gestation; and, next, that it is quite an exceptional one. While the average period of gestation is generally taken as 280 days, there are instances vouched for by reputable authorities where the period has exceeded 330 days, and there are instances, too well authenticated apparently to admit of reasonable question, where the period has exceeded 320 days. See, for instance, the case reported by

Dr. Taussig in his monograph on Prolonged Pregnancy, appearing in XLIV. American Journal of Obstetrics, 519. In this same article also Dr. Taussig compiles (page 524) a list of well-authenticated cases which would seem to justify his conclusion that "in this total of sixty-one reliable cases of partus serotinus (delayed birth) we have a mass of evidence that should make even the most conservative acknowledge that this condition occurs in the human race, just as it has long since been proved to exist in the lower animals." See also Cragin, Practice of Obstetrics, pp. 156-164; Edgar, Practice of Obstetrics, p. 128; 2 Witthaus & B. Med. Jur. pp. 507-520; 3 Wharton & S. Med. Jur. pp. 30-39.

On the other hand, a reading of these same authorities makes it plain that any period in excess of 300 days is quite exceptional, and that with each day over 300 the exceptional character of the case is much intensified. Dr. Taussig in his article endeavors to compile all well-authenticated cases where the period exceeded 300 days, and accepts but sixty-one as falling within reasonable certainty within this class. This small number strongly evidences the exceptional character of such cases, as does also the fact that those investigating the subject concern themselves with every case where the period may be supposed to exceed 300 days. This would not be true if such cases were not looked upon as quite exceptional, and therefore worthy of note and investigation. A number of authorities (see page 514 of 2 Witthaus & Becker) fix 300 days as the extreme limit, a conclusion which apparently must be abandoned in the light of more recent information; but the fact that such an opinion could be held at all by capable modern investigators indicates that instances of more than 300 days are entirely beyond the usual order of things. That this is the common experience of mankind is also indicated by the fact that in other countries 300 days has

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period of  
gestation.

been adopted by statutes as the limit of the presumptive period of gestation. French Civ. Code, art. 315; *McNeely v. McNeely*, 47 La. Ann. 1321, 17 So. 928. Dr. Edgar quotes Von Winckel (2 Witthaus & Becker, 575) as saying that "in 6.8 per cent [of cases] the duration is over 300 days." But the article in which this statement was made was published in 1890, and in 1900 or 1901 Von Winckel published the results of his examination of 30,500 cases, in which, as best we can judge from the references to the article, he found but thirty-one cases, or less than  $\frac{1}{10}$  of 1 per cent, wherein it was reasonably certain the period was 302 days or more. We can but conclude that the period involved in this case, 304 days, is quite exceptional, and not according to the usual and normal operation of the laws of nature.

This conclusion makes necessary a consideration of the second question, Is the conclusive presumption of legitimacy applicable to such a case? This is not determined by any statutory provision. Section 1962, subdivision 5, Code of Civil Procedure, provides: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read literally, this section would apply only where the wife is cohabiting with her husband at the time of issue; that is, of birth. This was not the fact in the present case. But putting upon the section the meaning it undoubtedly should have, namely, that issue of a wife cohabiting with her husband at the time of conception must be indisputably presumed legitimate, it yet does not determine the present case, for it still leaves open the very question involved, of when was conception or during what period must it be presumed to have taken place?

Section 194 of the Civil Code provides: "All children of a woman who has been married, born within ten months after the dissolution of

the marriage, are presumed to be legitimate children of that marriage."

—statutory presumption of legitimacy.

This presumption is but prima facie. *Re Walker*, 176 Cal. 402, 408, 168 Pac. 689. It is urged, however, in effect, that it is a statutory declaration of policy that 10 months is to be taken by the law as not exceeding the reasonable or normal period of gestation, so that all the incidents of birth within the normal period, such as the conclusive presumption of legitimacy, attach. There are several answers to this, but two will suffice. The presumption of the Code section is but prima facie, and the reasons of policy which would justify or induce a prima facie presumption in such a case are very different from those which would justify or properly induce a conclusive presumption. The legislature might well deem it wise to provide that a child born within 10 or 11 or even 12 months after separation of husband and wife, as was actually done in Pennsylvania, should be presumed legitimate in the absence of any other evidence, when it would be wholly unwilling to make such presumption apply contrary to all other evidence.

—making presumption conclusive.

In the next place the 10 months mentioned by the statute must be taken to be months of 30 days. No other construction will give it a reasonable operation. It is dealing with the working of natural laws, where

Bastard—statutory presumption of legitimacy—months.

any proper measure of time must be an absolute and regular one, such as days or hours, not an irregular one, such as calendar months. If this be not so, the legitimacy of a child might depend on the purely fortuitous circumstance that the marriage of its mother was dissolved in one month of the year instead of another. The long months occur irregularly during the year, and more of them accumulate in one period of 10 months than in another. For example, if the child were born

306 days after the dissolution of its mother's marriage, it would be presumed legitimate if the dissolution had happened to occur on any day in April prior to the 29th, while, if the child were so unfortunate as to have had the dissolution of its mother's marriage occur in any day in February, it would not be presumed legitimate by the statute unless it were born within 303 days thereafter. Such arbitrary and unreasonable inconsistencies and distinctions affecting so vital a matter would make the law ridiculous, and are to be avoided if by reasonable construction of the statute they can be. The word "month," when spoken of as a regular and constant measure of time,—each month having the same length,—as is not infrequently done, is commonly conceived of as having 30 days. The statute is applying the measure of months to something which should be measured by a constant and regular standard, where each month must have the same length, and the reasonable construction is to put upon the word "month" as so used the meaning which it commonly has when used in that manner, that is, a month of 30 days, so that the 10 months' period specified is one of 300 days. We believe that the necessity for this meaning is so plain that it is one "apparent from the context" within the language of § 14, Civil Code. This construction we are the more willing to put upon the statute in view of the fact that in those countries where there is a presumptive period of gestation it is more usually this time.

Other than the two Code sections mentioned, there is no statutory provision which bears upon the question. Nor is much assistance to be derived from previous decisions. So far as the question has been presented to the courts at all, the trend is apparently to the view that the conclusive presumption does not apply where the period of gestation required, in order that the husband be the father, is an exceptional, although a possible, one.

The point was presented in the Gardner Peerage Case (Le Marchant's report). There the child was born 311 days after the wife left the husband to join her paramour, with whom she continued for some time. There was much testimony pro and con as to this time being a possible period of conception, and counsel for the child urged strongly that the testimony showed it was a possible period, and that, this being the fact, a conclusive presumption of legitimacy followed. The House of Lords determined that the child was illegitimate. The decision, however, cannot be given much weight here, for the reason that the evidence that 311 days was a possible period was strongly controverted, and the two lords delivering opinions put them briefly on the ground that they were convinced of the fact of illegitimacy without stating anything more. It may fairly be said that they may have believed 311 days was not a possible period, and have reached their conclusion for that reason.

In *Burnaby v. Baillie*, L. R. 42 Ch. Div. 282, 58 L. J. Ch. N. S. 842, 61 L. T. N. S. 634, 38 Week. Rep. 125, the period between the separation of husband and wife and the birth of the child was 279 days. The child was found to be illegitimate. There was a good deal of testimony as to the ordinary period of gestation, and Judge North, who decided the case, in his opinion says that, "having regard to the normal or usual period of gestation," he is unable to come to a positive conclusion, and finally puts his decision on the ground that he was satisfied the parties had not had intercourse for some time before their separation. The inference from the decision, but it is only an inference, is that the conclusive presumption was applicable in the court's mind only in the case of intercourse by the husband within the usual period of gestation.

*Bosville v. Atty. Gen.* L. R. 12 Prob. Div. 177, 56 L. J. Prob. N. S. 97, 57 L. T. N. S. 88, 36 Week. Rep.

79, comes nearest to being directly in point. The facts are practically identical with those of the case at bar, except that the period intervening between separation of husband and wife and the birth of the child was but 277 days. The medical testimony introduced was to the effect that the normal time of gestation was from 270 to 275 days, and that a longer time, although not unknown or even uncommon, was exceptional. The case was left to the jury, which found the child illegitimate. On review the very argument here urged upon us was urged upon the court. It was contended that, it appearing that the husband and wife had occupied the same apartments up to 277 days before the birth, it must be presumed that intercourse was had between them as late as 277 days before birth, and that, such time being within the period required for gestation, a conclusive presumption of legitimacy followed. This contention was overruled and the verdict of the jury upheld. The case may, therefore, be fairly considered as directly holding in opposition to the contention of appellants here. It is not entitled to particular weight, however, because of the unsatisfactory reason given, which is that one presumption cannot be built upon another, a proposition which we do not believe applicable to such a case.

*People v. Case*, 171 Mich. 282, 137 N. W. 55, may perhaps be considered as tending the other way. It was there held in a bastardy proceeding that a child born only 253 days (8 months and 13 days) after the husband's liberation from jail and a renewal of relations with his wife must be conclusively presumed legitimate. The decision was based on evidence that the maximum period of gestation was 300 days and the minimum 240. The point under discussion here, however, was not considered or apparently suggested.

So far as we are aware, the foregoing are all the authorities which can be said to have any real bear-

ing on the question. We are therefore compelled to treat it as one of first impression. So approaching it, it is apparent at the outset that the conclusive presumption of legitimacy must either be extended to apply to every case where the period of gestation necessary in order that the husband be the father is a possible one, no matter how exceptional or extraordinary such period may be, or else it must be limited in its application to those cases where the period necessary to make the husband the father is within normal or usual limits. There is no middle ground. It is apparent also, from what has already been said, that the facts with which the law has to deal in this regard are that while the average period of gestation is 280 days there are exceptional and rare instances where it exceeds 320 days, and it is probable that there are instances where it exceeds 330 days. The situation therefore is either that a child born 320 days after separation of husband and wife, and probably a child born 330 days or more after, must be conclusively presumed to be legitimate, regardless of what the evidence may show as to the mother having intercourse with another man than her husband during the normal period of conception and the entire absence of any symptoms of prolonged pregnancy, or else the conclusive presumption must be limited to cases where the husband has had intercourse with the wife during the normal period of conception. The mere statement of this proposition involves its answer. The conclusive presumption cannot be applied to such extreme and exceptional cases. To do so would be wholly unreasonable, and would be contrary to the legal presumption which exists in this state, that "things have happened according to the ordinary course of nature." Code Civ. Proc. § 1963, subd. 28.

Nor is there any reason of public policy which requires such extend-

—exceptional  
period of  
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presumption of  
legitimacy.

ing of the conclusive presumption. The prima facie presumption of legitimacy, which requires clear and satisfactory proof for its overcoming, is founded on the policy of protecting the integrity of the family, of preventing the bastardizing of issue born in wedlock except upon clear and certain evidence. The reason for going beyond this prima facie presumption, and applying a conclusive presumption wherever the husband has had intercourse with the wife during the time when the child must normally have been conceived, although others as well may have had intercourse with her during the same period, is the impossibility of determining under such circumstances who is the father. As was said in *Com. v. M'Carty*, 2 Clark (Pa.) 356, the process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor anyone else can say with reasonable certainty which is the father. Any weighing of probabilities under such circumstances is but guessing, and, where the husband is one of the possible fathers, he must bear the burden of his relation to the woman and be taken to be the father of her child.

There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance white, and it appears that the wife has had intercourse with a man of another race, as for instance a negro, and the child is of mixed blood. *Watkins v. Carlton*, 10 Leigh, 560; *Bullock v. Knox*, 96 Ala. 198, 11 So. 339; *Wright v. Hicks*, 12 Ga. 161, 56 Am. Dec. 451; *Cross v. Cross*, 3 Paige, 139, 23 Am. Dec.

778. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable.

The same element of indeterminability is lacking in the class of cases under consideration where, in order that the husband be the father, the period of gestation, while a possible one, is exceptional and contrary to the usual course of nature. The actual fact as to paternity can be determined with reasonable certainty, if the probative facts capable of being known are made to appear. The courts must reason in accordance with the usual operation of the law of nature, and where it appears that the child was born at such a time that the husband might possibly be the father, but only in case of a very exceptional departure from the usual operation of the laws of nature, and it also appears that the wife has had intercourse with another at the time when, by the usual operation of these laws, he would be the father, the conclusion that the latter is the father is, in the absence of any symptoms or circumstances indicating an exceptional period of pregnancy, well-nigh irresistible. Nor is there any reason why this conclusion should not be followed in this class of cases as in other cases where the fact that the husband is not the father is capable of being shown clearly and satisfactorily and is so shown. The courts are reluctant to reach the conclusion of illegitimacy in any case, but, reaching it, there is no hesitation, and should be none, in giving it effect. Our conclusion in the present case is that the issue of paternity is not determined by any conclusive presumption of legitimacy.

It does not follow that the prima facie presumption of legitimacy is not applicable. That presumption applies in every case of a child born in wedlock and can be overcome only by clear and satisfactory evidence. *Re Walker*, 176 Cal. 402, 408, 168 Pac. 689. It remains to consider whether the evidence in the present case is of that character.

The circumstances in evidence leave no room for reasonable doubt. In addition to the fact that the child was born at a time much exceeding the normal period, if the husband were the father, we have the further circumstances that during all the time when normally it would have been conceived the mother was cohabiting with McNamara; that in January, nearly a month after leaving her husband and after conception must have taken place if he were the father, she had a full menstrual period,—something which may occur after conception, but ordinarily does not; that computing from the commencement of this menstrual period as that preceding conception, as is usually done, the period of gestation was 274 days, or only 6 days removed from the average period of 280 days, and wholly within the limits of normal variation; and, finally, that everyone concerned—McNamara, the girl, the girl's family, and so far as appears Bettencorte himself—believed without question that the child was McNamara's.

—bastardy—  
—sufficiency.

The combined force of these circumstances is sufficient certainty to justify the finding of fact of the lower court as to paternity.

The evidence is likewise fully sufficient to sustain the finding on the issue as to adoption. The requirements of the Code (Civ. Code, § 230) for legitimation by adoption are two: First, that the father must publicly acknowledge the child as his; and, next, that he must treat it as if it were legitimate, and

in particular must receive it into his own family as his child. The evidence is ample on both points. A more public acknowledgment than the act of McNamara in signing the child's birth certificate, describing himself as the father, it would be difficult to imagine. In addition the child was with him and its mother most of the time after its birth, and the evidence shows that the relation openly assumed by him was that of father. His statements and his actions were both a public acknowledgment of the child as his, and a consistent treatment of it as if it were legitimate. It was also received into his family within the meaning of the Code. It has already been decided by this court that the word "family," as used by the Code in this connection, does not necessarily mean relations, but may mean the family in which or as part of which the father abides. *Re Gird*, 157 Cal. 542, 137 Am. St. Rep. 131, 108 Pac. 499; *Re Jones*, 166 Cal. 108, 135 Pac. 288. In this sense the only family McNamara had after the birth of the child was the child and its mother, with whom he abided, with occasional absences, until his death, with full assumption of the relation of father, mother, and child. It is worthy of note in this connection that while McNamara was so living with Mrs. Bettencorte and her child, his sister, one of the appellants, visited and stayed with them for some days. The relation between McNamara and Mrs. Bettencorte was, to be sure, unlawful, but

Parent and  
child—adoption  
—sufficiency  
of evidence.

this does not negative the plain fact that the family relation existed. It is attempted to distinguish this case from *Re Jones*, supra, where the facts establishing an adoption were much weaker, on the ground that McNamara had no fixed habitation. The parties did change their abode several times, but it was a change of abode. They were not mere wanderers or travelers.

—family—  
—establishment.

Where they were, they made their home. When they finally moved to the place where McNamara died, they did not rent the place, but actually arranged to purchase it.

The alleged errors in the admission of evidence are three: First, the admission of testimony by Mrs. Bettencorte that she left her husband on December 24, 1913, and, except on one occasion immaterial here, did not see him again, in other words, testimony by a wife tending to show nonaccess by her husband; second, the admission of evidence of declarations by McNamara that he was the father of the child; and, third, the admission of testimony as to a declaration of Bettencorte at the time (December 26, 1913) he left the residence of Mrs. Bettencorte's parents, where he and she had been residing, that he was going to Redding, in the northern part of the state.

The admission over objection of testimony by Mrs. Bettencorte, tending to show nonaccess by her husband, presents a question on which the courts are in hopeless confusion. So far as rulings in this state are concerned, it was held in *Re Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91, that testimony by a wife that she did not have intercourse with her husband at a time when she was cohabiting with him was not competent on an issue as to the legitimacy of her child. This ruling is a necessary result of our Code provision that the issue of a wife cohabiting with her husband is indisputably presumed legitimate. It not being permitted to dispute the presumption of legitimacy under such circumstances, evidence disputing it is, of course, incompetent. Further than this our decisions have not gone. Mrs. Bettencorte's testimony does not come within the rule of *Re Mills*, supra, for she did not testify, nor was it claimed, that she did not have intercourse with Bettencorte as long as they cohabited. Her testimony was as to a separation between them and

that she did not meet him afterwards.

A reading of our Code sections would seem to settle the question. Section 1870, Code of Civil Procedure, reads: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: 1. The precise fact in dispute; . . . 15. Any other facts from which the facts in issue are presumed or logically inferable."

Section 1879, Code of Civil Procedure, reads (the italics are ours): "*All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses.*"

The next two sections (§§ 1880 and 1881, Code of Civil Procedure) purport to set forth the instances in which a person having direct knowledge of the facts is yet not competent as a witness. Testimony by a wife showing, or tending to show, nonaccess by her husband, is not mentioned in either section. More explicit language could not well be devised, and these sections are in our judgment controlling. It is true

Evidence—  
—of wife—  
nonaccess of  
husband.

that they were considered in *Re Mills*, and it was there said, in effect, that they do not abrogate the rule of the common law on this particular point. But this statement was not necessary for the decision, which could have been rested solely on the ground that the evidence there presented was inadmissible, because material only to dispute an indisputable presumption. Even if the Code sections were not controlling, from which conclusion we see no escape, the fact that any such rule of incompetency as is contended for by appellants actually exists at the common law has been seriously questioned, and the reasons of policy advanced to justify it severely criticized. See 3 Wigmore, Ev. §§ 2063 and 2064.



Our conclusion on this branch of the case is that the rule of *Re Mills*, *supra*, should not be extended further than it was actually there set down and applied,—that is, to evidence by either wife or husband of nonintercourse between them at a time when they were cohabiting together,—the evidence being offered on an issue as to the legitimacy of a child born to the wife; and that the rejection of the evidence in that instance is justified, not so much because it is incompetent, as because it is immaterial, being offered to dispute an indisputable presumption. Within this rule the testimony of Mrs. Bettencorte does not come.

The next objection is to the evidence of declarations by McNamara that he was the father of respondent. The objection made is not so much that such evidence was wholly incompetent as that it was incompetent until it had been shown the husband, Bettencorte, was not the father. As to its

—declarations  
of paternity.

competency generally there can be

no doubt. It was clearly competent for the purpose of proving the acknowledgment of paternity by McNamara and his adoption of the child in the manner required by the Code for legitimation. Being competent and material upon that issue it was, of course, admissible. Furthermore, McNamara being deceased, his declarations as to the relationship of the child

—declarations  
of pedigree.

to him were also admissible under the familiar pedigree rule. On this latter point § 1870, subdivision 4, Code of Civil Procedure, provides that evidence may be given of "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person." See also § 1852, Code Civ. Proc.; *Re Heaton*, 135 Cal. 385, 67 Pac. 321.

As to the point that the evidence

was incompetent until it had been shown that Bettencorte was not the child's father, this, in the first place, was a matter of the order of proof, and almost entirely within the discretion of the trial court. In the next place, such evidence is not incompetent

—absence of  
negative  
evidence of  
paternity.

on the issue of paternity, which is the point really made on behalf of the appellant. *Hargrave v. Hargrave*, 9 Beav. 552, 50 Eng. Reprint, 457, 15 L. J. Ch. N. S. 280; *Morris v. Davies*, 5 Clark & F. 163, 7 Eng. Reprint, 365; *The Aylesford Peerage*, L. R. 11 App. Cas. 1, 11 Eng. Bul. Cas. 523. The real point of the authorities cited by appellants' counsel in this connection is either that declarations by the putative father are not alone sufficient to overcome the presumption of legitimacy, or else that, where nonintercourse between husband and wife is not shown, such declarations are wholly immaterial. Both of these propositions are true, but neither has application here.

The final objection of appellants is to the admission of declarations by the husband, Bettencorte, immediately after his wife left him, that he was going to Redding. These declarations were made at the time he left the residence of his wife's parents, where he had been residing, and in connection with his actual departure. The fact that he went to Redding, where his wife was not, was material on the question of their separation. The fact that he departed, and that he intended to go to Redding, is some evidence that he did go, and it is well established that declarations of intention are admissible under such circumstances. For a quite notable case where, on this particular point, the facts are almost identical with those presented here, see *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909.

—declarations  
as to destination  
of husband.

It should perhaps also be stated

that even if this evidence were strictly inadmissible, its bearing on the real matter in dispute is so slight that it is impossi-

Appeal—  
admission of  
inadmissible  
evidence—non-  
prejudicial  
error.

ble that the appellants were prejudiced by its reception.

There are no other material errors complained of.

Order affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Lawlor, J.; Wilbur, J.; Lennon, J.

Melvin, J., dissenting:

I dissent. The policy of the law has always been to favor legitimacy, and to prevent, except upon the most convincing proof, the bastardization of a child born to a married woman. I believe the opinion of Mr. Justice Olney, in which all of my other associates concur, forsakes this oft-declared policy, and is, moreover, against the letter of our statute. I believe this decision, as a result of which a woman is permitted successfully to attach the stigma of illegitimacy to her little boy, will stimulate many similar efforts on the part of others who desire to spend the money left by deceased bachelors.

The presumption arising because of the ancient policy of the law, to which I have referred above, is well set forth in an opinion written by the learned author of the prevailing opinion in this case. I refer to *Re Walker*, — Cal. —, 181 Pac. 792, at page 794. In the opinion in that case I find the following language: "There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted."

In the opinion delivered by Mr. Justice Victor E. Shaw upon the former appeal in that case (*Re Walker*, 176 Cal. 402, 168 Pac. 689) he quoted approvingly the following language from *Powell v. State*, 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660: "Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies, or even the apparent justice, of any particular case, will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whim or purpose of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant."

Continuing, Mr. Justice Victor Shaw used the following language: "Before such a child can be adjudged a bastard, the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child."

The court cited the following authorities: *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Kraus v. Kraus*, 98 Mo. App. 427, 72 S. W. 180; *Orthwein v. Thomas*, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 159, 21 N. E. 430; *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Ewell v. Ewell*, 163 N. C. 236, 79 S. E. 509, Ann. Cas. 1915B, 373. (It is to be noted that, through a printer's error, the last quoted sentence, as appears on page 410 of 176 Cal., is erroneously credited to the opinion in *Powell v. State*, supra.) It is true that the old English rule, known as the "quatuor maria rule," which conclusively assigned legitimacy to a child born to a married woman while the husband was within the four seas, except upon proof of his impotence, has been modified by

modern decision. Generally, courts have adopted the rule laid down by Lord Langsdale to the effect that "the presumption may be wholly removed by proper and sufficient evidence showing that the husband was impotent; entirely absent, so as to have no intercourse or communication of any kind with the mother; entirely absent at the period during which the child must, in the course of nature, have been begotten; or present only under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." 3 R. C. L. 727. This rule, however, is still based upon the presumption arising from the policy of the law in favor of legitimacy. That policy was in existence when subdivision 5 of § 1962, Code of Civil Procedure, was adopted. That subdivision declares that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Read in view of the policy of the law in favor of legitimacy, it seems to me that this subdivision means that the issue of a wife born within the possible period of gestation, after proved access of her husband, he being not impotent, is indisputably presumed to be legitimate. Mr. Justice Olney, in the prevailing opinion, concedes that the subdivision applies to the issue of a wife cohabiting with her husband at the time of conception. Let us suppose that in the present case the period of separation of the spouses instead of 10 months had been 9. It seems to me that under the logic of the opinion the child would be conclusively presumed legitimate, for the case would then be like that of a husband living with his wife during all of the usual period of gestation. In such a state of facts I take it the paternity might not be impeached by a showing that the infant was small and probably a child born 8 months after conception. What reason is there for preventing inquiry in possible cases of subnormal pregnancy and permitting it in instances of that which may be abnormal? I can see none.

Undoubtedly, in the operation of subdivision 5 of § 1962, Code of Civil Procedure, some children who are actually bastards will be held legitimate without power on the part of anyone to attack their standing in that regard. But that is in accord with the policy of the law, which looks not to the possible foisting of a child upon a husband who might not have been the father, but seeks to prevent all possibility of a legitimate child having the stain and sorrow of illegitimate birth unjustly attributed to it as a sinister inheritance.

Does the unquestionable presumption of legitimacy cease with the period of 280 days after the last cohabitation of man and wife, that being, as we are informed, the average period of gestation? If not, when does the whole matter become open to the court's inquiry? Is it open to full inquiry on the 281st day or any day thereafter on which a child shall be born to the woman? Would this court sustain a finding that the child in this case was illegitimate if, instead of a little more than 3 weeks, the birth had passed the average period by only a day? If not, when would the passage of time become sufficient to justify such a finding? Would it be 1 minute after 300 days, since we are told that instances of pregnancy of more than 300 days are "entirely beyond the usual order of things?" Is the period covered by the indisputable presumption subject to the guessing of each judge of the superior court who may have a problem of this sort, he to be governed, not by the testimony of experts, but by such knowledge of the laws of nature as he may be able to acquire from medical works to which he may have access? These are questions no one of which is answered by the prevailing opinion.

Suppose, for illustration, a case exactly like this, except that instead of being true to one lover, after deserting her husband, the woman had possessed half a dozen to whom she had yielded herself very soon after the desertion.

According to the logic of the opinion, it would then be the duty of the court to guess whether the husband, the deceased lover, whose estate was sought, or some one of the living but possibly impecunious Don Juans, was the father, or as some one jestingly said at the oral argument, whether or not the baby was "of the progeny of a syndicate." It seems to me that many evils must flow from the announced rule of this court, and that the wisdom of extending the presumption of the statute to the utmost possible period of gestation is enforced by the illustration.

If the matter of legitimacy or bastardy is one purely of fact, to be drawn from the evidence adduced as in any other case, then the presumption of intercourse from possible access should be abolished; but this court upholds the doctrine of *Re Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91, and by it supports the conclusion that the husband and wife had sexual relations on the last night on which they were together, which is founded, as was declared in the opinion in that case, upon "good morals and public policy." To allow cohabiting married people thus to impeach the legitimacy of children born in wedlock would be, as well stated in the opinion in *Re Mills*, "to allow evidence which shocks every sense of decency and propriety." Yet in the case at bar evidence quite as shocking was permitted, namely, the statement of

Mrs. Bettencorte, regarding her alleged menstrual periods. This is the sort of testimony which may be manufactured without fear of contradiction. Its admission puts a premium upon perjury. In the case at bar it is evident that one of the controlling elements of the finding of the probate court was the testimony of the woman regarding her menstrual periods. Such testimony should have been excluded under what I believe to be the true interpretation of subdivision 5 of § 1962, Code of Civil Procedure.

All of these considerations make me adhere to the doctrine now repudiated by this court, but expressed so clearly and forcibly by Mr. Justice Olney in the opinion in the *Walker Case* that I venture to quote it here a second time (following the pious example of clergymen who sometimes emphasize a text by repetition): "There is no doubt but that the presumption of legitimacy goes at least to this extent: That if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of *possible* conception), legitimacy is conclusively presumed, and no guessing or weighing of probabilities as to paternity because of relations between the mother and other men will be permitted." (The italics are mine.)

Petition for rehearing denied September 22, 1919.

### ANNOTATION.

#### **Presumption of legitimacy of child born to married woman as affected by lapse of more than normal period of gestation after access by husband.**

- I. Introductory, 329.
- II. Where there is no opportunity for intercourse, 330.
- III. Where there is opportunity for intercourse:
  - a. View that intercourse may be disproved, 333.
  - b. View that intercourse may not be disproved, 337.

#### *I. Introductory.*

The courts uniformly concede that

a child born during wedlock is presumed to be the child of the mother's then husband. The difficulty has been in determining how far this presumption is conclusive; i. e., to what extent is it a positive rule of substantive law defining the legal quality of legitimacy. Here there have been stages of doctrine. The early rule is stated in 3 R.C.L. 726, as follows: "It was a maxim of the Roman law, and one

which the common law copied, that the presumption is that he is the father whom the marriage indicates, and Montesquieu, alluding to it, observed that 'the wickedness of mankind makes it necessary for the laws to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having confidence in the mother as if she were chastity itself.' D'Aguesseau laid it down that 'whilst the birth of children can be ascribed to a legitimate source, the law will not suppose criminality.' The early common-law rule in England was that if a wife had issue while her husband was within the four seas, that is, within the jurisdiction of the King of England, such issue was conclusively presumed to be legitimate, except upon proof of the husband's impotence; and even if he was beyond the four seas he must have been away for so long a period before the birth of the child as to make it a natural impossibility that he could be the father. To such an absurd length was the principle carried that it was solemnly decided by a court of the highest jurisdiction that a child born in England was legitimate, although it appeared on the fullest evidence that the husband resided in Ireland during the whole time of the wife's pregnancy, and for a long while previously, because Ireland was within the King's dominion. In another instance, where the husband resided in Cadiz, the child was held to be a bastard; not because Cadiz was at a greater distance, but because it was beyond the four seas."

In the time of Edward II. the Countess of Gloucester bore a child one year and seven months after the death of the duke, and it was pronounced legitimate. In the reign of Henry VI. Mr. Baron Rolfe expressed the opinion, with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation. See Dickinson's Appeal (1875) 42 Conn. 491, 19 Am. Rep. 553.

But after a gradual relaxation during five centuries the conclusiveness of the presumption has been gradually

removed, so that, with a few exceptions, which are set out in the note, it now appears that it may be explained away or rebutted by evidence to the contrary, but is conclusive in the absence of such evidence. It is the design of this note, therefore, to include those cases wherein it appeared that the husband did not have access to the wife, either during the entire gestation period, or at the time the child must have been begotten. Cases where the husband and wife were present under circumstances when access was impossible are included. Access is taken to mean sexual intercourse. The note does not include cases of antenuptial conception, nor does it include the question of the competency of the witnesses nor the admissibility of the evidence to show legitimacy. On whom rests the burden of proof and who may dispute the presumption, except under the rule in Louisiana, are also excluded.

## *II. Where there is no opportunity for intercourse.*

The presumption that a child born in wedlock is legitimate is rebutted by satisfactory proof that the husband was absent during the entire period in which the child must have been begotten. *Re Gird* (1910) 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499; *Bruce v. Patterson* (1897) 102 Iowa, 184, 71 N. W. 182; *Cross v. Cross* (1832) 3 Paige (N. Y.) 139, 23 Am. Dec. 778; *Com. v. Shepherd* (1814) 6 Binn. (Pa.) 283, 6 Am. Dec. 449; *Pittsford v. Chittenden* (1885) 58 Vt. 49, 3 Atl. 323; *Re St. George's Parish* (1705) 1 Salk. 123, 91 Eng. Reprint, 115; *Pendrell v. Pendrell* (1732) 2 Strange, 925, 93 Eng. Reprint, 945; *Rex v. Bedall* (1737) 2 Strange, 1076, 93 Eng. Reprint, 1042; *Head v. Head* (1823) 1 Sim. & Stu. 150, 57 Eng. Reprint, 61, Turn. & R. 188, 37 Eng. Reprint, 1049, 1 L. J. Ch. 105; *Rex v. Maidstone* (1810) 12 East, 550, 104 Eng. Reprint, 215; *Hargrave v. Hargrave* (1846) 9 Beav. 552, 50 Eng. Reprint, 457; *Re Saye* (1848) 1 H. L. Cas. 507, 9 Eng. Reprint, 857; *Gurney v. Gurney* (1863) 1 Hem. & M. (Eng.) 413, 32 L. J. Ch. N. S. 456, 9 Jur. N. S. 514, 8 L. T. N. S. 380, 11 Week.

Rep. 659; *Burnaby v. Baillie* (1889) L. R. 42 Ch. Div. (Eng.) 282, 58 L. J. Ch. N. S. 842, 61 L. T. N. S. 634, 38 Week. Rep. 125.

Since the relaxation of the early rule of *quatuor maria*, there seems never to have been any doubt but that proof of the impossibility of access by the husband during the normal period of gestation satisfactorily rebutted the presumption of legitimacy.

Thus, in the early case of *Re St. George's Parish* (1705) 1 Salk. 123, 91 Eng. Reprint, 115, it was held that where a separation has taken place between husband and wife, the children shall be taken to be legitimate, and so deemed until the contrary be proved, for access shall be intended; but if the special verdict finds that the husband had no access, that the children shall then be deemed illegitimate.

And in *Pendrell v. Pendrell* (1732) 2 Strange, 925, 98 Eng. Reprint, 945, wherein it appeared that after a separation of three years, the wife gave birth to a child, the court, on strong evidence of nonaccess by the husband, overruled the presumption of legitimacy, and the jury found the plaintiff illegitimate.

A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was absent at the time when it must, normally, have been begotten, so as to have no intercourse or communication of any kind with the mother. *Hargrave v. Hargrave* (1846) 9 Beav. 552, 50 Eng. Reprint, 457.

And see the dictum in *Wright v. Hicks* (1852) 12 Ga. 155, 58 Am. Dec. 451, wherein the court said: "Where the husband and wife reside at a distance from each other, so as to exclude the possibility of sexual intercourse, there it is admitted that the presumption of legitimacy is at once rebutted."

In the case of *Re Gird* (1910) 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499, it appeared that the wife separated from the husband in 1881,

and only saw him once afterwards, and that time at a distance. Four years later she gave birth to a child. In 1895 the wife gave birth to a second child. On these facts the court said: "The evidence very clearly establishes that Mrs. Bennett's husband was not the father of Nellie. It must also be taken as establishing that he was not the father of Stephen. The only evidence as to the year of the marriage was to the effect that it occurred in the year of 1880, and there was no evidence to contradict that given to the effect, that Bennett and Alice separated not later than the year 1881, and never thereafter cohabited or even saw one another until long after the birth of Nellie, except on one occasion when Alice saw him at a distance, saving and excepting evidence to the effect that Alice had on several occasions admitted to others that Stephen was Bennett's child. The evidence was clearly of such a nature that we cannot say that the jury and court were not warranted in concluding that Stephen was not Bennett's child."

So, where it was satisfactorily proved that the husband had been absent from the wife during a period of two years prior to the birth of the child, the court held that the presumption of legitimacy was rebutted. *Bruce v. Patterson* (1897) 102 Iowa, 184, 71 N. W. 182.

In *Cross v. Cross* (1832) 8 Paige (N. Y.) 139, 23 Am. Dec. 778, it appeared that husband and wife had been separated for several years prior to the birth of a child. It further appeared from the testimony of the complainant's mother, who lived in the house with him during all that time, that the defendant never called at the house more than two or three times after the separation, and then only for a few minutes in the daytime, when the witness was present; that for eighteen months prior to the birth of the child, the defendant had lived in another town, and had not even been to the complainant's house during that time; and that the husband had entirely broken off all intercourse with the wife from the time of their first separation. On this testimony the court

held that the presumption of legitimacy was satisfactorily rebutted.

In *Com. v. Shepherd* (1814) 6 Binn. (Pa.) 283, 6 Am. Dec. 449, the alleged father of the child was under an indictment for fornication with a married woman. It appeared that the husband had left his wife, and resided in another city for several years prior to the birth of the child. The court held that, since no evidence had been adduced to disprove the presumption of nonaccess resulting from the husband's absence, the presumption of the legitimacy of the child was effectually rebutted.

So, in *Pittsford v. Chittenden* (1886) 58 Vt. 49, 3 Atl. 323, wherein it appeared that the husband left the wife three years prior to the birth of the child, and had never returned, it was held that the presumption of legitimacy was effectually overcome.

Similarly, in *Re Saye* (1848) 1 H. L. Cas. 507, 9 Eng. Reprint, 857, the court held that the presumption of legitimacy was rebutted where it appeared that a child was born three years after the separation of the husband and wife, and it was proved that there had been no opportunity of access.

And where it appeared that the husband was absent for seven years prior to the birth of the child, it was held that the presumption of legitimacy was rebutted by the proof of nonaccess. *Rex v. Bedall* (1787) 2 Strange, 1076, 93 Eng. Reprint, 1042.

Similarly, where it appeared that the wife separated from the husband in December, 1859, and did not live with him afterwards, and in May, 1861, the wife gave birth to a child, it was held that the presumption of legitimacy was effectually rebutted. *Gurney v. Gurney* (1863) 1 Hem. & M. (Eng.) 418, 32 L. J. Ch. N. S. 456, 9 Jur. N. S. 514, 8 L. T. N. S. 380, 11 Week. Rep. 659.

In *Rex v. Maidstone* (1810) 12 East, 550, 104 Eng. Reprint, 215, it appeared that the husband was away with his regiment during a period of two years prior to the birth of the child. The court held that the conclusion was irresistible that the child was a bastard.

Failure to admit testimony to prove nonaccess on the part of the husband is reversible error. Thus, in *Mebane v. Capehart* (1900) 127 N. C. 44, 37 S. E. 84, it appeared that the lower court excluded evidence tending to prove that the husband did not have access to his wife for twelve months prior to the birth of the child, where the paternity was in dispute. On appeal the court held that the failure to admit the testimony was reversible error.

But access must be affirmatively denied. Thus, in *Herring v. Goodson* (1871) 43 Miss. 392, it appeared that the defendant charged that the child was a bastard because the father did not have access to the mother during the period of thirteen months immediately prior to the birth of the child. The paternity of the plaintiff was not affirmatively denied. On a question whether or not the paternity of the plaintiff was in issue by the pleadings, the court held that, since the defendant did not deny the paternity of the plaintiff, except by the affirmative allegation of nonaccess to the mother, that therefore the issue was not in the pleadings, to the extent claimed, and that the onus of the proof was on the defendant.

Likewise, where it appears that the husband was entirely absent at the period during which the child must, in the course of nature, have been begotten, the presumption of legitimacy is overcome. *Dean v. State* (1868) 29 Ind. 483; *Rex v. Luffe* (1807) 8 East, 193, 103 Eng. Reprint, 316.

Thus, in *Dean v. State* (Ind.) supra, wherein it appeared that the husband was absent from his wife from January until June, and a child was born on the 6th day of November of the same year, the court held that the presumption of legitimacy was rebutted.

And where it appeared that the husband had access to the wife only a fortnight prior to the birth of the child, it was held in the case of *Rex v. Luffe* (Eng.) supra, that the presumption of legitimacy was effectually overcome.

So, where the husband after a long absence did not join his wife until November, and she gave birth to a

full-grown child the following May, the court held that the presumption of legitimacy was rebutted. *Heathcote's Divorce Bill* (1851) 1 Macq. H. L. Cas. (Scot.) 277.

### III. Where there is opportunity for intercourse.

#### a. View that intercourse may be disproved.

The weight of authority is to the effect that intercourse need not be shown to have been impossible, and where an opportunity for sexual intercourse is shown, the presumption of legitimacy may be rebutted by proving that intercourse did not, in fact, take place. *Goss v. Froman* (1889) 89 Ky. 318, 8 L.R.A. 102, 12 S. W. 387; *People v. Case* (1912) 191 Mich. 282, 137 N. W. 55; *Rhyne v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335; *Kleinert v. Ehlers* (1861) 38 Pa. 439; *Goodright ex dem. Tompson v. Saul* (1791) 4 T. R. 356, 100 Eng. Reprint, 1062; *Banbury Peerage Case* (1811) 1 Sim. & Stu. 153, 57 Eng. Reprint, 62; *Cope v. Cope* (1838) 5 Car. & P. (Eng.) 604; 1 Moody & R. 269; *Morris v. Davies* (1837) 5 Clark & F. 215, 7 Eng. Reprint, 385, 1 Jur. 911; *Reg. v. Mansfield* (1841) 1 Q. B. 444, 113 Eng. Reprint, 1203, 1 Gale & D. 7, 10 L. J. Mag. Cas. N. S. 97, 5 Jur. 505; *Plowes v. Bossey* (1862) 2 Drew. & S. 145, 62 Eng. Reprint, 576, 31 L. J. Ch. N. S. 681, 8 Jur. N. S. 352, 7 L. T. N. S. 306, 10 Week. Rep. 332; *Atchley v. Sprigg* (1863) 38 L. J. Ch. N. S. (Eng.) 345, 10 Jur. N. S. 144, 10 L. T. N. S. 16, 12 Week. Rep. 364; *Bosville v. Atty. Gen.* (1837) L. R. 12 Prob. Div. (Eng.) 177, 56 L. J. Prob. N. S. 97, 57 L. T. N. S. 88, 36 Week. Rep. 79. And see the reported case (*RE McNAMARA*, ante, 313).

In England the case of *Goodright ex dem. Tompson v. Saul* (1791) 4 T. R. 356, 100 Eng. Reprint, 1062, was the first to hold that impossibility of access by the husband was not necessary to prove nonaccess by the husband.

The *Banbury Peerage Case* (1811) 1 Sim. & Stu. 153, 57 Eng. Reprint, 63, contains apparently the first statement of the sufficiency of the evidence necessary to overcome the presumption of

legitimacy. In that case the court said "that the presumption of legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is whether the husband was the father of such child, and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child."

In *Head v. Head* (1823) 1 Sim. & Stu. 150, 57 Eng. Reprint, 61, the court said: "The ancient policy of the law of England remains unaltered. A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father. But in modern times the rule of evidence has varied. Formerly, it was considered that all doubt could not be excluded, unless the husband were *extra quatuor maria*. But, as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt; and when the judges, in the *Banbury Peerage Case*, spoke of satisfactory evidence upon this subject, they must be understood to have meant such evidence as would be satisfactory; having regard to the special nature of the subject. It is to be de-



duced, as a corollary from the opinions of the learned judges in that case, that whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *prima facie*, to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not by mere evidence of circumstances which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present case, the husband and wife are proved to have been together at a time when, if sexual intercourse did take place between them, the husband might, in the order of nature, have been the father of the plaintiff; and the circumstances given in evidence on the part of the defendant not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probabilities in favor of the fact that sexual intercourse did take place between them."

In *Cope v. Cope* (1833) 1 Moody & R. (Eng.) 269, 5 Car. & P. 604, it was held that if there has been an opportunity of access, the circumstances of the case may still be relied on to show that no intercourse took place.

In *Morris v. Davies* (1837) 3 Clark & F. 215, 7 Eng. Reprint, 385, it appeared that the husband and wife separated under an agreement, but continued to live within such distance as afforded them opportunities for sexual intercourse. It did not appear that they were hostile towards each other. It was shown that the wife was suspected of familiarity with one Austin, who remained in her employ after the separation. It further appeared that the husband and wife later visited a Mrs. Lloyd, who testified that "they passed the evening and the night at her house, and she supposes they slept together." But servants of Mrs. Lloyd

testified that the husband and wife occupied separate bedrooms during that visit. A short while after their separation the wife appears to have gone to the house of her husband and to have passed several days there, but a witness gave evidence that the wife, although she passed several days at the house, slept in a distinct and separate part of the house, and did not pass the night with the husband. Several years later the wife became pregnant. When the child was born it was concealed and grew up under another name. On a question as to its legitimacy, it was claimed that the presumption of legitimacy was conclusive because it was shown that the husband and wife had an opportunity for sexual intercourse. The court held that the presumption in favor of legitimacy was rebutted, not only by the proof of nonaccess by the husband, but also by the evidence of the adultery of the wife, and the concealment of the child.

In *Atchley v. Sprigg* (1863) 33 L. J. Ch. N. S. (Eng.) 345, wherein it appeared that the husband had not had access during the normal period of gestation, the court said: "Now, the question is, Does this evidence convince my mind that Cole was not the father of this child, and that Palmer was? In other words, that Cole had not, at the period when the child was procreated, generative access to his wife. Now, the child was born on the 11th October, 1834, and assuming the ordinary period of gestation, the period of procreation would be about the 11th January, 1834; at all events between that date and the 11th March, in case it were a seven months' child. Cole and his wife had not lived together for nine years; she had never had a child by him. This child was born nineteen years after their marriage, and though not physically impossible for a wife to have a child by her husband for the first time after nineteen years, it is at least improbable. In 1824 they separated, and from that time their separation continued complete, unless there were stolen interviews; and the evidence satisfied me, that they never again lived to-

gether as husband and wife in the same house. We have the evidence of all the living persons who can give any information; and though the evidence of the persons interested in the issue must be taken with jealousy, every person who can confirm their evidence does so as far as they are capable; and Cole was never seen or heard of near the house, except on the two occasions I have mentioned. Where he was, we do not know; but we have every reason to conclude that during the whole of that period he never had communication with his wife under the circumstances which would enable him to be the father of that child. Of course, nobody can say where Mrs. Cole went when she was out of doors; but, Cole being her husband, what was to prevent his coming to the house, if he and his wife were desirous of it? The fact being to my mind satisfactorily proved, that he did not come openly to the house, why am I to assume she is to go out, and have stolen interviews, to gratify that conjugal feeling which she manifested in no other manner? That theory, then, has no reasonable grounds; and unless I adopt the rule which once prevailed, that, in order to overcome the presumption of legitimacy, there must be impossibility of access, access here was so improbable that I cannot suppose it. I am convinced in my own mind that from 1824 down to the death of Cole, no such communication took place; and, therefore, the child is illegitimate."

In *Bosvile v. Atty. Gen.* (1887) L. R. 12 Prob. Div. (Eng.) 177, 56 L. J. Prob. N. S. 97, 57 L. T. N. S. 88, 36 Week. Rep. 79, it was admitted that the husband and wife occupied the same bedroom up to the date of their separation. Exactly 277 days (or 276 days counting the commencement of labor of the preceding day) after she left her husband, the child was born. It appeared that immediately after the separation the wife engaged in adulterous intercourse. It was held that the question of legitimacy was properly submitted to the jury, and a finding of illegitimacy was sustained.

Likewise, where satisfactory evi-

dence is adduced to show that the husband had been present during the period of gestation, only under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse, the presumption is rebutted. *Goss v. Froman* (1889) 89 Ky. 318, 8 L.R.A. 102, 12 S. W. 387; *Burnaby v. Baillie* (1889) L. R. 42 Ch. Div. (Eng.) 282, 58 L. J. Ch. N. S. 842, 61 L. T. N. S. 634, 38 Week. Rep. 125.

Thus, in *Burnaby v. Baillie* (Eng.) supra, it appeared that the husband and wife lived together in the same house up to July 21st, 1884, but prior to that time had occupied separate bedrooms, and it was the habit of the wife to lock her bedroom each night to exclude him. It was proved that in speaking of him she used expressions of hatred. It further appeared that in the second week in July, 1884, the wife's monthly period occurred, but was over before the date of her departure on July 21, when she left her husband and remained away until the 17th of September. It also appeared that the husband was away from home during this period, but the evidence showed that he was not with his wife at any time. The husband returned on the 24th of September. They remained together in the same house until the 15th of December, living on the same terms as before. On that date she left the husband and never returned. A child was born on April 26, 1885, which was 279 days after July 21, 1884. On a question as to the legitimacy of this child the court held that while the child was born within 280 days after her departure from her husband, nevertheless their living together under circumstances that disproved access by the husband rebutted the presumption of legitimacy.

Similarly, in *Goss v. Froman* (Ky.) supra, it appeared that the wife left her husband in April and did not return until after his death in June. It further appeared that the wife said, time and again, that the husband could not have intercourse with her and that they had ceased, for at least a year prior to his death, to perform the

sexual act. Evidence was adduced to show that the husband was physically unfit to have sexual intercourse within the period of gestation. It was held that nonaccess by the husband was satisfactorily proved, and the presumption of legitimacy arising from marriage was rebutted.

But the presumption becomes conclusive if the evidence is insufficient to disprove access during the normal period of gestation.

Thus, in *Plowes v. Bossey* (1862) 2 Drew. & S. 145, 62 Eng. Reprint, 576, it appeared that on December 23, 1833, the husband was taken to a lunatic asylum, where he remained until his death. In December, 1835, the wife gave birth to the claimant. It appears that the asylum officials were enjoined not to allow the husband and the wife to be left together alone, but it was shown that it was not impossible that the husband and wife had been alone during one of her visits. It also appeared that the husband had been seen in the town before the birth of the child. Commenting on the evidence the vice chancellor said: "The evidence adduced to rebut the presumption of legitimacy may be considered as bearing on two distinct propositions: One, that there was not during the period within which the child must have been begotten any intercourse whatever between the husband and wife; using the term 'intercourse' in the sense of their being in each other's presence; the other, that if there was such intercourse, it was under circumstances which did not admit the possibility of sexual intercourse;" and after a review of the facts said that he was not "judicially convinced," that intercourse had not taken place, and therefore, since the evidence failed to overcome the presumption of legitimacy, that therefore the child must be taken to be legitimate.

And in *Reg. v. Mansfield* (1841) 1 Q. B. 444, 113 Eng. Reprint, 1203, it appeared that the wife was deserted by her husband. Several years later she was married again by banns, her husband still living, and afterwards had two children. In disposing of the case *Patterson, J.*, said: "From these

facts alone we are called upon to infer that there was no access of the husband to his wife, though during any part of the time he may have been living at the next door; I think we cannot form any such conclusions."

So, where a child was born two years after the separation of the husband and the wife, but it appeared that within the period of gestation the husband and wife had opportunity for sexual intercourse, it was held, in the absence of proof of nonaccess, that the issue was legitimate. *Kleinert v. Ehlers* (1861) 38 Pa. 439.

And where a child was born six months after a divorce a vinculo matrimonii on account of adultery, but it appeared that there was an opportunity for sexual intercourse during the time at which the child must, according to the laws of nature, have been begotten, it was held that the child was legitimate. The court said that the child must "be taken to be legitimate, unless it be proven, by irresistible evidence, that the husband . . . did not have sexual intercourse with his wife." *Rhyn v. Hoffman* (1862) 59 N. C. (6 Jones, Eq.) 335.

In *People v. Case* (1912) 171 Mich. 282, 137 N. W. 55, a bastardy proceeding, a married woman charged that she was gotten with child by the respondent on September 30th, 1910. At this time her husband was in jail, but was released October 15th, 1910. The child was born June 25th, 1911, or 253 days after the husband received his liberty. It did not appear that the husband returned to the wife, but it was shown that after his release he worked at several places and was absent from work from time to time. It was held that since nonaccess was not proved, the presumption of legitimacy controlled.

In *Bury v. Phillpot* (1834) 2 Myl. & K. 349, 39 Eng. Reprint, 977, the court said: "Access is such access as affords an opportunity of sexual intercourse, and where the fact of such access between a husband and wife, within a period capable of raising the legal inference as to the legitimacy of an after-born child, is not disputed, probabilities can have no weight; and

a case ought never to be sent to a jury. There is here nothing against the evidence of access, except evidence of the adulterous intercourse of the wife with Hughes, which does not affect the legal inference; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law."

*b. View that intercourse may not be disproved.*

At least two jurisdictions adhere to the rule that the question to be presented to the jury is not whether the husband and the wife did in fact have intercourse, but whether the bare possibility of intercourse presented itself to them at any time. If it did, then, unless impotency can be shown, the presumption is conclusive. *Powell v. State* (1911) 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660; *Scott v. Hillenberg* (1888) 85 Va. 245, 7 S. E. 377; *Bowles v. Bingham* (1811) 3 Munf. (Va.) 599, 5 Am. Dec. 497.

In *Powell v. State* (1911) 84 Ohio St. 165, 36 L.R.A. (N.S.) 255, 95 N. E. 660, it appeared that the wife separated from the husband on February 22, 1904, and denied having intercourse with him after that date. It further appeared that on the 12th day of January, 1905, the wife was delivered of a child, and the defendant was charged with being its father. Evidence was adduced to show that the husband remained in the same town until the 21st day of July. The court said: "Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies or even the apparent justice of any particular case will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whims or purposes of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant.

7 A.L.R.—22.

The proof must be such as to show the impossibility of access, and this evidence not only fails to prove that, but on the contrary it does show that access was a physical possibility at all the time from the date that she claims there was a final separation up until the time the divorce was granted, or at least up until the 21st of July, after which time there is some proof, very vague and uncertain however, that he was in distant parts."

In *Scott v. Hillenberg* (1888) 85 Va. 245, 7 S. E. 377, it was contended that the husband was a soldier in the Confederate Army, and that he was not at his home in the year 1864, and that during that year his wife did not visit him; that his wife became pregnant during the summer or fall of 1864 and gave birth to a child in May, 1865. The evidence was conflicting as to whether there had been an opportunity for access, and it was held that unless the proof clearly established nonaccess, the child must be taken as legitimate.

See also *Bowles v. Bingham* (1811) 3 Munf. (Va.) 599, 5 Am. Dec. 497, wherein the court said: "With respect to procreations during marriage the presumption is that all persons born during marriage are legitimate. This presumption can be destroyed only by contrary proof, demonstrating that the child is not the child of the husband; which again can only be by showing that from his continued absence from his wife, at or about the time of procreation, or from the impotency of his body, it is impossible that he should be the father. This presumption in favor of legitimacy is so strong, and the exceptions thereto are held under such strictness, that where a man was divorced from his wife, propter perpetuam generandi impotentiam, and then married another woman, who had issue during the marriage, that issue was holden to be his, on the ground that a man may be *habilis et inhabilis deversis temporibus*. *Bury's Case* (1600) 5 Coke, 98, 77 Eng. Reprint, 207. It is not, therefore, a mere circumstance of probability that will operate in this case to bastardize the issue. Such issue will be held to be

legitimate, unless it be conclusively shown that a person other than the husband must necessarily and unavoidably have been the father."

In Louisiana, where a child is conceived and begotten in wedlock and is not disavowed by the husband in the mode prescribed by law, the status of legitimacy is fixed, and the presumption of legitimacy is conclusive.

See also *Eloi v. Mader* (1842) 1 Rob. 581, 38 Am. Dec. 192; *Dejol v. Johnson* (1857) 12 La. Ann. 853.

In *Ezidore Cureau* (1904) 113 La. 839, 37 So. 773, it was said obiter: The right to disavow and repudiate a child born under the protection of the legal presumption, *pater est*, is peculiar to the father, and can be exercised only by him, or his heirs. And if the father renounce the right, expressly or tacitly, it is extinguished and can never more be exercised by anyone.

So, in *Saloy's Succession* (1892) 44 La. Ann. 433, 10 So. 872, the court said: "The onus is on the state to show by strictly legal proof that they have procured it by fraudulent representations and practices, and the question reduces itself as to whether the state has at her command the evidence exclusively permitted in such cases, in which children born during marriage are gravely charged with being adulterous bastards, incapable of inheriting under the law. . . . There is no doubt that a husband, although he be presumed by law to be father of the children born from his wife, during the existence of their marriage, has the indisputable right to repudiate them when they have not been begotten by him and are the spurious fruits of the adulterous intercourse of his wife with another man, but the cases in which he is permitted to go into the scandalous doings of his depraved consort, reeking with the odor of adultery, are specified with precision, and his action, and, in his default, that of his heirs, are to be asserted within a limited delay. Rev. Civ. Code, arts. 184-192 inclusive. The proceeding must be conducted contradictorily with the wife and with the child or children whose character

and status are involved. The law has made him the sole judge of the propriety of engaging in such a course, with a reserve of the right to his heirs of doing so, in the event of his death within the delay. He is the only one who perhaps can know that he is not the father. When, aware of the circumstances under which he might have exercised the right of repudiation, the husband, who is the sovereign arbiter of his honor, fails to do so, the door is forever closed and no one can afterwards assert a right strictly personal to him."

See also the dictum in *Eloi v. Mader*, supra, to the effect that the father, if he intends to dispute the legitimacy of the child, must do so within one month after the birth, or two months if absent when the birth occurs, or he shall be barred from ever making the objection. Civ. Code, arts. 188, 191.

In *Tate v. Penne* (1829) 7 Mart. N. S. 548, it appeared that the mother was married in 1806 and the defendant was born in 1809. The evidence was conflicting as to the date of the separation of the mother and her husband. On a question as to the legitimacy of the defendant the court said: "This is all the evidence. It creates a presumption of absence and non-access; but that will not do in cases like this. The legal presumption of the husband being the father, and of access being presumed in cases of voluntary separation, can only be destroyed by evidence bringing the parties within the exception the law has created to the rule, namely, the physical impossibility of connection—moral will not do. Now that physical impossibility can only be shown by proving the residence of the husband and wife to be so remote from each other that access was impossible. The proof here wholly fails in establishing it. The evidence of the husband's residence is only negative. He was not on the east side of the lake. Where the wife was, the proof is silent. How can we tell from the evidence that they did not meet and cohabit?"

And in *Vernon v. Vernon* (1851) 6 La. Ann. 242, it appeared that the wife left the husband about 1793 and did

not return until about 1800. On her return she brought back two children, born during her absence, one having the appearance of being about six years of age, and the other about four years of age, of whom the plaintiff was one. It appeared that the plaintiff had been brought up in the house, but had never been considered as the son, of the deceased. In holding that the Banbury Peerage Case was the rule as to the condition of the plaintiff, which was fixed by the law in force in South Carolina, it was remarked by the court: "It is obvious that these facts do not establish the impossibility of access and cohabitation of these parties. The evidence on this point is not at all satisfactory. There is no proof, other than that stated, as to where Mrs. Vernon went, or was at any time from 1793 to 1800. . . . We assume that the rule established by the judges in the Banbury Peerage Case would control the condition of the plaintiff at the time of his birth. He was born during marriage; and the marriage having been proved, nothing is allowed to impugn

his legitimacy, short of the proof of facts showing it to be impossible that the husband of his mother could be his father. . . . We understand that, to rebut the presumption of legitimacy resulting from marriage, the evidence against it ought to be distinct, clear, and conclusive. It is sufficient to state that the evidence adduced in this case is not of that character. It is, at best, conjectural; and at this distance of time it would be equally unjust and dangerous to deprive a man of his status of legitimacy by any evidence short of that which the law and public policy require to be administered in order to destroy the effect of a civil institution upon which society rests for its security."

But without proof of cohabitation between spouses since the separation from bed and board, the legitimacy of the child born of a wife 300 days after the separation may be contested. *McNeely v. McNeely* (1895) 47 La. Ann. 1321, 17 So. 928; *Ledet's Succession* (1908) 122 La. 200, 47 So. 506.

A. S. M.

E. H. JOSLYN, Plff. in Err.,

v.

PEOPLE OF THE STATE OF COLORADO.

*Colorado Supreme Court (Dept. No. 1) — June 2, 1919.*

(— Colo. —, 184 Pac. 375.)

**Contempt — by grand juror — conspiracy to violate oath.**

1. A grand juror who, before taking his oath that he will present no person through malice, hatred, or ill will, has entered into an agreement or conspiracy to violate it and as grand juror is engaged in consummating the agreement, is guilty of contempt.

[See note on this question beginning on page 345.]

— refusal to testify.

2. A refusal to testify in a judicial investigation of general public concern is a direct criminal contempt of court which may be punishable summarily.

[See 6 R. C. L. 497.]

— recital of facts in judgment.

3. The purpose of reciting the facts in the judgment itself in a proceeding

to punish a criminal contempt which may be punished summarily is to set them forth so fully in the record that accused may have the cause reviewed.

[See 6 R. C. L. 536.]

— charging corruption in drawing grand jury.

4. To publish that a sheriff drew a prejudiced grand jury to make a partisan investigation of a governmental

department of a city is a contempt of court.

[See 6 R. C. L. 500, 509.]

**Grand jury — charge against — statutory provision.**

5. A statutory provision that when it becomes necessary to investigate the conduct of a grand juror with reference to any charge, he shall be excused from further attendance, has no relation to a charge as to his competency to act as a grand juror.

— effect of prejudice.

6. Neither bias nor prejudice of a grand juror nor interest other than pecuniary in the prosecution, nor the fact that he has expressed an opinion,

will invalidate an indictment returned by him.

[See 12 R. C. L. 1022.]

**Witness — refusal to testify — grounds.**

7. A witness may not refuse to testify because he considers the matter inquired about as his private, confidential, and personal business.

**Courts — power to investigate truth of charge of prejudiced jury.**

8. The court may, upon receiving notice of a publication charging the sheriff with corruption in drawing a prejudiced grand jury to investigate a department of a city government, call witnesses to testify to the truth of the charge, and punish for contempt those refusing to testify.

**ERROR** to the District Court for El Paso County (Sheafor, J.) to review a judgment adjudging defendant guilty of contempt in refusing to testify in certain proceedings. *Affirmed.*

Statement by Burke, J.:

January 13, 1919, in the district court of El Paso county, a grand jury theretofore in session filed its report and was discharged. One of the matters undisposed of, for lack of time, was the investigation of the department of public safety of the city of Colorado Springs. February 27, 1919, another grand jury was impaneled, and among other things given it in charge was the completion of this investigation. On March 7, 1919, while this grand jury was sitting, there appeared in a certain newspaper, the Labor News, published in the city of Colorado Springs, the following article.

#### Curious Coincidences.

Isn't it a curious coincidence that the leaders of the county Republicans should boast, after their victory last fall, "We will now proceed to clean out the city hall?" Isn't it a curious coincidence that a Republican sheriff, when drawing a grand jury to investigate a city department presided over by a Democrat, should happen to find so many jurors who had made their boast of what they would do to that department if they had the chance? Isn't it a curious coincidence that all of the jurors save one belong to one

party? And isn't it a curious coincidence that when this lone Democrat was discovered that a way was discovered to have him resign? Isn't it a curious coincidence that justice should be called blind when she has such a keen vision as that?

March 22, 1919, there was filed in the district court of El Paso county, "In the Matter of Grand Jury, January Term, 1919," a petition, signed by the foreman of the grand jury, setting up the article above quoted, showing to the court that it constituted "a direct charge as to the competency of members of the grand jury," and asking that an investigation be immediately had by the court "to determine the truth or falsity of the charges made as aforesaid, in order that any members of said grand jury who may be found disqualified to act may be removed therefrom." This petition further prayed that plaintiff in error, as the reputed editor and owner of the newspaper, be summoned as a witness and examined concerning the charges made in the article in question.

This petition was presented to the court, and a subpoena ordered issued for the said Joslyn, returnable at 2 P. M. on said date. In re-

sponse thereto Joslyn appeared in person and by counsel, who objected to the calling of the witness to testify and to the hearing. This objection was overruled, and exception saved. Thereupon the witness testified that he was the owner of the Labor News; that he was acquainted with the article in question; that he understood the department referred to therein was the department of public safety of the city of Colorado Springs; that he knew nothing which would disqualify any member of the grand jury from acting; that he knew of none of them having made a boast such as was referred to in the article. He was then asked if he wrote the article, to which his counsel objected, saying: "He should first be warned by the court, or somebody, if it might in any manner tend to incriminate him."

The court replied that the objection would have to come from Mr. Joslyn. The question was reread and the witness answered: "I decline to answer that question, for the reason it is private, confidential, and personal business."

After some further colloquy between court and counsel, a continuance was granted until 2 P. M. March 24th following, when the witness again appeared in person and by Mr. Kriger and Mr. Kinsley, his counsel. The proceedings of March 22d were read, argument had, and authorities cited. Thereupon Mr. Kinsley stated that the "witness refuses to take the stand, and refuses to answer any further questions in the proceeding, for the reason that the court is without jurisdiction, and the order commanding him to take the stand and answer further questions is and would be void."

In answer to the court's inquiry of the witness if he still declined to answer the questions, he said: "My counsel has made the statement for me which I indorse. On advice of my counsel, I refuse to take the stand and answer questions."

Thereupon the witness was adjudged in contempt and sentenced to be imprisoned in the county jail un-

til he answered the questions submitted to him, "or until the further order of the court."

From this judgment the witness brings error. A stay of execution was granted, and the matter is now before us on application for superseas.

Messrs. Samuel H. Kinsley and John W. Kriger, for plaintiff in error:

The district court exceeded its jurisdiction.

Batchelder v. Moore, 42 Cal. 412; People ex rel. Dennis v. Brennan, 45 Barb. 347; 12 R. C. L. 1022; Cooper v. People, 13 Colo. 337, 6 L.R.A. 442, 22 Pac. 801; Tebbetts v. People, 31 Colo. 461, 73 Pac. 869; Newman v. Bullock, 23 Colo. 217, 47 Pac. 379; Smith v. People, 2 Colo. App. 99, 29 Pac. 924; United States v. Kilpatrick, 16 Fed. 765; Stidger v. People, 46 Colo. 49, 102 Pac. 745; Williams v. People, 46 Colo. 183, 103 Pac. 298.

The judgment is defective in form.

Wyatt v. People, 17 Colo. 253, 28 Pac. 961; Shore v. People, 26 Colo. 516, 59 Pac. 49.

Messrs. V. E. Keyes, Attorney General, William R. Ramsey, Assistant Attorney General, and Willis L. Strachan, for the People:

The court had jurisdiction to make the investigation and to pass upon the petition filed, and in refusing to take the witness stand and answer the questions propounded, defendant was clearly guilty of a direct criminal contempt, which having been committed in the immediate view and presence of the court, it had full power to summarily punish the defendant without notice, hearing, or rule to show cause.

Little v. State, 90 Ind. 341, 46 Am. Rep. 224; State v. Young, 118 Minn. 96, 129 N. W. 148, Ann. Cas. 1912A, 163; People v. Durrant, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; People ex rel. Phelps v. Fancher, 4 Thomp. & C. 467; Plunkett v. Hamilton, 136 Ga. 72, 35 L.R.A.(N.S.) 588; 70 S. E. 785, Ann. Cas. 1912B, 1259; Wigmore, Ev. § 2286; 40 Cyc. 2398; Liutz v. Denver City Tramway Co. 54 Colo. 371, 131 Pac. 258; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; Rapalje, Contempt, § 21; Hurd, Habeas Corpus, p. 7; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; Ex parte Adams, 25 Miss. 888, 59 Am. Dec. 234; Re Deaton, 105 N. C. 59, 11 S. E. 244; Cooper v. People, 13 Colo. 337, 6 L.R.A. 430,



22 Pac. 790; *State v. White*, T. U. P. Charlt. (Ga.) 123; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

The judgment was sufficient as to form and substance.

*Church, Habeas. Corpus*, § 386, p. 466; *Works, Jurisdiction*, p. 655; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633; *Ex parte Chastain*, 94 Ark. 559, 127 S. W. 973.

Burke, J., delivered the opinion of the court:

Two contentions are made in behalf of plaintiff in error: First, that the judgment is defective in form; second, that the court exceeded its jurisdiction.

It is unnecessary to dwell long on the first of these, that the judgment was defective in form. This

Contempt—  
refusal to  
testify.

was a refusal to testify in a judicial investigation of general public concern; hence a direct criminal contempt, which might be punished summarily. *Lindsey v. People*, — Colo. —, — A.L.R. —, 181 Pac. 581, decided by this court April 7, 1919. In such cases the purpose of reciting the facts in the judgment itself is that they may be so fully set forth in the record as to enable the defendant to have the cause reviewed. It is enough to say that this order of commitment, which is made a part of the record and is now before us, sufficiently sets forth such facts.

The question of the jurisdiction of the court depends upon the meaning of the article in question, and its relation to, and probable effect upon, the grand jury and its work. The meaning of the article is not to be determined from what anyone says about it. It speaks for itself. Stripped of all self-evident camouflage, it is a simple statement that the drawing of the grand jury was a piece of chicanery; that the sheriff who drew it violated his oath of office and selected its members for an ulterior purpose; that he intentionally selected men who had not only prejudged the particular mat-

ter referred to them by the court, but had prejudged it solely from the standpoint of partisan politics; that they were making no pretension of passing upon its merits, but had openly boasted their determination to do the contrary; that they had entered upon their duties with a fixed intention of violating their oath of office in the discharge thereof; and that, so far as this particular investigation was concerned, the whole proceeding was a farce and a judicial outrage. We think such is the plain purport of this article and the intention of its author. That it was calculated to bring discredit upon the grand jury and its work, and contempt upon the court of which it was an important part, cannot be doubted.

—charging cor-  
ruption in  
drawing grand  
jury.

Section 3700, Revised Statutes of Colorado 1908, provides as follows: "In any case where a grand juror has been sworn and it becomes necessary to investigate his conduct with reference to any charge, . . . the district attorney shall briefly set forth such fact in writing to the district judge, who shall excuse such juror from further attendance. . . ."

From this it is contended that the sole duty of the court in the present case was to act thereunder. If so, this would have required a discharge of all of the grand jurors, as the charge was made against all. A similar charge might then have been made against their successors, and it would thus be in the power of one whose conduct was being investigated by a grand jury to effectually block such investigation. This section relates only to a charge pending before the grand jury for investigation. It has no relation to a charge as to the competency of grand jurors as such.

Grand jury—  
charge against—  
statutory  
provision.

An officer charged with the duty of selecting and summoning jurors, who excludes all those acquainted with counsel for the defense solely upon that ground, is guilty of a

gross contempt of court, and should be severely dealt with. Harjo v. United States, 1 Okla. Crim. Rep. 590, 20 L.R.A.(N.S.) 1013; 98 Pac. 1021. The same is true if the officer were guilty of a similar violation of duty in summoning grand jurors.

Each grand juror is required to take an oath that he "will present no person through malice, hatred or ill will." Colo. Rev. Stat. 1908, § 3699. If before taking such oath he

Contempt—by grand juror—conspiracy to violate oath.

has entered into an agreement or conspiracy to violate it, and as a grand

juror he is engaged in consummating that agreement or conspiracy, he is clearly in contempt, and may be punished. United States v. Kilpatrick (D. C.) 16 Fed. 765.

The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a

Grand jury—effect of prejudice.

direct pecuniary interest), nor the

fact that he has formed, or expressed an opinion, will so disqualify him as to render invalid indictments returned by the grand jury. 20 Cyc. 1300; United States v. Belvin (C. C.) 46 Fed. 381; Com. v. Woodward, 157 Mass. 516, 34 Am. St. Rep. 302, 32 N. E. 939; Rolland v. Com. 82 Pa. 306, 22 Am. Rep. 758. But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and that wilful corruption which distinguishes the malefactor.

It should be borne in mind that plaintiff in error was not adjudged guilty of contempt for any aspersions cast upon the grand jurors, or upon the sheriff, but for his refusal to answer as a witness in an investigation being conducted by the court to determine the truth of a charge, publicly made, that the grand jury, an important part of the machinery of the court, had been turned into an engine of oppression.

A witness may not refuse to testify because such testimony may influence civil litigation in which he is interested. Radinsky v. People, — Colo. —, 180 Pac. 88. For the same reason he may not refuse to testify because he considers the matter inquired about as his "private, confidential, and personal business."

Witness—refusal to testify—grounds.

It was perfectly clear in the present case that a gross contempt of court had been committed, either by the sheriff and some of the grand jurors, or by the publication of the article in question, or both. It is equally clear, and not denied, that that contempt could have been tried and the guilty parties punished in a direct proceeding against them, or any of them, for that purpose. The question here to be determined is: "Might the court, upon having the matter called to its attention, proceed first to determine the probable truth thereof, and call and examine witnesses for that purpose?"

The primary object of such an investigation was to purge the grand jury of corrupt members, if any such there were. That object was of more vital importance in the administration of justice than the mere punishment of those who had already offended. "It is manifest that, if the jury is insulted and treated with contempt, the court must protect them, for they can render no judgment and are powerless to protect themselves." State ex rel. Crow v. Shepherd, 177 Mo. 205-228, 99 Am. St. Rep. 624, 76 S. W. 86.

So with a grand jury. Suppose the attack had been printed anonymously and widely circulated in the community, and was thus brought to the attention of the court, and, while neither author nor publisher were known, witnesses were at hand who could advise the court of their identity. The grand jury could not summon and examine them, because, being powerless to punish the contempt, they were without jurisdiction to investigate it. But can it

be said that the court, which had the duty to protect the grand jury, was also powerless, because, forsooth, the identity of the offender, though easily ascertainable, had not been disclosed?

In an early California case an attorney for one whose conduct was under investigation by a grand jury addressed a letter to the grand jurors, reflecting upon their conduct and integrity, and denouncing them for permitting themselves to be corruptly used by a person of wealth for the purpose of finding indictments to gratify his private malice and oppress and crush his adversary. The offense in that case was less serious than the one here under investigation. That was a mere private letter, which might only come to the attention of one or more of the grand jurors. This was as public in its nature as it was possible for the offender to make it. There the matter arose upon a review of a judgment in contempt against the writer of the letter. The court said: "If the invectives against the person named in the letter, and others, who are accused of having been hired by him to aid and abet him in his design, were founded upon facts, and the petitioner, as an attorney of the court, *had suggested them to the court in a regular way*, it is not to be doubted that *upon such a suggestion judicial inquiry would have been instituted*, and that, if there were adduced any evidence at all to sustain the suggestion, prompt action would have been taken to vindicate the law, maintain the respect due to the court, and to protect the court and the grand jury under its supervision and legal control against persons implicated in the attempt to commit, or in the commission of, such criminal acts. . . . And such criminal acts are also punishable as contempts of court, for they taint with suspicion the proceedings which they touch, embarrass, hinder, and delay courts in the exercise of their functions, and, if suffered to pass unrebuked and unpunished by the

court whose proceedings are tainted by them, they result in a paralysis of judicial confidence. *To prevent, arrest, and punish for such offenses, whether committed or attempted to be committed by or upon any grand juror, is therefore the duty of every court in which such a jury may be sitting in the discharge of its duties; and if guilt should be found to attach to members of the grand jury, the jury should be promptly discharged*, and the matters against the members thereof should be referred to another grand jury. . . . It is of the highest importance that jurors and judicial officers should be protected and preserved, not only from all improper influences, but even from the suspicion of such influences. . . . A grand jury should never forget that it sits as the great inquest between the state and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice. But the letter was . . . aimless for any purpose, except to exasperate the jurors, by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of public clamor which it expressed, or to create a distrust and a want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice. That such a communication to a jury sitting in or in connection with a court, of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court, does not admit of doubt. 'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' Bishop, Crim. Law, §

216. It would be strange if, under a government of law, it were otherwise." (Italics are ours.) Re Tyler, 64 Cal. 434, 1 Pac. 884.

In the instant case the foreman of the grand jury suggested that matter to the court. Upon that suggestion the court did institute a judicial inquiry, as was his duty, and if guilt had been found to attach to the jurors, or any of them, he would doubtless have promptly discharged such jurors, as was also his duty.

Any grand jury foreman, who, cognizant of such a publication and acquainted with the duties of his position, should fail to call it to the attention of the presiding judge, would be unfit to be further trusted with his important functions. Any judge who, having such a matter properly called to his attention, should fail to investigate it, and, if found true, discharge the unworthy jurors and direct the institution of proceedings for their punishment and the punishment of the sheriff, or, if found untrue, direct the institution of proceedings for the punishment of their traducers and the protection of the good name and dignity of his court (unless he were powerless to do so), would be unfit to hold judicial office. The simple reason is that if these things were true, or were publicly charged and believed to be true, indictments returned by such grand jury would be mere scraps of paper. Good citizens acting as petit jurors would refuse

to convict thereon, and the court itself would be brought into that contempt and detestation in the community which it richly deserved, and rendered impotent for anything but evil.

The fact that the communication, upon which the inquiry was based, may have prayed action which, in the first instance, would have been improper, by no means nullified the investigation or ousted the court of jurisdiction. This was not a proceeding to punish the author or publisher of "Curious Coincidences," nor to adjudge them in contempt for libeling the sheriff. It was an investigation to determine whether a grand jury, then sitting, was composed of upright and law-abiding citizens, honestly endeavoring to keep their oaths and act as "a great inquest between the state and the citizens," making accusations "only upon sufficient evidence of guilt," and protecting "the citizen against unfounded accusations, whether from the government, partisan passion, or private malice," or whether that grand jury was an aggregation of political tricksters, brazenly sitting in the halls of justice in the garb of public functionaries and juggling with the liberties and reputations of men.

For the reasons given, the supersedeas is denied, and the judgment affirmed.

Garrigues, Ch. J., and Teller, J., concur.

Petition for rehearing denied, October 6, 1919.

### ANNOTATION.

#### Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court.

There seems to be very little in the books on this subject.

It will be seen that it is held in the reported case (JOSLYN v. PEOPLE, ante, 339), that an officer charged with the duty of selecting and summoning grand jurors is guilty of contempt of court where he intentionally selects

those who have prejudged the particular matter referred to them by the court, and have done so solely from the standpoint of partisan politics.

In Harjo v. United States (1909) 1 Okla. Crim. Rep. 590, 20 L.R.A. (N.S.) 1013, 98 Pac. 1021, where the court reversed a conviction in a murder case

on the ground that the marshal had discriminated against the defendants in refusing to summon men to serve as jurors who were well acquainted with one of the attorneys for the defendant, the court said: "The officer was guilty of gross contempt of court, as well as a violation of a penal statute, and should have been required to make a satisfactory explanation, or have been severely dealt with."

In *Richards v. United States* (1903) 61 C. C. A. 161, 126 Fed. 105, it was held that the fact that the marshal knew that one of the talesmen whom he caused to be subpoenaed was a friend of the defendant was not in itself evidence sufficient to establish the charge of wilful contempt of court. The court said: "The most that can be said of the evidence against the marshal is that, conceding it all to be true, it presents some circumstances calculated to arouse suspicion, but not sufficient to sustain a judgment of conviction of so grave an offense as that with which he is charged."

In the *Richards Case* the court reversed an order of the trial court committing the marshal for contempt in summoning talesmen from bystanders, and not from the body of the district as the trial court intended, because of the failure of the evidence to show that the marshal knew of the intention of the court in that regard.

It may be noted that in *Keppeler v. Williams* (1778) 1 Dall. (U. S.) 29, 1 L. ed. 23, where the plaintiff's attorney demanded the venire of the sheriff, it was held that it would be a contempt to pocket the venire. The court cited *Comb. 303*, 90 Eng. Reprint, 492, which was the case of *Jones v. Montague* (1694), holding that it is a contempt for an attorney to take the venire from the sheriff by force and not bring it into court.

It may be observed that the endeavor to induce an officer to summon particular persons as jurors is a contempt. Thus, in *Sinnott v. State* (1888) 11 Lea (Tenn.) 281, the court said: "The attempt of the defendant to induce the officers of the court to summon as jurors, in the particular case then to be tried, certain persons specified by him in preference to others, or, in common parlance, to 'pack' a jury, was an unlawful interference with the proceedings of the court within the purview of said provisions [of the statute], and was a contempt for which he was punishable by the court." The provisions referred to declared that the wilful misbehavior of any person in the presence of the court or so near thereto as to obstruct justice is a contempt; and that abuse of, or unlawful interference with, the process or proceedings of the court is also a contempt. B. B. B.

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CITY OF HENDERSON, Appt.,

v.

ANNIE W. REDMAN et al.

*Kentucky Court of Appeals — September 26, 1919.*

(— Ky. —, 214 S. W. 809.)

**Bonds — municipal — illegal — return of purchase price.**

1. A city which receives money for its bonds under the mistaken belief of both parties that they were valid, when the statute under which they were issued is unconstitutional, is bound to return the money received as money had and received to the use of the purchaser, and it is immaterial that it may have paid out the money for improvements for which it was not liable.

[See note on this question beginning on page 353.]

(— Ky. —, 214 S. W. 809.)

**Appeal — cross appeal — coappellee.**

2. Upon appeal by a city against which a judgment for return of money paid for its bonds was rendered in favor of defendant in an action to hold him answerable for the value of the bonds to an assignee, to which the city was made a party by cross petition, no judgment can be secured in favor

of the original defendant against the original plaintiff by cross appeal, since a cross appeal will not lie against a coappellee.

**— right statutory.**

3. The right to take an appeal or cross appeal is merely statutory.  
[See 2 R. C. L. 27.]

**APPEAL** by the defendant city from a judgment of the Circuit Court for Henderson County in favor of the original plaintiff against the original defendants, cross petitioners, and in their favor against the defendant city in an action, brought to recover the amount of the remaining unpaid purchase price of certain property, in which the original defendants filed a cross appeal against the original plaintiff, coappellee. *Cross appeal disallowed. Judgment affirmed.*

The facts are stated in the opinion of the court.

Mr. B. S. Morris, for appellant:

The act of the general assembly approved March 18, 1912, and entitled, "An Act to Amend the Charters of Cities of the Third Class," is unconstitutional and void, and an ordinance for the improvement of the streets of a city of that class, enacted under the authority of and in pursuance of the provisions of such act, is invalid.

Hickman v. Kimbley, 161 Ky. 652, 171 S. W. 176.

Bonds issued under an unconstitutional statute are invalid.

Henderson v. Lieber, 175 Ky. 15, 192 S. W. 830.

The contract made by appellant with the contractors was one which appellant was wholly without authority to make, and one dealing with a municipality must take notice of provisions imposing a debt limit upon it.

Princeton v. Princeton Electric Light & P. Co. 166 Ky. 730, 179 S. W. 1074; Belleview v. Hohn, 82 Ky. 1; German Nat. Bank v. Covington, 164 Ky. 292, 175 S. W. 330; Pineville v. Pineville Bridge Co. 179 Ky. 375, 200 S. W. 659; Worrell Mfg. Co. v. Ashland, 159 Ky. 656, 52 L.R.A. (N.S.) 880, 167 S. W. 922.

A municipality, under the laws of this state, cannot exceed its constitutional debt limit.

Knipper v. Covington, 109 Ky. 187, 58 S. W. 498; O'Bryan v. Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800.

Messrs. Dorsey & Dorsey and Henderson & Taylor for appellees.

Thomas, J., delivered the opinion of the court:

The appellee and plaintiff below,

Annie W. Redman, on March 21, 1913, sold and conveyed to the appellees and defendants below, R. W. Youngblood and wife, a house and lot in the city of Henderson for the consideration of \$1,500, a small portion of which was paid in cash, and the remainder with a note for \$200, which Youngblood and wife executed to the vendor, and at the same time delivered to the latter eleven bonds of the city of Henderson, of the face value of \$100 each, which it is claimed were issued in payment for improving Jackson street in the city, and which work was ordered to be and was done under an ordinance duly passed by the city council pursuant to and under the provisions of § 3459a of the Kentucky Statutes, which is an act passed by the legislature at its 1912 session, and is chapter 118 of the published acts of that session. The title of the act purported to amend charters of cities of the third class, to which Henderson belongs.

The case of Hickman v. Kimbley, 161 Ky. 652, 171 S. W. 176, was one brought by the owner of property abutting on a street, which the city proposed to improve under the plan outlined in the amendment, to enjoin the work upon the ground that the statute and the ordinance enacted pursuant thereto was each unconstitutional. It was held that the amendatory act was unconstitutional.

al, in that the legislature, in enacting it, failed to comply with the provisions of § 51 of the Constitution.

In the later case of *Henderson v. Lieber*, 175 Ky. 15, 192 S. W. 830, the city endeavored to enforce the collection of bonds which were issued in payment of improvements made to one of its streets, and to enforce a lien against an abutting piece of property, which improvements had been made pursuant to the provisions of the amendment above referred to, and which amendment provided for the lien attempted to be asserted. It was again held that the statute was unconstitutional, and that neither the city nor any holder of bonds issued for such improvements could assert any lien against the abutting property on the improved street.

Some time after the rendition of the two opinions referred to, the plaintiff, Mrs. Redman, brought this suit against Youngblood and wife to recover, not only the note for \$200 which they executed in part payment for the purchase of the lot involved, but also to recover eight of the bonds which had been taken in part payment for the lot, three of which had been paid. The right to collect from the vendee the amount represented by the unpaid bonds as stated in the petition is upon the theory that the bonds were void and their delivery to the plaintiff constituted no payment. After the filing of the petition an amendment was filed, making the city of Henderson a party, and its answer denied all liability, relying, of course, upon the two opinions referred to. Youngblood and wife resisted liability upon the ground that neither of them had indorsed any of the bonds, which were made payable to bearer, and that plaintiff possessed the same knowledge of their vice as did defendants, and they were therefore accepted cum onere. The answer was also made a cross petition against the city, and a recovery against it in favor of defendants was asked in the event that plain-

tiff should recover judgment against them. To this cross petition the city made the same defense that it did to the amended petition. After the issues had been made up and the evidence taken, the cause was submitted, and the court followed the two opinions, *supra*, and held that the statute and the ordinance enacted pursuant thereto, under which the improvement was made, was each unconstitutional, but rendered judgment in favor of plaintiff against Youngblood and wife, and gave them judgment over against the city for the same amount, on the ground that the payment of the money to it by defendants was without consideration, and to reverse the latter judgment the city prosecutes this appeal, making all of the original parties to the suit appellees.

Since the rendition of the judgment appealed from, this court, in the case of *Cohen v. Henderson*, 182 Ky. 658, 207 S. W. 4, had before it the question of the liability of the city to a purchaser of a similar bond issued to the contractor in payment for work done under the same unconstitutional amendment, and it was held that the city was not liable to the holder of the bond, nor was it liable to him for the value of the improvement, upon the ground, as urged, that it had the right under the charter, independent of the unconstitutional amendment, to improve its sidewalks and streets, as had been done by the contractor under the invalid statute.

The appellant city, for reversal, relies upon the cases referred to and a long list of others from this court, holding in substance that persons who contract with municipal corporations must at their peril know the rights and powers of the municipality to make it, and the authority of the particular agent with whom it was made. Some of the cases so holding are: *Miles Auto Co. v. Dorsey*, 163 Ky. 692, 174 S. W. 502; *Floyd County v. Owego Bridge Co.* 143 Ky. 693, 137 S. W. 287; *J. I. Case Threshing Mach. Co. v. Com.* 177 Ky. 454, 197 S. W. 940; *Prince-*

ton v. Princeton Electric Light & P. Co. 166 Ky. 730, 179 S. W. 1074; Belleview v. Hohn, 82 Ky. 1; German Nat. Bank v. Covington, 164 Ky. 292, 175 S. W. 330, Ann. Cas. 1917B, 189; Pineville v. Pineville Bridge Co. 179 Ky. 375, 200 S. W. 659; and Worrell Mfg. Co. v. Ashland, 159 Ky. 656, 52 L.R.A. (N.S.) 880, 167 S. W. 922. But, according to our view, the doctrine of those cases does not apply to the facts before us.

The Cohen Case was not prosecuted upon the theory that the city was liable for money had and received from the plaintiff, for the manifest reason that he had paid to it no money, since he had purchased his bond, not from the city, but from a holder who had received it from the city in payment for work for which the city was not liable. Without going into details, the other cases cited sought to recover from the municipality, either for articles sold to it without it having statutory authority to purchase them, or without authority of the agent who made the purchase to do so, or for services rendered in the construction of improvements or otherwise, the contract for which was illegally made, or beyond the authority of the municipality to make. To illustrate: The city is not liable for the services of attorneys when employed by an agent without authority to do so (Covington v. Hallam, 16 Ky. L. Rep. 128; Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; District of Highlands v. Michie, 32 Ky. L. Rep. 761, 107 S. W. 216); nor for the repair of a county road under a contract made with the county judge without authority (Floyd County v. Allen, 137 Ky. 575, 27 L.R.A. (N.S.) 1125, 126 S. W. 124); nor for the building of a bridge when the contract therefor was not entered into as the statute required (Floyd County v. Owego Bridge Co. 143 Ky. 693, 187 S. W. 287); nor for materials bought and used by the city clerk without authority (Worrell Mfg. Co. v. Ashland, 159 Ky. 656, 52 L.R.A. (N.S.) 880, 167 S. W.

922); nor for the purchase of machinery for the use of the municipality by others than those authorized by the statute (J. I. Case Threshing Mach. Co. v. Com. 177 Ky. 454, 197 S. W. 940). Certainly the municipality would not be liable where the contract, although authorized and duly entered into, would create an indebtedness beyond the constitutional limit.

In each of the cases referred to, and many others which might be cited, the municipality got the benefit of the services, and it was urged that it ought to be made liable on a quantum meruit because of benefits received; but this contention was denied upon the ground that, although the result was harsh, a due regard for the protection of the taxpayer demanded that such corporations should be held strictly to their statutory authority in the making of contracts and the expenditure of public funds. If the doors were once opened for the violation of such authority, the treasury might be depleted, and additional burdens placed upon the citizen in the way of taxes. In other words, it would pave the way for an indiscriminate expenditure of public funds, with a possible failure to obtain value received. Thus, in the Worrell Mfg. Co. Case, *supra*, quoting from Belleview v. Hohn, 82 Ky. 1, in laying down the reason for denying liability in such cases, this court said: "Courts found it necessary to execute the powers expressly granted, and to refuse to make corporations liable upon implied promises by reason of benefits received. This is done for the protection of the inhabitants of the corporation, and because the only power the corporation has is from the law creating it; and, instead of recognizing a more liberal rule, the courts are inclined to hold corporations and their agents within the letter of their grant."

Further along in the same opinion for the doctrine, it is said: "It may ion, as if to emphasize the reason be that an occasional injustice will



result; but it is better that this should be than that the taxpayers of a city, whose burdens are already heavy, should be subjected to an increased burden imposed by unauthorized agents."

Again, in the Cohen Case, *supra*, it is said: "While the equities of this case greatly weigh in favor of the appellant, and the result seems harsh, the setting aside of the well-established principles of law, to save him from the consequences, cannot be justified, as the evil consequences which would flow from a contrary holding would be unending."

In the former part of the opinion it was shown that the "evil consequences" referred to were those that would operate to the detriment of the taxpayer. Indeed, in none of the cases do we find any other ground upon which to base the doctrine which they announce, the soundness of which we do not question. But, like all other doctrines or rules of law, when the reason for it ceases, its application should also cease.

In the instant case the city, by its council, had authorized the mayor and clerk to issue bonds of the nature purchased by the appellee Youngblood, and to the amount which he purchased. After that he applied to the mayor, and both of them acting under the belief that the bonds were valid (they being duly signed and executed), he issued his check, payable to the city of Henderson, and delivered it to the mayor, receiving therefor the bonds in contest. The check could not be cashed without being legally indorsed by the city, and the fact that the mayor may have wrongfully indorsed the check, or delivered it to one to whom the city was not justly indebted, cannot, according to our view, affect the rights of Youngblood; for if the check was wrongfully disposed of, either by an unauthorized indorsement or an unauthorized delivery, such facts raise questions affecting the city, and not the maker of the check. The facts

clearly present a case where both parties were mistaken as to the right of the city to either issue, sell, or deliver the bonds, and one where it obtained \$1,100 from appellee without any consideration whatever. In such case, can it be said that it would be a burden upon the taxpayer if the city should be required to rectify this mistake and to give back the wrongfully obtained cash consideration?

Bonds—  
municipal—  
illegal—return  
of purchase  
price.

We think not. The difference between this case and those where only services, machinery, or improvements have been rendered or furnished is perfectly apparent. In the latter class of cases no funds went into or were made payable to the treasury of the municipality, and if it were made liable the treasury would be drawn on without a corresponding amount having gone into it, and that, too, in payment for services or articles which the municipality did not have the right to purchase, or, if so, it illegally purchased them. In that case the amount adjudged to be paid would not be paid with a corresponding sum previously paid by plaintiff, but with money furnished by the taxpayer. The difference between the two classes of cases affords ample room for the application of a different legal principle. Suppose the city of Henderson had possessed the authority to issue and deliver the bonds in question, they being free from any taint of illegality, and Youngblood had paid for them, but the city declined to deliver them, either because the bonds were already sold, or for any other reason. Could it then be said that the city could retain the money upon the ground that it could not be held upon an implied contract to refund it, or upon any other ground? Such a contention would be monstrous, and would shock the conscience of enlightened jurisprudence. In that case the transaction would be nothing more than the city agreeing to deliver bonds, and failing to do so

after it had received payment therefor.

In the case before us the bonds delivered were in fact no bonds. They were mere scraps of paper, and we are unable to differentiate the case from the one where there was an utter failure to make any delivery. But it is insisted that the Worrell Mfg. Co. Case, and others referred to, hold that a municipality cannot be held on an implied contract, and such seems to be the holding of that opinion; but the expressions therein with reference to it were made in the light of the facts being dealt with, which were entirely dissimilar to those here presented, in that the collection was not sought for money paid to the municipality. However, if the doctrine of that and other cases should be construed to be of universal application, so as to include cases like the one before us, there are still grounds upon which the plaintiff ought to be entitled to recover—they being (a) payment of money by a mistake; and (b) a fraudulent obtention of the money by the municipality for which it should be made liable in tort. Indeed, to so hold is not a departure from the doctrine of the cases relied on and referred to above, for it is recognized therein that the plaintiff, although unable to collect from the municipality, may recover the consideration furnished by him, if he can obtain it either with or without the processes of the court. Thus, in the Owego Bridge Co. Case, *supra*, referring to the rule as announced by the Supreme Court of the United States in *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040, this court said: "The obligation to do justice rests upon all persons, natural and artificial, and if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. Under this rule, Floyd county will not be permitted to retain the bridges and not pay for them. Appellant having declined to pay for the

bridges, appellee will be permitted to remove the bridges and all the material which it furnished in their construction."

The same right of the plaintiff is upheld in the cases of *Bardwell v. Southern Engine & Boiler Works*, 130 Ky. 222, 20 L.R.A. (N.S.) 110, 118 S. W. 97, and *Floyd County v. Allen*, 137 Ky. 575, 27 L.R.A. (N.S.) 1125, 126 S. W. 124. To the same effect is *Dillon on Municipal Corporations*, § 961; the text being supported by cases from many of the states of the Union.

It will be noticed that the principle last referred to permits the plaintiff to recover the property which his services furnished or created, if obtainable, and it permits him to recover from the municipality "money" which it had obtained from him without authority. We are not without authority from this court holding that money illegally paid, or paid without consideration, to a municipality, may be recovered from it. In the case of *Stanford v. Hite*, 2 Ky. L. Rep. 386, and reported in full in 11 Ky. Ops. 145, it was held that one who paid to the city money for a license which had been executed under a void ordinance could recover it in a suit against the city, upon the ground that it had been paid by a mistake and without consideration. In the course of the opinion this court, through Judge Pryor, said: "The corporation has no right to this appellee's money. He was under neither a legal nor moral obligation to pay it; and, having received no consideration in any manner by reason of its payment, the corporation was properly required to refund it."

This is in accord with the fundamental principles of justice, and does not come within the rule requiring the court to protect the taxpayer by a strict construction of the powers and authority of the municipality or its agents, since he never had any interest in the fund to be protected, having in no way contributed to it, and we unhesitatingly adopt it as the correct doc-

trine, in order to carry out the principles of right, justice, and honesty between individuals, whether artificial or natural. But we go no further than to apply the principle herein announced to the facts of this case. The record does not show that the city was indebted beyond the constitutional limit, and this defense cannot prevail, even if it be conceded that this fact could be relied on in a case like this.

Since the pendency of the appeal, a motion has been made in this court by the original defendants for a cross appeal against plaintiff (a coappellee), which motion was sustained, and it is now insisted that plaintiff's petition should have been dismissed in so far as it sought judgment against defendants, Youngblood and wife, for the \$800 represented by the unpaid city bonds given as part consideration for the property purchased. We do

Appeal—cross  
appeal—co-  
appellee.

not think, however, that defendants can in this court question the judgment rendered against them through the prosecution of the attempted cross appeal. A cross appeal is allowable to an appellee against an appellant only, and not against a coappellee. This rule as applicable to practice in appellate courts is without exception so far as we are aware. In-

—right  
statutory.

deed, the right of appeal in any case, as well as the right to a cross appeal, is purely statutory, and unless such right is provided for by statute the litigant cannot insist thereupon. 3 C. J. 352. Under this rule the statute may provide for an appeal without providing for a cross appeal, and in that case no cross appeal can be prosecuted. Hence, in the authority just referred to, it is said: "As the right of appeal is purely statutory, where one party takes an appeal, the other party cannot take a cross appeal, unless it is authorized by statute."

Although § 755 of the Civil Code provides for the prosecution of a cross appeal, that section has been

construed to confine the right to an appellee dissatisfied with some relief granted against him in favor of an appellant. *Smith v. Northern Bank*, 1 Met. (Ky.) 575; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180, 21 Am. Rep. 209; *Home Ins. Co. v. Gaddis*, 8 Ky. L. Rep. 159; *McKay v. Mayes*, 17 Ky. L. Rep. 827, 32 S. W. 606; *Marion Nat. Bank v. Phillips*, 18 Ky. L. Rep. 159, 35 S. W. 910; *Asher v. Helton*, 31 Ky. L. Rep. 9, 101 S. W. 350; *Hessig v. Hessig*, 130 Ky. 685, 113 S. W. 851; and *Matney v. Edmonds*, 179 Ky. 243, 200 S. W. 365. In the case last mentioned this court, in announcing the rule, said: "A cross appeal is only allowable in behalf of an appellee against an appellant; it is not permissible against a coappellee."

The other cases referred to state the rule in equally emphatic terms. If an appellee desires a review of any judgment which a coappellee obtained against him, his only remedy is to prosecute an original appeal, since, under the rule, *supra*, he may not obtain such review through the medium of a cross appeal. It might be insisted that, the cross appeal having been heretofore granted, it is now too late to deny it; but the same conditions will be found to exist in the cases, *supra*, wherein the relief by cross appeal was denied on final hearing, although the motion was previously granted. Besides, such a motion, when made in this court, is generally sustained as a matter of course, but when heard upon its merits it will be allowed or disallowed according to the party's right thereto.

In this case there is yet ample time for the prosecution of an original appeal by Youngblood and wife against plaintiff, if such a course is desired. For manifest reasons we therefore decline to express any opinion upon the questions sought to be raised by the attempted cross appeal.

Wherefore the petition for a rehearing is sustained, the former opinion withdrawn, the cross appeal disallowed, and the judgment affirmed.

ANNOTATION.

**Liability of public corporation for money received by it for unlawfully issued instrument of indebtedness.**

- I. General rule, where proceeds of instrument remain in the treasury, 358.
- II. Where invalidity of instrument is not due to essential lack of power in corporation:
  - a. Where proceeds are used for purpose within general power of corporation to contract for:
    - 1. In general, 355.
    - 2. Illustrative cases, 356.
- II.—continued.
  - b. Where proceeds are used for purpose ultra vires the general powers of corporation, 359.
  - c. Where purchaser is an officer of the corporation issuing the instrument, 360.
- III. Where invalidity of the instrument is due to essential lack of power:
  - a. In general, 361.
  - b. Illustrative cases, 362.
- IV. Rights of subsequent holder of instrument of indebtedness, 364.
- V. Remedy, 365.

*I. General rule, where proceeds of instrument remain in the treasury.*

This note is not concerned with cases dealing with the question of the implied liability of public corporations for services rendered or material or goods furnished a public corporation where the instrument of indebtedness issued therefor is invalid, and hence not enforceable; but, as indicated by the title, the note deals only with cases involving the implied liability of public corporations for money received for invalid and unenforceable instruments of indebtedness.

Generally, public corporations are restricted by statute or constitution in their power to contract indebtedness. These restrictions are for the protection of taxpayers of the corporation from the unlawful acts of its officers. The restrictions or limitations, being primarily protective in their character, are not to be evaded either directly or indirectly by enforcing against the corporation an implied contract. Hence, it follows that in order that an implied liability may be raised against a public corporation by reason of money it has received for invalid securities, it should appear that the enforcement of the implied liability will not fritter away the essential safeguards thus imposed by law as a protection for the taxpayers. Where, however, the invalidity of the instrument is due to the defective execution of the power, or to the fact that while the corpora-

tion had authority to borrow money for the purpose for which the instrument was issued, it was without authority to issue an instrument of the character it did issue, and the proceeds of the instrument are actually appropriated to a purpose not ultra vires the general powers of the corporation, then no substantial right of the taxpayers is encroached upon by enforcing against the municipality an implied obligation to account for the benefit accrued to it from the money thus received and appropriated.

The necessity that the corporation shall not only receive the money, but shall actually appropriate it to some purpose for which it had power to contract an indebtedness or borrow money, is emphasized in many of the cases hereinafter considered. In this connection the actual holding in the reported case (*HENDERSON v. REDMAN*, ante, 346), is not entirely clear. If it is assumed that the court intended to hold that the mere receipt of money by a public corporation for its invalid securities will render it liable upon an implied contract for the money actually received, even though it was used for some purpose for which the corporation had no power to contract, then the case would seemingly be opposed to the majority rule upon the point. Upon the other hand, if the proceeds of the check were actually appropriated to some use with reference to which the corporation had the

general power to contract, even though the particular claim paid was itself unenforceable because of some irregularity, the case would seem to be in harmony with the weight of authority on the subject. In this connection it is to be observed that the distinction which the court makes between the rights of the holder of a bond for which money has been paid the corporation, and the rights of one who receives a bond in payment of services rendered or material furnished, is in some respects valid; as, for example, where the bonds are issued for a purpose wholly beyond the power of the corporation, but the proceeds are diverted to some purpose within the power of the corporation. Upon showing this fact, the holder of bonds for which the cash has been paid the municipality may recover; while of course such a showing cannot be made where the bonds are issued in payment of services or material, etc. But where the bonds or the proceeds are actually used for the purpose contemplated, and for such purpose the corporation has general power to contract, then in either case recovery may be had upon implied contract, even though no recovery could be had upon the bonds. In either case, however, the recovery is based upon the ground that the corporation has received a benefit for which it had the general power to contract. And in neither case is the recovery based upon the mere fact that the corporation actually received the proceeds of the bonds. The purpose to which the money was appropriated, and not the mere receipt of the money, is the true criterion of the implied liability.

Of course, if a public corporation has received money for its invalid securities, and the money still remains in the treasury, the obstacles to a recovery which are presented when the money has been expended do not exist, and there is no apparent reason, either in law or equity, why the holder of the instrument cannot recover the money the corporation received for it, and which it retains in its possession.

Upon this point in *Reynolds v. Lyon County* (1903) 121 Iowa, 733, 96 N. W.

1096, the court said: "The county obtained the money without consideration. . . . During its retention by the county the bondholders might have laid claim to it at any time, and could have enforced its surrender by *replevin*."

In *Valley Falls Co. v. Taft* (1905) 27 R. I. 136, 61 Atl. 41, it is held that money paid to a town council under a contract which it was without authority to make is paid without consideration, and may be recovered from the town. In this case the money was paid to be used in helping to construct a highway, but the town did not construct the highway; at least, as an entirety. It is not clear whether or not the money had actually been used. In *Dodge v. Memphis* (1892) 51 Fed. 165, the rule is stated that a municipal corporation which sells void bonds and receives the money therefor, may be compelled to restore the amount received in an action for money had and received.

In *Paul v. Kenosha* (1867) 22 Wis. 266, 94 Am. Dec. 598, the court said that the city having had the money and legal scrip for its city bonds, which turn out to be of no value whatever, the case "seems to fall under the general rule of law that where a party sells an obligation which turns out to be valueless, and not of such a character as he represents it to be, he is liable to the vendee as upon a failure of consideration. The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its own worthless bonds? The plaintiff took the bonds upon the presumption that they were valid securities, and paid his money, or its equivalent, to the city for them. They turn out to be void for want of power on the part of the city to issue them; and he seeks to recover back the money paid, as upon a failure of consideration. Can he not recover the amount he has paid the maker of the bonds for its worthless paper? It seems to us unnecessary to go into the authorities upon the question. . . . Upon the ground, therefore, that the amount

recovered was paid upon a consideration which has failed, we think the judgment right." In this case, however, the city had apparently used the money for legitimate municipal purposes. See further reference to this case, *infra*, II. a, 2.

It has been held that in order that the holder of invalid negotiable securities of a public corporation be entitled to recover the amount he had paid the municipality for the same, the money paid must be accurately identified and traced into a fund or property which represents the money in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons, or interfering with others' rights. *Litchfield v. Ballou* (1885) 114 U. S. 190, 29 L. ed. 182, 5 Sup. Ct. Rep. 820.

*II. Where invalidity of instrument is not due to essential lack of power in corporation.*

*a. Where proceeds are used for purpose within general power of corporation to contract for.*

*1. In general.*

This section deals with cases involving the liability of a public corporation upon an implied contract for money received for invalid instruments of indebtedness where the invalidity is not due to an essential lack of power in the corporation to issue them, and it had general authority to contract an indebtedness for the purpose for which the indebtedness in question was contracted, the money received having been used by the corporation or its officers. It also includes cases where the municipality was authorized to contract indebtedness, but this authority was subject to certain conditions, such as a consenting vote of the people, and it appears that these essential requirements have been complied with, but in nonessential features as to the manner of executing the instrument or the character or form of the instrument, there has been a deviation from the prescribed method, which, however, was of sufficient importance to vitiate the instrument itself. In this regard it

is to be noted that statutes empowering public corporations to contract indebtedness for specific purposes, and attaching to the exercise of the power certain conditions precedent as to the procedure, have in view two objects: One is to protect the taxpayer by requiring his consent to the proposed indebtedness; or by requiring competition in making the contracts. These requirements may be regarded as essential features which go to the very existence of the power to contract. The other requirements of the statute relate to the manner of entering into the contract, or the form or character of the instrument of indebtedness, and are principally for the purpose of securing uniformity in the method of entering into such contracts. Innocent deviations from this method, while perhaps rendering invalid the instrument of indebtedness, do not encroach upon or impair the reserved rights of the taxpayer, and cannot be regarded as going to the existence of the power to contract; in other words, the deviation relates to a nonessential requirement.

As hereafter shown, by the great weight of authority the mere fact that a municipality has received the benefit of the proceeds of invalid instruments of indebtedness is not, in and of itself, sufficient ground for raising against it an implied promise to repay the money it received for such invalid instruments. Where, however, a public corporation has the general power to contract an indebtedness for the purpose for which it used the proceeds of invalid bonds or other instruments of indebtedness, it may be held liable upon implied contract for the money thus received and appropriated without reference to the ground of the invalidity; providing, of course, that such invalidity is not due to a violation of public policy or an express statutory inhibition.

*United States.—Louisiana v. Wood* (1880) 102 U. S. 294, 26 L. ed. 153; *Read v. Plattsouth* (1882) 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *Gause v. Clarksville* (1879) 5 Dill. 168, Fed. Cas. No. 5,276; *Gause v. Clarksville* (1880) 1 McCrary, 78, 1 Fed. 353;

**Bangor Sav. Bank v. Stillwater** (1892) 49 Fed. 721; **Geer v. School Dist.** (1901) 49 C. C. A. 539, 111 Fed. 682; **Chelsea Sav. Bank v. Ironwood** (1904) 66 C. C. A. 230, 130 Fed. 410; **Gilman v. Fernald** (1905) 72 C. C. A. 675, 141 Fed. 941.

**Alabama.**—**Bluthenthal v. Headland** (1901) 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87 (stating the rule).

**Kansas.**—**Brown v. Atchison** (1888) 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465.

**Michigan.**—**Thomas v. Port Huron** (1878) 27 Mich. 320.

**Montana.**—**State ex rel. Northwestern Nat. Bank v. Dickerman** (1895) 16 Mont. 278, 40 Pac. 698.

**Nevada.**—**Waitz v. Ormsby County** (1865) 1 Nev. 370.

**New York.** — **Hoag v. Greenwich** (1892) 133 N. Y. 152, 30 N. E. 842; **Ironwood v. Wickes** (1904) 93 App. Div. 164, 87 N. Y. Supp. 554.

**North Dakota.** — **People's Bank v. School Dist.** (1893) 3 N. D. 496, 28 L.R.A. 642, 57 N. W. 787.

**Ohio.**—**Ampt v. Cincinnati** (1896) 3 Ohio N. P. 184.

**Pennsylvania.**—**Rainsburg v. Fyan** (1889) 127 Pa. 74, 4 L.R.A. 336, 17 Atl. 678.

**Rhode Island.**—**Valley Falls Co. v. Taft** (1905) 27 R. I. 136, 61 Atl. 41.

**Vermont.** — **New Haven v. Weston** (1913) 87 Vt. 7, 49 L.R.A.(N.S.) 921, 86 Atl. 996.

**Wisconsin.**—**Paul v. Kenosha** (1867) 22 Wis. 266, 94 Am. Dec. 598; **Thomson v. Elton** (1901) 109 Wis. 389, 85 N. W. 425.

It is said in **Thomson v. Elton** (Wis.) *supra*, that the implied promise springs into life the instant the money is used as a part of the public funds for a purpose for which public money would otherwise have been used.

In **Davis v. Stokes County** (1876) 74 N. C. 374, it appeared that a county without authority issued bonds for the purpose of obtaining money to pay an indebtedness it had unlawfully contracted to aid the Rebellion. The money not having been used for a legitimate purpose, it was held not to be recoverable by the holder of the bond. It was, however, conceded that had the county, without authority, borrowed

money by issuing bonds invalid for failure to follow the statutory requirements, and had the proceeds been used for a legitimate municipal purpose, the county would have been liable for the money thus received and used.

Where an instrument of indebtedness issued by a public corporation is invalid because in amount it exceeds the limitation placed upon the power of the corporation to contract indebtedness, if a portion of the indebtedness is within the limit, the holders of the instruments are entitled to recover of the corporation the amount it received for the instruments which is within the debt limit. **Everett v. Independent School Dist.** (1900) 102 Fed. 529, *s. c.* subsequent appeal (1901) 109 Fed. 697; **McPherson v. Foster Bros.** (1876) 43 Iowa, 48, 22 Am. Rep. 215; **Reynolds v. Lyon County** (1903) 121 Iowa, 733, 96 N. W. 1096. As to prorating this amount between different holders of the instruments, see **Everett v. Independent School Dist.** (Fed.) *supra*.

## 2. Illustrative cases.

In **Louisiana v. Wood** (1880) 102 U. S. 294, 26 L. ed. 153, it appeared that a city issued bonds to refund certain indebtedness; at the time the bonds were actually issued, the city was without authority to issue them, and attempted to overcome this difficulty by antedating the bonds as of a time when it had authority to issue the same; the bonds were placed in the hands of a broker and sold in behalf of the city, and the proceeds were used by the latter in retiring its valid indebtedness; subsequently the city repudiated the bonds and refused to pay them, on the ground that they were invalid for the reason stated. Conceding this invalidity, it was held that the owners of the bonds were entitled to recover from the city the money they had paid for the bonds, the benefit of which it had received. The court took the position that the money was paid through a mistake due to the fraudulent act of the city, and that the holders of the bonds, being without knowledge of this mistake, and being free from wrong in the matter, were entitled to recover the money thus paid. It is pointed out in this connection that the city had the power to borrow

money, but that, in issuing the bonds as it did, it did not follow the lawful method.

In *Read v. Plattsmouth* (1882) 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208, it is held that a city acting without authority in that regard, having issued bonds to raise funds to build a schoolhouse which it had the power to build, and the bonds having been sold and the proceeds used for this purpose, the act of the legislature of the state in subsequently enacting a statute validating the bonds, is not within the constitutional inhibition against the legislature's passing special acts conferring powers upon public corporations. The court said that since the city received and used the money for valid purposes, it was bound to repay the money which it had received for the bonds, and an act of the state recognizing the existence of this obligation and confirming the bonds themselves was not a special act conferring upon the city any new power within the constitutional provision referred to.

In *Gause v. Clarksville* (1879) 5 Dill. 168, Fed. Cas. No. 5,276; *Gause v. Clarksville* (1800) 1 McCrary, 78, 1 Fed. 353, it is held that where a city sold invalid bonds and applied "the proceeds to legitimate purposes, the amount thereof may be recovered by the owner of the bonds in an action as for money had and received.

In *Bangor Sav. Bank v. Stillwater* (1892) 49 Fed. 721, a city having power to contract for public improvements issued negotiable promissory notes to raise funds therefor. It being without power to issue the notes, and they being therefore invalid, the holders were held entitled to recover from the city the money it had received in exchange for the notes.

In *Geer v. School Dist.* (1901) 49 C. C. A. 539, 111 Fed. 682, it appeared that a school district was authorized to contract an indebtedness to build a schoolhouse, without limit as to the amount of indebtedness it might contract. There was, however, a limit upon the amount of the bonded indebtedness which the school district might contract, and, because of this limit,

the bonds issued by the district in excess thereof to secure funds with which to pay for the construction of the school building were held to be invalid. Notwithstanding this invalidity, the purchaser of the bonds or his assignee was held entitled to recover the amount which the district received and used for legitimate purposes. The court, however, pointed out that this would not have been so had the school district, in contracting for the building, exceeded the debt limit.

In *Gilman v. Fernald* (1905) 72 C. C. A. 675, 141 Fed. 941, negotiable bonds issued and sold for the purpose of raising money to construct a waterworks system were invalid. The proceeds of the bonds were used for the purpose for which they were issued, but while the town had authority to borrow money to construct a waterworks system, it did not have the authority to issue negotiable bonds for any purpose, and it was upon this ground that the bonds were held to be *ultra vires*. The township was nevertheless held liable to the assignee of the original purchaser of the bonds for the money which it had received on the bonds and used for a lawful town purpose.

In *State ex rel. Northwestern Nat. Bank v. Dickerman* (1895) 16 Mont. 278, 40 Pac. 698, warrants issued by a school district were invalid because the law authorizing the issuance of such warrants was not strictly complied with by the trustees; the latter, however, had authority to issue warrants for the purpose and for the amount for which these warrants were issued. It appeared that the school district had received the benefit of the proceeds of the warrants, and the holders having acted in good faith, the district was held liable to repay the amount which it received for the warrants. The court said: "From these authorities it seems clear that if, in making the contract under discussion, the trustees exceeded their authority, still there was created thereby a liability to refund the money advanced by relator under and in pursuance of said contract. The most, we think,



that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had the authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance. Nor is any bad faith or fraud alleged in the issuance of said bonds. If the bonds had been declared void, we think it could hardly be contended that the contract with relator to advance money on them as security for the building of the schoolhouse would have been considered void for want of authority in the trustees to make the same. And, besides, the contract, so far as relator is concerned, has been fully executed, and we think the doctrine of *ultra vires* can be invoked with less force here than in cases of executory contracts. The school district secured the benefit of relator's money, advanced in good faith; and we think it would be a most inequitable and unjust holding to say that the district assumed no liability on account thereof, and that relator is left without a remedy, under the circumstances of this case."

In *Waitz v. Ormsby County* (1865) 1 Nev. 370, it appeared that warrants issued by a county to secure funds for county purposes were invalid because the county commissioners were without authority to negotiate the loan. It was, however, held that if the holder or his assignee showed that the proceeds were expended for the benefit of the county in a manner authorized by law, he would be entitled to recover on a count for money had and received.

In *Hoag v. Greenwich* (1892) 133 N. Y. 152, 30 N. E. 842, it was held that bonds issued by a town were invalid because payable in a less period of time than that authorized by the statute providing for their issuance. It appearing, however, that the town had received the benefit of the proceeds of the bonds, it was held liable for the amount thus received, the

amount, however, to be paid in the manner in which it was authorized to negotiate the loan. The court said that it does not follow that even though the bonds were invalid the loan was void or that the borrowing was unlawful,—that the lender lost his money and the town was at liberty to perpetrate a disgraceful robbery by means of the fault or mistake of its own agents. "Treating the four bonds as void, we are required to dismiss them from the transaction, but not to repudiate the transaction itself. They were unlawful incidents of a perfectly lawful transaction, and may be disregarded while the transaction stands. Conceding them to be void, they become nullities, mere blank and worthless paper, to be treated as if they had never existed, and to be appealed to for no purpose; at least, by the party who avoids them. Dismissing them entirely, we may turn to what remains, and I am confident that enough remains to work out that measure of justice which we all feel it to be our duty to attain."

In *People's Bank v. School Dist.* (1898) 3 N. D. 496, 28 L.R.A. 642, 57 N. W. 787, it is held that where bonds issued by a school district are invalid because made payable within a shorter period of time than authorized by statute, the district is nevertheless liable for the money it received for the bonds. The court said: "While the bonds are void, the holder of them can fall back upon the original transaction and recover. If he has loaned money to the municipal corporation which it had authority to borrow, he can recover it in a proper action. The want of power in such a case merely affects the form of security issued to evidence the loan."

In *Ampt v. Cincinnati* (1896) 3 Ohio N. P. 184, the rule is stated that where bonds issued by a city are invalid because formalities provided by the statute are not complied with, the purchaser may recover from the city the amount paid for the bonds, of which it received the benefit.

In *Rainsburg v. Fyan* (1889) 127 Pa. 74, 4 L.R.A. 386, 17 Atl. 678, it is held that where bonds issued by a

borough were invalid for failure to comply with the formalities of the statute, a purchaser thereof may recover from the city the amount of the proceeds for which it received benefit.

In *New Haven v. Weston* (1913) 87 Vt. 7, 49 L.R.A. (N.S.) 92, 86 Atl. 996, it is held that where the treasurer of a town is without authority to borrow money in behalf of the town, instruments representing loans made to him as treasurer are invalid, but the amount actually paid therefor is recoverable from the town to the extent that the latter received the benefit of the money. The court said that if it appeared, however, that the money was not applied to legitimate purposes of the town, the latter is not liable for the amount paid the treasurer for notes of the town, issued without authority.

In *Paul v. Kenosha* (1867) 22 Wis. 266, 94 Am. Dec. 598, it is held that where void bonds are issued by a city, the proceeds thereof may be recovered by the purchaser in an action for money had and received. The court deals with the question as though the city still retained the money. But in *Thomson v. Elton* (1901) 109 Wis. 589, 85 N. W. 425, referring to *Paul v. Kenosha*, it is said that in that case the money was obtained as a consideration for the sale of bonds previously made for another purpose, issued therefor, and thereafter acquired by the municipality. The reissue of the bonds was illegal, though, as supposed, for a legitimate purpose, and the money was used for such purpose. It is said that the implied promise upon which recovery was sustained arose not from the loan of money to the municipality, nor from the mere illegality of the means used to obtain it, but from the fact that the city, having possession of money to which it had no legal right, used the same for lawful municipal purposes.

In *Thomson v. Elton* (Wis.) *supra*, it was held that although a loan of money to a township was invalid because it was without authority to negotiate the loan, nevertheless, an action for money had and received could be maintained to recover the money re-

ceived by the township and applied by it to a legitimate township purpose. The court said that "municipalities are bound by moral obligations, as well as individuals, and that where, in case of the latter, such an obligation will give rise to a legal liability, it may have the same effect as to a municipality; that if a municipality obtains money of a person by an illegal sale of property to him, or an illegal contract of some kind, not expressly prohibited by law nor tainted by moral turpitude, so that a court, on grounds of public policy, will not recognize it, or the relations growing out of it, to grant relief, and such person acts in good faith in parting with his money, believing the same to be for the benefit of the municipality, and the latter uses the money for its legal and legitimate purposes, to that extent the law will imply a promise to return the same, upon which an action for money had and received will lie. *Justitia nemini neganda est* applies even to a person dealing with a public corporation."

*b. Where proceeds are used for purpose ultra vires the general powers of corporation.*

By the weight of authority, even where the invalidity of the instrument is due to the failure of the municipality strictly to comply with nonessential statutory formalities in contracting the indebtedness, the money paid for the instrument cannot be recovered unless it is made to appear that the money was actually received by the proper municipal authorities and used for a purpose within the powers of the municipality to appropriate money for.

In *Agawam Nat. Bank v. South Hadley* (1880) 128 Mass. 503, a town was held not liable for money received by its treasurer upon negotiable instruments of the town, although he used the proceeds in paying debts of the town. It appeared that while the town had authority to borrow money in a certain way, in making the loans in question, such statutory method was not pursued. Upon the question of the liability of the municipality under such circumstances for money received by its treasurer and applied by him in extinguishing indebtedness of

the town, the court said: "The plaintiff contends that it is entitled to recover upon the last count in the declaration for money had and received; and, at the trial, offered to show that the money paid or credited to the town treasurer upon the notes in suit was used by him in the payment of debts due from the town. This evidence was properly rejected. It fails to show that the money was received by the town in its corporate capacity, or that the act of the treasurer in applying it to the payment of its debts was ever authorized or ratified by the town. The difficulty is, that the money was paid to one who had no authority as treasurer or as agent of the town to receive it in the name of the town and apply it to the payment of town debts. If a town could be held in an action for money had and received, under such circumstances, then the purpose of the second and third sections of the statute would be wholly defeated. It makes no difference that the treasurer used this specific money in payment of the town debts. There is nothing to show any appropriation of such payments by the town to its own use, or any ratification of the act. The money in the hands of the treasurer did not belong to the town. For all that appears, funds may have been previously supplied by the corporation from other sources for the payment of these very debts. The relations of the treasurer to the town are not disclosed; he may then have been, and may now be, a defaulter to more than the amount of the alleged payments. The treasurer is an independent accounting officer. . . . If he applies money unlawfully obtained to the payment of town debts, that fact alone creates no liability on the part of the town to refund the money to the party from whom it was obtained."

In *Brown v. Newburyport* (1911) 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495, it was held that notes issued by a treasurer of the city were invalid because they were issued without the express approval of the finance committee, as required by the town council in authorizing the issuance of

certain notes. It appeared that the proceeds of these notes were placed by the treasurer to the credit of the city in its bank account, and were at once checked out by him to cover his defalcations. Under these circumstances, the city was held not liable for the amount paid for the notes. The court said: "The liability of the defendant on the count for money had and received is also urged. The check with which this note and the others of even date were bought, was made to the order of the defendant, deposited in its bank account, and immediately used by the treasurer to cover his defalcations. If the note had been valid in the hands of the holder, the purchaser would not be answerable for the application of the purchase money. But this note was not a binding obligation of the defendant. So far as the city was concerned, the check was a voluntary payment without its knowledge. The fact that it was deposited in its bank account is not enough to charge the defendant with liability."

In *Watson v. Huron* (1899) 38 C. C. A. 264, 97 Fed. 449, it is held that where invalid city warrants were issued to secure money for unlawful purposes, and the funds were applied to this purpose, no equity arose in favor of the purchaser of the warrants, entitling him to recover from the city the amount he paid therefor.

*c. Where purchaser is an officer of the corporation issuing the instrument.*

In *Long v. Lemoyne* (1908) 222 Pa. 311, 21 L.R.A.(N.S.) 474, 71 Atl. 211, it was held that even though a warrant issued by a borough is invalid because the holder was a member of the board, the borough having received and used the money for legitimate purposes, the holder is entitled to recover the amount he paid it for the warrant. To the same effect is *First Nat. Bank v. Goodhue* (1913) 120 Minn. 362, 43 L.R.A.(N.S.) 84, 139 N. W. 599, in which it appeared that an officer of the purchaser of the warrant was a member of the village board which issued it.

*III. Where invalidity of the instrument is due to essential lack of power.*

*a. In general.*

This section deals with cases involving instruments of indebtedness void because the corporation issuing the same was wholly without power to issue the instrument, or, in issuing it, violated public policy or statute, or failed to follow the requirements prescribed by statute as a condition to the existence of the power.

The courts are generally astute in their efforts to hold public corporations liable for money received on invalid instruments. But due effect is also given to provisions restricting the power of public corporations to contract indebtedness, and no implied promise will be raised against the corporation in cases where the deviation is of such a character that the implication would operate to defeat the protective purpose of statutes imposing upon municipalities the duty of following a prescribed method as a condition to the power to contract indebtedness. *Thomas v. Richmond* (1871) 12 Wall. (U. S.) 349, 20 L. ed. 453; *Litchfield v. Ballou* (1885) 114 U. S. 190, 109 L. ed. 132, 5 Sup. Ct. Rep. 820; *Morton v. Nevada* (1890) 41 Fed. 582; *Travelers' Ins. Co. v. Johnson City* (1900) 49 L.R.A. 123, 40 C. C. A. 58, 99 Fed. 668; *Geer v. School Dist.* (1901) 49 C. C. A. 539, 111 Fed. 682; *Bluthenthal v. Headland* (1901) 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87; *McPherson v. Foster Bros.* (1876) 43 Iowa, 48, 22 Am. Rep. 215; *McCurdy v. Shiawassee County* (1908) 154 Mich. 550, 118 N. W. 625; *Hackettstown v. Swackhamer* (1874) 37 N. J. L. 191; *Davis v. Stokes County* (1876) 74 N. C. 374 (bonds issued in violation of public policy).

In *Bluthenthal v. Headland* (1901) 132 Ala. 249, 90 Am. St. Rep. 904, 31 So. 87, the rule is stated that a corporation cannot make a contract which is prohibited by ordinance or by statute, and that if such a contract is entered into by a municipality or its officers, and money or other property is furnished under it, the city is not bound, although the money or property may have been used by it.

However, in the reported case (*HENDERSON v. REDMAN*, ante, 346) it is held that where bonds issued by a city are invalid because the law under which they were issued was unconstitutional, and the bonds were paid for by a check payable to the city, the purchaser is entitled to recover from the city the amount of the check, even though the check was wrongfully indorsed by a city official, or delivered to someone to whom the city was not justly indebted. Followed in *Henderson v. Winstead* (1919) — Ky. —, 215 S. W. 527.

And in *First Nat. Bank v. Goodhue* (1918) 120 Minn. 362, 43 L.R.A. (N.S.) 84, 139 N. W. 599, it appeared that money was borrowed by a village upon warrants issued by it to raise funds for the construction of a fire and jail building. The warrants were invalid because not authorized by vote of the electors, as required by law. Notwithstanding this invalidity, the village was held liable for the money it received and used for the purpose mentioned. The court said: "The money was loaned to the municipality by plaintiff in good faith. It was paid into the village treasury, and subsequently expended for a purpose authorized by law. The forms of law were not complied with in effecting the loan, and the contract was invalid for that reason. Yet the village received the money, and ought in equity and good conscience to return it. And, though we have held that the doctrine of ultra vires is applied to municipal corporations with greater strictness than to private corporations, the doctrine really has no application to the case. If the question was whether the contract was valid, the decision necessarily would be that it was not. This action proceeds upon that theory. In that view the express contract disappears, because unauthorized, and the rule of implied liability takes its place. We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty. The private corporation in a case of this kind would not be heard to dispute its lia-

bility, nor should a public corporation be permitted to do so where, as in the case at bar, there is no question of fraud or collusion, and no concerted purpose between the village officers and plaintiff intentionally to evade or violate the law."

*b. Illustrative cases.*

In *Thomas v. Richmond* (1871) 12 Wall. (U. S.) 349, 20 L. ed. 453, the facts were that the city of Richmond issued negotiable notes with the intent that they should circulate as money. This act was contrary to public policy as well as statute. Under these circumstances it was held that the owner of the notes could not recover from the city for the money it had received for the notes. In so holding, the court distinguished between the liability in this regard of a private and a public corporation. Conceding that a private corporation would be held liable under similar circumstances, the court said that "in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is in *pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the state to issue them. It was a penal offense in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power, to issue them."

In *Litchfield v. Ballou* (1885) 114 U. S. 190, 29 L. ed. 132, 4 Sup. Ct. Rep. 820, it is held that where bonds issued by a city were void because representing a debt in excess of the constitutional limit on the power of the city to contract indebtedness, no implied contract or equity can be raised against the city on the ground that it received the money and used the same for a public benefit, such as the construction of a waterworks system.

In *Morton v. Nevada* (1890) 41 Fed. 582, it appeared that bonds were issued by a city in violation of the constitutional inhibition against municipal corporations loaning their credit to any private corporation unless authorized by a two-thirds vote of the qualified voters. The larger portion of the proceeds of the bonds was turned over to a railroad company and the balance used for various purposes incident to the government of the town. It was held that the money received by the town for the bonds was not recoverable by the purchaser. The court said: "If the principle of an implied promise to pay is applicable in this case, how is the constitutional inhibition to be made effectual? Its object being, as declared by the expounders, both state and Federal, of this Constitution, to prevent taxing the people without their consent first had thereto, how can it be reached, if this suitor prevails? The result to the taxpayer is the same, whether he be taxed on the expressed contract in the bond, or on a contract arising by implication. What substance is there in the constitutional bulwark of protection, if its barriers are to be removed when the purchaser of the forbidden

claim comes in the form of a suitor for money had and received, rather than in the action of *indebitatus assumpsit*? It is the cause of action, rather than the form of action, which determines the right. In either case, the constituent is taxed to pay the judgment. Such a distinction would sacrifice substance to form, and its practical result, inevitably, would be a nullification of the Constitution. What the law forbids municipal bodies to do directly should not be permitted by indirect methods."

In *Travelers' Ins. Co. v. Johnson City* (1900) 49 L.R.A. 123, 404 C. C. A. 58, 99 Fed. 663, the purchaser of municipal bonds who purchased the same in the market for full value was held not entitled to recover from the municipality the money paid for the bonds, the latter having been unlawfully issued to a foreign railroad company in violation of a statute permitting aid only to domestic companies. It appeared that the only benefit which the municipality received from the bonds was that a railroad was constructed through it, and a depot was constructed on the ground purchased by the municipality for the railroad company.

In *McPherson v. Foster Bros.* (1876) 43 Iowa, 48, 22 Am. Rep. 215, it appeared that bonds issued by a school district to raise funds for the construction of a schoolhouse were invalid because creating an indebtedness exceeding the debt limit of the district. Under these circumstances, it was held that the town could not be held on an implied contract for the amount it had received for the bonds in excess of the debt limit. To the contention that if the bonds were void and the city had received value, it would be liable to pay back what it had received from innocent persons, or else the provision of the Constitution would operate to ensnare and defraud those who dealt with it, the court replied that "this view presents the suggestion of an ingenious plan for setting at naught the provision of the Constitution of the state under consideration. It is commended on the ground that, if the Constitution be enforced so as to cure the

evil from which it is intended to protect the people of the state, it would operate to ensnare and defraud those who deal with political corporations. In such a case, according to the sentiment of the above quotation, the Constitution becomes an instrument of fraud, and on that ground may be violated. It must be confessed that it is a novel thought, to disregard the supreme law of the state because it operates to ensnare and defraud innocent persons. The error of the quotation is based upon a partial view of the rights of those who are called innocent purchasers, and want of attention to the object and purpose of the constitutional restriction in question."

In *McCurdy v. Shiawassee County* (1908) 154 Mich. 550, 118 N. W. 625, it appeared that the county treasurer, acting under order of the board of supervisors, issued negotiable notes which were negotiated to the plaintiff, and the proceeds were received and placed to the credit of the county. The board of supervisors was without authority to borrow money to defray the current expenses of the county, and such expenses were required to be raised by taxation. Under these circumstances, it was held that plaintiff was not entitled to recover, on implied contract, the money the county had received on the notes. There was no specific evidence that the county ever used the money for county purposes, but the court said that, as it viewed the case, the question as to whether or not the county had actually applied the funds to county purposes was not of material significance, and added: "In cases where equitable reasons are urged for the purpose of placing liability upon a municipality, consideration of the rights and interests of those most seriously interested must not be lost sight of. The taxpayer is entitled to the protection of all constitutional and statutory restrictions. In the aggregate he is the public for whose benefit the municipality exists, and which bears all the burdens put upon it, but which is not consulted when such burdens, as in this case, are assumed. In the case at bar the record shows that three times the

electors have, at special elections, refused to vote to bond the county to pay floating indebtedness, which includes the amount in suit. Whether this was done before or after the notes in suit became due is immaterial. In the only constitutional way provided these electors have repudiated the illegal acts of the officers of the county. If this court should undertake to say that this indebtedness, admittedly illegal, must be paid by this county, it will practically declare the restrictions above mentioned to be inoperative, and subject the treasuries of all the municipalities of this state to the rapacity of designing and dishonest officials, leaving no protection whatever against recklessness, extravagance, crime, and bankruptcy. Such holding would be contrary to the spirit of previous decisions of this court, and against public policy."

In *Hackettstown v. Swackhamer* (1874) 37 N. J. L. 191, it is held that where a town was without authority to borrow money for its current expenses, no implied liability could be raised against it for the proceeds of notes issued by it, although such proceeds were used for this purpose. The court said that it did not add anything to the right to enforce the notes "that the money which it represents, and which was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its repayment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. If this contention is tenable, it is impossible to close the eye to the fact that the loan, although held illegal and void in its inception, would thus, by a subsequent act, be rendered valid and enforceable. To style it, as was done in the argument, money had and received, would not change the real nature of the transaction. To permit a recovery of it in this secondary form would be, virtually and in truth, to effectuate a loan, and all the

evils attendant on the power to borrow money in an unrestricted form would supervene. And it is to be noted that it is altogether a fallacy to argue that the law will raise an implied promise to repay the money after it has been used. The impediment to such a theory is, that the corporation has not the competency to make the promise thus sought to be implied. An express promise to the effect contended for would be illegal, and, therefore, clearly, the law will not create one by implication. It is not the case of a principal using money borrowed by his agent without authority, but it is the case of a principal who is incapacitated by law from borrowing, and who, therefore, cannot legalize the act, either directly or by circuitry. Perhaps a parallel instance would be presented in case of a loan to a married woman at common law, the money being used by her. Her promise to repay the loan would be void; and, from the fact of her having made use of the money, no implied promise in law could be deduced."

*IV. Rights of subsequent holder of instrument of indebtedness.*

It is the general rule that where the original purchaser of the invalid instrument of indebtedness of a public corporation is entitled to recover of the corporation the money he paid it for the invalid instrument, a subsequent holder of the instrument is likewise entitled to recover this amount. *Louisiana v. Wood* (1880) 102 U. S. 294, 26 L. ed. 153; *Gause v. Clarksville* (1800) 1 McCrary, 78, 1 Fed. 353; *Geer v. School Dist.* (1901) 49 C. C. A. 539, 111 Fed. 682; *Gilman v. Fernald* (1905) 72 C. C. A. 675, 141 Fed. 941; *Waitz v. Ormsby County* (1865) 1 Nev. 370.

It has, however, been held that even though the original purchaser of invalid bonds issued by a municipality might be entitled to recover from the municipality the money it had received from him therefor, a subsequent purchaser of the bonds is not entitled to be subrogated to the rights of the original holder in this respect, and hence, he cannot recover from the municipality the money it had received

for the bonds. *German Ins. Co. v. Manning* (1899) 95 Fed. 597. To the same effect, on the ground of lack of privity between municipality and subsequent holder, is *Henderson v. Winstead* (1919) — Ky. —, 215 S. W. 527.

In *Gause v. Clarksville* (1879) 5 Dill. 168, Fed. Cas. No. 5,276; *Gause v. Clarksville* (1800) 1 McCrary, 78, 1 Fed. 353, it is held that a bona fide holder of bonds can recover as assignee of the holder of the original demand to the same extent that the latter would be entitled to recover.

In *Coquard v. Oquawka* (1901) 192 Ill. 355, 61 N. E. 660, refunding bonds were held invalid because issued to pay an invalid series of bonds. To the contention by the holders of the refunding bonds that a recovery should be allowed in their behalf on the common counts on the original bonds or indebtedness, the court, in denying the contention, replied that the municipality was never indebted to these bondholders unless as assignees of the bonds issued, and it never promised to pay them except as holders of negotiable bonds payable to bearer.

In *Ironwood v. Wickes* (1904) 93 App. Div. 164, 87 N. Y. Supp. 554, the doctrine is stated that a purchaser of city bonds from a broker, which are subsequently adjudicated invalid, is entitled to rescind his contract of purchase and recover from the city the amount he paid for the bonds, provided he returns them to the city. In this case such relief was denied on the ground of the failure of the bondholder to tender all the bonds he had received. But in *Paul v. Kenosha* (1867) 22 Wis. 266, 94 Am. Dec. 598, it is held that where city bonds are invalid, the purchaser is entitled to recover the amount paid the city for them and it is immaterial that he does not offer to return the bonds. It is assumed in this case that the bonds were part of the record of the case and so remained; and it is suggested that if the city had expressed a desire for their return after the court had held them to be invalid, the request doubtless would have been complied with.

#### V. Remedy.

An action for money had and received is a proper remedy to recover of a public corporation money it had received for invalid securities and appropriated to some legitimate corporate purpose.

*Louisiana v. Wood* (1880) 102 U. S. 294, 26 L. ed. 153; *Gause v. Clarksville* (1800) 1 McCrary, 78, 1 Fed. 353; *Bangor Sav. Bank v. Stillwater* (1892) 49 Fed. 721; *Dodge v. Memphis* (1892) 51 Fed. 165; *Gilman v. Fernald* (1905) 72 C. C. A. 675, 141 Fed. 941; *Waitz v. Ormsby County* (1865) 1 Nev. 370; *Thomson v. Elton* (1901) 109 Wis. 589, 85 N. W. 425.

It has been held that a bill in equity is not the proper remedy to obtain a money decree against the city for money it received from invalid bonds. The court said that the action for money had and received is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in the bill in equity. *Litchfield v. Ballou* (1885) 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820. But where some equitable relief is sought in addition to a mere money decree for the amount the municipality has received and appropriated to legitimate corporate purposes, equity jurisdiction may be invoked. For example, in *Everett v. Independent School Dist.* (1900) 102 Fed. 529, s. c. subsequent appeal (1901) 109 Fed. 697, it is held that a bill in equity will lie in behalf of the holder of bonds issued by a municipal corporation for a public improvement where the bonds are invalid because exceeding the debt limit, and a decree will be entered against the municipality for the amount it received for the bonds of which it received the benefit within the debt limit, and said amount will be apportioned among all the holders of the bonds that have been made parties to the bill. To the same effect is *Ætna L. Ins. Co. v. Lyon* (1899) 95 Fed. 325.

And in *Chelsea Sav. Bank v. Ironwood* (1904) 66 C. C. A. 230, 130 Fed. 410, it appeared that a city issued bonds for lawful purposes, but the



bonds were defective, not from lack of power to issue the same, but because of the failure to exercise the power in a regular way. The bonds were issued to a broker, who paid the city only a portion of the proceeds. Under these circumstances, it was held that equity had jurisdiction to determine the

amount which the city had received on the bonds and hence should repay, and to divide this sum among all the holders of the bonds. A bill in equity in behalf of all these holders was equitable in that it was an attempt to reach funds held by the city in trust for the holders of the bonds. A. G. S.

## GEORGE E. HARRIS

v.

### MICHIGAN MUTUAL HAIL INSURANCE COMPANY, Plff. in Err.

*Michigan Supreme Court — July 18, 1919.*

(207 Mich. 182, 173 N. W. 533.)

#### Insurance — against injury to fruit — fertilized blossom.

1. Insurance against damage or loss to fruit by hail covers injury to fertilized blossoms which prevents their maturing into fruit.

[See note on this question beginning on page 373.]

#### Damages — injury to growing fruit — basis of determination.

2. The injury to growing fruit by hail may be determined by the jury from the difference in yield of the injured trees and protected trees in the

same or neighboring orchards, the usual yield in the injured orchard, and the cost of picking, packing, and marketing the crop.

[See 14 R. C. L. 1820.]

ERROR to the Circuit Court for Van Buren County (Des Voignes, J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a hail insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kinnane, Black, & Leibrand for plaintiff in error.

Messrs. W. J. Barnard and Earl L. Burhans, for defendant in error:

Plaintiff suffered a loss to growing fruit within the meaning of the policy issued to him by the defendant.

Wilkinson v. Ketler, 69 Ala. 435; Providence Jewelry Co. v. Bailey, 159 Mich. 285, 123 N. W. 1117.

The damages were certain and capable of legal ascertainment.

14 R. C. L. § 1495, pp. 1320, 1321; Ohio & M. R. Co. v. Nuetzel, 48 Ill. App. 108; Shotwell v. Dodge, 8 Wash. 338, 36 Pac. 254; Gulf, C. & S. F. R. Co. v. Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546; Boyer v. State Farmers' Mut. Hail Ins. Co. 86 Kan. 442, 40 L.R.A. (N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 674; Condon v. Des Moines Mut. Hail Asso. 120 Iowa, 80, 94 N. W. 477; Barry v. Farmers' Mut. Hail Ins. Asso.

110 Iowa, 433, 81 N. W. 690; Van Arsedale-Osborne Brokerage Co. v. Patterson, 55 Okla. 477, 154 Pac. 1131; Schultz v. Des Moines Mut. Hail & Cyclone Ins. Asso. 35 S. D. 627, 153 N. W. 884, Ann. Cas. 1917D, 78; Mahoney v. Minnesota Farmers Mut. Ins. Co. 136 Minn. 34, 161 N. W. 217; French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; McIlrath v. Farmers Mut. Hail Ins. Asso. 114 Iowa, 244, 86 N. W. 310; 4 Joyce, Ins. 2d ed. § 2782, pp. 4728-4730; Gilman v. Drusa, 111 Wis. 400, 87 N. W. 557.

Ostrander, J., delivered the opinion of the court:

The plaintiff made written application to defendant for membership and for "indemnity against damage or loss to growing grain, fruit, and other farm products, . . . \$1,000

on 112 acres of fruit, on section 20, Lawrence township, Van Buren county, Michigan," from noon of the 25th of May, 1915. The policy issued upon this application recites that plaintiff "has this 25th day of May, 1915, become a member" of the defendant company, and "has insured in said company against loss or damage to growing grain, fruit, and other farm products by hail to the amount of \$1,000, from noon of the 25th day of May, 1915." The premises and specification of the insurance are as stated in the application; namely, "\$1,000 on 112 acres of fruit, section 20, Lawrence township. . . ." The undertaking of the company is "to make good unto the said insured . . . all such loss or damage, not exceeding the amount insured, as shall happen by hail to the property above named, and more specifically described in the application on file, . . . which is hereby made a part of this contract, from the 25th day of May, one thousand nine hundred and fifteen, . . . the said loss or damage to be estimated according to the actual cash value at the time the same is adjusted. . . ."

The policy was in force May 8, 1916, on which day a violent hailstorm occurred at the plaintiff's farm. Plaintiff then had on section 20 about 2,000 bearing fruit trees from fourteen to forty years old, apple and pear trees. He notified the defendant that he had sustained a loss by the hailstorm. Officers of the defendant visited the orchards. There was some correspondence. Finally, after an attempt had been made to adjust the loss, and on October 16, 1916, defendant wrote plaintiff a letter, signed by its secretary, the pertinent portions of which are: "We will say in regard to your claim for damages by hail on May 8, 1916:

"First, that blossoms are not fruit, and hence are not covered by the policy.

"Second, that on your pear orchard, on which you claimed 50 per cent loss, did not show to as good fruit men as are in Van Buren

county any loss by hail. So if any loss occurred to your crops, it was from something besides the hail of May 8, 1916."

In September, 1917, plaintiff filed his declaration in this cause, with a bill of particulars. Defendant pleaded the general issue. The cause came on to be tried in February, 1918. Plaintiff offered, defendant did not offer, testimony. There was a motion by defendant for a directed verdict upon the grounds: (1) That plaintiff had shown no injury to any property covered by the policy, namely, growing fruit; (2) that the plaintiff "has failed to show any damages that could be submitted to a jury at this time, all damages, from whatever cause they may have occurred, or whether they occurred or not, being uncertain, speculative, and contingent."

There was a verdict for plaintiff for \$1,056.60, upon which judgment was entered. The grounds asserted in the motion for a directed verdict are those urged here for a reversal of the judgment.

Upon the first point defendant, appellant, presents the question in this way:

"Whether or not," it says, "the incorporators had in mind the line of demarcation where the protection would commence, there certainly is a line somewhere, and that line must be ascertained from the language they used. If we say 'growing fruit' includes blossoms, then it is by a hair's breadth to the next station and includes fruit buds. Horticulture teaches and the evidence shows that the fruit of this year is produced from buds grown last year. Therefore damage to this year's fruit buds may have a tendency to damage next year's fruit crop. Having gone that far, it is only a very short step to the next station, by claiming that, inasmuch as damage to fruit buds is proof of damage to fruit, proof of damage to leaf buds ought to be admitted as proof of damages to fruit on the theory that damage to the

foliage has a tendency to damage the fruit crop, present or future. This line of reasoning could be continued, like the rhyme of 'The House that Jack Built,' to include future damage to foliage, damage to the limbs of the trees, then to the trunk, then to the soil from which the trees draw their sustenance, etc.

"It must be clear that these farmers intended mutually to insure another against loss or damage to some kind of growing fruit and grain; not something that might or might not develop into growing fruit and grain.

"To determine what the contract is we must resort to the language used in the writing. There is no parol testimony from which assistance may be had in the construction, and whatever that construction is found to be, the parties must be held to be bound by it."

It refers to the Century Dictionary, the New International Encyclopedia, and to the opinion of a Federal court (Nix v. Hedden (C. C.) 39 Fed. 109, id., 149 U. S. 304, 37 L. ed. 745, 13 Sup. Ct. Rep. 881) for a definition of the word "fruit." With respect to these definitions it is said:

"It will be observed that one element tenaciously present in all these definitions is the element of seeds. We find no comprehensive definition of the term 'fruit' which does not contain the element of 'seed.' We can then say that unless the blossoms contain seed they would not be fruit within the purview of the policy.

"There is no evidence that any of those blossoms or fruit buds contain seed resulting or contained in a pollenized ovary which develops into the core and obtains the result of proper fertilization—seed.

"Pollen is referred to by some of the witnesses as seed, but pollen is not the seed mentioned in the definitions. The stamens which contain the pollen are part of the blossom (the leaves and carpels), and are never contained in the growing or ripened fruit. The seeds of fruit

have such a well-known meaning that no one can be mistaken as to what is meant when it is said that one of the constituent elements of fruit is seed, contained in and covered by the juicy, pulpy product of a tree or plant.

"This would seem to be the only logical place to draw the line. The policy covers when the embryo apple is sufficiently advanced so that the presence of seed is susceptible of proof. Until then five sixths of the blossoms may not be fertilized, and those not fertilized would, of course, never develop into fruit.

"To hold the other policyholders liable for damages to blossoms that would never have developed even into a fertilized embryo apple was certainly not within the contemplation of the incorporators. It would be doing violence to their language to so hold."

Counsel for appellees, directing attention to the fact that in the policy the words "growing fruit" are employed to describe the risk insured, refers to the lexicographers and to botanists for definitions of "growth," "grow," "growing," and to Black's and Bouvier's dictionaries for a definition of "growing crop," and they say that anything that is developing is growing, and: "We claim fruit is growing fruit any time after the ovary within the blossom is pollenized, or is impregnated, as it were. From that point life begins, and from then to maturity it is merely in its stages of growth. True, a bare blossom is but a possibility. The ovary of the blossom contains what we call ovules. On receiving the pollen it fertilizes and the ovules become seeds. Where fruit is spoken of as a ripened ovary, we find botanists using this word in the sense of a pollenized or impregnated ovary."

Upon the other point the defendant, appellant, says in the brief in concluding the argument: "In this case there were no damages whatever proved. There was no proof that the blossoms claimed to have been injured had been far enough

advanced to have even developed into embryo fruit. There is absolutely no proof of any kind or character as to how many bushels less the plaintiff probably received as a result of the hailstorm. There is not even any proof of that character to enable the jury to make any kind of a guess. What the jury did was to simply allow plaintiff the full face of the policy without having anything before them by which they could tell whether his damages were \$1,000, \$100, or \$10,000. There was just as much proof as to any one of the above three sums as there was to either of the other two. . . ."

To this appellee replies, generally, that difficulty in ascertaining the damages is not a reason for refusing recovery, and that it does not follow that because their ascertainment is difficult they are therefore uncertain, remote, or speculative. He asserts that the damages may be measured by the difference between what his orchard affected by the hail produced and what other orchards in the immediate locality, not affected by the hail, produced. For the purpose of applying this rule, he contends that the record furnishes an ample basis. The rules given to the jury by the trial court we do not know, none of the charge of the court appearing in the printed record, and no complaint being made that the charge was erroneous.

Defendant is a mutual company, and its articles and by-laws are printed upon the policy which it issued to plaintiff. In the articles of association the "object" of the company is stated to be "to mutually insure the property of its members against loss or damage by hail on grain, fruit, and other farm products in such a manner as set forth in its by-laws."

The sixteenth article provides that the company insures its members against loss or damage by hail to growing crops,—on farm crops not to exceed \$30 an acre; on fruit and garden truck not to exceed \$100 per acre. "The rate of assessment on fruit and garden truck shall be

treble what it is on farm crops." It is provided in the by-laws that a loss exceeding \$100 shall not be adjusted before the maturity of the crop, and further provided that the association will not be liable for any loss or damage except that occasioned by hail.

The testimony tended to prove a rather severe hailstorm, the wood of trees and buildings being scarred, the blossoms knocked or cut from the trees; that plaintiff had in one field 550 apple trees, fifteen years old in 1916, in another about 800 apple trees, ten years old; that there were also 940 or 950 Keifer, 400 Bartlett, and 150 Angel pear trees, fourteen years old in 1916. On the 8th of May, 1916, the trees had been in blossom for a week or more, and the blossoms were dropping.

The secretary of defendant, called as a witness by the plaintiff, testified that he looked the orchards over June 14th, again in September, and a third time in October; that he estimated plaintiff's loss on his pears at from 300 to 350 bushels. To this effect, under date October 9, 1916, he wrote to plaintiff. He testified also that he never admitted plaintiff had any loss on his apples by hail. In what manner this witness estimated the loss of pears is not shown. No expert biologist or botanist gave testimony. A number of fruit growers, with large practical, but with little theoretical knowledge of the subject, gave testimony.

Plaintiff, on direct examination, testified in part as follows:

The hailstorm had the effect of knocking off the blossoms—that is, the fruit on the stem. It cut some of them. That morning I went out and found the blossoms cut off. Some was knocked off entirely, and some was cut off so you could cut it with shears, the little fruit, the fruit, you know; after the blossoms, you know how the fruit looks. After these white leaves, blossoms, drop off, there is your fruit right there, and it cut them off. They were all over the ground, it was covered.

Q. With things that you could identify as apples and pears?

A. Yes, sir.

Q. I will ask you if, previous to the storm, you had examined blossoms out there with regard to whether or not pollenization or fertilization had taken place? You know what I mean when I speak of a stamen, don't you?

A. Yes.

Q. What was the condition of that practically on the end of the stamen—now I don't know what they call it?

A. Well, the way that I should call that, it was ripe; it was kind of a brownish; it had turned brown. When they first come out they are white, and then they turn kind of a yellowish color and grow a little darker.

Q. When they turn that color what is that an evidence of?

A. That the pollen is distributed.

On cross-examination he testified in part:

Friday, previous to the hail-storm, I opened up some of the buds to show Mr. High some of the inside, the fruit. You can see the fruit with the naked eye when they are blossomed. You could see the small apple. The apple would be about the size of a pin head. The blossoms were about half on. It showed the fruit on May 4th or 5th. I went out there to show him my prospect of the fruit crop. When I went out there Monday morning, I don't know as I saw a branch broke off from the trees, but I saw that my blossoms was cut. Some was knocked clear off from the main branch, and some was cut just as you cut it with shears. And they were laying all around on the ground with the fruit in the blossom. That I did notice that it knocked off the blossoms that had the fruit set in them and that they were laying on the ground. There are always more blossoms than a tree is capable of bearing apples or pears. Not all the blossoms were cut off. There was those left Monday morning that I thought at the

time might make a crop, but in two or three days those stems had been hit with the hail and turned black. Then I knew I had a pretty heavy loss and got busy and wrote Garber. There are different things that might injure the blossom and kill the fruit, besides the breaking off of the stem. A cold, steady rain for a week will damage the blossoms, and a hard enough freeze will hurt apples.

Q. Did you at any time previous to the trial claim any damage on growing fruit? Was it not always damages to the blossom?

A. On growing fruit. I claim that the blossom, when it gets developed as far as they was developed, is growing fruit, because your fruit is in the—you can open it. I have opened probably thousands of them. I am always in the orchard seeing how they are coming, probably three or four days in a week. I go out in the orchard and open up these blossoms, and you can see it. If you have ever examined it yourself you can see it.

Q. Your position is that the blossom was injured and as a result the fruit would be injured?

A. Why, the fruit was injured when the blossom was injured; it is all the same thing; the fruit was there with the blossom.

Another witness, a fruit grower of long experience, testified:

From my observation I find an apple makes two kinds of growth, what we call wood growth and blossom growth. All apple buds are produced, practically all of them, on the end of a fruit spur which must be produced the season previous or some time before the blossom bud can be formed. Many other fruits have lateral fruit buds that grow on the previous year's growth, as a peach, but the apple grows on a fruit spur which is made in some previous year before that, and the bud for the ensuing year's crop—the bud for the 1916 crop would be completed during the growing season of 1915, and in the following spring, if nothing should happen to injure

that bud in any way whatever, I think there could be no reason whatever why that bud shall not proceed to grow and make a bloom, and we believe, from my observation, that every perfect bloom, under right weather conditions, fertilizes. Later on, as the apple begins to grow, nature eliminates the weakest of these apples and thins them,—what we call the June drop,—and usually thins them down to the crop that the tree can mature.

Q. From your experience as an apple man, can you tell by the examination of the apple tree whether or not the apple has been fertilized?

A. Under normal conditions, under normal weather conditions, when the petals begin to drop naturally, the growth of the little apple is visible, at the time which the petals drop naturally.

Q. By the petal you mean the flower?

A. The white bloom of the apple. But my observation is that when the petal drops normally fertilization has taken place, and to prevent—the only thing that will prevent its making an apple or starting to grow, and until that dropping period what we call the June drop, would be some disease affecting the apple, or bad weather conditions; that might affect it. I think that apples may be sometimes fertilized and still injured later by bad weather conditions, but it would be very exceptional. As an incident, I might give the year, I think, of 1910, when our apples blossomed in April. On the 16th of April apple trees were in full bloom in our township. That is the year snow went off about the latter part of February and we sowed our oats in March, but that was very exceptional, and that year in May we had a very severe snowstorm and freeze from the Northwest, and it practically ruined the apple crop which was formed at that time. That is the only instance I know of being ruined from that cause after fertilization has apparently taken place or positively taken place.

Q. And after these petals have begun to drop normally the fruit is then growing?

A. Yes, sir.

Q. And it can be distinguished, you say?

A. Yes, sir. One point I would like to make. Every observer knows that a cluster of about six or seven, five to seven blossoms, in each apple bud, contains five to seven blossoms separately, and the center one of those seems to be a stronger bud than the others, and blossoms generally about two days earlier than the other blossoms open, and that center blossom usually fertilizes and the petals begin to drop by the time the others are in full bloom. And in our own orchard at home we had one crop of Jonathans, a very good crop that consisted entirely of apples formed from that one strong bloom in the center which blossomed two days previous to the others coming out, and the others were destroyed, simply withered up and turned brown, the petals did, and made no apples and didn't fertilize.

Q. From your observation as an apple man, can you tell by the examination of these petals on the tree whether or not fertilization has taken place; that is, supposing it has not taken place, explain what condition you find the petals in?

A. I find when weather conditions are so as preventing apples fertilizing that the petals remain on very much longer than in case fertilization has taken place, if the weather conditions are such and it is damp and the pollen can't circulate. I suppose that is the reason, but the petal will remain for a long period; I have known it to remain for ten days or two weeks.

Q. Under favorable weather conditions, where it is warm, how long does it take for fertilization to take place?

A. I think under perfect weather conditions that the apple will, at the expiration of two days after the apple is in full bloom, that the petals will begin to drop.

Other witnesses gave testimony to the same effect.

The articles of association and the policies issued by defendant seem to make no distinction between fruit and grain or other farm products. These members ought to have agreed among themselves concerning the state to which nature must have brought growing grain and fruit before liability would attach for its destruction, if they did not want the courts to give to the words employed by them a popular meaning. The argument of defendant that blossoms are not insured could be modified and used in the case of grain by saying that the growing wheat plant or corn plant was not insured. Suppose the property insured and destroyed was a field of wheat not headed out or a field of tomatoes with plants in blossom or having lost some or all of their blossoms. Without applying to the contracts of these mutually insuring members of the defendant corporation the rule that the language used by the insurer in the policy will be given a meaning favorable to the insured, we are justified in saying that in popular phrase wheat not headed and corn upon which no ears have formed are growing grain. It being so easy and manifestly so proper for defendant to state a rule, we shall attempt to state none for its guidance. We are contented to say that evidence was introduced which fairly tends to prove that the trees in plaintiff's orchards had on them growing fruit, fertilized growths, which in due course of

Insurance—  
against injury  
to fruit—  
fertilized  
blossom.

time would have been apples and pears, for the destruction of which by hail the defend-

ant, by the terms of its policy, may be liable.

The subject of the damages sustained by plaintiff has given us greater trouble. It must be assumed that the defendant did not intend merely to collect premiums and suf-

fer no losses. Rarely will two orchards or two fields of growing grain, with different owners, be found where the soil, the exposure, the tillage are the same. The rule that to prove the extent of his loss by the crops secured by a neighbor whose orchard was untouched by the hail, the plaintiff must prove that in the orchards compared the soil, moisture, exposure, fertilization, spraying were the same, is not a workable one in such a case as this. Corporations like defendant have themselves made a practical rule for estimating damages to grain by hail which is (*Barry v. Farmers' Mut. Hail Ins. Asso.* 110 Iowa, 433, 437, 81 N. W. 692): "The loss in all cases shall be considered the difference between the amount grown on the damaged tract and a fair average of the same kind grown on an equal tract in the immediate neighborhood, where no damage was sustained."

In the case at bar the testimony for plaintiff tended to prove that there were in the immediate neighborhood orchards of pear and apple trees not affected by the hail and some trees in the plaintiff's orchards somewhat protected from the storm. The yield of the protected trees, the usual yield of the orchards themselves, the yield of fruit in the neighborhood orchards, these facts were laid before the jury. The cost of picking, packing, and marketing the crop was in evidence. We are not warranted in saying that the jury had before it no competent evidence of the damages sustained. We must assume that the court properly instructed the jury upon the subject. The court did not err in refusing to direct a verdict for defendant.

Damages—  
injury to grow-  
ing fruit—basis  
of determina-  
tion.

The judgment is affirmed, with costs to appellee.

Bird, Ch. J., and Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ., concur.

## ANNOTATION.

## Construction of hail insurance policy.

This annotation is supplementary to that appended to *Reeves v. National F. Ins. Co.* 4 A.L.R. 1298, on the above question.

It will be observed that in the reported case (*HARRIS v. MICHIGAN MUT. HAIL INS. CO.* ante, 366), a policy insuring against damage or loss to fruit by hail was held to cover injury to fertilized blossoms which prevented their maturing into fruit, and it was

further decided that the injury to the growing fruit by the hail might be determined by the jury from the differences in yield of the insured's trees and protected trees in neighboring orchards, the usual yield of the insured's orchard, and the cost of picking, packing, and marketing the crops.

A search has disclosed no subsequent decisions on the subject under consideration.  
J. T. W.

## BOARD OF COMMISSIONERS OF THE COUNTY OF OHIO

v.

W. M. CLEMENS, Ex-sheriff,

and

CITIZENS' TRUST & GUARANTY COMPANY OF WEST VIRGINIA,  
Plff. in Err.*West Virginia Supreme Court of Appeals — October 21, 1919.*

(— W. Va. —, 100 S. E. 680.)

**Continuance — authority of attorney to consent to — release of surety.**

1. An attorney at law, employed to prosecute or defend a suit, has implied authority to agree to a continuance thereof, when such continuance is in the interest of his client, or, in the attorney's judgment, will expedite a hearing, and such continuance is not an extension of the time of payment, and does not discharge a surety.

[See note on this question beginning on page 376.]

**Principal and surety — rights of paid surety.**

2. Although a voluntary surety is a favorite of the law, and entitled to stand on the strict letter of his contract, the rule of *strictissimi juris* does not apply to a corporation organized to enter bonds and undertakings

for a profit. Such companies are essentially insurers, and their contracts, being usually expressed in terms prescribed by themselves, should be construed most strongly in favor of the obligee therein.

[See 21 R. C. L. 1160.]

Headnotes by WILLIAMS, J.

**ERROR** to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in a suit brought to recover the balance of public funds in the hands of the defendant sheriff, alleged to be due plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hubbard & Hubbard, for plaintiff in error:

A surety is bound only by his under-

taking, according to its exact terms, and any change or varying of these terms by agreement between the cred-



itor and the principal debtor, without the consent of the surety, releases the surety from liability.

Miller v. Stewart, 4 Wash. C. C. 26, Fed. Cas. No. 9,591, affirmed in 9 Wheat. 680, 6 L. ed. 189; Weir Plow Co. v. Walmsley, 110 Ind. 243, 11 N. E. 232; Com. v. Holmes, 25 Gratt. 771; 32 Cyc. 73.

The undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms.

Kirschbaum v. Blair, 98 Va. 35, 34 S. E. 895.

An extension of the time for the performance of a contract is such an alteration of it as releases the surety, if made without his consent.

Norris v. Crummey, 2 Rand. (Va.) 333; Shields v. Reynolds, 9 W. Va. 483; Dey v. Martin, 78 Va. 1; Stuart v. Lancaster, 84 Va. 772, 6 S. E. 189; Green v. Biddle, 8 Wheat. 84, 5 L. ed. 568; Dan. Neg. Inst. ¶ 1312; Miller v. Stewart, 4 Wash. C. C. 26, Fed. Cas. No. 9,591; Ducker v. Rapp, 67 N. Y. 464; Govan v. Binford, 25 Miss. 151; Prairie v. Jenkins, 75 N. C. 545; Johnson v. Hacker, 8 Heisk. 388; Taylor v. Johnson, 17 Ga. 521; Knight v. Charter, 22 W. Va. 422.

The rule that a surety is released by an extension of time or other alteration of the principal contract is not affected by the fact that the surety suffers no loss thereby.

Stuart v. Lancaster, 84 Va. 772, 6 S. E. 189; Dey v. Martin, 78 Va. 1; Ducker v. Rapp, 67 N. Y. 464; Johnson v. Hacker, 8 Heisk. 388; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; United States v. Simpson, 3 Penr. & W. 437, 24 Am. Dec. 331; Taylor v. Johnson, 17 Ga. 521; Weir Plow Co. v. Walmsley, 110 Ind. 243, 11 N. E. 232.

The rule of release of sureties is applied whenever the right of the creditor to proceed in the enforcement of his demand is suspended for a time.

Ducker v. Rapp, 67 N. Y. 464; Johnson v. Hacker, 8 Heisk. 388; Davis v. People, 6 Ill. 409; People v. McHatton, 7 Ill. 638; Moore v. Broussard, 8 Mart. N. S. 277; State use of Carroll County v. Roberts, 68 Mo. 234, 30 Am. Rep. 788; Shields v. Reynolds, 9 W. Va. 483.

The rule under which the surety was released applies to a state the same as to an individual.

State use of Carroll County v. Roberts, 68 Mo. 234, 30 Am. Rep. 788; Prairie v. Jenkins, 75 N. C. 545; United

States v. Howell, 4 Wash. C. C. 620, Fed. Cas. No. 15,405; Johnson v. Hacker, 8 Heisk. 388; Davis v. People, 6 Ill. 409; People v. McHatton, 7 Ill. 638; Com. v. Holmes, 25 Gratt. 771.

Mr. David A. McKee, for defendant in error:

A surety company is not relieved from liability on a bond by an extension of time where the extension did not go beyond the time limit for suit on the bond, and the surety suffered no material harm.

Philadelphia v. Fidelity & D. Co. 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085; State v. Pederson, 135 Wis. 31, 114 N. W. 828; State v. United States Fidelity & G. Co. 81 Kan. 660, 26 L.R.A. (N.S.) 866, 106 Pac. 1040; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12; United States Fidelity & G. Co. v. Golden Pressed Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Kansas City ex rel. Williams v. Davidson, 154 Mo. App. 269, 133 S. W. 365; Walker v. Holtzclaw, 57 S. C. 459, 35 S. E. 754; Brandrup v. Empire State Surety Co. 111 Minn. 376, 127 N. W. 424; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; Cowles v. United States Fidelity & G. Co. 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; Brown v. Title Guaranty & S. Co. 232 Pa. 337, 38 L.R.A. (N.S.) 698, 81 Atl. 410; 82 Cyc. 306; Western Casualty & G. Ins. Co. v. Muskogee County, — Okla. —, L.R.A.1917B, 977, 159 Pac. 655; 19 Cyc. 657.

Williams, J., delivered the opinion of the court:

The board of commissioners of Ohio county recovered a judgment against W. M. Clemens, ex-sheriff of said county, and the Citizens' Trust & Guaranty Company, his surety, in an action on his official bond, and the surety brings this writ of error, claiming that it should have been discharged from liability, because a continuance of the case for thirty days was taken by agreement between the attorneys for plaintiff and the principal debtor, respectively, without its knowledge or consent.

Defendant Clemens was sheriff of Ohio county from the 1st of January, 1909, to the 31st of December, 1912. After his term of office ended,

an audit was made of his accounts by J. H. Otto, under the direction of the state tax commissioner's office, which showed a balance of public funds in his hands due to the board of commissioners of Ohio county, and this action was brought to recover that balance. The items sought to be recovered are 15 per cent of the fees required to be paid to and collected by the sheriff as county treasurer, commissions improperly deducted on miscellaneous settlements, and interest. The action was begun by notice of motion for judgment.

The Citizens' Trust & Guaranty Company of West Virginia, the surety, filed a special plea on the 23d of September, 1916, admitting its suretyship on the bond sued on, and alleging that, in disregard of its persistent demands upon plaintiff to proceed with due diligence to prosecute such claims as it might have against the sheriff, based on said bond, and in disregard of the court's order made on the 25th of May, 1916, referring the cause to a commissioner, and ordering the testimony to be taken and the commissioner's report completed and filed on the first day of the next term, which was the 5th day of September, 1916, plaintiff and the principal defendant agreed before that time, without the surety's knowledge or consent, to defer the taking of testimony until the next October, thus staying the proceedings for more than thirty days.

Neither party requiring a jury, and both parties agreeing thereto, all matters of law and fact were submitted to and decided by the court. On the 3d of December, 1917, it heard the cause upon the aforesaid special plea, general replication thereto, the commissioner's report, and exceptions thereto by defendant Clemens, and sustained his exceptions in respect to certain items, and found against the surety on the issue raised by its special plea, and rendered judgment against both principal and surety for \$8,196.65,

with interest thereon from the 1st of December, 1917, until paid.

After the cause was referred to a commissioner the prosecuting attorney, who was counsel for plaintiff, agreed with counsel representing the sheriff that the taking of testimony might be deferred until October following, for the reason, as then suggested by the attorney for said Clemens, that a great deal of time could be saved by thus allowing time to Mr. Welch, who had been chief deputy for said sheriff, to go over the audit made by the state; that in all probability defendant would admit a great many items therein charged, and thus dispense with the necessity of taking evidence to prove them. The effect of this continuance was to carry the case over the term at which the commissioner had been directed to file his report. The surety insists that the continuance was in effect an extension of time to the principal debtor, and, being granted without its consent, operated to discharge it from liability. We do not think so, for two reasons:

First, because it does not appear that the plaintiff consented, nor that the prosecuting attorney had authority to bind it by an agreement to extend time of payment.

Second, because a different rule respecting liability applies to a surety company, who becomes surety for another for a valuable consideration, than is generally applied to a mere voluntary surety.

The agreement between attorneys for the respective parties to continue the time for taking testimony was apparently for the purpose of expediting the hearing. As counsel for plaintiff, the prosecuting attorney had the right and implied authority to make such an agreement. Thornton, Attorneys at Law, p. 486. Stipulations between opposing counsel, necessary or incidental to the management of the suit, are within the implied authority of the attorney, and are binding on his

Continuance—  
authority of  
attorney to  
consent to—  
release of  
surety.

client. 2 R. C. L. 989; 6 C. J. 702. While, generally speaking, an attorney at law has control over the conduct of a suit, and may bind his client by an agreement made in his interest to continue the case, he has no implied power to grant an extension of time of payment, nor will an unauthorized extension by him discharge a surety. *Hall v. Presnell*, 157 N. C. 290, 39 L.R.A.(N.S.) 62, 72 S. E. 985, Ann. Cas. 1913B, 1298; *Jerauld v. Trippet*, 62 Ind. 122; *Haselton v. Florentine Marble Co. (C. C.)* 94 Fed. 701. Moreover, it does not appear that the continuance occasioned any loss to appellant.

A voluntary surety is a favorite of the law, and he is generally entitled to insist on the very letter of his contract. But the doctrine of strictissimi juris does not apply to

Principal  
and surety—  
rights of paid  
surety.

corporations organized to enter into bonds or undertakings for a profit.

Although such companies sometimes call themselves surety companies, their business is essentially that of insurer, and their contracts,

being usually expressed in terms prescribed by themselves, should be construed most strongly in favor of the obligee therein. 32 Cyc. 307.

An extension of time will not relieve a surety company on a bond, unless the extension exceeds the time limited in the bond for bringing suit thereon, nor unless the surety company is thereby made to suffer material harm. *Philadelphia v. Fidelity & D. Co.* 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085, and cases cited in note at page 1087; *Brown v. Title Guaranty & S. Co.* 232 Pa. 337, 38 L.R.A.(N.S.) 698, 81 Atl. 410; *United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States)* 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; *George A. Hormel & Co. v. American Bonding Co.* 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513, and numerous cases cited in note; *Western Casualty & G. Ins. Co. v. Muskogee County*, — Okla. —, L.R.A. 1917B, 977, 159 Pac. 655.

We affirm the judgment.

## ANNOTATION.

### Consenting to continuance or extension of time in action as releasing surety.

This note does not include bail bonds nor postponements of executions.

The few cases on this subject leave the matter in a somewhat indefinite situation.

The surety on a replevin bond was held to be discharged where the defendant in the replevin action entered into an agreement with the plaintiff to refer to arbitration a prior action of replevin between them, and also other matters in dispute between them, but not the second replevin suit, and agreed that all proceedings should in the meantime be stayed till the award should be made, which was stipulated to be published by a future certain time, which was afterwards further enlarged by the plaintiff and defendant, all without the knowledge of the

surety. *Bowmaker v. Moore* (1819) 7 Price, 223, 146 Eng. Reprint, 954.

The sureties on a note were held to be released, where the payees entered into a written agreement with one of the principal obligors, by which it was stipulated that the time of payment of the note should be extended beyond the time specified, and additional security, in the shape of a deed of trust, was furnished to the payees of the note, and, in pursuance of the agreement, there was a continuance by consent of the attorney of the payees and the attorney of the principals by which the cause was adjourned from the fall term of one year to the spring term of the next. *Wybrants v. Lutch* (1859) 24 Tex. 309.

It was held that the surety on a debtor's relief bond was discharged where the attorney for the creditor,

for a consideration, extended the time for the principal to make his disclosure beyond the six months stated in the bond, by adjournment of the hearing on the disclosure. The court said: "An attorney retained to manage a cause before any tribunal has authority to apply for a continuance or postponement of the trial or hearing; and he may make an agreement to effect that object, which will be binding upon his client." *Phillips v. Rounds* (1851) 33 Me. 357.

On the other hand, it will be seen that it is held in the reported case (*OHIO COUNTY v. CLEMENS*, ante, 373) that an attorney's consent to a continuance will not discharge a surety who is a surety company. The court in its opinion apparently rests its decision on two grounds: first, that an attorney, while having power to agree to continuances, has no implied power to agree to any valid extension of time of payment; second, that contracts of surety companies are to be construed most strongly in favor of the obligees. The official headnote expresses the deduction from the first ground that a continuance is not such an extension of time as will discharge a surety.

Where the court, on consent of one of a guardian's sureties, made an order that the guardian might retain the money of his ward until the further order of the court, he paying interest upon it at a special rate, it was held, in an action of the consenting surety against his cosurety for contribution, that the consent and order were no defense. *Berton v. Anderson* (1892) 56 Ark. 470, 20 S. W. 250, where the court said: "The court did not sustain towards Moore the relation of a creditor; but if its action could be regarded as having extended the time in which the law required him to pay or account for the money, the extension was for an indefinite period, and did not, for that reason, have the effect to discharge either of his sureties."

Where a decree provided that "by consent of parties, no decree is to be entered in these causes in favor of the plaintiff at this term," the court said: "It is not the case of a new contract

or novation of the debt, so as to discharge the surety absolutely; but, if it discharges, it must be because it is mere indefinite indulgence. No consideration for this indulgence appears, and therefore, unless the fact that it is a consent of record changes it, the want of consideration prevents it from operating to tie the hands of the creditor, and therefore does not release the surety. . . . The most we can say is that such consent of record estopped the creditors from asking a decree that term of court. I do not know that it did that, as the parties might withdraw their consent with the court's leave; and the court, seeing that it was based on no consideration, if the other party were present, or on rule, would set it aside, on motion of creditor or surety, if justice required. It was a mere consent not to prosecute that term, and not releasing the attachments or changing the status of the cases for future efficacy. It was only a continuance. . . . Here, too, comes another consideration. If that consent continuance did bind the creditors to a continuance, it did not tie the hands of the surety from any legal steps he might take for his security; and the cases all say that, if what the creditor does does not stop the surety from steps to save himself, he is not released." The court further considered that no harm was done the surety. *First Nat. Bank v. Parsons* (1898) 45 W. Va. 688, 32 S. E. 271.

Where it was claimed that a surety on a note secured by mortgage was discharged by a provision in a decree of foreclosure that the sale should be postponed for sixty days, the court said: "But an extension by a creditor of the debt of the principal which will work a discharge of the surety without his consent must be made by the agreement of such creditor. There must be a binding agreement made by the creditor for an extension for a definite time, and supported by sufficient consideration, before there can be any discharge of the surety. . . . The giving of time in said decree for the sale of the land was done by the court, and not by the agreement of

plaintiff, nor was it made upon any consideration." *Kissire v. Plunkett-Jarrell Grocer Co.* (1912) 103 Ark. 473, 145 S. W. 567.

It may be noted that a mere dis-

continuance of an advertisement of sale of real estate under a deed of trust does not exonerate a surety on the note secured thereby. *Butler v. Gambs* (1876) 1 Mo. App. 466. B. B. B.

COLUMBUS W. MILLER et al., Appts.,  
v.  
ILLINOIS BANKERS' LIFE ASSOCIATION.

*Arkansas Supreme Court — April 28, 1919.*

(— Ark. —, 212 S. W. 310.)

**Insurance — exception of loss in military service — public policy.**

1. A provision in an insurance policy against liability for death while in the military service of the United States is not against public policy.

[See note on this question beginning on page 382.]

— death from pneumonia in camp.

2. Death from pneumonia while in a military camp is within an exception in a life insurance policy, of death while in the service of the Army or Navy of the government.

[See 14 R. C. L. 1154.]

— waiver of exceptions — acceptance of premium.

3. Mere acceptance by an insurer of premiums, with knowledge that the in-

sured is in the military service, does not waive a provision in the policy, exempting it from liability in case of death while in the military service.

[See 14 R. C. L. 1190.]

— construction by agent — effect.

4. An insurance company is not bound by the construction of a policy by a local agent, although premiums are paid on the faith of it.

**APPEAL by plaintiffs from a judgment of the Circuit Court for Conway County (Priddy, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.**

The facts are stated in the opinion of the court.

Mr. W. P. Strait, for appellants:

An agent is presumed to be a general agent, with authority to act, until the contrary is shown, and knowledge of his limitations of authority must be brought home by the principal to the party who deals with such agent, and otherwise such principal will be liable for his acts, and the agent can bind his principal the same as if he was a general agent with general authority.

*Oak Leaf Mill Co. v. Cooper*, 103 Ark. 86, 146 S. W. 130; *Brown v. Brown*, 96 Ark. 456, 132 S. W. 220; 1 *Clark & S. Agency*, § 200; 31 *Cyc.* 1645; *Brett v. Bassett*, 63 *Iowa*, 340, 19 N. W. 210; *Planters' & M. Bank v. King*, 9 *Ala.* 279; *Roach v. Rector*, 93 Ark. 521, 123 S. W. 399.

Knowledge as to matters affecting the risk or condition of the policy ac-

quired by an agent will be imputed to his company.

*Peebles v. Eminent Household, C. W.* 111 Ark. 443, 164 S. W. 296; *People's F. Ins. Co. v. Goyne*, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 865, 9 *Ann. Cas.* 373; *Merchants' F. Ins. Co. v. McAdams*, 88 Ark. 554, 115 S. W. 175; *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; *Woodmen of World v. Hall*, 104 Ark. 538, 41 L.R.A.(N.S.) 517, 148 S. W. 526.

Knowledge of an agent of an insurance company, authorized to solicit insurance and fill blanks, is the knowledge of the company itself.

*Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016; *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; *Mutual Reserve Fund Life Asso.*

(— Ark. —, 218 S. W. 310.)

v. Farmer, 65 Ark. 581, 47 S. W. 850; Gray v. Stone, 102 Ark. 146, 148 S. W. 114.

If in any negotiations or transactions with assured, after knowledge of the conditions, the company recognizes the continued validity of the policy, or acts based thereon, or requires the insured to do some act or incur some trouble or expense, forfeiture is waived.

Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719; Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; Lord v. Des Moines F. Ins. Co. 99 Ark. 476, 138 S. W. 1008; Planters' Mut. Ins. Co. v. Loyd, 67 Ark. 584, 77 Am. St. Rep. 136, 56 S. W. 44.

Where assured does not understand clauses or provisions of an insurance policy, and they are interpreted to him by the agent of the company, and their meaning is explained to him by such agent, he has the absolute right to rely upon such statement and explanation, and the company is estopped from taking a position inconsistent with or contrary to that represented by such agent.

Michigan State Ins. Co. v. Lewis, 30 Mich. 41; People's F. Ins. Asso. v. Goyne, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 865, 9 Ann. Cas. 373; Young v. Hartford Ins. Co. 45 Iowa, 377, 24 Am. Rep. 784; Bush v. Missouri Town Mut. Ins. Co. 85 Mo. App. 155; Gish v. Insurance Co. of North America, 13 L.R.A.(N.S.) 850, note.

Messrs. Webber & Webber, for appellee:

The insured having died while in the service in the Army or Navy, the insurance company is not liable under the policy for any greater sum than the amounts actually paid to the company on account of the policy.

3 Cooley, Ins. pp. 2217 et seq.; Welts v. Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518, affirming 46 Barb. 412; La Rue v. Kansas Mut. L. Ins. Co. 68 Kan. 539, 75 Pac. 494; Ayer v. New England Mut. L. Ins. Co. 109 Mass. 490; 4 Joyce, Ins. 2d ed. 3818 et seq.; Moerschbaeher v. Supreme Council, R. L. 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17; Garrity v. Catholic Order of Foresters, 148 Ill. App. 189, affirmed in 243 Ill. 411, 90 N. E. 753; Mutual Protective League v. Langsdorf, 126 Ill. App. 572.

Where the policy specifies the occupation of the insured, it may prohibit

a change of occupation without the consent of the company.

25 Cyc. 823; Ayer v. New England Mut. L. Ins. Co. 109 Mass. 430; Welts v. Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518.

Authority to solicit insurance, receive and write applications for insurance and forward the same to the general agent of the insurance company, and to receive and deliver policies and collect premiums would not empower the agent to waive certain provisions in the policy.

American Ins. Co. v. Hornsbarger, 85 Ark. 345, 108 S. W. 213; Fidelity Mut. L. Ins. Co. v. Bussell, 75 Ark. 29, 86 S. W. 814; Mutual L. Ins. Co. v. Abbey, 76 Ark. 828, 88 S. W. 950.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant instituted this action against appellee to recover on a life insurance policy issued by the latter on March 6, 1915, to Arl E. Miller, who died at Camp Beauregard, Louisiana, on December 26, 1917, while in the military service of our government. Death of the insured resulted from pneumonia. The facts of the case are undisputed, and the trial court decided that there was no liability under the policy, except to the extent of the small sum paid to the company by the insured as premiums.

The policy contained the following clause: "It is expressly provided that death while in the service in the Army or Navy of the government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy, for any greater sum than the amounts actually paid to the company thereon."

There is another clause in the policy which reads as follows: "This policy shall be incontestable two years from its date, except for non-payment of premium calls, or death while engaged in or caused by violation of the law or while in the service of the Army or Navy of any government, which is not a risk covered at any time during the continuance or reinstatement of this policy for any greater sum than the

amounts actually paid to the association thereon."

The application contained a clause similar to the one last quoted. The clauses quoted above are not entirely consistent with each other, in that the one first quoted provides for an exemption from liability on account of death of the assured while in the Army or Navy service of the government "in time of war," and the other two clauses contain much broader provisions, exempting the company from liability for death while in the Army or Navy of the government, without restriction as to it occurring during time of war. The death of the assured occurred while he was in the military service of this government during the period of the war with the Central Powers of Europe, and it is unimportant, therefore, to attempt to reconcile the apparently conflicting clauses, or to determine which of them controls.

It is suggested by learned counsel for appellant that the above-mentioned provisions, exempting the company from liability under the circumstances named, ought to be held void for the reason that it is against public policy to permit such

Insurance—  
exception of  
loss in military  
service—  
public policy.

contracts of insurance to be made, in that the tendency is to prevent voluntary enlistments in the

Army or Navy of the government, or to induce the holder of such a policy to evade or resist involuntary enlistment under the Draft Laws. We do not think the argument is well founded. An insurance company has the right to select the particular risks it is willing to assume, and there is no public policy against a contract of this sort exempting the insurance company, in advance, from liability for death of the insured while in the military or naval service of the government. The stipulation does not provide for a forfeiture of the policy, but merely for an exemption from liability under certain circumstances and conditions. It holds out no inducements to the assured

to refrain from enlistment in his country's service, and does not constitute, in any sense, an agreement not to enlist or to evade the Draft Law. No authorities are cited by counsel in support of the contention, and we are unable to find any cases in which the question has been raised. The subject of exemptions from liability on insurance policies in case of service in the Army or Navy is discussed by Mr. Joyce in his work on the Law of Insurance, vol. 4, § 2237, but there is no suggestion there by the author of any question of doubt about the validity of such a provision. There is likewise a discussion on the subject in Coolsey's Briefs on the Law of Insurance, vol. 3, pp. 227 et seq., but nothing is said by that author about the possibility of those provisions being held to be void. We find two cases on the subject, in one of which the insurance company was held not to be liable under such an exemption (*La Rue v. Kansas Mut. L. Ins. Co.* 68 Kan. 539, 75 Pac. 494), and in the other (*Welts v. Connecticut Mut. L. Ins. Co.* 48 N. Y. 34, 8 Am. Rep. 518) the company was held liable for the reason that the death of the insured did not fall within the terms of the exemption, as interpreted by the court rendering the decision. In each of the cases, the assured was in the service of the government during the pendency of war; but in one of the cases it was decided the assured was not in the military service, and that the case was, for that reason, not within the exemption.

The trial court was, therefore, correct in the present case, in holding that the death of the insured fell within the exemption clause set forth in the policy.

—death from  
pneumonia  
in camp.

The principal contention of counsel for appellant is that there was a waiver of the exemption provision of the policy. In support of that contention on the trial below, appellant introduced as a witness, Mr. Scroggins, who testified that he was the agent of the insurance company at Morrilton, where Arl E. Miller resided, and that he

stated to Miller, in response to an inquiry by the latter, after he had enlisted in the Army, as to whether or not, under the terms of the policy, the full amount would be paid in the event of death while in that service, that he (witness) construed the policy to mean that there was only an exemption in case of death of the assured in battle, and that the exemption clause did not apply to death from natural causes. The exact statement of the witness was as follows: "He asked me if the policy would be good in event of his death in the service, and I told him that it was my construction of the war clause in this policy, if he died of natural causes, it would be paid, but if he died by violence, while in battle, it would not. I also called his attention to the Fulkerson claim as my conclusion of the matter. And he says, 'Well, if it won't be good, I don't want to pay any more, but if it will, I want to continue my policy,' and I told him it would be good in event of his death by natural causes. So one year's premium was paid to me a few days later, almost on the same spot of ground. . . . Mr. Ben Fulkerson had a policy. He volunteered in the service at Jefferson Barracks, Missouri, in September, 1916, and this country was not at war at that time, and he died of contagious disease in the Army, and the company paid his claim."

The witness testified that he was the county agent for the company, and that his duties were to solicit insurance, forward applications to the home office of the company, and deliver policies sent to him from the home office for that purpose, and to collect the initial premiums on delivery of a policy. He also testified that he sometimes collected premiums on policies already delivered, but that this was generally for the convenience of the parties, though the company paid him a commission on all such collections.

It will be observed that the provision of the policy now under con-

sideration is not for a forfeiture, but is merely an exemption from liability on account of death occurring under certain circumstances. It is not a case where acceptance of premiums with knowledge of the forfeiture constitutes recognition of the continued valid existence of the policy; nor does the case fall within the principle that a forfeiture is waived, where an insurance company, when it enters into a contract, has knowledge through any of its authorized agents, of facts which would work a forfeiture. *People's F. Ins. Co. v. Goyne*, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, 96 S. W. 365, 9 Ann. Cas. 373; *Lord v. Des Moines F. Ins. Co.* 99 Ark. 476, 138 S. W. 1008; *Peebles v. Eminent Household*, C. W. 111 Ark. 435, 164 S. W. 296.

There was no forfeiture provided for at all, but the company had, as before stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the government, notwithstanding the exemption of the company from liability for death occurring during the period of that service, and the mere acceptance by the company of the premium, with knowledge of the fact that the assured was in the military service of the government, did not constitute a waiver of the stipulation in regard to exemption. In other words, when the assured paid his premium, his policy was kept in force, and would have remained in force, if the assured had survived the period of his service in the Army.

Conceding, therefore, that the knowledge of Scroggins, the agent of the company, was the knowledge of the company itself, there was no waiver on account of acceptance of the premium, with knowledge of the fact that the assured was serving in the Army. The statement of Mr. Scroggins

—waiver of  
exceptions—  
acceptance of  
premium.



to the assured on the occasion mentioned by Scroggins as to his interpretation of the exemption clause of the policy was not binding on the company, for it was not done within the apparent scope of the agent's authority. There is not the slightest evidence that the statement was made for the fraudulent purpose of inducing Miller to pay the premium, or that it was not made in good faith in response to Miller's inquiry. It was only an expression, given in obvious good faith, of the personal opinion of the witness as to the proper construction of the language of the policy. Scroggins had no authority to issue policies, or to alter or interpret the terms thereof. The policy had already been issued and delivered more than two years before this conversation occurred, and the agent had no duty to perform with respect to the matter, and it was entirely beyond the apparent scope of his authority to advise the assured as to the legal effect of the various clauses in the policy. *Home F. Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113.

Counsel rely especially on the case of *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, where the

court held that knowledge on the part of the company, at the time of the issuance of an accident policy, that certain risks necessarily pertained to the occupation and employment of the assured, constituted a waiver of a provision in the policy exempting the company from such liability. We think that decision has no application to the facts of the present case, for in that case the policy would have had no force at all, unless it embraced the risks mentioned in the exemption clause, and the knowledge of the company of the existence of facts which brought the circumstances of the assured within the exemption clause necessarily operated as a waiver, by treating the policy as being in force notwithstanding the facts which would render it inoperative. Here we have a case, as before stated, where the policy remains in force, notwithstanding the temporary existence of conditions — i. e., the service by the insured in the Army—which exempted the company from liability, and the mere acceptance of premiums with knowledge of that service did not constitute a waiver of the exemption.

Our conclusion is that the Circuit Court was correct in its decision, and the judgment is, therefore, affirmed.

### ANNOTATION.

#### Validity, construction, and effect of provisions in life or accident policy in relation to military service.

This annotation supplements that accompanying *Kelly v. Fidelity Mut. L. Ins. Co.* 4 A.L.R. 848, where the earlier cases on the subject are considered. A search has disclosed but two subsequent cases on the question.

In *Malone v. State L. Ins. Co.* (1919) — Mo. App. —, 218 S. W. 877, where the policy provided that if the insured should engage in any military or naval service, and should die "while so engaged, as the result of such service, or within six months thereafter," the liability should be limited to a return of the premiums paid, it was held, follow-

ing *Redd v. American Cent. L. Ins. Co.* (1918) 200 Mo. App. 383, 207 S. W. 74 (set out at p. 850 of the prior annotation), that the insured entered the military service when he passed the required examination, took the oath, enrolled, and subjected himself to military orders, and, it appearing that he continued in such service until his death, it was held that there could be no question that he died "while so engaged;" but it was held that under the provision of the policy it devolved upon the insurer, in order to escape liability, not only to prove that the in-

sured's death occurred while he was engaged in military service, but also that death resulted from, or was caused by, such service, and where the insurer introduced no evidence as to the cause of the insured's death, and the plaintiff's evidence only tended to show that the insured died while in military service, from an accidental gunshot wound from a gun in the hands of another soldier, it was held that the insurer had failed to prove that the insured's death was the result of his military service. The court distinguished the reported case (*MILLER v. ILLINOIS BANKERS' LIFE ASSO.* ante, 378) on the ground that the provision of the policy involved in that case was different, and said: "In that case the war risk clause exempted the insurer from liability 'provided that death, while in the service in the Army or Navy of the government in time of war,' should occur. The court very properly held that if the insured died while at a military training camp, after enlisting in the United States Army during the late war with Germany, there was no liability. But there was no further restrictive clause in that policy limiting the death while in military service only to such death as resulted from such service, as does the policy now in question. That case, therefore, is not in point."

In *Myli v. American L. Ins. Co.*

(1919) — N. D. —, — A.L.R. —, 175 N. W. 631, it appeared that the insured enlisted in the Navy during the World War, and was assigned to an institution in Minneapolis for training, and that while there he contracted influenza, from which he died in the city hospital. The insurer contested liability, except for a limited sum, claiming to be relieved from paying the face of the policy by a clause providing that, "if within five years from date hereof the death of the insured shall occur while engaged in military or naval service in time of war, without previously having obtained from the company a permit therefor, the company's liability shall be limited," but it was held that this provision did not, under the facts, exclude liability for the face of the policy; that such provision should be construed in connection with a clause providing for double indemnity in the event of accidental death not "resulting from military or naval service in time of war," and another clause providing for double indemnity, "excluding . . . injuries resulting from military or naval service in time of war," and that when so construed the provision exempted the insurer from liability for the face of the policy only where death was occasioned by an extra hazard, incident to military or naval service.

J. T. W.

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ESTHER A. MUNDELL, Appt.,

v.

J. H. WELLS et al., Respts.

E. B. TAYLOR, Intervener, Appt.

*California Supreme Court (In Banc) — October 3, 1919.*

(— Cal. —, 184 Pac. 666.)

**Constitutional law — due process — application of cash bail to fine.**

1. A statute permitting the application of cash bail to payment of the fine imposed upon accused is not an unconstitutional discrimination against the one making the deposit in favor of sureties on a bail bond.

[See note on this question beginning on page 389.]

**Money in court — action to recover — liability of clerk.**

2. One furnishing cash bail for an accused, which is placed in custody of the clerk of the court, has no right of action against the latter upon his obeying an order of the court to apply a portion of the bail money in satisfaction of the fine imposed upon accused.

[See 3 R. C. L. 80; 22 R. C. L. 481.]

**Bail — right to apply in satisfaction of fine.**

3. The court is not required to protect the rights of one who deposits money as bail for an accused, under a statute providing that money so deposited may be applied in satisfaction of a fine imposed upon accused.

**— right to surrender principal.**

4. Persons who advance cash bail for an accused are not entitled to surrender accused in exoneration of their bail, as in case of obligors on a bail bond.

**— cash — irregular deposit — effect.**

5. That money intended as cash bail for an accused reaches the court through the hands of the sheriff, when it should have been deposited directly by the owner, does not entitle the owner to its return, instead of being

applied to the satisfaction of the fine as required by statute.

[See 8 R. C. L. 30.]

**— presumption as to ownership.**

6. The money deposited for bail in a criminal action is regarded as the property of accused.

[See 3 R. C. L. 30.]

**— contest between strangers — who entitled to money.**

7. When money deposited as bail for an accused is claimed under attachment against him, and by the one making the deposit, the court will determine which is, in equity and good conscience, entitled to the fund, notwithstanding the statute provides that the surplus, after payment of the fine, shall be returned to accused.

**— right as against attaching creditors.**

8. One depositing cash bail for an accused is entitled to its return as against the claim of an attaching creditor of accused.

[See 8 R. C. L. 30.]

**Costs — against custodian of bail.**

9. Costs will not be awarded against a clerk of court, sued for return of cash bail which has been applied, by direction of the court, in satisfaction of the fine, since he is a mere custodian of the fund.

[See 7 R. C. L. 790.]

**APPEALS** by plaintiff and intervener from a judgment of the Superior Court for Contra Costa County (Barber, J.) in favor of plaintiff in part only, dismissing the action as to the defendant surety, and adjudging that intervener take nothing, in an action brought to recover an amount deposited with defendant Wells as bail in a certain cause. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles S. Peery for appellant Mundell.

Mr. E. B. Taylor in propria persona.  
Messrs. T. D. Johnston, A. B. Tinning, Alfred C. Skaife, and Guy Le Roy Stevick for respondents.

Melvin, J., delivered the opinion of the court:

Plaintiff sued as assignee of W. A. Mundell for \$2,000 deposited with defendant Wells, who is ex officio clerk of the superior court of Contra Costa county, as bail in the case of the People, etc., v. R. B. Cradlebaugh. The corporation defendant is the surety on the official bond of Mr. Wells, and the intervener Taylor asserts an interest in

the money by reason of an attachment and judgment against Cradlebaugh. The plaintiff and the intervener Taylor are the appellants.

Cradlebaugh was charged with a misdemeanor triable in the superior court. After his arrest he was released on cash bail of \$2,000, deposited in that behalf by W. A. Mundell, who had borrowed the money for that purpose. He was preliminarily examined, was held to answer, and his bail was fixed at \$2,000. At his request, the fund deposited at the time of his arrest was transmitted to the county clerk. Cradlebaugh was tried and convicted.

ed; was readmitted to bail pending sentence; and the money in the hands of Mr. Wells, as clerk of the court, was, by order of court, accepted as security for his due appearance for sentence.

Cradlebaugh appeared for sentence, as ordered, and his counsel in open court, not in his behalf but for those who had advanced the money in lieu of bail, sought to surrender him into custody, and asked for an order remitting the bail money "to the parties who put it up, and for the purpose of filing new bonds later on." The court did not act upon the suggestion of surrender, nor was there any ruling upon the motion to return the money. Cradlebaugh was arraigned and sentenced to imprisonment for one year in the county jail, and to pay a fine of \$1,000.

After notice of appeal, the court, on request, fixed bail on appeal, the amount being \$2,000. Counsel for the prisoner then asked that the bail theretofore deposited be exonerated. The court instructed him to draw the order and present it to the district attorney. Later in the day the district attorney asked for an order directing the clerk to apply \$1,000 of the fund in his hands to the satisfaction of the fine imposed upon Cradlebaugh. After argument upon this matter, the court directed the clerk to satisfy that part of the judgment imposing a fine out of the money in his custody. He obeyed this order and offered the \$1,000 remaining, after satisfaction of the fine, to Cradlebaugh. This sum, however, was sought to be attached in the hands of the clerk by Mr. Taylor, in an action brought by him against Cradlebaugh to recover \$500 as a fee for his services as counsel in the criminal action. Mr. Taylor recovered a judgment against Cradlebaugh, which was in force at the time of the trial of the case at bar.

Upon these facts the superior court gave judgment for plaintiff against Mr. Wells, as clerk, for the sum of \$1,000 remaining in his

hands after satisfying the fine imposed upon Cradlebaugh. The court dismissed the action against the sureties on the clerk's bond and adjudged that the intervener take nothing.

Appellants, Mrs. Mundell and Mr. Taylor, contend that the offer to surrender Cradlebaugh into custody was sufficient to exonerate the bail; that the fund on deposit was not the property of the defendant in the criminal action, out of which a fine might be satisfied; and that such payment of the fine deprived the real owner of that amount without due process of law.

Even if appellants could uphold their declaration that the money deposited as bail was not, in the contemplation of law, the property of Cradlebaugh, but of the person who furnished it for that use, they could not prevail in this action against Wells, who, as county clerk and ex officio clerk of the superior court, only performed his duty as a ministerial officer of the court, acting under the order of the judge of said court, when he applied half of the fund to the satisfaction of the fine.

Money in court—  
action to  
recover—liability  
of clerk.

Regarding that portion of the fund, they can have no possible recourse against defendant Wells. The court had jurisdiction of the subject-matter and could order the disposition of the money in custodia legis. If the clerk had disobeyed the order of the court in this case, he would have been guilty of contempt of court. A ministerial officer is protected and justified when acting under a process or order of a court possessing general jurisdiction over the subject-matter, in spite of any errors committed by the court issuing the process or giving the order. 22 R. C. L. 481.

But the court acted correctly, and fully within its powers, in making the order of which appellants complain. Section 1295 of the Penal Code provides for the deposit of money for the release from custody of a person held to answer. Section

1297 is as follows: "When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the county clerk must, under the direction of the court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant."

It will thus be seen that in contemplation of law, so far as the criminal action is concerned, the money deposited for the purpose of insuring a defendant's appearance is

**Bail—right to  
apply in satis-  
faction of fine.**

his money, and the court is not required to protect the supposed rights of anyone who may have advanced it for him. There is no pretense that Cradlebaugh in the criminal action surrendered himself into custody. His counsel, in making the motion, was seeking to protect the rights of the person or persons who had advanced the money, as if bondsmen had appeared upon a written obligation. But persons who advance money in lieu of bail are not in the same position as sureties on a bond, and have no such rights.

**—right to  
surrender  
principal.**

When the defendant in the criminal action appeared for sentence, the counsel for Cradlebaugh, addressing the court, said: "Now if the court please, at this time, at the request of the bondsmen, I will ask for an order of court surrendering the defendant into custody, and for an order of the clerk remitting the bail money back to the parties who put it up, and for the purpose of filing new bonds later on."

The court then proceeded to pronounce judgment. From the foregoing it will be seen that there was no offer of the defendant in the criminal action to surrender himself "to the officer to whom the commitment was directed"—a prerequisite to the return of the bail money. Penal Code, § 1302. Therefore the court was not called upon to rule upon the motion to order Cradlebaugh into custody. Conse-

quently, the money in the hands of the clerk was a fund remaining on deposit "at the time of a judgment for the payment of a fine." Under the statute (Penal Code, § 1297) there was but one correct method of disposing of half of it. The court adopted that method.

Appellant Mundell contends that the statute (Penal Code § 1297) is unconstitutional, in that it deprives of property, without due process of law, the person who advances the money for bail, by placing him in a different and less advantageous position than the surety on a bail bond.

**Constitutional  
law—due  
process—appli-  
cation of cash  
bail to fine.**

There is no force in this contention. There is no constitutional reason why one who advances cash in lieu of bail money should occupy the identical position of a surety on a written contract. The latter is bound, and the court, clerk, and sheriff are bound, by the strict terms of the written promise, while the measure of the depositor's liability, as well as of the correlative duties of the court and its officers, is to be found in the statutes. The law does not provide for a written agreement between the state and one who advances cash in lieu of bail. It attributes the ownership of such a fund to the defendant, and one who furnishes money for the release of a person held under a criminal charge is presumed to know that fact. It is argued that the sheriff had no right to accept the money originally, and that the clerk, therefore, could not receive it in lieu of bail. But it is not contended that the money was not advanced for the purpose of obtaining Cradlebaugh's release. If it finally reached the proper judicial custody, and Cradlebaugh was in fact permitted to go at large, the plaintiff Mrs. Mundell cannot complain because the purpose of the payment by her assignor was

**Bail—cash—  
irregular  
deposit—effect.**

accomplished not by a direct deposit in court, but through the agency of the sheriff, who receipted for \$2,000,

"being bail money, case of R. B. Henry" (one of Cradlebaugh's aliases).

That the money deposited for bail in a criminal action is regarded as the defendant's property is a rule sustained by the weight of authority. In *People ex rel. Gilbert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, the court, construing statutes very similar to §§ 1296 et seq. of the Penal Code of California, used the following language: "All these sections treat the money deposited as belonging to the defendant, and in all cases where money is deposited in lieu of bail it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant. The relator, when he deposited this money, must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them. There is no authority for the county treasurer to take a deposit in lieu of bail except by virtue of these statutes, and the deposit must be made in strict compliance with the statutes. The statutes may have been framed as they are for the very purpose of avoiding a dispute like that which has arisen in this case. If the contention of the relator be upheld, then disputes may frequently arise as to whose money was deposited, and the county treasurer can never know with certainty to whom the money is to be returned, and the court cannot know in passing sentence, or in making its order, whether the money is properly applicable upon the fine imposed. It is, therefore, wiser that the provisions of the statute should have their obvious meaning, to wit, the money is deposited as the money of the defendant, and if a fine is inflicted upon him, it may be used to pay the fine, and the surplus is to be returned to him."

Other authorities upon this subject, announcing substantially the

same rule, are *State v. Wisnewski*, 134 Wis. 497, 114 N. W. 1118; *State v. Ross*, 100 Tenn. 308, 45 S. W. 673; *People ex rel. Meyer v. Gould*, 38 Misc. 505, 77 N. Y. Supp. 1067, and *State v. Owens*, 112 Iowa, 403, 84 N. W. 529. But it is suggested very earnestly that in California an entirely different rule has been adopted, and *Hudson v. Police Ct.* — Cal. App. —, 178 Pac. 172, is cited to support this theory. That was a case in which a writ of review was issued against the police court of the city of Oakland, and, after hearing, the district court of appeal annulled a judgment forfeiting money deposited as bail and applying it to the payment of a fine. It appears from the opinion in that case that before trial Mr. Hudson, counsel for the defendant in a criminal action, offered to surrender said defendant. There seems to have been no question regarding the sufficiency of this offer, and the district court of appeal correctly decided that the court was bound to accept it and to return the money to the counselor who had deposited it for his client. In the case at bar the facts are very different. No request was made for the acceptance of defendant's surrender in the criminal action, but the court was asked for an order accepting his surrender by his bondsman. He had no bondsman, and the court was neither bound to act nor to regard the request for the order as a personal surrender by Cradlebaugh to the sheriff.

But although, as between defendant and the state, the money deposited in lieu of bail is regarded as a defendant's property and will be applied, so far as necessary, to the satisfaction of a fine, nevertheless, in a contest like the one waged in the case at bar, involving the residue in the hands of the clerk after the payment of the fine, the court will regard the claims of the person who advanced the fund in order to bring about the release of the individual held in custody. While it is true that the statute pro-

vides for the payment to the defendant of the surplus, if any, after satisfaction of the fine (Penal Code, § 1297), if the true ownership be litigated, as in the case at bar, before the refunding contemplated by the statute, the court will

—contest between strangers  
—who entitled to money.

inquire who is, in equity and good conscience, entitled to the money, and will award it accordingly. In *Way v. Day*, 187 Mass. 476, 73 N. E. 543, the supreme judicial court of Massachusetts was considering a judgment dismissing a bill in equity whereby a judgment was prayed to enforce an assignment by Day of \$800 deposited as bail, and remaining in the hands of the clerk of the superior court after Day's conviction and sentence. It was found in the lower court that Greer, one of the defendants, had deposited the money, and that it never was the property of Day, and that court ruled "that, while Greer cannot claim against the commonwealth that this money belongs to him, and not to Day, yet this rule does not protect the plaintiff or give to him any rights against the real owner of the fund, and that for this sole reason the bill cannot be maintained."

In approving this ruling and the dismissal of the bill, the supreme court used the following language: "Even if it be assumed that a court of equity can interfere with the power and duty of the court in which the money is deposited, and direct to whom it shall be paid,—an assumption attended with great, if not insuperable, difficulties,—and even if it be further assumed that as between the commonwealth and Day the money must be regarded as belonging to Day, and not to Greer, and, still further, that the court in which it is deposited has no power to order it to be paid to any other person than to Day or his order (see *Edelsten v. Adams*, 8 Taunt. 557, 129 Eng. Reprint, 500; *Douglass v. Stanbrough*, 3 Ad. & El. 316, 111 Eng. Reprint, 434; *Salter v. Weiner*, 6 Abb. Pr. 191; *People ex rel. Gil-*

*bert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910), still it is plain that, the money being in fact Greer's and not Day's and having been pledged only for a certain purpose, Day had no authority, express or implied, to divert it to a different purpose. In equity and good conscience the money should go to Greer, and as against him the assignment by Day to the plaintiff must be regarded as invalid to convey any interest in or right to the fund, and equity will not lend its aid to enable him to get possession of it."

In *Wright & Taylor v. Dougherty*, 138 Iowa, 195, 115 N. W. 908, the question presented to the supreme court was whether or not, when money is deposited with the clerk of a court by a friendly third person to secure the release from custody of one under indictment, such fund is subject to seizure in satisfaction of the claims of judgment creditors of the indicted person. After reviewing the authorities which hold that, as between the state and the person under indictment, the money deposited as bail may be used in satisfaction of a fine, the court said: "True, under the statute, the money is to be deposited in the name of the defendant, and perhaps in a sense the legal title thereto is to be regarded as in him. But the money in the hands of the clerk is no more than a deposit, and this is only in favor of the state, the other party to the transaction; and the interest of the state does not extend to the actual ownership of the money. It goes no farther than that the defendant shall appear when called for trial, and that the deposit shall be available out of which to pay any fine or costs that may be assessed against him. This the depositor must be held to have agreed to. The statute goes no farther, and the cases cited go no farther. As between the depositor and the defendant, or his creditors, the ordinary rules of property obtain."

We are of the opinion that the true rule is clearly set forth in the

passages quoted above, and, therefore, that the surplus remaining in the hands of the county clerk after satisfaction of the fine was properly adjudged to be the money of plaintiff. We also approve of that part of the judgment imposing costs upon plaintiff. Manifestly, it would have

—right as  
against attach-  
ing creditors.

Costs—against  
custodian  
of bail.

been unjust to charge costs against the officer who was the mere custodian of the fund.

The judgment is affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Lennon, J.; Olney, J.; Wilbur, J.; Lawlor, J.

Petition for rehearing denied November 6, 1919.

## ANNOTATION.

### Right to apply cash bail to payment of fine.

#### General rule.

In jurisdictions where, by statute, a deposit of money may be made in lieu of bail in criminal cases, the decisions are unanimous in holding that a fine imposed on the accused may be satisfied from the cash deposit; and this is true, although the money has been furnished by a third person. *La Porte v. Williams* (1911) 17 Cal. App. 428, 120 Pac. 55; *Wills v. Neilan* (1893) 88 Iowa, 548, 55 N. W. 527; *State v. Owens* (1900) 112 Iowa, 403, 84 N. W. 529; *Wright & Taylor v. Dougherty* (1908) 138 Iowa, 195, 115 N. W. 908; *People ex rel. Meyer v. Gould* (1902) 38 Misc. 505, 77 N. Y. Supp. 1067, affirmed in (1902) 75 App. Div. 524, 78 N. Y. Supp. 279; *People v. Burke* (1902) 38 Misc. 566, 78 N. Y. Supp. 112, 11 N. Y. Anno. Cas. 365, 17 N. Y. Crim. Rep. 28; *Alexander v. Creamer* (1899) 46 App. Div. 211, 61 N. Y. Supp. 539; *People ex rel. Gilbert v. Laidlaw* (1886) 102 N. Y. 588, 7 N. E. 910; *State v. Ross* (1898) 100 Tenn. 303, 45 S. W. 673; *State v. Wisniewski* (1908) 134 Wis. 497, 114 N. W. 1113.

"That, either in civil or criminal proceedings, money deposited as bail may be applied to the satisfaction of obligations to secure which the defendant is held to bail, regardless of the rights of third parties to the money, seems settled by authority." *Alexander v. Creamer* (1899) 46 App. Div. 211, 61 N. Y. Supp. 539.

"We think it should be held, as a matter of law, that the money, when received by the clerk pursuant to the order made by the court, belonged to

the defendant, . . . and that the court properly directed the clerk to apply a sufficient amount thereof to satisfy the judgment entered against the defendant." *State v. Owens* (1900) 112 Iowa, 403, 84 N. W. 529.

The California statute (Penal Code, § 1297) "authorizes the application of money deposited as bail in satisfaction of a fine, and the refunding of the surplus, if any, to the defendant." *La Porte v. Williams* (1911) 17 Cal. App. 428, 120 Pac. 55.

A Tennessee act (Shannon's Code, § 7135) provides as follows: "When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine and costs, the clerk shall, under the direction of the court, apply the money in satisfaction thereof, paying the surplus, if any, to the defendant." Under this section of the statute, "it is clearly the duty of the court to direct the costs to be paid out of the sum deposited, and if there is a fine, that must also be paid, and until this is done the fund cannot be withdrawn." *State v. Ross* (1898) 100 Tenn. 303, 45 S. W. 673.

#### Application of rule.

In *La Porte v. Williams* (Cal.) supra, the petitioner was arrested for vagrancy, and, on conviction before the police court, appealed to the superior court. The judgment was affirmed, and the superior court certified its judgment to the court below, directing the justice to apply the bail money to the extent of the fine, in execution of the judgment. The petitioner there-



upon applied for a writ prohibiting the justice from so doing, on the ground that the petitioner or her counsel had no notice, after the hearing on appeal, when the judgment would be rendered, and that the superior court transmitted its findings and judgment to the lower court before the expiration of ten days. It was held that these contentions were not well founded, and since the Penal Code authorized the application of money deposited as bail in satisfaction of a fine imposed, the police court was authorized to apply the cash bail to the payment of the fine, on the superior court's certification of its judgment affirming the police court.

But in *Hudson v. Police Ct.* (1918) — Cal. App. —, 178 Pac. 172, a cash bond deposited with the clerk of court by an attorney, to secure the release of his client, was held not available for the payment of a fine imposed on the client, when the attorney, both at the time of the trial and after the client pleaded guilty, appeared personally with the client, offering to surrender her and demanding the return of the money.

In *Wright & Taylor v. Dougherty* (1908) 138 Iowa, 195, 115 N. W. 908, the question arose whether money furnished by a third person as bail, to secure the release of one charged with crime, was subject to garnishment at the suit of the creditors of the accused, after the dismissal of the indictment. It was held that this money could not be garnished, since it was deposited for the purpose only of assuring that the defendant should appear when called for trial, but that it was available to pay any fine or costs that might be assessed against the accused.

In *People ex rel. Meyer v. Gould* (1902) 75 App. Div. 524, 78 N. Y. Supp. 279, affirming (1902) 38 Misc. 505, 77 N. Y. Supp. 1067, the question was whether a deposit of cash made in lieu of bail by a person indicted for the larceny of money could be attached in a civil action, by the person whose money was taken. It was held that the deposit was answerable only for the appearance of the accused at

the trial and for any fine that might be imposed.

In *State v. Owens* (1900) 112 Iowa, 403, 84 N. W. 529, a preliminary information was filed against the defendant and another, accusing them of the crime of keeping a gambling house. They appeared to that information, and, waiving examination, were held to answer to the grand jury, their bail being fixed at \$300 each. A check for \$600, made by a third person, was deposited with the clerk of the court, in lieu of a bail bond, and the defendants were released. Thereafter the grand jury returned two indictments against one of the defendants alone, on each of which bail was fixed at \$600. This amount was afterwards reduced to \$300 in each case, and the \$600 check was, by consent of the party making it, allowed to remain as bail for the defendant. The defendant pleaded guilty to one of the indictments, and judgment was rendered that he should pay a fine and costs; and on the same day the defendant filed an application, asking the court to require the clerk to apply so much of the \$300 deposited as cash bail as might be necessary to satisfy the judgment rendered against him. The county attorney made a like motion on the same day, and produced a certificate from the clerk, showing that the bail was in his possession. In the meantime, however, the person who drew the check for the bail filed a motion for the release of the money, on the ground that he had surrendered the defendant to the sheriff. It was held that the transaction between the defendant and the third person was, in effect, a loan to the defendant, and the deposit was defendant's and could be used to pay the fine imposed, refunding to the defendant the surplus, if any. The court, after quoting the statute allowing cash bail, pointed out that in no place in the statute was provision made for the deposit of cash by a third person.

In *Wills v. Neelan* (1898) 88 Iowa, 548, 55 N. W. 527, a person charged with a misdemeanor was convicted by a police judge, and sentenced to fine or imprisonment. The accused elected

to serve the imprisonment, but the court, nevertheless, ordered that the amount of the fine should be deducted from a cash deposit which the accused had given as bail, the balance of the bail to be returned to the accused, and the accused to be released from custody. This was accordingly done, and the accused thereupon instituted an action in detinue against the police judge. The authority of the police judge to receive the certificate of deposit in lieu of bail, and to order it applied for the payment of a fine, was not questioned; the only question being whether he was authorized so to apply it when the prisoner preferred to serve the jail part of the sentence. Answering this question in the affirmative, Given, J., said: "The judgment is in the alternative, and would be satisfied by either payment or by imprisonment, but, until satisfied, it might be enforced either by collection or by imprisonment. The appellee had the right to pay the fine, and thereby avoid imprisonment, but he had no right to elect to go to jail instead of paying the fine. The judgment not being satisfied, it might be enforced either by collecting the fine or by imprisonment."

In *People v. Burke* (1902) 38 Misc. 566, 78 N. Y. Supp. 112, 11 N. Y. Anno. Cas. 365, 17 N. Y. Crim. Rep. 28, the defendant was adjudged, for abandonment of his wife, to contribute a weekly amount to her support. Thereafter an appeal was taken and allowed, the defendant depositing \$300 as cash bail with the city chamberlain. The judgment of the lower court was subsequently affirmed, and the defendant surrendered himself and was committed. The defendant then filed a motion to direct the city chamberlain to return to him the money deposited in lieu of an undertaking. It was ordered, however, that the money should be applied to the support of the wife and the payment of costs as adjudged by the lower court, the balance only to be returned to the defendant.

In *People ex rel. Gilbert v. Laidlaw* (1886) 102 N. Y. 588, 7 N. E. 910, the relator applied for a writ of mandamus, addressed to the county treas-

urer, commanding him to return a \$300 cash bond which the relator had deposited as bail for a person charged with assault. It appeared that the accused had been convicted of the offense charged, and was sentenced to pay a fine of \$250, which was ordered to be paid from the \$300 deposited with the county treasurer, and the surplus of the deposit was ordered to be refunded to the accused. The fine was so satisfied, and the balance of the deposit was turned over to the accused. Under statute, it was provided that the defendant might, instead of giving bail, deposit the amount in cash, and "if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant." In affirming the judgment of the special term, dismissing the writ of mandamus, Earl, J., said: "The money is deposited as the money of the defendant, and if a fine is inflicted upon him it may be used to pay the fine, and the surplus is to be returned to him. When any party other than the defendant makes the deposit for him, it is a deposit in compliance with the statute, and the money is thus devoted to the purposes of the statute, and to the use of the defendant. The certificate which was issued to the plaintiff in this case certifies that the money was deposited for the defendant. It must, therefore, be treated as if it were furnished to the defendant and the deposit had been made by him."

In *State v. Ross* (1898) 100 Tenn. 803, 45 S. W. 673, the defendant was indicted for larceny, was found guilty, and sentenced to prison. He appealed to the supreme court, and, his bail having been fixed at \$3,000, a cash deposit of that amount was placed in the hands of the clerk of the county criminal court, and was paid over by him to the clerk of the supreme court. The judgment of the lower court was affirmed, and application was thereupon made to withdraw the cash bail by a person who claimed to have made

the deposit as agent for the defendant's mother, to whom, it was alleged, the money belonged. This application was made on the theory that the deposit was made in lieu of a bond, and that, the defendant having appeared and been sentenced by the court, the fund could no longer be held. The court, after quoting sections of Shannon's Code which provide for the deposit of a cash bail in lieu of a bail bond, and for the application of this deposit for the payment of all fines and costs, and for the refunding of the surplus, if any, to the defendant, held that the costs of court should be deducted from the money on deposit, and the balance should be paid over to the defendant, or to such person as he might direct by proper power of attorney.

In *State v. Wisnewski* (1908) 134 Wis. 497, 114 N. W. 1113, the defendant was arrested on a charge of forgery, and, on failure to furnish bail, was committed. He was afterwards admitted to bail; the sum of \$800 in cash being furnished by one Julius Wisnewski. The defendant was thereupon discharged from custody, but was subsequently arrested on a second charge of forgery, for which he was tried and convicted. He served his term in prison, and during that term the first charge remained pend-

ing, and the cash bail remained on deposit. About the time of the defendant's release from prison, one Edgar, an attorney, procured authority from the defendant to represent him in obtaining the \$800 deposit, and, on application of Edgar to the circuit court, an order was made directing the clerk to pay Edgar the \$800, and thereupon payment was made accordingly. Thereafter Julius Wisnewski made application to the circuit court to be made a party to the proceeding instituted by Edgar, and for the vacation of the order previously made directing the clerk to pay the \$800 to Edgar, and asking that the \$800 be paid into court. It was held that the statute authorizing the defendant to deposit the amount of bail in money, and providing for the payment of fines out of the deposit, and the return of the surplus, if any, to the person depositing the money, contemplated that the cash should be deposited by the accused; and if the money was actually furnished by a third person, the defendant would, nevertheless, be entitled to the surplus; and since the money had been paid to the defendant's attorney, on order of the defendant, the attorney could not be required to pay it into court for the benefit of the petitioner. W. F. F.

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JAMES T. SMITH et al., Plffs. in Err.,  
v.  
PEOPLE OF THE STATE OF COLORADO.

*Colorado Supreme Court (Dept. No. 1) — October 6, 1910.*

(— Colo. —, 184 Pac. 872.)

**Bail — forfeiture — insanity as defense.**

1. That the principal is insane and in custody of the authorities in another state is a defense to a proceeding to forfeit his bail bond.

[See note on this question beginning on page 394.]

**Pleading — demurrer — effect.**

2. A demurrer to the answer in a scire facias to recover the penalty on a bail bond admits the truth of its allegation that accused was insane on the

return day of the recognizance, and was in custody of the law in another state.

[See 21 R. C. L. 506.]

**Bail — object of recognizance.**

3. The enrichment of the public treasury is no part of the object in

taking a recognizance for the appearance of one accused of crime.  
[See 3 R. C. L. 64.]

**ERROR** to the District Court for Chaffee County (Cooper, J.) to review a judgment sustaining a demurrer to the answer in an action brought to recover the penalty on a bail bond. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John A. Rush and Foster Cline, for plaintiffs in error:

The court erred in sustaining the demurrer and in entering judgment.

Tanquary v. People, 25 Colo. App. 531, 139 Pac. 1118.

The object of a recognizance is not to enrich the treasury.

United States v. Feely, 1 Brock. 259, Fed. Cas. No. 15,082; State v. Jackschitz, 76 Wash. 253, 136 Pac. 132; McArdle v. McDaniel, 75 Ga. 270.

Impossibility of performance excuses the sureties.

Bail and Recognizance, 2 R. C. L. ¶ 67; People v. Tubbs, 37 N. Y. 586; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; Com. v. Craig, 6 Rand. (Va.) 732; Chase v. People, 2 Colo. 481; Russell v. State, 45 Ga. 9; State v. Hines, 37 Okla. 198, 131 Pac. 688, Ann. Cas. 1915B, 431; State v. Dykes, 127 La. 53, 53 So. 407; Hargis v. Begley, 129 Ky. 477, 23 L.R.A.(N.S.) 136, 112 S. W. 602; State v. Traphagan, 45 N. J. L. 134; State v. McNeal, 18 N. J. L. 333; People v. Perlstein, 28 N. Y. S. R. 402, 7 N. Y. Supp. 662; Woolfolk v. State, 10 Ind. 532; Bank of Mt. Pleasant v. Pollock, 1 Ohio, 36; Mather v. People, 12 Ill. 9; People v. Wissig, 7 Daly, 23; Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62; Wood v. Com. 17 Ky. L. Rep. 1076, 33 S. W. 729; Fuller v. Davis, 1 Gray, 612.

Messrs. T. Lee Witcher and A. R. Miller, for the People:

The sureties were not released from their liability.

Ringeman v. State, 136 Ala. 131, 34 So. 351; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 237, 36 Conn. 242, 4 Am. Rep. 60; Piercy v. People, 10 Ill. App. 219; Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 64; Adler v. State, 35 Ark. 517, 37 Am. Rep. 48; People v. Bartlett, 3 Hill, 570; State v. Edwards, 4 Humph. 226; Markham v. State, 38 Tex. Crim. Rep. 91, 25 S. W. 127; Bonner v. Com. 27 Ky. L. Rep. 652, 85 S. W. 1196; State v. Funk, Ann. Cas. 1912C, 748, note.

Teller, J., delivered the opinion of the court:

Plaintiffs in error were sureties on a criminal recognizance given for the appearance of one Minnie De Lage, who was charged with a felony. On the return day of the recognizance the defendant did not appear, and the bond was therefore forfeited, and a scire facias issued, requiring the sureties to show cause why judgment for the penalty named should not be rendered against them. To this they answered, alleging that the accused was insane on the return day and was still insane; that she was in the custody of the sheriff of a county in Texas, under a criminal charge; and that there was then pending in Texas a proceeding to determine the question of her sanity. A general demurrer to the answer was sustained, and judgment entered for \$1,000 against said sureties. They bring the case here on error.

The demurrer admits the allegations of the answer, including the allegation that the accused was insane on the return day and when the answer was filed, and was in the custody of the law in Texas. There is therefore presented the question whether or not the sureties are relieved from their obligation to produce their principal in the recognizance by the fact that she is insane and in the custody of another state. It is plain that the purpose of a recognizance is merely to insure the presence for trial of a person accused of a bailable offense. The enriching of the public treasury is no part of the object at which the proceeding is aimed.

There is no reason for penalizing

Pleading—  
demurrer—  
effect.

Bail—object of  
recognizance.

the sureties when it appears that they are unable, by no fault of their own or of their principal, to perform the condition of the bond. Moreover, to produce for trial an insane person would serve no good purpose, as the trial could not proceed. These considerations have been many times recognized by the courts, which have set aside forfeitures and vacated judgments on bail bonds when the principal has been prevented by death, sickness, or insanity from appearing as required by the bond. Such cases come within the rule which relieves from the obligation of a contract rendered impossible of performance by an act of God. "Ordinarily, insanity of the principal is a good defense for nonperformance of the obligation of the bond." 2 R. C. L. p. 55, ¶ 67.

In *Chase v. People*, 2 Colo. 481, this court held that, when a principal in a recognizance was on the return day prevented by sickness from appearing, such sickness not being the

result of fault or misconduct on his part, a judgment of forfeiture should be set aside, when the facts were made to appear. In that case it was held that the costs should be paid by the sureties. In *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62, a number of cases are cited to the effect that sickness and insanity, as well as death, excuse performance of the condition of a recognizance. The rule is well settled, and has our <sup>—forfeiture—  
insanity as  
defense.</sup> entire approval. It may be that, on a hearing upon an issue made as to the alleged insanity, it will appear that the accused is not or was not insane.

The judgment will be reversed on payment of costs by the plaintiffs in error, and such further proceedings may be had in the cause as are consistent with the views hereinbefore expressed.

Garrigues, Ch. J., and Burke, J., concur.

## ANNOTATION.

### Insanity of principal as relieving bail for his nonappearance.

In criminal cases, it seems to be well established that bail will be exonerated from liability for failure to produce the principal at the trial when such failure is due to the fact that the principal is in confinement because of his insanity. *Com. v. Fleming* (1893) 15 Ky. L. Rep. 491; *Wood v. Com.* (1896) 17 Ky. L. Rep. 1076, 33 S. W. 729; *Briggs v. Com.* (1919) — Ky. —, — A.L.R. —, 214 S. W. 975 (obiter); *Reg. v. Blackwell* (1857) 7 Cox, C. C. (Eng.) 353. And see the reported case (*SMITH v. PEOPLE*, ante, 392).

In *Com. v. Fleming* (Ky.) supra, it appeared that the accused, while still on bail, but before his trial commenced, was duly adjudged a lunatic by a court of competent jurisdiction within the same state, and ordered to be sent to the insane asylum. While on his way there, in the custody of a duly authorized officer, the accused escaped, and was still at large and could not be located at the time of his

trial. It was held that these facts constituted a good defense to an action against the sureties to recover the bail.

In the reported case (*SMITH v. PEOPLE*), the court holds that there was no reason for penalizing the sureties for failure to produce the principal, where it appeared that the principal on the return day was insane and in custody of the sheriff in another state, pending a proceeding in such state to determine her sanity.

In *Reg. v. Blackwell* (Eng.) supra, it appeared that the accused was held for murder, but became so insane during his confinement that he was, by the order of the secretary of state, removed to the insane asylum. It was held that the recognizances would be respited sine die.

So, in *Wood v. Com.* (1896) 17 Ky. L. Rep. 1076, 33 S. W. 729, the state sought to hold the sureties liable on a forfeited bail bond, conditioned on the appearance of the accused to answer

an indictment for murder. The sureties pleaded that the accused, while still on bail and before his trial, was duly adjudged a lunatic in proceedings instituted for that purpose before a police justice, and in consequence thereof had been confined in an insane asylum. It was held that the defense was good.

But in *Reg. v. Cobus* (1845) 1 Cox, C. C. (Eng.) 207, it appeared that the accused was charged with murder and had been committed to the insane asylum before trial on a certificate of two justices of the peace that he was insane. The court held that they would not discharge the recognizances, but would only respite them until the next assizes.

In *Adler v. State* (1880) 35 Ark. 517, 37 Am. Rep. 48, it was held no defense to the sureties on the bond that the accused was confined in an insane asylum in another state, and so was unable to attend his trial, where it appeared that the sureties themselves had assumed the responsibility of sending the accused there, without consulting the court or permitting others to do so. The court said: "The paragraph of the answer in question does not allege that Kahn was sent to the New York asylum for care and medical treatment by any act or authority of the state. He was in the custody of appellants as his bail. The inference from the plea is, that they assumed the responsibility of sending him there, without consulting the court, or permitted others to do so. If by the law and regulations of the asylum he was detained there, as alleged, and out of the process of the court, it was not the fault of the state, but the result of their sending him there, or permitting him to be sent."

In *Com. v. Allen* (1914) 157 Ky. 6, 50 L.R.A. (N.S.) 252, 162 S. W. 116, it was held that where the accused was indicted for larceny and allowed out on bail, his subsequent insanity and disappearance from the state without informing anyone of his intentions was no defense to an action against the sureties to recover the amount of the bail; that to exonerate the sureties

from liability it must appear that the principal was duly adjudged insane. The court said: "Appellee insists that he is released, because the failure of the principal in the bond to appear was caused by the act of God; and in support of this contention he relies upon *Com. v. Fleming*, and *Wood v. Com. (Ky.) supra*. But in both of those cases the defendant had been adjudged a lunatic by a court of competent jurisdiction; and in the *Wood Case* the defendant was actually confined in the asylum at the time his bond was forfeited."

The rule on the subject is thus declared in an obiter statement in *Briggs v. Com.* (1919) — Ky. —, — A.L.R. —, 214 S. W. 975, the actual question before the court being as to the effect of the induction of the principal into the military service. "In this state, where the principal is actually confined in an insane asylum, being thus in the custody of the state, and beyond the power of the sureties to produce him, the latter is discharged. . . . Likewise where the principal has been adjudged to be of unsound mind. . . . But where the principal, though insane, has not been so adjudged, the bail is liable if he permits the accused to escape beyond the jurisdiction; and, the court being in law the custodian of the principal, his surety must produce him either for trial or for surrender, as provided by statute."

In civil cases the rule seems to be that lunacy of the principal does not exonerate the bail. *Bowerbank v. Payne* (1810) 2 Wash. C. C. 464, Fed. Cas. No. 1,727; *Ibbotson v. Galway* (1795) 6 T. R. 133, 101 Eng. Reprint, 474; *Cock v. Bell* (1811) 13 East, 355, 104 Eng. Reprint, 407.

Thus, in *Bowerbank v. Payne* (Fed.) *supra*, where it appeared that the defendant was a lunatic and confined in the hospital, the court refused to enter an exoneration on the bail piece.

So, in *Ibbotson v. Galway* (1795) 6 T. R. 133, 101 Eng. Reprint, 474, it was held that the sureties would not be exonerated though it appeared that, after the commencement of the action, a commission of lunacy had issued

against the principal, under which he had been found a lunatic.

So, in *Cock v. Bell* (1811) 13 East, 355, 104 Eng. Reprint, 407, the court held that even where the principal was duly adjudged insane, the insanity, when not violent or dangerous, did not excuse the sureties or give them additional time within which to render up the principal.

But in *Fuller v. Davis* (1854) 1 Gray (Mass.) 612, it was held a good defense to an action against the surety on a bond for the liberties of the prison limits, that between the date of the execution of the bond and the time at which it was returnable, the principal was furiously mad and had been committed by the judge of probate to the state lunatic asylum. W. J. McC.

**LOUISVILLE TRUST COMPANY, Impleaded, etc., Appt.,**

**v.**

**J. H. MORGAN, Admr., etc., of Charles C. Morgan, Deceased.**

*Kentucky Court of Appeals — May 21, 1918.*

(180 Ky. 609, 203 S. W. 555.)

**Trust — noncompliance with statute — individual liability of trustee.**

1. A trustee managing an estate, who leases a hotel without complying with the statutes and ordinances with respect to fire escapes and extinguishers, is individually liable for injury to a guest because of the absence of those things.

[See note on this question beginning on page 408.]

**Statute — enacting clause — noncompliance with statute.**

2. The use of an enacting clause, "Be it enacted by the legislature of the state," when the Constitution states that the style shall be, "Be it enacted by the general assembly of the commonwealth," does not invalidate the act.

[See 25 R. C. L. 775.]

**Pleading — ordinance — sufficiency.**

3. A petition charging violation of an ordinance passed a certain day, having a specified title and specifying the particulars of violation, is a sufficient pleading of the ordinance.

**Negligence — necessity of proximate cause.**

4. There can be no recovery for injury or loss occasioned by negligence unless the complaining party can show that the negligence charged contributed to or brought about the injury or loss complained of.

[See 22 R. C. L. 113.]

**Evidence — proximate cause — circumstantial.**

5. The causal connection between an act of negligence and an injury need not be shown by direct evidence if there is ample circumstantial evidence to establish it.

**— acts or declaration of injured person.**

6. The causal connection between the act of negligence and the resulting injury need not be shown by acts or declarations of the person injured.

**Proximate cause — neglect to utilize means of escape from injury.**

7. Where one alleged to have been injured by another's negligence had some means of escape from the impending danger, which he could have availed himself of, but failed to do, the negligence of the other party will not generally be regarded as the proximate cause of his injury, in the absence of facts or circumstances showing the connection between the two.

[See 22 R. C. L. 142.]

**Innkeeper — failure to provide egress from building — liability.**

8. An innkeeper who fails to comply with the ordinance requiring the arrangement of doors and passageways to facilitate egress in case of fire cannot avoid liability in case of the death of a guest in a fire, on the ground that failure to provide fire escapes and extinguishers was not the proximate cause of death, because he could not have

reached a fire escape or used the extinguisher had they existed.

[See 4 R. C. L. 405.]

—arrangement of passageways so as to cut off egress in case of fire.

9. Statutory provisions that hotels shall be equipped with fire escapes, and that the way of egress to such fire escapes shall at all times be kept free and clear of any and all obstructions of any and every nature, require the doors and halls in the hotels to be so arranged as to facilitate egress in cases of fire, and an arrangement of halls and

doors which prevents such egress will impose liability on the hotel keeper for death of a guest who is unable to escape from a fire because of an unsafe arrangement of means of exit.

**Evidence — presumption of negligence — guest dying in fire.**

10. There is no presumption of negligence on the part of a guest dying in a fire in a hotel not equipped with fire extinguishers and escapes as required by statute.

[See 8 R. C. L. 859; 20 R. C. L. 195.]

**APPEAL** by the defendant Trust Company from a judgment of the Common Pleas branch of the Circuit Court for Jefferson County, Second Division (Gordon, J.), in favor of plaintiff in an action brought to recover damages for the death of plaintiff's decedent, alleged to have been caused by defendant's negligence in violating a statute and ordinance with respect to fire escapes and extinguishers. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edwards, Ogden, & Peak, Fred Forcht, and Garnett & Van Winkle, for appellant:

The proved facts afford no reasonable basis for the presumption that must be indulged in in order to hold defendant liable.

Sutton v. Louisville & N. R. Co. 168 Ky. 85, 181 S. W. 938; Siemer v. Chesapeake & O. R. Co. 180 Ky. 113, 201 S. W. 469.

The facts proved were not sufficient to show the causal connection between the failure to comply with the law and the injury complained of.

Weeks v. McNulty, 101 Tenn. 495, 43 L.R.A. 187, 70 Am. St. Rep. 693, 48 S. W. 809; Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L.R.A. 194, 25 N. E. 999; Davis v. Ohio Valley Bkg. & T. Co. 127 Ky. 800, 15 L.R.A. (N.S.) 402, 106 S. W. 848; Louisville & N. R. Co. v. Long, 139 Ky. 304, 117 S. W. 359; Conley v. Ennis, 170 Ky. 129, 185 S. W. 501; Ramsey v. Chesapeake & O. R. Co. 177 Ky. 331, 197 S. W. 796; Cincinnati, N. O. & T. P. R. Co. v. Perkins, 177 Ky. 88, 197 S. W. 526; Louisville & N. R. Co. v. Keiffer, 132 Ky. 419, 113 S. W. 483; Illinois C. R. Co. v. Skinner, 177 Ky. 69, 197 S. W. 552; Louisville & N. R. Co. v. Cooper, 164 Ky. 489, L.R.A. 1915E, 336, 175 S. W. 1034; National Casket Co. v. Powar, 137 Ky. 156, 125 S. W. 279; Cumberland Teleph. & Teleg. Co. v. Yeiser, 141 Ky. 18, 31 L.R.A. (N.S.) 1137, 131 S. W. 1049; Poll v. Patterson, 178 Ky. 28, 198 S. W. 567.

The words prescribed by § 62 of the Constitution must be used as the enacting words, and nothing can be a law which is not introduced by these very words, even though other equivalents are at the same time used.

Varney v. Justice, 86 Ky. 596, 6 S. W. 457; Scott v. McCreary, 148 Ky. 794, 147 S. W. 908; Com. v. Illinois C. R. Co. 160 Ky. 751, L.R.A. 1915B, 1060, 170 S. W. 171, Ann. Cas. 1916A, 515; Com. v. Sherman, 85 Ky. 686, 4 S. W. 790; Penitentiary Comrs. v. Spencer, 159 Ky. 255, 166 S. W. 1017.

Messrs. Milby & Henderson, A. Scott Bullitt, and Keith L. Bullitt, for appellee:

The petition states a cause of action, and the Act of March 23, 1914, is valid.

Penitentiary Comrs. v. Spencer, 159 Ky. 267, 166 S. W. 1017; Yeager v. Groves, 78 Ky. 278; Com. v. Sherman, 85 Ky. 690, 4 S. W. 790; State ex rel. Gough v. Burrow, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809; Com. v. Illinois C. R. Co. 160 Ky. 752, L.R.A. 1915B, 1060, 170 S. W. 171, Ann. Cas. 1916A, 515; Ex parte Paducah, 125 Ky. 514, 101 S. W. 898.

The ordinance of the city of Louisville was sufficiently pleaded.

Riggs v. Maltby, 2 Met. (Ky.) 90; Drake v. Semonin, 82 Ky. 293; Petty v. Malier, 14 B. Mon. 246; Duncan v. Brown, 15 B. Mon. 197.

The defendant, Louisville Trust Company, is liable in its individual capacity.

Keating v. Stevenson, 21 App. Div.



604, 47 N. Y. Supp. 848; *O'Malley v. Gerth*, 67 N. J. L. 610, 52 Atl. 563, 12 Am. Neg. Rep. 121; *Norling v. Allee*, 31 N. Y. S. R. 412, 10 N. Y. Supp. 97, 131 N. Y. 622, 30 N. E. 865; *Burling v. Newlands*, 4 Cal. Unrep. 940, 39 Pac. 49; *Parmenter v. Barstow*, 22 R. I. 245, 63 L.R.A. 227, 47 Atl. 365; *Louisville v. O'Donaghue*, 157 Ky. 244, 162 S. W. 1110; *Ireland v. Bowman*, 130 Ky. 153, 113 S. W. 56, 17 Ann. Cas. 786.

There was shown a sufficient causal connection between the death of Morgan and the violation of law by the Trust Company to entitle the jury to pass upon the question.

*Mullins v. Nordlow*, 170 Ky. 169, 185 S. W. 825; *Yall v. Snow*, 201 Mo. 511, 10 L.R.A. (N.S.) 177, 119 Am. St. Rep. 781, 100 S. W. 1, 9 Ann. Cas. 1161; *Arms v. Ayer*, 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; *Rose v. King*, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267.

Messrs. Bruce & Bullitt also for appellee.

Carroll, J., delivered the opinion of the court:

There is located in the city of Louisville on Seventh street a three-story building, known as the Seventh Avenue Hotel, and in December, 1915, during a fire originating in and which partially destroyed this hotel, Charles C. Morgan, William Buckner, and C. F. Buckner, who were guests at the hotel, lost their lives as a result of the fire, and this suit was brought by the administrator of Morgan against the Louisville Trust Company, as trustee, owner, and landlord, and C. P. McClary, as tenant and proprietor of the hotel, to recover damages for his death. It appears that the hotel property was owned by the estate of Emma McBurnie, of which estate the Louisville Trust Company was duly appointed, qualified, and acting trustee, and as trustee it leased the property to McClary, who was operating it at the time of the fire as a hotel.

Originally, the suit was brought against the Louisville Trust Company as trustee of the estate of Emma McBurnie, and in its individual capacity as a corporation, but upon motion to require the ad-

ministrator to elect whether he would prosecute the suit against the trust company in its individual capacity or in its fiduciary capacity, the court ruled that it was not liable in its fiduciary capacity, and thereupon the action proceeded against it in its individual capacity. After the pleadings had been made up there was a trial before a jury and a verdict in favor of the administrator against the Louisville Trust Company for \$6,000, and against McClary for \$1,000, and from the judgment on this verdict the trust company, but not McClary, prosecutes this appeal. At this point it will be convenient to set out such a description of the hotel building as may be necessary for the understanding of the case:

The original building that composed a part of this hotel was made of brick, three stories high, and fronted on Seventh street, but afterwards a frame addition, extending along the south side of the brick building, was constructed, and the two buildings constituted the hotel at the time of the fire. The office was on the first floor of the brick building, and leading from the office to the second floor of the brick building there was a stairway going into a hall in the second floor of the brick building that extended from the front to the rear of the building. Morgan and the Buckners occupied, on the night of the fire, room No. 1 in the frame building, and between this room and the other rooms and the hall in the brick building there was a brick wall extending from Seventh street to the rear of the building. In this wall that separated completely room No. 1 and the other rooms in the frame building from the brick building and the main hallway therein, there were no doors or other openings except one near the front of the building that furnished a means of exit and entrance to and from the main hall of the brick building to the frame building, and in order to go from the office to room No. 1 it was necessary to go up the stairway to the main hall in

the brick building, then down the hall towards Seventh street to the door in the brick wall that opened into the frame building, then across the frame building to a little hall, 3 feet wide, on the south side of the frame building, then down this hall a few feet to a door that opened into another hall, from which hall there was a door opening into room No. 1, and also a door opening into room No. 2; room No. 1 being back of room No. 2. Room No. 1 had in it two doors, one opening into the little hall above mentioned, and the other into room No. 2, and in the rear of room No. 1 there were two windows that looked out on the roof of the one-story dining room and kitchen.

It is difficult to describe, so that it can be understood, the location in the hotel of room No. 1, and the difficulty of getting from the office, or the main hall in the brick building, to or from it, but we have been furnished with plans of the second floor that enable us to confidently say that if the architect of this frame building had endeavored to plan a room that it would be almost impossible to escape from, in case of fire in the frame building, he could not well have succeeded in locating it, and the means of ingress and egress therefrom, better than the plans show he did. If there ever was located in a building intended to be and that was used as a hotel a room that might be described as a fire trap, room No. 1 fills the description. Indeed, a stranger, as it appears Morgan and these Buckners were, would find it difficult in the middle of a quiet day to make his way from room No. 1 to the main hall and the office, to say nothing of the almost insurmountable difficulties that would present themselves if a stranger in the night, and in the midst of a fire, should attempt to find his way to a place of safety.

The fire was discovered about 4 o'clock in the morning by a policeman out on the street, who at once turned in the fire alarm, and within a few minutes thereafter the fire de-

partment reached the place, but before they got there the hotel clerk, the porter, and a man named Ash had gone through the building to awaken the guests, all of whom, it appears, made their escape except these three men, who were, apparently, the only occupants of the second floor of the frame building. Ash did not testify in the case, but Louis Thompson, the porter, was introduced as a witness, and said, in substance, that the fire originated in the one-story kitchen, and soon enveloped the entire rear end of the frame building, thereby prohibiting escape from room No. 1 through the windows that opened out on the kitchen roof. At the time the porter reached the little hall, into which the door of room No. 1 opened, this hall was full of suffocating smoke, and he did not go to the door of room No. 1 to alarm the inmates, because, as he said, this service had been performed by Ash, whom he heard calling out "Fire," and knocking on the door of room No. 1. When the fire department reached the building some of the firemen made their way into this little hall on the second floor through the fumes and smoke, and, breaking open the door of room No. 2, which was used as a storeroom, they found Morgan and the two Buckners, all of them either dead or in a dying condition on the floor of this room, to which it appears they had gotten from room No. 1 through the door in the partition between these two rooms. There was also some evidence to show that the firemen found the door of room No. 1 unlocked, and an intimation that the occupants may have attempted to make their escape through this door, but, being prevented by the smoke in the hall, they turned to the door leading into room No. 2, hoping that they might make their escape in that way; but there were no doors or openings in that room, except the door leading into room No. 1, and the door leading into the little hall, and so they were compelled to re-

main in room No. 2, where they were suffocated by the smoke.

Turning now to other matters, it appears that in 1914 the legislature enacted a law regulating hotels and restaurants, and in this act, which is now § 2095a, subd. 6, of the Kentucky Statutes, it was provided that "in all hotels and restaurants two stories high with ten or more sleeping rooms, where sleeping accommodations are furnished to the public, there shall be provided for each 2,500 feet of area or fractional part thereof an efficient chemical fire extinguisher conveniently located in a public hallway outside of the sleeping rooms, and always in condition for use, or a 1 and  $\frac{1}{4}$  inch inside standpipe with hose connection and a hose of sufficient length always attached in such a hallway, which standpipe shall be supplied by a sufficient pressure of water."

It further provided that all hotels and restaurants more than two stories high should be equipped with an iron stairway or fire escape on the outside of the building, and that "the way of egress to such fire escapes shall at all times be kept free and clear of any and all obstructions of any and every nature." Subdivision 8.

It further appears that in 1909 the city of Louisville enacted an ordinance known as the Building Code, and in § 153 it was provided that every building three or more stories high, used as a hotel, should have at least one fire escape, and as many more as might be necessary for safety; the location of the fire escapes to be subject to the approval of the inspector of buildings; and in § 183 it was further provided that "the doors . . . and passageways . . . shall be arranged . . . to facilitate egress in cases of fire or accident and to afford requisite and proper accommodations for the public protection in such cases."

In accordance with these statutory and ordinance provisions and § 466 of the Kentucky statutes, giving a cause of action for injuries resulting from the violations of a

statute, the trial court instructed the jury that "it was the duty of the Louisville Trust Company, when it permitted the building known as the Seventh Avenue Hotel to be used as a hotel, to cause it to be equipped with an efficient chemical fire extinguisher conveniently located in a public hallway outside of the sleeping rooms, and an inside standpipe, with hose connection attached, in the hallway, and supplied by sufficient pressure of water, and to cause the building to be equipped with an iron stairway on the outside of the building, and to cause the doors, stairways, passageways, and aisles of the building to be arranged for the facilitation of egress from the sleeping rooms and all of them in case of fire."

Coming now to the errors relied on, we find it urged that the judgment should be reversed: (1) Because the Louisville Trust Company was not liable in its individual capacity. (2) The Act of 1914, regulating hotels and restaurants, was void because the enacting clause was fatally defective. (3) The city ordinance was not sufficiently pleaded to be the basis of a cause of action. (4) There was no causal connection between the proved negligence and the death of Morgan, or, in other words, there was a failure to show that the negligence of the trust company, in failing to have the building equipped in the manner provided in the statute and ordinance, was the proximate cause of the death of Morgan. (5) Error in the instructions, and the admission of evidence. (6) Because Morgan was guilty of such contributory negligence as to defeat a recovery.

As before stated, the trust company was sued in its fiduciary and individual character, but upon motion to elect the trial court held that it was liable in its individual, and not in its fiduciary, capacity, and, in so ruling, the trial court was clearly correct. The trust company controlled and managed

Trust—noncompliance with statute—individual liability of trustee.

this hotel property in its fiduciary capacity, and leased it some years before the fire to McClary, or his predecessor, for hotel purposes, and at the time of the fire McClary, as tenant of the trust company, was occupying and using the building with the knowledge and consent of the trust company for hotel purposes. It is further plainly made to appear that the trust company, in 1914, was notified that the hotel building was not supplied with any of the equipment mentioned in the statute or ordinance for the protection of guests, and that it negligently failed to take any steps to provide this equipment or any part thereof. At the time of the fire there was no fire escape on the building, or fire extinguisher, or standpipes in the building; nor was there any door leading from room No. 1 to the main hall in the brick building, and the means of egress and ingress to and from room No. 1 were so arranged as to prevent, rather than facilitate, egress from this room. In short, the trust company, having violated the law in leasing the building for hotel purposes, willfully failed and refused to comply with any of the requirements of the statute or ordinance, or the notice it received from the fire inspector, and to its neglect in these respects the death of Morgan may reasonably, if not certainly, be attributed. Under these circumstances, the general rule is that the trustee is liable in his individual, and not in his official, capacity, and this, for the sound reason that the trustee should not be allowed, by his tort or negligence, to impair the trust fund. 39 Cyc. 302; 11 Am. & Eng. Enc. Law, 942, 2065; Louisville v. O'Donaghue, 157 Ky. 243, 162 S. W. 1110; Helling v. Boss, 121 N. Y. Supp. 1013; O'Malley v. Gerth, 67 N. J. L. 610, 52 Atl. 563, 12 Am. Neg. Rep. 121; Belvin v. French, 84 Va. 81, 3 S. E. 891; Plimpton v. Richards, 59 Me. 115; Elmore v. Elmore, 58 S. C. 289, 51 L.R.A. 261, 36 S. E. 656; Daily v. Daily, 66 Ala. 266; Parker v. Barlow, 93 Ga. 700, 21 S. E. 213;

Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695; Parmenter v. Barstow, 22 R. I. 245, 68 L.R.A. 227, 47 Atl. 365. Nor do we find in the case of Ireland v. Bowman, 130 Ky. 153, 118 S. W. 56, 17 Ann. Cas. 786, anything conflicting with the general principle set forth. In that case the question of the personal liability of the trustee was not put in issue; besides, the testator, who, during his life, had maintained a dam in connection with a mill that obstructed a stream, conferred upon his executors authority to continue the operation of the mill, and pursuant to the authority they were conducting the business as directed by the testator, and when sued to recover damages on account of the obstruction of the stream by the dam, the court said that "if the dam was a public nuisance, J. M. Thomas could not by his will confer upon the defendants authority to maintain it, and the trustees are answerable as trustees for any damage which they may have done by the maintenance of the nuisance. They are sued here as trustees. The trustees and devisees simply stand in the shoes of J. M. Thomas. The suit is against them as the representatives of his estate."

But in this case the trust company voluntarily and without testamentary direction so to do rented this property for hotel purposes when it knew, or should be charged with notice, that it was not equipped in the manner provided by law, and then, when its attention was directed to the lack of equipment, it persisted in continuing to lease the building for hotel purposes without making the improvements, or any of them, that it was required by the statute and ordinance to make. Under these circumstances, it would be, as said in Plimpton v. Richards, 59 Me. 115, monstrous to hold that judgment and execution should go against the estate for a tort which the trustee had no authority under or by virtue of its trusteeship to commit.

The attack on the validity of the legislative Act of 1914 finds its only

support in the fact that the title to that act reads, "Be It Enacted by the Legislature of the State of Kentucky," when the Constitution of the state, in § 62, provides that "the style of the laws of this commonwealth shall be as follows: 'Be it enacted by the general assembly of the commonwealth of Kentucky.'" It will thus be observed that the enacting clause of this 1914 act departed from the constitutional direction in the use of the word "legislature" in place of the words "general assembly," and in the use of the word "state" in place of the word "commonwealth."

In the case of *Com. v. Illinois C. R. Co.* 160 Ky. 745, L.R.A.1915B, 1060, 170 S. W. 171, Ann. Cas. 1916A, 515, the court held that the requirement of the Constitution that the style of laws should be as directed was mandatory, and, therefore, when the enacting clause set forth in the Constitution had been wholly omitted, there was such a departure from the Constitution as to render the proposed legislation void, and we have no disposition to depart from or question the correctness of that decision. We regard it as thoroughly sound and in keeping with numerous decisions of this court holding mandatory constitutional directions. But there is a marked difference between the failure to provide an act with any enacting clause and the failure to provide the act with a perfect enacting clause. The act here in question has an enacting clause, but it is an imperfect one in the respect that it does not contain the precise words that it is specified in the Constitution an enacting clause should contain, but the defect is in form and not in substance, and the departure from the precise phraseology of the Constitution is neither misleading nor deceptive, because the words "legislature" and "general assembly" are commonly used interchangeably, as are the words "commonwealth" and "state," in various sections of the Constitution, in many legislative enactments as well

as in court opinions, and there could be no misunderstanding on the part of any person arising from the use of the words employed in this enacting clause. *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790. Under these circumstances, to hold void, for the reason suggested, an otherwise valid legislative enactment, would be sacrificing substance for mere technical form, and giving to mandatory constitutional directions a narrow, if not an absurd, meaning and effect. No court of last resort has held more consistently and firmly than has our court to the doctrine of mandatory construction of constitutional provisions, but we have as consistently refused to overthrow legislative enactments for frivolous and purely technical reasons.

The ruling in the case of *McCreary v. Speer*, 156 Ky. 783, 162 S. W. 99, is relied on, but plainly it does not support counsel, or conflict with what we have said, because in that case the legislature fixed sixty days as the time the notice of a vote on a proposed amendment should be advertised when the Constitution directed that ninety days' notice should be given, and the court ruled that this was a substantial departure from the constitutional direction, and that it was, admits of no doubt.

The principle that has controlled us in constitutional construction was thus stated by the court in *Penitentiary Comrs. v. Spencer*, 159 Ky. 255, 166 S. W. 1017, where it was said: "At the threshold of what we have to say it might be well to observe that this court has no disposition to give a narrow or technical construction to the section of the Constitution under consideration, or a construction that would make it difficult or impracticable for the legislature to phrase or construct titles or acts that would not be obnoxious to this provision of the Constitution. The section should be liberally construed so as not to hinder or embarrass the legislature in its efforts to enact laws, but at the same time a construction so loose

as to virtually nullify the section, which is mandatory in its terms, should not be adopted. . . . Running through all of them [the cases] will be found the determined purpose of this court to enforce substantial compliance with this section, while giving to it a reasonable and liberal construction."

We are therefore of the opinion that the validity of the act was not affected by the imperfections in the enacting clause.

Statute—enact-  
ing clause—  
noncompliance  
with statute.

As to the objection that the ordinance of the city was not properly pleaded, the petition charged that the hotel was being operated in violation of the ordinance, and specified the particulars in which the violation consisted, and in the reply it was further averred that the directions of the building inspector to the trust company in respect to equipping this building in the manner provided by the ordinance was pursuant to "an ordinance of the city of Louisville, approved August 4, 1909, and entitled an ordinance establishing and providing for a department of building for the city of Louisville, and regulating the construction, equipment, maintenance, alteration, repairing, and removing of buildings and the occupancy, obstruction of streets and alleys in the performance of same, and provided certain penalties for the violation thereof, same to be known and cited as the Building Code." These

Pleading—  
ordinance—  
sufficiency.

averments were, as we think, substantially sufficient to comply with the practice, and especially so in view of § 2775 of the Kentucky statutes, providing that the courts shall take judicial notice of the ordinances of the city.

It is also urgently insisted by counsel that there was a total failure to show that the negligence of the trust company in the respects mentioned was the proximate cause of the death of Morgan, and therefore there could be no recovery against it. If it should be admitted

that there was no causal connection between the proven negligence and the proven injury, then the argument of counsel would be well founded, because it is the settled rule, not only in this state, but in other jurisdictions, that there can be no recovery for injury or loss occasioned by negligence, unless the complaining party can show that the negligence charged contributed to or brought about the injury or loss complained of. Thus it was said in *Conway v. Louisville & N. R. Co.* 135 Ky. 229, 119 S. W. 206, 122 S. W. 136, that "there is also a plain elementary principle of negligence law that to constitute actionable negligence there must be a concurrence of two things: First, negligence; and, second, injury resulting as a proximate cause of it. It matters not how negligent a person may be; his negligence, unless the injuries complained of were the proximate result of it, will not authorize a recovery in damages."

Negligence—  
necessity of  
proximate cause.

To the same effect are *Davis v. Ohio Valley Bkg. & T. Co.* 127 Ky. 800, 15 L.R.A. (N.S.) 402, 106 S. W. 848; *Conley v. Ennis*, 170 Ky. 125, 185 S. W. 501; *Cincinnati, N. O. & T. P. R. Co. v. Perkins*, 177 Ky. 88, 197 S. W. 526. This principle in the law of negligence, although it has not heretofore been applied by this court to a case like this, as this is the first of its kind that has come before us, has often been laid down by other courts as applicable to injuries resulting from the negligent failure to provide buildings with fire escapes and other safety equipment. *Weeks v. McNulty*, 101 Tenn. 495, 43 L.R.A. 185, 70 Am. St. Rep. 698, 48 S. W. 809; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999; *Arnold v. National Starch Co.* 194 N. Y. 42, 21 L.R.A. (N.S.) 178, 86 N. E. 815; *Radley v. Knepfly*, 104 Tex. 180, 135 S. W. 111.

Let us see, now, if there is not evidence, direct or circumstantial, tending to sufficiently show a causal

connection between the negligence of the trust company and the death of Morgan, and in considering this feature of the case it should here be said that it is not essential that the

**Evidence—** causal connection  
**proximate cause** should be shown by  
**—circumstantial.** direct evidence; in-

deed, direct evidence in many cases like this would be difficult, if not impossible, to obtain, although there might be ample circumstantial evidence to sustain the cause of action, and so, when the causal connection can be shown by circumstances, these circumstances will be equally as effective as direct evidence would be.

Nor is it indispensable that the evidence showing the connection between the negligence and the injury should be exhibited

**—acts or dec-** by the acts or declara-  
**laration of in-** rations of the in-  
**jured person.** juryed party, as it may be shown by

facts and circumstances entirely independent of anything that he said or did, as for example by the acts of the party charged with negligence if these acts were of such a nature as that but for them the injury would not have happened.

When, however, the complaining party has some means of escape from an impending

**Proximate cause** danger that he  
**—neglect to** could have availed  
**utilize means of** himself of, or when  
**escape from** the means of avoid-  
**injury.** ing it are open to his choice, the neg-

ligence will not generally be regarded as the proximate cause of the injury in the absence of facts or circumstances showing the connection between the two. To illustrate, if the halls and doors in this building had been so arranged as to facilitate egress in case of fire, and it appeared that Morgan was unable to or failed to make his escape on account of fright, or confusion, or delay on his part, or because he was not awakened in time, or because of the rapidity with which the flames spread, or the smoke filling the halls, then we would have a case where the causal connection between the

negligence and the injury was lacking. But this general rule, so often applied in negligence cases, should have no controlling weight in a case where the injured party, on account of the negligence of the other party, has no means of escape, and there is not open to him any way by which he can avoid the impending danger. If this were not so, then the greater the negligence the less the liability would be, and the rights of the injured party would be diminished in the same ratio that the negligence was increased, when the converse is true, and the greater the negligence the greater the liability.

Coming, now, to apply what we have said to the facts of this case, we think the evidence shows that the failure of Morgan to escape was not caused by fright, or confusion, or delay on his part, or by the rapidity by which the fire spread or the smoke filled the halls, or by the fact that he was not awakened in time, but by the unsafe and dangerous construction of the interior of the hotel that prevented Morgan from reaching a fire escape if one had been provided, and therefore the rule laid down in the case of *Weeks v. McNulty*, 101 Tenn. 495, 43 L.R.A. 185, 70 Am. St. Rep. 693, 48 S. W. 809, and others cited by counsel, have little application to the facts in this case. In the *Weeks Case*, the court based its opinion that there was no causal connection between the negligence and the injury upon facts showing that the injured party could not have reached the fire escapes if they had been erected on account of the rapid spread of the flames, and other acts committed by him in his fright caused by the presence of the fire; and so in the *Radley Case*. But in no one of those cases was it made to appear, as in this one, that the injured party would have been prevented from reaching fire escapes if they had been erected by obstacles and obstructions placed in his way by the negligent and unsafe manner in which the hotel was constructed.

A case supporting the doctrine that obstacles and obstructions arising from defects in construction or maintenance will furnish the connecting link between the negligence and injury is *Arnold v. National Starch Co.* 194 N. Y. 47, 21 L.R.A. (N.S.) 178, 86 N. E. 815. In that case suit was brought by a party injured in a fire to recover damages on account of the failure to have the building equipped with fire escapes, and one of the defenses was that the failure to have the fire escapes was not the proximate cause of the injury. In discussing this point the court said: "But . . . it is further urged in behalf of respondent that its failure to comply with the statute, even if mandatory, may not be made the basis of a recovery for any damages sustained by appellant on the occasion in question, because it was not established that the injuries resulted from such failure. This argument rests on two propositions,—the first one being that other sufficient means of escape were provided, and the second one that appellant's clothes and hair took fire immediately when the conflagration reached the room where she was, and that, therefore, her damages accrued before she could possibly have reached the fire escape, if provided. The evidence, in my judgment, permitted the jury to find against this argument, and both of the propositions involved in it. . . . And, on the other proposition, while the evidence may not establish with mathematical accuracy just when the fire reached appellant's clothes and person with reference to its first appearance on the floor, or with reference to her final escape therefrom many minutes afterwards, still, as I read it, it permitted the jury to find that, as the result of an accumulation of inflammable dust and material, the fire spread very rapidly throughout the floor; that appellant came in contact with it, and was set on fire some time after it first appeared; and that, if there had been statutory and convenient fire escapes

from the windows, she might have escaped thereby before becoming on fire, and, conversely, that the failure to comply with the statute resulted in her detention in the burning room for many unnecessary minutes, and that such detention and inability to escape caused and contributed to her injuries."

Another case is *Kohn v. Clark*, 236 Pa. 18, 84 Atl. 692, Ann. Cas. 1913E, 775. In that case the plaintiff brought suit to recover damages upon the ground that the building in which he was employed was not equipped with fire escapes. The trial court directed a verdict in favor of the defendant upon the ground that it did not appear that the failure to provide the building with fire escapes was the proximate cause of the injury complained of. In considering this feature of the case the court said that the statute provided that "the number and location of such escapes to be governed by the size of the building and the number of its inmates, and arranged in such a way as to make them reasonably accessible, safe, and adequate for the escape of said inmates."

And that "whether the one external fire escape that was here constructed was an adequate provision for escape during a fire, considering the size of the building and the number of inmates, and whether it was so arranged as to make it readily accessible, safe, and adequate for the escape of the inmates, were clearly questions for the jury. We have no disposition to weaken by refinement of construction the obligation which this wise and salutary legislation imposes on the owners of such buildings. The act provides an easy way by which they may relieve themselves of responsibility. . . . So, too, we think the question of proximate cause was for the jury. It may be that one cause of plaintiff's failure to escape unhurt was want of familiarity on the part of the operatives with the means of escape that had been provided; but, suppose the means provided were found to be short



of what the law requires,—a matter which the jury as we have said alone could determine,—in such case to hold want of familiarity to have been the proximate cause is to imply a duty on the part of the employer to make good the owner's default, by instructing and training his employees as to the best way of using inadequate means of escape.

What circumstances, it may be inquired, are in the record conducing to show that the death of Morgan was attributable to the failure to have this building equipped in the manner pointed out in the instructions, and conducing to show that the negligent construction of the building and the location of room No. 1 would have prevented Morgan from reaching the fire escape, if the building had been supplied with one? Morgan and his companions, it should be kept in mind, died before they had an opportunity to make any statement connected with the transaction, and as no one else saw or heard them from the time they entered this room until the firemen discovered them in a dead or dying condition in room No. 2, there is a total failure to show what efforts they made to escape, aside from the circumstance that they broke the door and went from room No. 1 into room No. 2, and the further circumstance that the door of room No. 1, opening into the little hall, was unlocked, but that they did make every possible effort that men, situated as they were, could make to escape, cannot be doubted in the light of universal human experience. But it is said by counsel that the flames and fumes and smoke spread through the hallways so rapidly that these men could not have stayed the fire with a chemical extinguisher or a hose if there had been one in the hall, nor could they have found their way to a fire escape in the front of the building if one had been there located. Possibly, indeed probably, this may be so in view of the unsafe and dangerous construction of the interior of the hotel, when considered in connec-

tion with the location of the room occupied by these men. Proceeding now with this argument a little further, the effect of it is that if guests in a hotel are put in a room from which escape, in case of fire, would be extremely difficult, if not wholly impracticable, there should be no recovery on account of the want of safety equipment, because if the equipment had been supplied, the guests could not avail themselves of its protection. To so construe the statute and ordinance would be to destroy the very purpose of their enactment, and give to them a meaning that would enable owners and lessees of fire traps, like the Seventh Avenue Hotel, to escape liability upon the ground that the rooms and halls were so located and situated as that guests could not avail themselves of fire escapes and other safety equipment if they had been provided. Of course, we cannot agree that the useful provisions of the statute and ordinance should be made worthless by such a construction. They were intended to promote the safety of guests in hotel buildings, and to afford them means of escape from injury and death in cases of fire, which are not infrequent occurrences in hotel buildings, and they should be given such a reasonable construction as would carry out the wholesome intent in their enactment.

Turning again to these legislative enactments, we find it provided that the hotel should be equipped with a fire escape, and that "the way of egress to such fire escapes shall, at all times, be kept free and clear of any and all obstructions of any and every nature."

And further that "the doors and passageways shall be arranged to facilitate egress in cases of fire, and to afford requisite and proper accommodations for the public protection in such cases."

It would be folly to erect fire escapes that were inaccessible, and therefore the plain meaning of these

landowner—  
failure to provide egress from building—  
liability.

provisions is that the doors and halls in the hotel should be so arranged as to facilitate egress in cases of fire, and kept in such condition as to be, at all times and under all circumstances, free from obstructions of every kind, and so the statute and ordinance contemplated not only that the building shall be provided with fire escapes, but that the doors and passageways shall be so arranged as to facilitate egress in cases of fire; and it is equally as

great a violation of these legislative requirements to fail to have the doors and passageways so arranged and kept as it is to fail to have the building supplied with fire escapes.

Now, we think it clear that the doors and hallways leading from room No. 1 were not so located or arranged as to facilitate egress in cases of fire, or to afford requisite and proper accommodations for the protection of guests; on the contrary, they were so located and arranged as to prevent egress in cases of fire, and to deny the requisite protection, and therefore the trust company will not be heard to say that Morgan could not have found his way to a fire escape if one had been put up, or have found his way out of the room to a place of safety if the building had been equipped with water and fire extinguishers.

In such a state of case as is here presented, the presumption is that Morgan could and would have escaped if the doors and halls had been so arranged as to facilitate egress and the building had been equipped with requisite appliances. For example, if there had been a door, as there should have been, opening from room No. 1 into the main hall in the brick building, it is scarcely

to be doubted that Morgan and his companions could easily have made their escape, but as it was, they had no means of escape. Their means of escape had been cut off by the manner in which the hotel was constructed and maintained in violation of the statute and ordinance.

No presumption of negligence or that the failure of Morgan to escape was due to causes within his control is to be indulged in. In cases where death ensues as the result of a negligent act, there

Evidence—  
presumption of  
negligence—  
guest dying in  
fire.

is no presumption of contributory negligence on the part of the deceased. Contributory negligence may, of course, be relied on as a defense, but the burden of showing it is on the defendant. *Anglea v. East Tennessee Teleph. Co.* 142 Ky. 539, 134 S. W. 1119; *Stuart v. Nashville, C. & St. L. R. Co.* 146 Ky. 127, 142 S. W. 232; *Osborne v. Cincinnati, N. O. & T. P. R. Co.* 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1913D, 449. We therefore think that there was sufficient circumstantial evidence to take the case to the jury on the issue that the failure to have the building arranged and equipped in the manner pointed out in the instruction was the proximate cause of the death of Morgan.

Some effort is made to show that Morgan, on the night in question, was intoxicated, but we shall not take up time with this issue put in the case for the purpose of endeavoring to make out a defense of contributory negligence. Sufficient is it to say that there is no material evidence supporting this contention. Nor do we find any substantial error committed by the trial court in the instructions, or in the admission of evidence.

The judgment is affirmed.

Petition for rehearing denied.

## ANNOTATION.

**Individual liability of trustee for injury to person or property of third person due to negligence, or violation of statute or ordinance, in management of trust estate.****I. Testamentary trustees, executors, and administrators:****a. Generally, 408.****b. With respect to condition of premises, 408.****c. With respect to negligence of employees, 411.****d. Violation of statute, 413.****II. Receivers, 414.****III. Other trustees, 415.**

In most of the cases cited in this note in which the personal liability of the trustee, executor, or administrator has been affirmed, the question arose in an action by the person injured; and the decision against the trustee, executor, or administrator, does not necessarily in all cases imply that he will not be entitled to an allowance on his settlement with the estate on account of the liability he has thus incurred. That aspect of the subject seems to have been rarely presented.

**I. Testamentary trustees, executors, and administrators.****a. Generally.**

Subject to the limitations subsequently noted it may be stated generally that trustees under wills, and executors and administrators, are held personally liable for injuries or damages resulting from negligence in administering the property.

**United States.**—*Boston Beef Packing Co. v. Stevens* (1882) 20 Blatchf. 443, 12 Fed. 279.

**Hawaii.**—*Kalua v. Camarinos* (1898) 11 Haw. 557.

**Illinois.**—*Everett v. Foley* (1907) 132 Ill. App. 438.

**Michigan.**—*Bannigan v. Woodbury* (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531.

**Missouri.**—*T. L. Horn Trunk Co. v. Delano* (1912) 162 Mo. App. 402, 142 S. W. 770.

**New York.**—*Donohue v. Kendall* (1884) 18 Jones & S. 386, affirmed in

(1885) 98 N. Y. 635; *Gillick v. Jackson* (1903) 40 Misc. 627, 83 N. Y. Supp. 29; *Keating v. Stevenson* (1897) 21 App. Div. 604, 47 N. Y. Supp. 847; *Gatti-McQuade Co. v. Flynn* (1913) 79 Misc. 430, 140 N. Y. Supp. 135; *McCue v. Finck* (1897) 20 Misc. 506, 46 N. Y. Supp. 242.

**Ohio.**—*Deschler v. Franklin* (1900) 11 Ohio C. D. 188.

**Rhode Island.**—*Parmenter v. Barslow* (1900) 22 R. I. 245, 63 L.R.A. 227, 47 Atl. 365.

**Virginia.**—*Belvin v. French* (1887) 84 Va. 81, 3 S. E. 891.

**Canada.**—*Ferrier v. Trépannier* (1894) 24 Can. S. C. 86.

**b. With respect to condition of premises.**

Where trustees under wills or executors and administrators by virtue of the trust have possession and control of property, they are generally held liable for injuries or damage resulting from their negligence in failing to keep the property in repair.

**United States.**—*Boston Packing Beef Co. v. Stevens* (1882) 20 Blatchf. 443, 12 Fed. 279.

**California.**—*Eustace v. Jahns* (1869) 38 Cal. 3.

**Illinois.**—*Everett v. Foley* (1907) 132 Ill. App. 438.

**Michigan.**—*Bannigan v. Woodbury* (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531.

**Missouri.**—*T. L. Horn Trunk Co. v. Delano* (1912) 162 Mo. App. 402, 142 S. W. 770.

**New York.**—*Donohue v. Kendall* (1884) 18 Jones & S. 386, affirmed in (1885) 98 N. Y. 635; *Helling v. Boss* (1910) 121 N. Y. Supp. 1013; *Gillick v. Jackson* (1903) 40 Misc. 627, 83 N. Y. Supp. 29; *Keating v. Stevenson* (1897) 21 App. Div. 604, 47 N. Y. Supp. 847.

**Virginia.**—*Belvin v. French* (1887) 84 Va. 81, 3 S. E. 891.

**Canada.**—*Ferrier v. Trépannier* (1894) 24 Can. S. C. 86.

In *Keating v. Stevenson* (1897) 21 App. Div. 604, 47 N. Y. Supp. 847, it was held that trustees under a will who became legal owners of realty, and were chargeable with the duty of repairing the premises, were personally liable for negligently failing to make repairs by reason of which another sustained an injury. The reasoning of the court in the case was that the trustees were the legal owners of the property, and that, having the entire ownership of the estate, the duty rested upon them to use reasonable care to keep it reasonably safe for those having occasion to use it. The court said: "The failure to repair being a neglect of the personal duty imposed upon the defendants by virtue of their legal ownership, they, in the first instance, must be held personally liable for it. There is no reason apparent upon this record why it could be held that the estate which they represented in a certain sense should be charged with any of the damages resulting from this act, which was imposed upon them personally. If it should turn out in the settlement of the estate, for any reason, that it was the estate, and not the defendants, which was properly chargeable with the payment of any damages for such neglect, undoubtedly the defendants would be authorized to retain the amount of such damages from the rents. But unless something of that kind was made to appear, the liability, being personal to the defendants, could not be made a charge upon the estate. The case is not like any of those in which it has been permitted to plaintiffs to maintain actions for negligence against receivers who were in possession of the property under the orders of the court. Such receivers are in no sense the owners of the property and they have not the legal title to it. The property is in the court for its management and administration, and the receiver is an officer of the court, being under its orders and carrying out its directions. The servants whom he is obliged to employ are employed by him solely in his official capacity and by virtue of his official duty, and they do not in any way rep-

resent him personally. For that reason it has been held in many cases that, in the absence of any personal neglect of the receiver, he is not liable personally for the neglect of his servants. *Murphy v. Holbrook* (1870) 20 Ohio St. 187, 5 Am. Rep. 633; *Cardot v. Barney* (1875) 63 N. Y. 281, 20 Am. Rep. 533; *Barton v. Barbour* (1881) 104 U. S. 128, 26 L. ed. 674. It is different in a case where the receiver is guilty of personal negligence, or where he has entered into some contract relation with the particular piece of property which was the subject of the negligence, so that he is personally responsible for its proper condition. In such a case he would be held liable for any neglect in the management of the property upon the sole ground of his legal relation to it as owner. *Kain v. Smith* (1880) 80 N. Y. 458. The duty of the care of the property seems to be one that is inherent in the ownership of it, and the distinction seems to be that the person who is legally the owner of the property has imposed upon him, by reason of that ownership, the duty of keeping it in proper repair, and that for a violation of that duty he is personally liable; whereas, if he has no title to the property, but simply performs certain duties which are imposed upon him with reference to it, his liability is not personal, but grows out of his official situation. It is to be noticed in this form of action the defendants would be liable to be arrested in a proper case, and if judgment went against them, a body execution might be issued against them. All of that shows that the violation of the duty insisted upon is one which is personal to them, and not official. The case of an action against an assignee in bankruptcy or a receiver or other trustee to foreclose his interest in the property is not analogous, because in that case the thing attacked is only his property right which is sought to be taken away, and for that reason it is necessary that he should be made a party in his official capacity. But in such a case as this no remedy is sought against the property. It is against the individual for his

personal neglect. The rule is similar to that one which is applied in actions against executors for acts done by them in regard to the management of the property which they held in their official capacity. They have the legal title to this property, and, having that, they are personally responsible, by reason of the legal title, to third parties dealing with them with relation to the property, precisely as though no one else had any beneficial interest in it."

And trustees having possession of real property under a devise in a will are liable in their individual capacity for an injury to one caused by a negligent failure to repair a coalhole in the sidewalk in front of the premises. *O'Malley v. Gerth* (1902) 67 N. J. L. 610, 52 Atl. 563, 12 Am. Neg. Rep. 121.

And in *Everett v. Foley* (1907) 132 Ill. App. 438, where by a will trustees were given exclusive control of property and directed to keep and perfect the estate, and provided with means to keep up repairs, they were held personally liable to one who sustained an injury by being struck by a blind which was negligently allowed to remain in an unsafe condition. The court said: "It is next insisted that there was no right of action against appellants, first, because they were only possessed as trustees under the will of James Campbell; and second, because they had leased the premises to the Wonderland Company. The will gives the premises to appellants as trustees, giving them exclusive control over the property until ten years after the death of testator's widow, and gives them authority to mortgage it to the extent of \$50,000, to improve and repair it, and to preserve it from waste. It directs them to take possession of, keep, and protect the estate, and provides the means to keep up repairs, if the income should not be sufficient. Appellants accepted the trust by qualifying under the will and taking charge of the property. All persons who had occasion to deal with this property must do so through the appellants. All the duties which devolve upon the owners of property were the duties of appellants, and if,

through their negligence, any person should be injured, they are personally liable for the damages that result therefrom."

And in *Belvin v. French* (1887) 84 Va. 81, 3 S. E. 891, executors to whom real estate was devised in trust to hold and keep in repair were held personally liable for an injury sustained to one by their negligence in failing to keep an area light in the sidewalk in repair. The court said: "The jury also found that the negligence of the defendants was the proximate cause of the plaintiff's injuries, which undoubtedly renders them personally responsible. And why, we ask, should they not be liable for their own neglect of a plain official duty? Grant, as we do, that the principle invoked in their behalf is a correct one, namely, that fiduciaries ought not to be dealt with by such harshness as to deter a prudent man from accepting the trust, yet, on the other hand, it is equally true that a fiduciary ought not to be permitted to manage the trust estate in his hands in such a manner as to injure others with impunity, so far as any personal liability on his part is concerned, and to hold that the defendants are not personally liable in the present case would be as inconsistent with natural justice as with the well-settled principles of the common law."

And executors having control and possession of a building are personally liable for the death of one killed by a window which fell upon him because of a failure to keep the building in repair. *Ferrier v. Trépannier* (1894) 24 Can. S. C. 86. The court stated that there could be but one answer as to the personal liability of the executors, that they were the parties primarily liable and the guilty parties in the first degree, that it was their personal fault and negligence which was the immediate cause of the accident, that they were at the time in actual possession of the building, which was under their exclusive control and superintendence, and that, whether as trustees or executors or in any other fiduciary capacity, it did not in any way lessen their personal

liability for tortious negligence whereby a third party suffered damage.

And in *Boston Beef Packing Co. v. Stevens* (1882) 20 Blatchf. 443, 12 Fed. 279, executors were held liable personally for damage sustained by an adjoining owner by the fall of a building belonging to the estate which they had leased as a warehouse, and which was unsafe and unfit for use as a warehouse at the time it was let.

And executors in control and possession of a building are personally liable to one rightfully therein who is injured by neglect to keep the premises in repair. *Donohue v. Kendall* (1884) 18 Jones & S. (N. Y.) 386, affirmed in (1885) 98 N. Y. 685. The court stated that it was supposed that the executors had no power to repair, and that it was conceivable that they had not such power at the expense of the estate, but that the presumption was otherwise; that however this might be, they had the power to make repairs at their own expense, and were not compelled to go into control of the property if they did not see fit to do so.

And in *Bannigan v. Woodbury* (1909) 158 Mich. 206, 133 Am. St. Rep. 371, 122 N. W. 531, it was held that an administrator, having control and possession of a building belonging to the intestate, is chargeable with the duty of keeping the building in a safe condition, and is personally liable for his negligence in failing to repair the building by reason of which a pedestrian is injured by a window falling from the building.

And in *T. L. Horn Trunk Co. v. Delano* (1912) 162 Mo. App. 402, 142 S. W. 770, it was held that an administratrix was individually liable for negligence in failing to keep a tank on leased property of the estate in proper repair, by reason of which a tenant suffered loss of his goods.

It has been held, however, where a will vested a title to premises in executors, but contained nothing in any way bearing upon their duties in respect to the house, and gave a right to occupy it to the testator's widow, that the executors were not liable for an injury sustained through the un-

safe and defective condition of the house, although they had knowledge thereof. *Butler v. Townsend* (1895) 84 Hun, 100, 31 N. Y. Supp. 1094. The court stated that the executors were not entitled to the possession, use, or management of the house, and that as the will made no provision for repairs and conferred no authority upon them to devote any part of the estate to that purpose, they failed to see upon what theory the executors could be held liable, and stated further that the duty of keeping premises in a safe condition pertained to occupancy, and not to ownership, and that in the case at bar the use and occupation of the property were given to the widow, and that the executors never had been in control or management thereof.

And it has been held that an executor who takes no estate in the lands of the testator, but has merely a naked power to receive the rents, is not personally liable to a tenant who sustains damage through the defective construction and maintenance of a building. *Robbins v. Mount* (1867) 4 Robt. (N. Y.) 553.

See also *Gillick v. Jackson*, *infra*, I. d.

#### *c. With respect to negligence of employees.*

In some cases trustees under wills and executors and administrators have been held personally liable for injuries or damage sustained because of the negligence of persons employed in administering the trust. *Kalua v. Camarinos* (1898) 11 Haw. 557; *McCue v. Finck* (1897) 20 Misc. 506, 46 N. Y. Supp. 242; *Gatti-McQuade Co. v. Flynn* (1913) 79 Misc. 430, 140 N. Y. Supp. 185; *Deschler v. Franklin* (1900) 11 Ohio C. D. 188; *Parmenter v. Barstow* (1900) 22 R. I. 245, 63 L.R.A. 227, 47 Atl. 365.

In *Kalua v. Camarinos* (1898) 11 Haw. 557, an administrator who was carrying on the intestate's business was held personally liable for injuries suffered in a collision with a wagon, which was caused by the negligence of one employed by him as a driver, who at the time of the injury was acting within the scope of his employment. The court in this case said: "The de-

defendant's counsel in their brief assert that defendant was not carrying on the business as a trader, but merely to preserve its good will until such time as it could be sold, under the direction and by the authority of the probate court. We do not find this position supported by the pleadings or the proofs adduced below. This is a complete answer to the contention of defendant's counsel that an administrator is only responsible for damages or injuries caused either directly by himself or indirectly by his negligence. Defendant was not winding up his intestate's estate. Kondo was employed by the defendant, and the alleged trespass was committed by Kondo while driving the wagon in the scope of his employment in the fruit store business. Defendant was his master. According to well-settled law, not disputed by defendant, the master is responsible to third persons for injuries through the negligence of his servant while acting within the scope of his employment. This is so because every master is bound to employ servants that are both skilful and careful. So far as third persons are concerned Kondo was the servant of defendant. . . . In this case the law casts upon the defendant the same responsibility to third parties for the acts of his servants as is cast upon all masters or employers of servants. Whether the master employs them in the business of his decedent or his own business it makes no difference."

And in *McCue v. Finck* (1897) 20 Misc. 506, 46 N. Y. Supp. 242, it was held that an executor carrying on a business under a will was liable individually, and not in his representative capacity, for a negligent injury sustained by a truck driven by an employee.

And in *Gatti-McQuade Co. v. Flynn* (1913) 79 Misc. 430, 140 N. Y. Supp. 135, it was held in an action to recover for an injury sustained through the negligence of a driver employed by an administratrix, that an administratrix committing a tort, either personally or by an agent, is liable therefor in her personal capacity, and not in her representative capacity, and the com-

plaint in this case was construed to state a good cause of action against the administratrix in her individual capacity.

And it has been stated that one holding property as trustee under a will is personally liable for an injury sustained by another by being struck in the eye by chips of stone which were negligently caused to fly into the plaintiff's face by persons employed on the property while she was passing on the sidewalk. *Parmenter v. Barstow* (1900) 22 R. I. 245, 63 L.R.A. 227, 47 Atl. 365. The action in this case, however, was against the trustee in his official capacity.

And in *Deschler v. Franklin* (1900) 11 Ohio C. D. 188, which was an action against executors to recover for an injury claimed to have been sustained through the negligent operation of an elevator in a building belonging to the estate, the court refused to hold the executors liable in their representative capacity, and stated that if any cause arises through the negligence of an executor in managing an estate, the action must be against him personally, and not against him in his representative capacity.

In some cases, however, the courts have refused to hold trustees under wills, or personal representatives, liable for injuries or damage resulting from the negligence of employees.

Thus, in *Fetting v. Winch* (1909) 54 Or. 600, 38 L.R.A. (N.S.) 379, 104 Pac. 722, 21 Ann. Cas. 352, where it was sought to hold an executor liable for the death of an assistant janitor in a building belonging to the estate, which was alleged to have resulted from the negligence of the head janitor in placing an inexperienced person in charge of an elevator, it was held that no recovery could be had. The court stated that if liable at all, as the act was beyond the scope of his official capacity, the executor must be sued as an individual; that a judgment against him personally for damages sustained on account of a personal injury must rest either on the principle of *respondet superior*, or on the breach of some duty amounting to actionable negligence, or on his independent tort, and

that the maxim of respondeat superior is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him must answer for an injury which a third person may sustain from it, and said that there was no testimony to show that the executor in the case at bar was managing the building for his own profit, or that he derived or expected to derive any advantage or profit from the employment of the head janitor, and that in the absence of such evidence it could not be legally said that he was individually liable for the janitor's act, and that the evidence did not show any act of negligence on the part of the executor that would render him liable for damages caused by the carelessness of the head janitor, whom the complaint alleged was competent. The court in this case recognized the rule that when the law imposes a duty on an executor or administrator and he neglects to discharge the obligation thus enjoined, whereby another sustains an injury, the personal representative is liable therefor.

In *Benett v. Wyndham* (1862) 4 De G. F. & J. 259, 45 Eng. Reprint, 1183, a trustee under a will was held entitled to recover from the estate the amount paid by him on a judgment recovered in an action in which it appeared that the trustee directed the bailiff to have certain trees cut, and that the latter ordered woodcutters, usually employed on the estate, to do the work, and that in the process thereof a tree fell and injured the plaintiff, who was passing. The court said: "The trustee in this case appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act the directing which to be done was within the due discharge of his duty. The agent makes a mistake the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought, as between the trustee and the estate, to be borne by the estate."

And in *Re Raybould* [1900] 1 Ch. (Eng.) 199, 69 L. J. Ch. N. S. 248, 48 Week. Rep. 301, 82 L. T. N. S. 46, where a trustee and executor carried on a

colliery, it was held that an adjoining landowner whose land had been let down without recklessness or improper working of the mine was entitled to recover directly from the testator's estate for the damage suffered. The court relied upon the decision in *Bennett v. Wyndham* (Eng.) supra, holding that there was no personal liability on the part of the trustee in the absence of negligence on his part.

And there is an obiter statement in *Kellogg v. Church Charity Foundation* (1908) 128 App. Div. 214, 112 N. Y. Supp. 566, which was an action of negligence against a charitable corporation, that a trustee under a will, or a like trustee, is not individually liable for the negligence of servants employed in the administration of the trust unless he was himself negligent.

#### *d. Violation of statute.*

It will be observed that in the reported case (*LOUISVILLE TRUST CO. v. MORGAN*, ante, 396) a trustee managing an estate under a trust in a will, who leased a hotel belonging to the estate without complying with the statutes and ordinances with respect to fire escapes and extinguishers, was held individually liable for injuries to guests because of the absence of such equipment.

And it has been held that testamentary trustees of a tenement house under a trust imposing the duty of keeping the property in repair upon them were personally liable for an injury sustained by a tenant because of the trustees' failure to properly light a hallway as required by a statute. *Gillick v. Jackson* (1903) 40 Misc. 627, 83 N. Y. Supp. 29. The court stated that so far as the tenant was concerned, the trustees were the owners of the building; that trustees of an express trust in real estate, where the will creating the trust imposes upon the trustees the duty of managing, leasing, and keeping in repair the property, are, by virtue of the legal title which is vested in them, liable personally, at least in the first instance, and not in their representative capacity, for failure to perform their duty.



And in *McAdams v. Starr* (1901) 74 Conn. 85, 92 Am. St. Rep. 197, 49 Atl. 897, an administrator was held the "owner," within the meaning of § 376, Gen. Stat., of a dog which had belonged to the intestate, and it was accordingly held that judgment might be rendered personally against the administrator for an injury resulting from a bite by the dog. The exact terms of the statute do not appear, nor does there appear to have been any personal negligence by the administrator.

## II. Receivers.

For the distinction between testamentary trustees and receivers as bearing upon their personal liability, see *Keating v. Stevenson*, cited and quoted *supra*, I. b.

As to statute creating presumption of negligence against railroad company as applicable to receiver operating road, see annotation to *Lamb v. Floyd*, 1 A.L.R. 1180.

Cases involving the liability of receivers are not included unless it is clear that the court was considering their individual or personal liability.

In the absence of personal negligence a receiver is held not individually liable for the negligence of employees causing injury to a third person, since he is held master only in his official capacity.

*United States*.—*Davis v. Duncan* (1884) 19 Fed. 477.

*Alabama*.—*Ferrell v. Ross* (1917) — Ala. —, 75 So. 466; *McGhee v. Willis* (1901) 134 Ala. 281, 32 So. 301.

*Illinois*.—*Robinson v. Kirkwood* (1900) 91 Ill. App. 54; *McNulta v. Ensich* (1890) 134 Ill. 46, 24 N. E. 631, 2 Am. Neg. Cas. 675; *McNulta v. Lockridge* (1891) 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452, affirmed in (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; *Bartlett v. Cicero Light, Heat & P. Co.* (1898) 177 Ill. 68, 42 L.R.A. 715, 52 N. E. 339.

*Indiana*.—*Vandalia R. Co. v. Keys* (1910) 46 Ind. App. 358, 91 N. E. 173.

*Iowa*.—*Sloan v. Central Iowa R. Co.* 62 Iowa, 738, 16 N. W. 331.

*Kansas*.—*Erb v. Popritz* (1898) 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871.

*Minnesota*.—*Erskine v. McIlrath* (1895) 60 Minn. 485, 62 N. W. 1130.

*Missouri*.—*Averill v. McCook* (1900) 86 Mo. App. 346.

*New York*.—*Cardot v. Barney* (1875) 63 N. Y. 281, 20 Am. Rep. 533; *Camp v. Barney* (1875) 4 Hun, 375.

In *Davis v. Duncan* (1884) 19 Fed. 477, in considering the right to recover for injuries sustained through the negligence of employees of a railroad after a receiver had surrendered and turned the road back, the court said: "The railroad company took the property cum onere as to these claims. A receiver, as such, upon principle and authority is not personally liable for the torts of his employees. Were he so liable few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver for the wrongs of his employees is in the nature of a proceeding in rem and renders the property in his hands, as such, liable for compensation for such injuries." To the same effect is *Gray v. Grand Trunk Western R. Co.* (1907) 84 C. C. A. 392, 156 Fed. 736.

And in *Erskine v. McIlrath* (1895) 60 Minn. 485, 62 N. W. 1130, it was held that the liability of a receiver of a railroad for a personal injury caused by the negligence of an employee arises only by reason of the doctrine of respondeat superior, and that in his individual capacity the receiver is not the master of the servant causing the injury, but is such only in his capacity of receiver, and that he is not personally liable for the negligence of servants employed by him to operate the railroad under the orders of the court.

And in *Cardot v. Barney* (1875) 63 N. Y. 281, 20 Am. Rep. 533, a receiver in bankruptcy of a railroad company was held not individually liable for injuries resulting from the negligence of his employees in the absence of any negligence on his own part; the court stated that there was good reason that one employing another in his business should be responsible for his acts, but that it knew of no principle upon which a receiver, or other officer of a court, merely obeying its orders, hav-

ing no interest in the prosecution of the work, and deriving no profit from it, should be answerable except for his own acts and neglects.

And in *McNulta v. Ensich* (1890) 134 Ill. 46, 24 N. E. 631, 2 Am. Neg. Cas. 675, a judgment against a receiver of a railway rendered against him personally in an action to recover for personal injuries sustained through the negligence of employees engaged in the operation of the railroad was reversed, the court stating that no judgment could be rendered against the receiver individually, but that it must be entered against him as receiver and be payable out of the funds held by him in that capacity in the due course of the administration of his receivership.

And in *Averill v. McCook* (1900) 86 Mo. App. 346, it was held error in an action against receivers of a railroad for killing a cow to enter a personal judgment against them, on the ground that the receivers were liable only in their official capacity, and that the judgment rendered would necessarily be paid from the funds in their hands as receivers.

And in *Camp v. Barney* (1875) 4 Hun (N. Y.) 375, a receiver operating a railroad was held not personally liable for the neglect or misconduct of those employed by him, and the record and proceedings in an action against him individually to recover for personal injuries sustained by a passenger were amended so as to make the suit and judgment against him as receiver, and so payable out of the funds in his hands, instead of by him personally. The court stated that the receiver was personally liable, however, for his own neglect or misconduct.

And in *Robinson v. Kirkwood* (1900) 91 Ill. App. 54, a personal judgment against receivers was modified to stand against them officially. The court said: "It is true no personal judgment could be rendered against the receivers, nor could execution be awarded against them; the judgment should be entered against them as receivers and be made payable in due course of administration of their trust as such receivers."

In *Erwin v. Davenport* (1871) 9 Heisk. (Tenn.) 44, which was an action against the receiver of a railroad to recover for the death of an employee, an averment in the complaint that the receiver had knowledge of a material defect in the equipment of the train on which the employee was injured, and that with this knowledge he was running the train when the accident occurred, was held to state a good cause of action, the court saying that the agent is personally responsible whether he did the wrong intentionally or ignorantly by the authority of his principal, for the latter could not confer upon him any authority to commit a wrong upon the rights of another. It was held, however, that the receiver's responsibility did not extend to nonfeasance or mere negligence, and certain declarations which merely alleged negligence were held not to state good causes of action.

In *Vasele v. Grant Street Electric R. Co.* (1897) 16 Wash. 602, 48 Pac. 249, an action to recover for personal injuries against a corporation and its receiver was held to fail as to the latter where the title of the cause merely designated him as "receiver," without the word "as" preceding, and the complaint, although it stated that he was a duly appointed and qualified receiver of the road, did not aver that he had charge and control as the receiver of the company, and it was distinctly averred that the motorman whose alleged negligence caused the injury was the agent of the defendant company.

In *Kain v. Smith* (1880) 80 N. Y. 458, a receiver of a railway appointed in one state, in possession of another road in New York under a lease, was held liable in an action against him individually for injuries to an employee from defective apparatus, the court holding that he could not shield himself from liability on the ground that he was a receiver.

And under similar facts a like conclusion was reached in *Lyman v. Central Vermont R. Co.* (1886) 59 Vt. 167, 10 Atl. 346.

### III. Other trustees.

In *Ballou v. Farnum* (1864) 9 Allen

(Mass.) 47, trustees of a railroad named in a mortgage, who were operating it for the benefit of the bondholders and who had executed a lease of a part of the road to other parties, but continued to operate it for the lessees, and to select and discharge all employees, and exercise all the powers usually exercised by railroad corporations over their own roads, were held to stand in the relation of master and servant with the employees and to be personally liable for an injury to a person which was caused through the negligence of an employee in the performance of his duties.

And in *Fallardeal v. Boston Art Students' Asso.* (1903) 182 Mass. 405, 65 N. E. 797, where it was sought to hold a corporation liable for the negligence of a person employed as janitor by trustees in the control and management of a building under an assignment by the corporation of a lease of the building held by the corporation, the court refused to hold the corporation liable, and stated that according to the terms of the assignment no one had any right to interfere with the control and management of the premises by the trustees, that they entered into possession under the assignment and continued their control over the premises until after the accident, and that the janitor was their servant, and that if there was any liability the trustees, and not the corporation, were liable.

And it has been held that one in control of a tenement house by virtue of a trust, who causes the stairways to be improperly and negligently repaired, and allows that condition to go into further defect whereby a tenant is injured, is personally liable for the injury. *Trani v. Gerard* (1918) 181 App. Div. 387, 168 N. Y. Supp. 808. The court stated that although the defendant's opportunity to do the things complained of came from his trusteeship, yet his negligent doing was an individual misfeasance. It refrained from passing upon his liability for a nonfeasance, stating that that question was not before them. It does not expressly appear in this case how the trust was created.

And in *Norling v. Allee* (1890) 31 N. Y. S. R. 412, 10 N. Y. Supp. 97, where one of three trustees was sued in his representative capacity to recover for an injury sustained through the blowing down of a fence, it was held that the trustee was not liable for negligence, and that the remedy, if any, was against the trustees personally. It does not appear in this case in what particular way the trust was created.

Trustees empowered by a deed of trust to deal with property and conduct a business as if they were the absolute owners thereof have been held not liable for an injury sustained through the negligence of a servant employed by them in the conduct of the business, where there was a provision in the deed of trust that no responsibility whatever should result to the trustees by reason of misconduct of agents or employees, and that there should be no liability or responsibility for negligence upon the part of the trustees, the intention clearly being that the risk of loss because of negligence on the part of the employees should be assumed and borne by the estate. *Prinz v. Lucas* (1905) 210 Pa. 620, 60 Atl. 309, 18 Am. Neg. Rep. 245.

In *Fisheries Co. v. McCoy* (1918) — Tex. Civ. App. —, 202 S. W. 343, it was held that trustees of a joint stock association were personally liable for negligence resulting in injury to an employee, and that they could not make a valid contract with an employee relieving them from such liability.

In *Baker v. Tibbetts* (1895) 162 Mass. 468, 89 N. E. 350, which was an action in which it was sought to charge a trustee for the benefit of creditors for a personal injury, on the ground that his agent, acting within the scope of his employment, invited the plaintiff into a place of hidden danger, by reason of which he was injured, the court stated that the fact that the defendant held the title to the property as trustee would not reduce him to the position of an intermediate agent between the real principal and the person actually causing the damage. J. T. W.

STATE OF NEW MEXICO  
v.

OTIS FOSTER, Appt.

*New Mexico Supreme Court — August 4, 1919.*

(— N. M. —, 183 Pac. 397.)

**Evidence — confession — person in authority.**

1. A cattle inspector and the owner of the cattle appellant was accused of stealing held to be "persons in authority," within the rule excluding a confession of a defendant in a criminal case, where the confession is induced by promises of immunity made by persons in authority.

[See note on this question beginning on page 419.]

**—sufficiency.**

2. The evidence in this case reviewed, and held, that the confes-

sion made by appellant was involuntary.

[See 1 R. C. L. 553 et seq.]

Headnotes by MECHEM, Dist. J.

**APPEAL** by defendant from a judgment of the District Court for Chaves County (McClure, J.) convicting him of larceny of cattle. *Reversed.*

The facts are stated in the opinion of the court.

Mr. L. O. Fullen, for appellant:

The alleged confession of the defendant was not a free and voluntary confession; it was obtained through the offer of "hope and reward."

State v. Ascarate, 21 N. M. 201, 153 Pac. 1036; 1 Wigmore, Ev. 815; 1 Elliott, Ev. 271; Jones, Ev. 2d ed. 235; Underhill, Crim. Ev. 160; Hughes, Ev. 7; Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; State v. Armijo, 18 N. M. 262, 135 Pac. 555; Bishop, New Crim. Proc. § 1220; United States v. Phumpreys, 1 Cranch, C. C. 74, Fed. Cas. No. 16,097; People v. Gonzales, 136 Cal. 666, 69 Pac. 487, 12 Am. Crim. Rep. 97; People v. Phillips, 42 N. Y. 200; Rains v. State, 33 Tex. Crim. Rep. 294, 26 S. W. 398; State v. Potter, 18 Conn. 166; Taylor v. Com. 8 Ky. Ops. 401; State v. Jacques, 30 R. I. 578, 76 Atl. 652; May v. State, 38 Neb. 211, 56 N. W. 804.

To sustain a conviction for a crime the corpus delicti must be proven beyond a reasonable doubt.

2 Bishop, Crim. Proc. 739; 8 Enc. Ev. 86; 1 Whart. Crim. Law, § 745; 3 Greenl. Ev. § 30; 1 McClain, Crim. Law, § 512; Territory v. Leslie, 15 N. M. 246, 106 Pac. 378; Chezem v. State, 56 Neb. 496, 76 N. W. 1056; State v. Westcott, 130 Iowa, 1, 104 N. W. 341.

Ownership of the animals must be proven beyond a reasonable doubt.

7 A.L.R.—27.

Territory v. Smith, 12 N. M. 229, 78 Pac. 42; Territory v. Ortiz, 8 N. M. 220, 42 Pac. 61; Chaves v. Territory, 6 N. M. 455, 30 Pac. 903; 1 Bishop, New Crim. Proc. § 488, ¶ 3; 3 Greenl. Ev. § 154; 12 Am. & Eng. Enc. Law, 800.

Ownership must be proved by sufficient evidence, or the conviction cannot be sustained.

McNight v. State, — Tex. Crim. Rep. —, 58 S. W. 95; Kenney v. State, — Tex. App. —, 19 S. W. 681; Thompson v. State, 23 Tex. App. 356, 5 S. W. 114; Atkins v. State, 44 Tex. Crim. Rep. 291, 70 S. W. 744; 12 Cyc. 382; State v. Griggs, 20 N. M. 466, 150 Pac. 921.

Mr. Carl H. Gilbert, Special Assistant Attorney General, for the State.

Mechem, District Judge, delivered the opinion of the court:

The appellant appeals from a conviction of larceny of cattle. His confession of the crime to Lee J. Richards, a cattle and hide inspector, and to W. A. Hamilton, the owner of the stolen cattle, was introduced by the state over appellant's objection that the same was involuntary, having been induced by promises of immunity made by both Richards and Hamilton. The court was of the opinion that there was a conflict in the evidence whether the confession was voluntary or involun-

tary, and let it go to the jury, under an instruction that if they believed that the confession was voluntary they could consider it in arriving at their verdict, but if they believed that it was involuntary they should not so consider it. This action of the court is assigned as error.

The undisputed facts in the case are: That the appellant, learning that he was under suspicion, went into hiding. That his mother went to a neighbor, H. C. Hammond, and asked him to see what could be done in appellant's behalf. Hammond called on Richards and asked him to see Hamilton, and see if Hamilton would be inclined to deal leniently with the appellant, if the appellant would come in and tell all he knew about the case. Richards told Hammond that he (Richards) would see Hamilton, and if Hamilton would help the appellant, Richards would bring Hamilton to Hammond's house at a named hour, and that if they came Hammond could inform appellant that Hamilton would help the appellant, if he would come to Hammond's house and meet them, and tell them all he knew about the case. Hammond so informed the appellant, and when, according to the arrangement, Richards and Hamilton came to his house, Hammond sent for the appellant, who came in, met Richards and Hamilton, and confessed. There is a conflict in the testimony whether or not, at the time appellant confessed and immediately prior thereto, Richards and Hamilton promised him immunity. Richards denies that they did. The appellant testified that they made him the promises immediately before he confessed. Hamilton did not appear as a witness in the case.

But we believe the court misapprehended the conclusive effect of the facts leading up to the making of the confession, for it was established by the testimony of all the witnesses, including Hammond, that the confession was brought about by Richards telling Hammond that he (Richards) would see how Hamilton

felt about the matter, and if Hamilton would not push the case, Richards would bring Hamilton to Hammond's house for a meeting with appellant, and that Hammond could tell appellant that, if they came, appellant could understand that Hamilton would not prosecute him.

Richards, just before leaving the stand, testified as follows:

Q. And do you know you arranged a meeting?

A. Yes, sir.

Q. And you conveyed the impression, by what you said and what you did, to Hammond, that if the boy did come up there with Hammond that he could know that it was all right, and that Hamilton was not going to prosecute him. Didn't you?

A. Well that was—appeared to be kinder the understanding.

Q. Well, appeared to be; you was there, and your old brain works. You know what you did; that was what happened, wasn't it?

A. Well, we went over there two or three times.

Q. Well, just answer the question, Mr. Richards; you know that the arrangement was made, and that was the understanding, that when the boy showed up there and told about this thing, that Hamilton, the owner of these cattle, and you, as far as you could, was going to help the boy; now, wasn't that the arrangement?

A. Well, yes, in a way it was.

Q. Well, in a way it was; wasn't the way, not in way; wasn't that the arrangement?

A. That was the agreement between us and Hammond; we made no agreement with the boy, and had no conversation with the boy.

Q. But you did make an agreement with Hammond, and, Hammond had talked with you for the boy, didn't you?

A. Yes, sir.

At another point in his examination Richards testified:

Q. Were you requested by Hammond to get anything in the nature of a promise on the part of Hamilton

as to what he would do, any definite or specific promise as to what he would do, if the boy would talk and tell what he knew?

A. Well, that was the nature of it; it was to get Hamilton and see Hamilton's feelings in the case, and I don't suppose that, if Hamilton had said, "No, I am going to prosecute the boy to the full limit, every way, don't matter whether he talks or don't talk," I don't suppose there ever would have been any meeting made between us and the boy; but, as I said before, Hamilton felt like there might be somebody else interested in it, and the boy said he wanted to tell the facts of the case, but he did not say what the facts were, or did not lead us to believe what the facts were in any way.

There was no necessity of Richards repeating to appellant the promises, theretofore conveyed to appellant by Hammond, to make the inducement complete. The promises communicated to appellant by Hammond were confirmed by both Richards and Hamilton, by their going to meet the appellant, pursuant to the arrangement they made with Hammond, and of which the appellant had notice. The appellant's confession was involuntary, and the court erred in admitting it.

Appellee insists that, even though the confession was involuntary, the promises which induced it were not made by persons in authority. But the question must not be whether the persons making the promises

were persons in authority—that is, capable of performing their assurances of immunity, but were they in such a situation that the person confessing might reasonably consider them as persons able to afford him aid? 1 Bishop, New Crim. Proc. 1234. That the appellant in this case had abundant reason to believe that the owner of the cattle and a cattle inspector had it in their power to do him very considerable favors, in the situation he was in, is not to be seriously questioned.

There is no more convincing evidence to the ordinary man than a confession of guilt, and where a confession is admitted, under an instruction to the jury to determine whether it is voluntary or involuntary, and to consider it in the former case, or in the latter case to reject it, the probabilities are, unless the confession was extorted under circumstances calculated to arouse sympathy for the defendant, that the average jury will consume but little time in determining the question of whether the confession was voluntary or involuntary, but will, in the great majority of cases, say the prisoner has confessed, and therefore is guilty beyond a reasonable doubt.

The judgment of the lower court is reversed, and the cause is remanded, with instructions to grant appellant a new trial; and it is so ordered.

Parker, Ch. J., and Roberts, J., concur.

## ANNOTATION.

Whose promises are contemplated by rule excluding confession made under promise of immunity.

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- II. Prosecutor, 420.
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*I. Introductory.*

The general doctrine is indisputable that confessions which are made under promises of immunity are considered as made under mental duress, and therefore incompetent as evidence. 1 R. C. L. 564. But whether they are so extorted must depend on the character of the authority, power, or influence by which they are induced. It is the purpose of this note to show what persons are considered as clothed with authority sufficient to justify the exclusion of confessions made under promises held out by them.

*II. Prosecutor.*

It is held, almost without exception, that a prosecutor, or a person representing him, is a "person in authority," within the meaning of the rule excluding confessions made under promise of immunity held out by one in authority.

**Alabama.**—Owen v. State (1885) 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206.

**Arkansas.**—Sullivan v. State (1899) 66 Ark. 506, 51 S. W. 828, 11 Am. Crim. Rep. 280.

**California.**—People v. Williams (1901) 133 Cal. 165, 65 Pac. 323.

**Delaware.**—State v. Jackson (1900) 3 Penn. 15, 50 Atl. 270.

**Iowa.**—State v. Foster (1907) 136 Iowa, 527, 114 N. W. 36.

**Kentucky.**—Rector v. Com. (1882) 80 Ky. 468.

**Louisiana.**—State v. Mims (1891) 43 La. Ann. 532, 9 So. 113.

**Massachusetts.**—Com. v. Tuckerman (1857) 10 Gray, 173.

**Mississippi.**—State v. Smith (1894) 72 Miss. 420, 18 So. 482; Draughn v. State (1898) 76 Miss. 574, 25 So. 153, 11 Am. Crim. Rep. 192.

**Nevada.**—State v. Dye (1913) 36 Nev. 143, 133 Pac. 935.

**New Mexico.**—See the reported case (STATE v. FOSTER, ante, 417).

**North Carolina.**—State v. Roberts (1827) 12 N. C. (1 Dev. L.) 259.

**Tennessee.**—Boyd v. State (1840) 2 Humph. 39; Deathridge v. State (1853) 1 Sneed, 75.

**England.**—Rex v. Warickshall (1783) 1 Leach, C. L. 263; Rex v. Jones

(1809) Russ. & R. C. C. 152; Rex v. Simpson (1834) 1 Moody, C. C. 410; Upchurch's Case (1836) 1 Moody, C. C. 465; Reg. v. Taylor (1839) 8 Car. & P. 733; Reg. v. Thompson [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 69 L. T. N. S. 22, 41 Week. Rep. 525, 17 Cox, C. C. 641, 57 J. P. 312, 8 Eng. Rul. Cas. 90.

As to a promise of immunity by the employer of the accused, where the offense is against the property of the employer, see *infra*, X.

In Sullivan v. State (Ark.) *supra*, it appeared that the defendant, suspected of complicity in a larceny of meat, was induced to make a confession of guilt on a promise by the owner of the meat that he would be made a state's witness, and that he would not be bound over or prosecuted, "if he would testify against the Allen boys." The owner of the meat held no official position, but he was the prosecutor, and it was held that, as such, he was a person "in authority," within the meaning of the law, and the court accordingly held the confession to be involuntary, and inadmissible in evidence.

So, where a boy of tender years, accused of burning a barn, was told by the owner of the barn that if he would tell the truth "he would get out of it better," and the accused thereupon confessed his guilt, it was held that the confession was inadmissible. State v. Jackson (Del.) *supra*.

In People v. Williams (Cal.) *supra*, it appeared that the defendant, accused of rape, was induced to go with the brothers of the prosecutrix to the office of the city marshal, and was there confronted with the prosecutrix. He was told by the brothers, in the presence of the marshal and the prosecutrix, that if he would make a statement exonerating the prosecutrix that he could go free, but if he declared his innocence he would be prosecuted. Thereupon the prosecutrix made a statement as to the alleged occurrences. The defendant "made no reply, but just sat there and kind of cowed right down." The court held that this silence did not imply an admission, but, granting that it did, the

admission was not voluntary, because induced by the suggested promise that he could go free if he admitted his guilt.

Where the defendant, accused of the larceny of money, was induced to make a confession of guilt by a promise held out by the owner of the money that, if the defendant would tell where the money was hid and how it had been divided, he would not "prosecute him heavy," and that all that he wanted was his money, it was held that the confession was inadmissible. *Rector v. Com.* (1882) 80 Ky. 468.

In *State v. Foster* (1907) 136 Iowa, 527, 114 N. W. 36, it appeared that the defendant, charged with assault with intent to murder her husband, on being promised immunity from prosecution by her husband, made a detailed statement of the facts connecting her with the crime. Later in the day she repeated the confession in the presence of two attorneys and the physician attending her husband. The court said: "Even if defendant's husband had assured her in the morning, before her first statement was made, that he had no desire to prosecute her, she could not assume in the afternoon, when the whole situation had been changed by reason of her disclosures, and two attorneys had been summoned, one of them the county attorney, to listen to what she had to say, that she was speaking under any immunity or promise of exemption. And as already indicated, the testimony of the state directly negated any continuing promise or inducements being held out to her. Under these circumstances the fact that the statements in the morning may have been made under such inducements as to justify the exclusion of the evidence with reference thereto would not render the confession in the afternoon inadmissible."

Where a person accused of arson was induced to make a confession of guilt by the prosecutor, who told him that it would be better for him if he turned state's evidence, thereby raising a hope of immunity, it was held that the confession was inadmissible.

*State v. Mims* (1891) 43 La. Ann. 532, 9 So. 118.

In *Boyd v. State* (1840) 2 Humph. (Tenn.) 39, it appeared that the defendant was charged with maliciously disfiguring a horse by cutting off its tail and mane. One of the witnesses at whose house the act charged took place testified that after defendant and Depew were arrested he said to them that if they would acknowledge that they did it in a frolic, and from no disrespect to his family, he would forgive them and use his endeavors to get the owner to drop the prosecution. Depew then said: "We have done it out of a frolic," and Boyd, the defendant, "that it was not done out of any harm, or with any view to disgrace witness's family." The court said: "It was the duty and province of the court in this case to have excluded the evidence of confession. The proof was direct and manifest that the confession was obtained by a promise that witness would attempt to put an end to the prosecution."

In *Deathridge v. State* (1853) 1 Sneed (Tenn.) 75, it appeared that the prisoner, accused of arson, was told by the person who had him in custody that it was best "to retract and tell all about it," and if he did not he could save him no longer; that the prosecutor then came up and told the prisoner that "it was best to turn state's evidence, and get out of it." A confession thus induced was held inadmissible in evidence.

In *State v. Dye* (1913) 36 Nev. 143, 133 Pac. 935, it appeared that a prisoner charged with arson, while in jail, was visited by the prosecutor who said to him: "Bill, I want the principals in this proposition. It wouldn't do me much good to send you to prison, for they could hire someone to do the job again. Bill, I want the head man in this." The prisoner thereupon made a full confession. It was held that the confession was inadmissible in evidence.

In *Com. v. Tuckerman* (1857) 10 Gray (Mass.) 173, it appeared that a prisoner charged with embezzlement of the funds of a corporation was told by a stockholder and director of the



corporation, whom he had been led to believe had great influence with the other directors and could stop a prosecution, that he (the stockholder and director) had no vindictive feelings toward the prisoner, and intended to do whatever was right and proper to prevent his arrest, or the institution of a prosecution against him. It was held that the confession made on the strength of this inducement was inadmissible in evidence.

So where, in the presence of the prosecutor, a stranger told the prisoner that if he would confess, being in custody, his confession could not be used against him, it was held that the confession thus obtained was inadmissible in evidence. *State v. Roberts* (1827) 12 N. C. (1 Dev. L.) 259.

In *Rex v. Warickshall* (1783) 1 Leach, C. L. (Eng.) 263, in which it appeared that the prisoner, charged as an accessory after the fact with having received stolen goods, knowing them to have been stolen, was induced to make a confession by promises of favor held out by the prosecutor, it was held that the confession was inadmissible in evidence.

In *Rex v. Jones* (1809) Russ. & R. C. C. (Eng.) 152, it appeared that the prosecutor said to a prisoner charged with theft that he only wanted his money, and that if the prisoner gave him that he might go to the devil, if he pleased. The prisoner took 11s. 6d. out of his pocket, and said it was all he had left of it. The prisoner was found guilty. It was held that the evidence was not admissible, and the conviction wrong.

So where the son of the prosecutor told the accused that his father had told him to promise that if accused would confess and tell on all the others who were engaged in it, he would be turned loose, it was held that a confession subsequently made on the strength of the promise of immunity was inadmissible. *Owen v. State* (1885) 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206.

But it has been held that while the magistrate before whom the prisoner, together with one jointly charged with the same offense, was examined, is a

"person in authority," the owner of the barn, for the burning of which the accused is charged, is not a person in authority. *Wolf v. Com.* (1878) 30 Gratt. (Va.) 833.

Where one accused of stealing certain articles called the prosecutrix aside during the preliminary trial, and told her that if she would dismiss the prosecution he would try to get her things for her, and she then promised him that she would dismiss the prosecution, it was held that the confession was not induced by the promise of immunity, but was antecedent to, and therefore, of necessity, uninfluenced by, it. *Murdock v. State* (1881) 68 Ala. 567.

So where one accused of shooting mules was told by the owner of the mules that all he (the owner) wanted was compensation for his mules, and if accused would pay him for them he would not prosecute him, and that would be the end of it, it was held that a confession of guilt was voluntary, since the promise of the prosecutor was given not for a confession, but for compensation for the mules. *Meadows v. State* (1902) 136 Ala. 67, 34 So. 183.

See also *Womack v. State* (1884) 16 Tex. App. 178, wherein it appeared that the prosecutor, Henderson, told the defendant that he, Henderson, had consulted with the district attorney, and that officer had authorized him to say that if defendant would turn state's evidence against his codefendant Fuller, he (defendant) would not be prosecuted, and also that the prosecutor would file no complaint against him. Under these promises the defendant made a confession, and the lower court admitted it in evidence against the defendant on the ground that he had repudiated the agreement by refusing to testify against Fuller. The court said: "That defendant subsequently repudiated the agreement does not, and cannot, affect the question as to the circumstances under which the confession was made. At the time it was made, was he not induced to make it through the promise or hope held out to him by Henderson? If so, then no subsequent act of bad faith on his part could or would render valid and

legal that which per se was illegal and inadmissible as a voluntary confession."

On the trial of an indictment for larceny, it appeared that the owner of the goods, on the prisoner's expressing regret for having committed the offense, promised not to prosecute him; but on meeting the constable shortly afterwards the prisoner was told by that officer that the matter could not be settled in that way, and the prisoner was arrested. A subsequent confession was held admissible in evidence against the prisoner. *Ward v. People* (1842) 3 Hill (N. Y.) 395.

### III. Prosecuting attorney.

Prosecuting attorneys, their agents, and authorized investigators are generally held to be "persons in authority," so that confessions induced by a promise of immunity held out by them are inadmissible in evidence.

**United States.**—*United States v. Lee* (1846) 4 McLean, 103, Fed. Cas. No. 15,588.

**Alabama.**—*Porter v. State* (1876) 55 Ala. 95; *Gregg v. State* (1894) 106 Ala. 44, 17 So. 321.

**Arkansas.**—*Corley v. State* (1887) 50 Ark. 305, 7 S. W. 255.

**Georgia.**—*Holsenbake v. State* (1872) 45 Ga. 43.

**Illinois.**—*People v. Buckminster* (1916) 274 Ill. 435, 113 N. E. 713.

**Louisiana.**—*State v. Johnson* (1878) 30 La. Ann. 881.

**Massachusetts.**—*Com. v. Knapp* (1830) 10 Pick. 477, 20 Am. Dec. 534.

**Mississippi.**—*Simmons v. State* (1883) 61 Miss. 243.

**Missouri.**—*State v. Hunter* (1904) 181 Mo. 316, 80 S. W. 955; *State v. Murphy* (1909) 146 Mo. App. 707, 125 S. W. 557.

**New York.**—*People v. Reilly* (1918) 181 App. Div. 522, 36 N. Y. Crim. Rep. 248, 169 N. Y. Supp. 119, affirmed in (1918) 224 N. Y. 90, 120 N. E. 113.

**Ohio.**—*Searles v. State* (1892) 6 Ohio C. C. 331, 3 Ohio C. D. 478.

**Oklahoma.**—*Smallwood v. State* (1917) 14 Okla. Crim. Rep. 125, 167 Pac. 1154.

**Oregon.**—*State v. Moran* (1887) 15 Or. 262, 14 Pac. 419.

**Texas.**—*Lopez v. State* (1882) 12 Tex. App. 27; *Neeley v. State* (1889) 27 Tex. App. 315, 11 S. W. 376; *Lauderdale v. State* (1892) 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679.

**Virginia.**—*Jackson v. Com.* (1912) 116 Va. 1015, 81 S. E. 192.

**England.**—*Reg. v. Croydon* (1846) 2 Cox, C. C. 67.

In *People v. Buckminster* (1916) 274 Ill. 435, 113 N. E. 713, it appeared that one Fink, having been promised immunity for his part therein by the assistant state's attorney, confessed that he had been hired by the defendant to burn a certain building. The court held the confession inadmissible.

In *State v. Johnson* (1878) 30 La. Ann. 881, it appeared that the defendant was induced to confess to the offense of grand larceny by a promise held out by the district attorney that he might be used as a state's witness. The court held the confession inadmissible in evidence.

Where an agent is sent by the prosecuting attorney to a person accused of crime for the purpose of obtaining admissions, and tells the person that he is authorized by the prosecuting attorney to find out who the parties were that were concerned with him, and that it would be better for his interest and save him a heavy fine if he would own up who the parties were, it was held that a confession thus obtained was inadmissible in evidence. *Searles v. State* (1892) 6 Ohio C. C. 331, 3 Ohio C. D. 478.

In *Simmons v. State* (1883) 61 Miss. 243, it appeared that one McIntosh, of counsel for the prosecution and "the leading spirit" in it, had told the prisoner that if he would tell what he knew of the murder of General Tucker, he (McIntosh) would do all he could to save him; and it was after this that the prisoner made a confession of guilt. It was held that the confession was not admissible in evidence.

Where the defendant, accused of the larceny of shoes, testified, on the trial of one Slime charged with having received stolen goods, to the effect that defendant stole the shoes and sold them to Slime, it was held that this judicial confession was inadmissible in

evidence, since it had been induced by a promise of immunity from prosecution, held out by the prosecuting attorney. *State v. Murphy* (1910) 146 Mo. App. 707, 125 S. W. 557.

In *State v. Hunter* (1904) 181 Mo. 316, 80 S. W. 955, it appeared that the defendant was induced to confess that he had obtained judgment in a civil suit on perjured testimony, and that his testimony on the trial of said cause was false. This confession was induced by a promise held out by the prosecuting attorney, who had been defendant's attorney in the civil suit, that he would not be prosecuted for perjury. The court held the confession inadmissible in evidence on the trial of the defendant for perjury.

In *Porter v. State* (1876) 55 Ala. 95, wherein it appeared that the defendant, accused of murder, was induced to make a confession on a promise of immunity from punishment held out by his attorney, and confirmed by the prosecuting attorney, the brother of the deceased, and the magistrate, the court said: "In the present case, the strongest conceivable influences were brought to bear on the prisoner to induce him to confess. The promises were of the most complete immunity from criminal punishment; and this guaranty was given and sanctioned by the court before which he was being tried, the brother of the deceased, and by the officiating attorneys of both the prosecution and the defense. Never was importunity more vehemently urged, backed by a stronger array of personal influence, or enforced by the promise of a more tempting boon. A clear head and an imperious will could scarcely resist such combined influences. Under these the first confession was made, and it matters not that the prisoner then announced he expected to be hung; thus repelling, as it may be supposed, all idea that he was at all influenced to make the confession by the promises previously made him. It is very improbable that, in the absence of the importunities and assurances with which he was besieged, he would have confessed his guilt of the horrid crime, the commission of which was

then so justly disturbing the public repose. In fact, the counsel for the prosecution, in view of the circumstances, admitted on the trial that the confession, then and thus obtained, could not be given in evidence against the prisoner. In this he but affirmed what all the law books teach."

In *Corley v. State* (1887) 50 Ark. 305, 7 S. W. 255, it appeared that the defendant was suspected of complicity in a larceny. He was summoned before the grand jury, and the grand jurors exhorted him to tell the truth and promised him protection. He then made a statement implicating others in the larceny. Later, while awaiting the further direction of the grand jury, he was visited by the prosecuting attorney, who assured him that the state would deal fairly with him if he would tell the whole truth. The next morning, while waiting to be called before the grand jury, three persons, who afterwards became witnesses against him, were admitted to him, and, referring to his statement previously made before the grand jury, told him he ought to tell the whole truth. Thereupon he produced a confession which he said he had prepared for the grand jury, as he had not intended to tell anything until he got before the grand jury where he could get protection. The court held this confession inadmissible in evidence.

In *Gregg v. State* (1894) 106 Ala. 44, 17 So. 321, it appeared that on a trial for infanticide, the defendant being charged with having killed her daughter's infant, a witness testified that he, together with others, went to the house of the defendant to investigate the matter, and made the impression upon the defendant that they had authority to institute investigation, and after the denial by the defendant of the birth and destruction of the child, the witness said to the defendant, "Tell us the truth about it all, and that will be the last of it," in response to which the defendant admitted the birth and murder of the infant. It was held that the confession was involuntary and inadmissible in evidence.

In *Jackson v. Com.* (1914) 116 Va.

1015, 81 S. E. 192, wherein it was held that a person, who, under the direction and authority of the attorney for the commonwealth, actively engages in the effort to ascertain the perpetrator of a crime and to secure his arrest and conviction, is a "person in authority," within the rule excluding a confession induced by the hope of some advantage held out by such person, the court stated the rule as follows: "The rule in Virginia is well established by the decided cases, that persons in authority (within the rule excluding a confession, unless it appears that it was not obtained from the party by some inducement of a worldly or temporal character, in the nature of a threat or promise of benefit held out to him by a person in authority, or with the apparent sanction of such person or persons) are such as are engaged or concerned in the apprehension, prosecution, or the examination of the accused."

In *Lopez v. State* (1882) 12 Tex. App. 27, it appeared that the district attorney promised that he would not prosecute the prisoner if he would appear and testify against his accomplice, but did not warn him that his confession might be used against him if he refused so to testify. On the strength of this promise, the prisoner made a confession to the district attorney. When the accomplice was placed on trial, the prisoner refused to testify against him. Afterwards he was placed upon his own trial, and his confessions made to the district attorney were admitted in evidence against him. The court of appeals held this to be error, because it was not shown, as a predicate for the admission of the confession, that it was within a statute providing that confessions are inadmissible in evidence unless "freely made, without compulsion or persuasion."

In *Neeley v. State* (1889) 27 Tex. App. 315, 11 S. W. 376, it appeared that the district attorney had a conference with the defendant, accused of the theft of cattle, in which it was agreed that the defendant would testify in behalf of the state, to material facts against his accomplices, and in

consideration of his so testifying he would be exempted from prosecution for said theft; but that, should he violate said agreement and refuse so to testify, he would be liable to prosecution. He thereupon made a confession, and thereafter refused to fulfil his agreement with the district attorney to testify against the other parties, and the district attorney caused him to be indicted for the theft to which his confession related. The confession was held not to be admissible.

So, where it appeared that the prisoner was charged with arson, and the county attorney, city marshal, and another party went to the prisoner's house to see him with reference to turning state's evidence, and the county attorney told him that if he would testify for the state through all the courts, he would see that he would not be prosecuted, but warned him that his testimony might be used against him if he refused so to testify, and the prisoner thereupon gave evidence on the examining trial, but refused to testify when called against his accomplice, it was held that the confessions of the defendant, made at the examining trial, were inadmissible against him on his own trial, because not made in compliance with the statute that no confession is admissible in evidence "unless freely made, without compulsion or persuasion." *Lauderdale v. State* (1892) 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788, 19 S. W. 679.

In *United States v. Lee* (1846) 4 McLean, 103, Fed. Cas. No. 15,588, it appeared that the defendant, charged with stealing from the mail, was used as a witness for the government against an accomplice, with the understanding that he would not be prosecuted to conviction, provided he made a full disclosure in regard to the acts of the accomplice. In making the disclosure according to the agreement, the defendant implicated himself. The court said: "The government is bound in honor, under the circumstances, to carry out the understanding or arrangement by which the witness testified, and admitted, in

so doing, his own turpitude. Public policy and the great ends of justice require this of the court."

But where a district attorney of the United States entered into an agreement with the defendants, who were accused of an offense against the United States, that if they would testify on behalf of the plaintiffs frankly and truthfully, when required, in reference to a conspiracy among certain government officials then known to exist, they would not be prosecuted, it was held that the district attorney had no authority to make such an agreement. *Whiskey Cases* (1878) 99 U. S. 594, 25 L. ed. 399.

In *Reg. v. Croydon* (1846) 2 Cox, C. C. (Eng.) 67, it appeared that one Baker had been tried, found guilty, and transported for burglary. After this conviction, the prisoner, who appeared to have been connected with Baker in the transaction, made a confession on the strength of inducements held out by the attorney who had conducted Baker's defense, and was then engaged in an endeavor to get up a prosecution, and seeking to discover a criminal. It was held that the attorney was clothed with authority to offer such an inducement, and the confession was therefore inadmissible.

But in *Com. v. Knapp* (1830) 10 Pick. (Mass.) 477, 20 Am. Dec. 534, it appeared that the attorney general wrote to the prisoner a letter, promising the protection of the government on condition of his making a full disclosure and testifying in the case fully and truly. A full confession was made by the prisoner under this arrangement with the attorney general, but on being called to testify against his accomplices he refused to do so. It was held that by this refusal the prisoner forfeited all claim to the immunity which had been promised him by the attorney general, so that his confession was admissible against him in evidence when he was put on trial.

So in *State v. Moran* (1887) 15 Or. 262, 14 Pac. 419, it appeared that the defendant was promised immunity on the condition of his testifying fully against an accomplice. In accordance

with this agreement he made certain admissions and confessions before the examining magistrate and the grand jury, but at the last minute, when he must have known that his refusal to testify would result in the acquittal of the accomplice, he fled. It was held that he thereby deprived himself of the immunity which had been accorded him, so that his admissions and confessions were admissible against him when he was put on trial.

In *Smallwood v. State* (1917) 14 Okla. Crim. Rep. 125, 167 Pac. 1154, it appeared that the defendant, charged with robbery, was induced to make a confession of guilt and return the stolen property by a promise held out by the county attorney that he would not be prosecuted, if the owner of the property should fail to appear as a witness at the examining trial. The owner, however, appeared as a witness at the examining trial, and it was held that the county attorney, having lived up to his agreement, was entitled to introduce the confession in evidence on the trial of the accused.

So where the attorney general promised to secure a pardon for the accused, if he would confess and disclose who else was engaged in the crime, but the accused failed to act on the promise, and later made a confession which was not in the least influenced by the promise of the attorney general, it was held that the confession was voluntary and admissible. *Holsenbake v. State* (1872) 45 Ga. 43.

In New York, by virtue of a statute, a confession of a defendant, whether in the course of judicial proceedings or to a private person, cannot be given in evidence against him if made on a stipulation of the district attorney that he shall not be prosecuted therefor. *People v. Rogers* (1908) 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177.

In *People v. Reilly* (1918) 181 App. Div. 522, 169 N. Y. Supp. 119, affirmed in (1918) 224 N. Y. 90, 120 N. E. 113, it appeared that the defendant, after his arrest, was brought to the district attorney's office, and a priest in the presence of the assistant district attorney told the defendant that there was no danger of any statement he

made being used against him, and that their only desire was to help him. The defendant thereupon made admissions which tended to connect him with the crime. It was held that the admission thus obtained could not be used on the trial of the defendant.

In a case where the prisoner charged with receiving and concealing stolen goods was promised immunity from prosecution by the state's attorney if he would turn state's evidence, and the prisoner complied with the agreement, it was held that the agreement was no bar to a prosecution, but that the prisoner had an equitable title to the mercy of the executive. *State v. Guild* (1899) 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909.

#### IV. Sheriff or other arresting officer.

The sheriff, constable, or other officer arresting the prisoner, and having him in control and custody, is a "person in authority," contemplated by the rule excluding confessions made under promises held out by persons in authority.

**United States.**—*United States v. Kurtz* (1836) 4 Cranch, C. C. 632, Fed. Cas. No. 15,547.

**California.**—*People v. Thompson* (1890) 84 Cal. 598, 24 Pac. 384; *People v. Castro* (1899) 125 Cal. 521, 58 Pac. 133; *People v. Gonzales* (1902) 136 Cal. 666, 69 Pac. 487, 12 Am. Crim. Rep. 97.

**Kentucky.**—*Rutherford v. Com.* (1859) 2 Met. 387; *Collins v. Com.* (1894) 15 Ky. L. Rep. 691, 25 S. W. 743.

**Massachusetts.**—*Com. v. Taylor* (1850) 5 Cush. 605; *Com. v. Curtis* (1867) 97 Mass. 574; *Com. v. Cuffee* (1871) 108 Mass. 285; *Com. v. Cullen* (1873) 111 Mass. 435; *Com. v. Smith* (1876) 119 Mass. 305.

**Michigan.**—*People v. Wolcott* (1883) 51 Mich. 612, 17 N. W. 78.

**Minnesota.**—*State v. Staley* (1869) 14 Minn. 105, Gil. 75.

**Mississippi.**—*Mackmasters v. State* (1903) 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119.

**Missouri.**—*Couley v. State* (1849) 12 Mo. 462.

**Montana.**—*Territory v. McClin*

(1871) 1 Mont. 398; *Territory v. Underwood* (1888) 8 Mont. 131, 19 Pac. 898; *State v. Sherman* (1907) 35 Mont. 512, 119 Am. St. Rep. 869, 90 Pac. 981.

**Oklahoma.**—*Kearns v. State* (1917) 14 Okla. Crim. Rep. 142, 168 Pac. 242. **Tennessee.**—*Morehead v. State* (1849) 9 Humph. 635.

**Texas.**—*Clayton v. State* (1893) 31 Tex. Crim. Rep. 489, 21 S. W. 255; *McVeigh v. State* (1901) 43 Tex. Crim. Rep. 17, 62 S. W. 757, 12 Am. Crim. Rep. 143.

**England.**—*Reg. v. Millen* (1849) 3 Cox, C. C. 507; *Reg. v. Laughner* (1846) 2 Car. & K. 225, 2 Cox, C. C. 134.

In *People v. Thompson* (Cal.) supra, it appeared that the defendant, a boy of eighteen years, had heard of some persons accused of crime who had gotten off by confessing, and, imbued with this notion, he sought an interview with the sheriff and, after ascertaining that his impression was to some extent true, inquired of the sheriff if it would be better for him to make a statement of the facts, and the sheriff replied that it would. The confession thus induced was held not to be voluntary.

So where a confession of guilt was induced by the promise of a sheriff that he would do everything in his power to help accused out of the scrape, it was held to be inadmissible in evidence. *People v. Castro* (1899) 125 Cal. 521, 58 Pac. 133.

Where a defendant, charged with murder, while imprisoned in the county jail, was induced to confess by the sheriff's promise that if he told the truth the sheriff would do whatever he could for him, it was held that the confession was not voluntary, and was inadmissible in evidence. *People v. Gonzales* (Cal.) supra.

In *Territory v. McClin* (Mont.) supra, wherein the defendant was induced to confess by a statement by a deputy sheriff that it would be better for him, the court, in speaking of the persons whose promises are contemplated by the rule, said: "In regard to the person by whom the inducements were offered, it is very clear that if they were offered by the prosecutor, or by an officer having the

prisoner in custody, or by a magistrate, or, indeed, by anyone having authority over him or over the prosecution itself, or by a private person in the presence of one in authority, the confession will not be deemed voluntary and will be rejected."

In *Territory v. Underwood* (1888) 8 Mont. 131, 19 Pac. 398, it appeared that the defendant was charged with obtaining money under false pretenses from a corporation. The officer who had the defendant under arrest told him that he thought the principal thing the superintendent of the corporation wanted to know was how much the company had lost; that accused had better confess the crime to the superintendent and give evidence against two other persons implicated; and that he thought the superintendent, if he did, would withdraw the charge, or ease it as light as he possibly could. The court held the confession thus induced inadmissible.

In *State v. Sherman* (Mont.) supra, wherein it appeared that the defendant was induced to make a confession by a promise held out by his father in the presence of the officers, it was held that a confession so elicited was inadmissible.

In *Kearns v. State* (Okla.) supra, wherein the plaintiff in error, while under arrest and confined in jail, made certain written and oral confessions to the sheriff, the county attorney, and the jailer of the county, the court said: "If the confessions obtained by the officers were obtained under duress or promise of immunity, or other inducements in connection with the crime charged, they would not be admissible in evidence. As is stated . . . the officers testified that no promises were made nor inducement offered. Against this is the statement of the plaintiff in error only. The trial court, after hearing the matter at length, concluded that the inhibitions of the law against the admission of confessions obtained by promises of immunity or other inducements had not been encroached upon, and that the statements were voluntarily made, and therefore entitled to be introduced."

So where a person accused of murder was induced to confess by the deputy sheriff's promise that he would "help him out if they sent him to the pen," it was held that the confession was incompetent evidence. *Mackmasters v. State* (1908) 82 Miss. 459, 34 So. 156, 12 Am. Crim. Rep. 119.

In *State v. Staley* (1869) 14 Minn. 105, Gil. 75, wherein it was alleged that the officer who arrested the accused induced him to confess by promising him the privilege of turning state's evidence if he told a straighter story than his accomplice, the court said: "The rule seems well settled that if an advantage is held out, or harm threatened, of a temporal or worldly nature, by a person in authority, the confession induced thereby must be excluded. . . . The officer who made the arrest, and by whom the inducements are alleged to have been held out, is, within the rule, a person in authority."

In *Couley v. State* (1849) 12 Mo. 462, it appeared that the defendant, accused of burglary, was induced to confess by the officer who arrested him. The officer told defendant "that he would not appear against him if he would confess," and that "he could turn state's evidence and get clear." The court held that testimony of a confession thus induced should have been excluded from the jury.

In *Morehead v. State* (1849) 9 Humph. (Tenn.) 635, wherein it appeared that the prisoner, accused of the larceny of a slave, was told by someone in the company that arrested him that it would be better for him to confess and tell on his accomplice, and that he would probably be made state's evidence, as it was the accomplice they were after mainly, the court said: "The inducements to the confession proceeded from some of the company assembled to apprehend the prisoner, and were made, if the witness is to be credited, in the hearing of the prosecutor and officer. Upon well-settled principles, therefore, the confession thus obtained was inadmissible."

In *McVeigh v. State* (1901) 43 Tex. Crim. Rep. 17, 62 S. W. 757, 12 Am.

Crim. Rep. 143, it appeared that the prisoner was told by a friend in the presence of the sheriff and deputy sheriff that if he would confess they would get the district attorney to dismiss the case against him. The deputy sheriff added that he had known men to be turned loose by turning state's evidence. The court held that a confession thus obtained should not be received in evidence.

In a case where a prisoner, charged with the theft of money, was told by the deputy marshal who arrested him that he had better confess, and that he (the deputy marshal) would help him to get out of it, it was held that the confession was inadmissible in evidence. *Clayton v. State* (1893) 31 Tex. Crim. Rep. 489, 21 S. W. 255.

In *Rutherford v. Com.* (1859) 2 Met. (Ky.) 387, it appeared that while the accused was in the custody of the deputy sheriff, by whom he had been arrested, he remarked to the officer that he had no fear, and asked him what he thought. The deputy sheriff replied that if one or two important facts could be shown he would get clear. The prisoner inquired what they were, and the officer then told him to show where he was the night before, and also to show that he had no money transactions with Starks, and he would get clear. The prisoner then stated that he had had no money transactions with Starks. This statement was admitted in evidence on the trial of the prisoner in order to connect him with the robbery and murder of Starks. In holding that the statement should have been rejected, the court said: "Now it is very evident that the statement in question was made under the influence of hope. The prisoner was induced to believe, if he would assume the attitude indicated by that statement, that he would get clear of the charge that was made against him. This inducement was presented by the officer who had him in custody, and in whose knowledge he seemed to confide. The statement was made by the prisoner under the belief that it was necessary for his safety, and consequently there is no certainty of its truth; and this is the

very ground upon which statements and confessions, extracted by the influence of hope upon the mind, are rejected as unworthy of credit."

In *Collins v. Com.* (1894) 15 Ky. L. Rep. 691, 25 S. W. 743, it appeared that the defendant, accused of burning a house, was induced to make a confession of guilt by a promise by the sheriff, in the presence of the jailer and the commonwealth's attorney, that if the defendant would come out and tell all he knew the prosecution would let him off and use him as a witness. The court held that confession to be inadmissible in evidence.

In *Com v. Taylor* (1850) 5 Cush. (Mass.) 605, it appeared that the prisoner was in the hands of the police officer and a deputy sheriff, and was told by them that, if he would make disclosures that would be of benefit to the government, they would use their influence to have them go in his favor. The court said: "The case seems to us to fall within the rule excluding confessions obtained under the influence of inducements held out by an officer having the prisoner in his custody, and for that reason the testimony of Wright [the deputy sheriff] ought to have been excluded."

In *Com. v. Cullen* (1878) 111 Mass. 485, it appeared that the defendant was charged with larceny from the person. One Weir, a police officer, testified that he arrested the defendant in New York and brought him on the cars to Boston; that on the way he said to the defendant: "If you will get the money, it will not be used as evidence against you; I want the money." On the next day the defendant made a confession to another police officer. The court said: "The jury should have been instructed that if an inducement in the shape of promises or threats had been brought to bear upon him by an officer, it would be their duty to allow no weight or influence against the prisoner to any statements which he afterwards made to another officer, provided they were satisfied that these statements were made under the influence, and as the result and consequence, of such inducement."



In *Com. v. Curtis* (1867) 97 Mass. 574, wherein it appeared that the prisoner, under arrest on a charge of adultery, made a confession on the strength of an inducement held out by the officer who had him in custody, the court said: "There is no doubt that any inducement of temporal fear or favor coming from one in authority, which preceded and may have influenced a confession, will cause it to be rejected unless the confession is made under such circumstances as show that the influence of the inducement has passed away. No cases require more careful scrutiny than those of disclosures made by a party under arrest, to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions."

In *Com. v. Cuffee* (1871) 108 Mass. 285, it appeared that two officers who had arrested a boy without a warrant, upon suspicion of having committed murder, searched him, stripped him of his clothing, and placed him in a cell at a police station, and that about 10 o'clock at night "they took him out of his cell for the purpose of questioning and examining him, and examined him from that time till midnight, without warning him of his right not to answer unless he chose to do so, or offering him any opportunity to consult counsel or friends." The boy was thus induced by the police officers to make statements tending to show his guilt. The court held that the jury was properly instructed to disregard the statements if, on the whole evidence in the case, it appeared that they were induced by threats or promises.

In a case wherein a person, accused of setting fire to a house, while in the custody of the officers who arrested her, confessed that she had set the fire, but on the trial testified that she made the statement under the promise that she would not be prosecuted, it was held proper to instruct the jury that they should give no weight to the confession if they believed it was induced by the promise, but if they believed it was not so induced, that such weight should be given to it as they thought

it entitled to. *Com. v. Smith* (1870) 119 Mass. 305.

In *United States v. Kurtz* (1836) 4 Cranch, C. C. 682, Fed. Cas. No. 15,547, it appeared that the defendant, having been arrested by two constables upon a charge of stealing goods, was told by them that, if he would tell where the goods were, they would do what they could for him. The defendant was also suspected of having stolen money from another on a former day, but nothing was said by the constables to him about the theft of money, when they told him they would do what they could for him. Defendant made confessions to the constables in regard to the goods, and later made confessions to the magistrate in regard to the money. The court rejected the confessions as to the goods, but admitted the confessions as to the money.

So, where it appeared that accused, after the officer in whose custody he was had retired to rest, was visited in the middle of the night by three persons in succession, who represented to him that it would be better for him, or he would get off easier, if he made a confession, it was held that a confession thus obtained was incompetent in evidence. The court said: "None of these persons was the officer in charge; but their admission to the cell at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority. No reliance can be placed upon admissions of guilt so obtained, for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them." *People v. Wolcott* (1883) 51 Mich. 612, 17 N. W. 78.

In *Reg. v. Millen* (1849) 3 Cox. C. C. (Eng.) 507, it appeared that the prisoner, Sheepwash, was in custody upon a charge of murder, together with a man named Oliver. Sheepwash made a confession on the strength of an inducement held out by Oliver in the presence of the constable. Wright-

man, J., held the confession inadmissible in evidence, as the inducement appeared to have the sanction of the constable, who was present and apparently assented to it.

In *Reg. v. Laugher* (1846) 2 Car. & K. (Eng.) 225, it appeared that the prisoner, a married woman who resided with her husband, was charged by a police constable with breaking into the house of the prosecutor and stealing his money. She denied it, but her husband, coming in soon afterwards, told her, if she knew anything about it, to tell the truth. Pollock, C. B., said: "The fact of the constable being present, and not dissenting from what was said, places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was the person in authority, such an inducement ought to be sufficient to exclude the admission."

In *Rex v. Pountney* (1836) 7 Car. & P. (Eng.) 303, it appeared that a prisoner, in the custody of a constable upon a charge of felony, was taken by the constable to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to confess, whereupon the prisoner confessed in the constable's hearing. Alderson, B., though he received the evidence, said he entertained a strong opinion against its admissibility, and that, if it had been necessary, he would have reserved the point for the opinion of the judges.

#### V. Magistrate.

The examining magistrate is such a person in authority that a confession made on a promise of immunity made by him is not admissible. *United States v. Cooper* (1857) Fed. Cas. No. 14,864; *United States v. Pocklington* (1822) 2 Cranch, C. C. 298, Fed. Cas. No. 16,060; *Austine v. People* (1869) 51 Ill. 236; *Rex v. Rudd* (1775) Cowp. pt. 1, p. 331, 98 Eng. Reprint, 1114, 1 Leach, C. L. 115.

In *Austine v. People* (1869) 51 Ill. 236, it appeared that the defendant, accused of rape, was induced to admit the charge on the promise by the officiating magistrates that the prosecution would be dropped. The court

said: "The rule is, a confession can never be received in evidence when the prisoner has been influenced by any threat or promise, for the reason the law cannot measure the force of the influence used, or decide upon its effect on the mind of the prisoner, and therefore excludes it if any degree of influence has been exerted. . . . The evidence shows most clearly this confession was forced by the hope and promise the prosecution should be dropped. The inducement to confess was held out by the officiating magistrates by persons in authority; and to avoid an accusation before a grand jury, and a public trial before the circuit court, a man of deficient stamina would confess, as this defendant was willing to do, to almost anything."

In *United States v. Cooper* (Fed.) supra, it appeared that the justice of the peace, while officially engaged in the examination of a criminal charge, obtained a confession from the prisoner by holding out an inducement. The court said: "Among the rules most carefully elaborated and strictly enforced is this: That if a confession has been made to a person in authority in the premises, and has been induced by anything said or done by said person, calculated to excite either hope or fear in the prisoner's mind, then the confession is inadmissible. It has always been understood, without a dissenting voice, that a justice of the peace, engaged in an official investigation of a criminal charge, is a person in authority in regard to such charge. In regard to persons bearing that character, too much care cannot be exercised to prevent them from this reprehensible tampering with parties arraigned before them."

So in a case in which a prisoner, indicted for breaking open a storehouse, was examined before the mayor of the town, who informed him that one of the party had confessed to a part of the charge, and that if the prisoner would confess candidly the truth, the mayor would represent his case to the court, it was held that the confession was inadmissible in evidence. *United States v. Pocklington* (1822) 2 Cranch,

C. C. 293, Fed. Cas. No. 16,060. See also *Wolf v. Com.* (1878) 30 Gratt. (Va.) 833, *supra*.

In *Rex v. Rudd* (Eng.) *supra*, it appeared that the justices of the peace admitted the prisoner to testify against her accomplice, and told her that if she would make a full disclosure she should be safe; if not, she should be prosecuted. It was held that the justices were persons in authority, even though in strictness they had no right to give such an assurance, and that any evidence thus extorted from her would be of no prejudice to her on the trial.

In a case wherein it appeared that the prisoner, charged with the stealing of a bank post bill, was apprehended and brought before the receiver general for the county, who, after hearing his account, said to him: "Unless you give me a more satisfactory account, I will take you before a magistrate," it was held that a confession made on the strength of this implied promise of immunity was inadmissible in evidence. *Rex v. Thompson* (1783) 1 Leach, C. L. (Eng.) 325.

It has been held that a clerk to the committing magistrate by whom accused was examined is a person in authority, and a confession made as a result of an inducement held out by him is inadmissible in evidence. *Rex v. Drew* (1837) 8 Car. & P. (Eng.) 140.

But where an accomplice, after making a full disclosure before the committing magistrate, refused before the grand jury to give any evidence at all, *Wrightman, J.*, ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Rex v. Holthem* (1843) 2 Greave's Russell, Crimes (Eng.) 958.

#### VI. Jailer.

In *Bob v. State* (1858) 32 Ala. 560, in which it appeared that a negro slave was induced to confess to the shooting of a white person by the implied promise of his jailer that his master would sell him, and not let him be hung, it was held that the subsequent reiteration of the confession was not competent evidence against the accused.

But see *Shifflet v. Com.* (1858) 14 Gratt. (Va.) 652, wherein it was held that a young man living in a jailer's family and having control of the jail in the jailer's absence, but who was not an officer of any kind, was not a "person in authority." The court defined what persons are meant by the phrase as follows: "Persons in authority, within the meaning of that rule, are generally, if not always, persons engaged in the apprehension, prosecution, or examination of the prisoner. The prosecutor, the officer who makes the arrest, and the magistrate before whom the prisoner is carried are clearly persons in authority; and inducements held out in their presence, without their objection, are regarded as held out by them. There are others who may also be persons in authority. If a jailer in whose jail the party making the confession is confined be such a person (as to which I express no opinion), there is, I think, neither reason nor authority for saying that a mere member of the family of the jailer, holding no office of any kind, nor having any connection with the prisoner further than to attend about the jail, and, in the absence of the jailer, to have control of it and carry the keys, is a person in authority within the meaning of the rule. If he is, so also, it seems, would be the wife of the jailer in this case, who kept the keys when the witness was not using them, and the son of the jailer, who sometimes acted for him. What power could any such subordinates be reasonably supposed to have to execute any promise or threat they might make to a prisoner, 'in respect of his escape from the consequences of the offense, or the mitigation of the punishment.'"

In a case where the prisoner, charged with murder of a child, was induced to make a confession by a woman who had her in custody to prevent the prisoner from laying violent hands on herself, it was held that the confession was inadmissible because induced by one in authority. *Rex v. Enoch* (1833) 5 Car. & P. (Eng.) 539.

*VII. Detective.*

In *People v. Kurtz* (1886) 42 Hun (N. Y.) 335, it appeared that the defendant, accused of burglary, was induced to make a confession on being told by one Pinkerton, a detective, that if he would confess he could get the benefit of a state's witness. It was held that the confession was inadmissible in evidence against the defendant. The court said: "Pinkerton had been in communication with the district attorney about this case, and the district attorney had given instructions to Pinkerton in regard to the prisoner. Pinkerton, then, was not a merely unofficial person. He was, to some extent, acting for the district attorney; and what he did and said might be deemed to come from the district attorney, unless it were positively disavowed. It would be most unreasonable, under the circumstances, that what Pinkerton said should not be considered as said in behalf of the district attorney. And simply to say, 'Your statement must be voluntary,' did not so repudiate what the detective had previously said as to take away from the mind of the prisoner the influence which had been exerted."

In *People v. Stielow* (1916) 161 N. Y. Supp. 599, it appeared that the defendant, accused of crime, made a confession to a detective in the employ of the county, on the latter's promise that he would not be prosecuted therefor. The court said: "Evidence of promises of immunity, express or implied, made by a detective in the employ of the county, under engagement by the district attorney to discover the perpetrators of a crime, are not binding upon the district attorney, so as to compel him to grant immunity, or so as to invalidate a confession, where such promises are not made with the express or implied authority of the district attorney, or under such circumstances as to imply his assent, and such evidence is not sufficient to warrant the granting of a new trial, where the evidence of the promises is in conflict, and the confession is alleged to be made without any promise of immunity."

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So in *Roesel v. State* (1898) 62 N. J. L. 216, 41 Atl. 408, in which it appeared that the prisoner made a confession on the strength of inducements held out by one Keron, a county detective, who had charge of the prisoner, the court said: "Keron was a person in authority within the meaning of the rule relating to the admissibility of confessions. A confession by an accused to one in authority, to be admitted in evidence, must be voluntary. By this is meant that the confession must not be extorted by any sort of threats or violence, nor obtained by any direct or implied promises."

So where a weak-minded man, under arrest, accused of burning a mill, was induced to make a confession of guilt by a detective in the employ of the owners of the mill, who told the accused that it was best for him to own up and turn state's evidence, because he (the detective) was anxious to get it out of him, it was held that the confession was incompetent. *Flagg v. People* (1879) 40 Mich. 706, 3 Am. Crim. Rep. 70.

But see *United States v. Stone* (1881) 8 Fed. 232, in which it appeared that the defendant was charged with stealing property from a wrecked steamboat. The chief witness, Bennett, a detective employed by the owners to hunt up the missing goods, and empowered by them to institute criminal proceedings against the guilty parties, testified to a confession made by the defendant, in which the latter admitted his guilt. It appeared that the defendant was induced to make this confession, and pay for the goods alleged to have been stolen by him, on being promised by Bennett that "that should be the end of it." The court admitted the confession in evidence on the ground that Bennett was not a "person in authority," within the rule excluding confessions induced by persons in authority.

So it has been held that a suspended policeman, drawing pay as a policeman and acting as a private detective, but wearing no badge or insignia of office, is not a person in authority,

within the rule excluding confessions to such person, induced by a promise of benefit. Page v. Com. (1876) 27 Gratt. (Va.) 954.

Also it has been held that a mere private detective, employed to work up the case, is not a "person in authority" within the rule, so that a confession made to him is admissible, even though it may have been induced by a promise of gain. Early v. Com. (1890) 86 Va. 921, 11 S. E. 795.

In *Rex v. Todd* (1901) 13 Manitoba L. R. 364, 1 B. R. C. 883, it appeared that the prisoner was induced to confess to the crime of murder on the strength of pretenses and representations held out by two detectives, acting under the authority and by the direction of the chief officer of the police force, but who were not members of the force or otherwise in authority in respect of the said matters, except by virtue of their special employment as detectives. Bain, J., said: "But another essential element that has to be considered in deciding whether a confession is voluntary or not is the position of the person who held out the inducement, for it is now clearly established, I think, that it is only an inducement held out by a person in authority that will make a confession involuntary. . . . A person in authority means, generally speaking, anyone who has authority or control over the accused, or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is clearly this: that the authority that the accused knows such persons to possess may well be supposed, in the majority of instances, both to animate his hopes of favor, on the one hand, and, on the other, to inspire him with awe, and so in some degree to overcome the powers of his mind. . . . Now it is expressly stated in the case that when the prisoner made the admissions, he was without notice or knowledge of any facts that could constitute either of the two men persons in authority; and, this being so, it could not be contended that, as to the

prisoner, they were persons in authority, and cessante ratione, cessat lex."

#### VIII. Interpreter.

It has been held that an interpreter is a person in authority, within the meaning of the rule relating to the admissibility of confessions. *State v. Kwiatkowski* (1912) 83 N. J. L. 650, 85 Atl. 209.

#### IX. Master of slave.

In *State v. Nelson* (1848) 3 La. Ann. 497, it appeared that a slave, accused of murder, made a confession of guilt to his young master, who was also his overseer, on being advised by the latter "that it would be better for him to tell what he had done." The court said: "The confession of Nelson comes strictly within the rules which should have excluded it from evidence. It was made to his young master, who was also his overseer, to whose authority he habitually submitted, to whom he would naturally look for protection, and upon being advised 'that it would be better for him to tell what he had done.' The admonition, coming from such a source, was well calculated to inspire the slave with the hope of protection from the consequences of his act, if he fully confessed, and his confession, made under that impression, should have been rejected."

#### X. Employer.

Where a servant is charged with an offense against the property of his employer, the employer is "a person in authority," within the rule that a confession induced by a promise of immunity from such a person is inadmissible. *State v. Bostick* (1845) 4 Harr. (Del.) 563; *Byrd v. State* (1882) 68 Ga. 661; *Com. v. Howe* (1861) 2 Allen (Mass.) 153; *Reg. v. Mansfield* (1881) 14 Cox, C. C. (Eng.) 689; *Reg. v. Rose* (1898) 18 Cox, C. C. (Eng.) 717, 11 Am. Crim. Rep. 275; *Rex v. Simpson* (1834) 1 Moody, C. C. (Eng.) 410; *Rex v. Upchurch* (1836) 1 Moody, C. C. (Eng.) 465; *Reg. v. Thompson* [1893] 2 Q. B. 12, 62 L. J. Mag. Cas. N. S. 93, 69 L. T. N. S. 22, 41 Week. Rep. 525, 8 Eng. Rul. Cas. 90.

In *State v. Bostick* (Del.) *supra*, it appeared that a girl twelve years of age, suspected of burning the house of her mistress, was induced to make a confession of guilt by the promise of her mistress that nothing would be done with her, but that she would be sent home to her mother. The court held the confession inadmissible.

A confession of larceny of meat by an employee, induced by a statement from his employer that if he would bring back the meat there was a probability that the whole business could be settled, is not admissible. *Byrd v. State* (1882) 68 Ga. 661.

In *Com. v. Howe* (1861) 2 Allen (Mass.) 153, in which it appeared that the prisoner charged with larceny was told by his employer that unless he settled for the stolen property he would be discharged, but that if he settled for the property he would be permitted to keep his position, and the employer further promised that he would say nothing about the affair to injure the prisoner, it was held that a confession made on the strength of these promises was inadmissible in evidence.

In *Reg. v. Mansfield* (1881) 14 Cox, C. C. (Eng.) 639, it appeared that the prisoner, a domestic servant, aged fifteen, was apprehended by a police constable, and charged in the presence of her mistress (the daughter of the prosecutrix) with setting fire to a stack of hay. The prisoner then said to her mistress: "If you will forgive me, I will tell you the truth." The mistress replied: "Ann, did you do it?" The prisoner then made a statement. Williams, J., said: "I hold the statement of the prisoner to be not admissible in evidence. The true principle which renders the confession of a prisoner not receivable in evidence seems to be that if the confession is made either under fear caused by a threat, or in the hope of ultimate forgiveness or gain held out by a person in authority, that then it is not admissible. In the present instance, the prisoner, while in the custody of a policeman, makes this appeal to her mistress, who is standing by. If her mistress did not mean to for-

give her, the girl was under a complete delusion, for by her silence the mistress acquiesced in the prisoner's appeal for forgiveness. The mistress practically invites the prisoner to continue her statement, and she is consequently induced to do so by the expectation that she will be forgiven."

In *Reg. v. Rose* (1898) 18 Cox, C. C. (Eng.) 717, it appeared that the prisoner, who had been employed by a farmer in a more or less confidential capacity, was charged with stealing a variety of articles, the property of his master. It appeared, further, that the prosecutor, having reason to suspect that some of his property had been improperly dealt with, spoke with the prisoner, telling him it would be better if he confessed. It was held that, the inducement having been held out by a person in authority, the confession was not admissible in evidence.

In *Rex v. Simpson* (1834) 1 Moody, C. C. (Eng.) 410, it appeared that a servant girl was accused of burning a house. She was induced to confess by promises of immunity held out to her by the mother of the prosecutor's wife. It was held that the confession should not have been received in evidence.

In *Rex v. Upchurch* (1836) 1 Moody, C. C. (Eng.) 465, the prisoner was a domestic servant to the prosecutor, who kept a beer house. The prisoner was induced to confess by promises held out by the prosecutor's wife, who lived with him and took her share in the management of the house. It was held that the prosecutor's wife was a person in authority, within the meaning of the rule, and that the confession should not be received.

In *Reg. v. Thompson* (Eng.) *supra*, it appeared that the prisoner, charged with embezzling the funds of a company, was induced to make a confession by a promise of favor held out by the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued. It was held that the chairman was a person in authority, and the confession induced by him ought not to have been received in evidence.

So, where a servant girl, accused of

setting fire to a house, was induced to confess by promises made by a private person in the presence of the wife of the prosecutor, who was also the mistress of the girl, it was held that it must be taken as if the inducement was held out by the prosecutor's wife, who was a person in authority, and that, therefore, the evidence of the confession was inadmissible. *Reg. v. Taylor* (1839) 8 Car. & P. (Eng.) 733.

In *Rex v. Parratt* (1831) 4 Car. & P. (Eng.) 570, the prisoner was a mariner, and was charged with having stolen a watch from a shipmate while on board their vessel, the watch having been found concealed in the cable. The captain of the ship threatened to commit him to jail immediately upon their arrival at Newcastle unless he would confess who his partner was, and the prisoner accordingly did make a confession. Here the felony was committed on board the vessel of which the party holding out the inducements was the master, and he had the right to arrest the prisoner and commit him to jail on reasonable suspicion that he was the guilty party. It was held that the confession was not admissible.

But in *Reg. v. Moore* (1852) 2 Den. C. C. (Eng.) 522, 3 Car. & K. 153, 21 L. J. Mag. Cas. N. S. 199, 16 Jur. 621, 5 Cox, C. C. 555, the question arose as to the admissibility of a confession made to the prisoner's mistress, under inducements held out by her, the offense being unconnected with the person or property or dwelling house of the master or mistress. The charge was infanticide, and the prisoner, under inducements held out by her mistress, had made a confession, which was offered in evidence against her. It was held that the mistress was not one "in authority," within the rule excluding confessions.

So in *Smith v. Com.* (1853) 10 Gratt. (Va.) 734, it appeared that the prisoner, charged with rape, had been brought up by one Edmonson, a magistrate of the county, and was an indentured apprentice to the said Edmonson, and living with him. On the morning after the crime had been per-

petrated, Edmonson went to the room where the prisoner was asleep, and said to him solemnly: "The die is cast. The dog is dead. She (meaning the prosecutrix) has sworn it, and you must suffer. Now will you suffer and let Campbell escape? Now I want you to tell the truth, the whole truth, and nothing but the truth; and I will save your neck if I can." And thereupon the prisoner made a full confession of his guilt. It was held that Edmonson was not such a person "in authority" as was contemplated by the rule excluding confessions made to persons in authority, unless voluntarily made, without threats or promises of benefit.

## *XI. Other person.*

### *a. Generally.*

There is a very grave conflict in the authorities as to the admission in evidence of confessions made under promises held out by private persons, bearing no relation of confidence to the accused and in no way connected with the offense, so that it is impossible to lay down any definite rule on the subject. But it would seem that each case must be left to the court to decide, under all the circumstances, whether the promises were such as to overcome the mind of the prisoner.

In *Beggary v. State* (1875) 8 Baxt. (Tenn.) 520, wherein it appeared that the prisoner, accused of murder, was told by a private person that it would be better for him to confess and tell all about it, and that he might be used as a state's witness, the court stated what seems to be the true rule, as follows: "In regard to the person by whom the inducements were offered, there has been conflict in the authorities, some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus obtained; but the sounder rule manifestly is that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by prosecutor, officer, or person in authority, and those ob-

tained by private persons, yet if, in fact, the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, they should be rejected. In determining this, the judge should look not only to the position and character of the person offering the inducements, as well as of the prisoner, and all the attending circumstances."

In *State v. Kirby* (1846) 32 S. C. L. (1 Strobh.) 155, wherein it appeared that a private person told the defendant, who was accused of murder, that if he confessed he might be pardoned, the court said: "If the inducements held out to the prisoner be made by one having authority over him or over the prosecution, as by the prosecutor or his wife, if the prisoner be his servant, or by the officer having him in custody, or the magistrate, or even by a private person in the presence of one in authority, confessions under such circumstances, it would seem from the authority of decided cases, should be rejected. The power of such persons may well be supposed to animate the prisoner's hopes of favor on the one hand, and to inspire him with awe on the other, and in some degree to overcome the powers of his mind. . . . But where the confessions are made on inducements held out by private persons having no authority over the prisoner or the prosecution, there seems to be no satisfactory conclusion to be drawn from the authority of decided cases, so as to lay down any definite rule which can be applied to the almost infinite variety of cases which occur. The same difficulty does not exist where the confessions are made to one in authority. There, it is true, the rule may sometimes fail of meeting the truth on account of the difference in age, experience, and self-possession, in the midst of the most trying and difficult position in which man can be placed; yet in general, it has been found to be a wise rule which excludes confessions made to such persons; and as it is always wise to narrow the bounds of discretion, whenever it is practicable, it has been adopted as a rule. But in the case of confessions made on suggestions of benefits, by

private persons having no authority, the difficulty of laying down a more specific rule than the general one that the confession must be voluntary has suggested the idea that the question is a mixed one of law and fact, and that it must be left in a great degree to the judge to decide, under all the circumstances, whether the threats or inducements were such as to overcome the mind of the prisoner. . . . That seems to be the result to which the more modern cases lead; and a late writer on the subject has come to the conclusion that a confession made to a private person, under inducements held out by him, is admissible."

In *Rex v. Spencer* (1835) 7 Car. & P. (Eng.) 776, it appeared that the prisoner was charged with stealing. It was proved that after the prisoner was in custody he was induced to confess by a person who was neither prosecutor nor constable, nor a person in any kind of authority. Parke, B., said that there was a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable.

*b. Confession held not admissible.*

In *State v. Guild* (1828) 10 N. J. L. 163, wherein it appeared that a confession of guilt was induced by the remark of a bystander that "if he would confess he would probably get off clear," it was held that the confession so induced was inadmissible as evidence, but subsequent confessions of the same nature were admissible if sufficient time and other circumstances had intervened to warrant the inference that the inducement which operated upon the mind of the accused at the time of the original confession were entirely dispelled at the time of the subsequent confession.

So, where a confession was induced by a promise held out by a private person that the prisoner would be made state's evidence, it was held inadmissible in evidence, though immediately previous thereto no promise was made, and immediately thereafter defendant declared it was made freely and voluntarily, and from a sense



of duty. *Re Thorn* (1820) 4 N. Y. City Hall Rec. 81.

Also where a person accused of murder was induced to confess, by the promise of a private citizen that he would intercede with the judge in the prisoner's behalf, it was held that the confession thus induced was inadmissible. *Johnson v. State* (1906) 89 Miss. 773, 42 So. 606.

Statements in the nature of confessions, made by a prisoner, such as a declaration of intention to tell the truth about the matter, and an inquiry as to his power to turn state's evidence and the like, though not direct confessions, have been held to be inadmissible on his trial for the offense spoken of, it appearing that the witness to whom they were made told him that "if he turned state's evidence, and there were others implicated, and he could prove it, that he would get clear." *Johnson v. State* (1878) 61 Ga. 305.

So, where a man said to an accused boy, "If you will confess you will probably get clear," the confession thus obtained was held not to be admissible. *State v. Guild* (1828) 10 N. J. L. 163, 18 Am. Dec. 404.

In *United States v. Nott* (1839) 1 McLean, 500, Fed. Cas. No. 15,900, it appeared that the prisoner was charged with stealing bank notes from a letter. On being assured by the postmaster that the whole matter might be compromised, and that the prosecutor would probably be satisfied on the reimbursement of his expenses, he made a confession of guilt. It was held that the confession should be disregarded by the jury.

So, where the prisoner was induced to assent to the confession of an accomplice, thereby implying his own guilt, and the assent was given under the influence of a hope of pardon held out to him by his brother in the presence of a clergyman, it was held that testimony as to the assent, thus obtained, was incompetent evidence. *Com. v. Knapp* (1830) 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

In *Rex v. Royds* (1904) 10 B. C. 407, it appeared that the prisoner was a choir boy, and along with several oth-

er choir boys, was implicated in an alleged assault that took place on the way to a choir reunion, to be held in the choirmaster's house. On the third day after the occurrence, the rector of the cathedral detained the boys after choir practice, and sent them into the church under the charge of the vergers; the choirmaster then called each of them separately into the vestry, and the rector questioned them in the presence of the bishop, the assistant curate, and the choirmaster, and took their statements in writing. He told them they were to speak the truth, and that their statements were to be used for the purpose of that inquiry only. On the trial, the statement made by the prisoner was offered in evidence by the Crown, and objected to. Irving, J., said: "Under the circumstances of this case, in my opinion, the rector was a person in authority, and, as the Crown has not satisfied me that the statement was voluntary, I cannot admit the evidence."

In *Reg. v. Charcoal* (1897) 3 Terr. L. R. (Can.) 7, it appeared that an Indian was induced to confess to the murder of another Indian, by a promise of favor held out by the Indian agent on the reserve to which the prisoner belonged. The agent testified that he made it a rule to tell Indians so charged that what they tell is to their benefit, to assist in their defense, and that he is there as their adviser, to help them. Wetmore, J., said: "The authorities are abundantly clear that an admission of guilt made by a party charged with an offense, to a person in authority, under the inducement of a promise of favor, or by menaces, or under terror, is inadmissible. This is so clear that it does not require authority to be cited in support of it. Whether, if the promise or threat is made by a person not in authority, that is sufficient to reject the admission, it is not now necessary to decide, because I am of opinion that James Wilson, the Indian agent, was, *quoad* the Indians on his reserve, a person in authority."

So, in a case where it appeared that a girl, accused of administering arsenic, was induced to make a confes-

sion by the surgeon who was called in to attend the victim, it was held that the confession was inadmissible. *Rex v. Kingston* (1830) 4 Car. & P. (Eng.) 387.

*c. Confession held admissible.*

In *People v. Piner* (1909) 11 Cal. App. 542, 105 Pac. 780, it appeared that the defendant, accused of larceny, was induced to make a confession of guilt by the promise of one Robison, a relative, who was also suspected of the crime, that the latter would help the accused out of his trouble. The defendant well knew that the said Robison was not an officer of the law, and that he was clothed with no authority for guaranteeing immunity from prosecution and punishment. The court held the confession voluntary, and admissible in evidence.

In a case where the prisoner was induced to make a confession by his stepfather, who advised him to go before the magistrate and make a complaint against the others concerned, and that he would be admitted as state's evidence, it was held that the confession was admissible in evidence against the prisoner. *People v. Burns* (1828) 2 Park Crim. Rep. (N. Y.) 34.

In a case where one accused of murder was induced to confess by the advice of a friend, who told him that his only chance of getting rid of the charge was by confessing and turning state's evidence against the other parties who were jointly charged with him, it was held that the confession was admissible in evidence against him. *Young v. Com.* (1871) 8 Bush (Ky.) 366.

So, in a case in which it appeared that a county treasurer was induced to confess that he had misappropriated the funds in his hands, by one of his bondsmen, who said to him, "If

you are short, and will come out and say so, we will try and fix it up," it was held that the bondsman was not a "person in authority" within the rule relating to the admissibility of confessions. *State v. Carrick* (1881) 16 Nev. 120.

In *Rex v. Row* (1809) Russ. & R. C. C. (Eng.) 153, wherein a man had been arrested for theft, and some of his neighbors, who had nothing to do with the apprehension, prosecution, or examination of the prisoner, officiously interfered, and held out inducements to the prisoner to confess, but the constable, who had the prisoner in custody, made no answer or observation thereon, it was held that the confession subsequently made to the constable was admissible in evidence, "because the advice to confess was not given or sanctioned by any person who had concern in the business."

In *Rex v. Tyler* (1823) 1 Car. & P. (Eng.) 129, it appeared that the prisoner, indicted for breaking into a house, while locked up alone in a room at a public house, was told by a man that the other prisoner had told all, and that he had better do the same to save his neck. It was held that, as the promise was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence.

Where a newspaper writer said to the accused that her first statement was not accepted as true by the public, and suggested that she should make a correct statement, thereby raising a hope of immunity, but without making any promise of immunity, it was held not to be such an inducement as to make a confession thus induced inadmissible. *State v. Griffin* (1896) 48 La. Ann. 1409, 20 So. 905. B. R.

## B. V. D. COMPANY, Appt.,

v.

MORRIS ISAAC et al., Doing Business as Morris Isaac &amp; Sons.

*United States Circuit Court of Appeals, Sixth Circuit — February 6, 1919.*

(168 C. C. A. 659, 257 Fed. 709.)

**Sale — effect — restrictions — validity.**

1. A manufacturer who sells his products outright parts with the right to have secret marks preserved on the inclosing cartons, which he placed there to enable him to identify jobbers who refused to comply with restrictions under which the goods were sold.

[See note on this question beginning on page 449.]

**Injunction — in aid of price maintenance.**

2. Injunction will not lie to prevent dealers from removing from cartons

in which a manufacturer delivers his goods secret marks intended to aid the manufacturer in price maintenance.

[See 19 R. C. L. 38, 135.]

APPEAL by plaintiff from a decree of the District Court of the United States for the Southern District of Ohio (Hollister, District, J.), dismissing a bill filed to enjoin defendants from removing secret marks from boxes containing plaintiff's goods, purchased by them. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Knappen and Denison, Circuit Judges, and Cochran, District Judge.

Messrs. Hans v. Briesen and Murray Seasongood, for appellant:

The special identifying mark in issue is used for a lawful purpose, and as a check against fraud, and as such will be protected against wilful erasure.

B. V. D. Co. v. Kommel, 119 C. C. A. 39, 200 Fed. 559; Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794; Wells & R. Co. v. Abraham, 146 Fed. 190; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Gillott v. Kettle, 3 Duer, 624; Ingersoll v. Doyle, 247 Fed. 620.

The essence of the right which is invaded by the defendant's unlawful erasures is not a trademark, but is the right to prevent and to be protected against fraud.

Croft v. Day, 7 Beav. 84, 49 Eng. Reprint, 994; Perry v. Truefitt, 6 Beav. 66, 49 Eng. Reprint, 749; 4 Pom. Eq. Jur. 1905 ed. § 1354, p. 2689; 6 Pom. Eq. Jur. ¶ 577, p. 989.

Erasures of special marks have been generally condemned by the courts.

B. V. D. Co. v. Kommel, 119 C. C. A. 39, 200 Fed. 559; Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794; Wells & R. Co. v. Abraham, 146 Fed. 190, 79 C.

C. A. 228, 149 Fed. 408; Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Dr. Miles Medical Co. v. Platt, 142 Fed. 606; Hartman v. John D. Park & Sons Co. 145 Fed. 358; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; Gillott v. Kettle, 3 Duer, 624.

The license to use the manufacturer's name and reputation by a dealer is something which holds the manufacturer responsible to dealer and public that goods bearing such trademarks, or sold under such trademarks, are genuine, and are protected to the full extent of the law with respect to genuineness.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

Mr. James N. Ramsey, for appellees:

Defendants, having purchased the goods in boxes bearing the trademark "B. V. D.," have the right to sell the goods contained therein, after removal of the special identification number.

John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A.

158, 153 Fed. 24; Dr. Miles Medical Co. v. John D. Park & Sons Co. 90 C. C. A. 579, 164 Fed. 803; 38 Cyc. 753; Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 18; Webster v. Ellsworth, 36 Fed. 327; Russia Cement Co. v. Frauenhar, 66 C. C. A. 500, 133 Fed. 518; Saxlehner v. Graef, 81 Fed. 704.

Removal of the serial number did not conflict with any of plaintiff's rights in goods which it had sold and received pay for, and in which it had no further title.

Russia Cement Co. v. Frauenhar, 66 C. C. A. 500, 133 Fed. 518; Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 18; Fred Gretsch Mfg. Co. v. Schoening, 151 C. C. A. 630, 238 Fed. 780; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Ford Motor Co. v. Union Motor Sales Co. 156 C. C. A. 584, 244 Fed. 156; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; Straus v. American Publishers' Asso. 231 U. S. 222, 58 L. ed. 192, L.R.A.1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; Straus v. Victor Talking Mach. Co. 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; Motion Picture Patents Co. v. Universal Film Mfg. Co. 243 U. S. 502, 61 L. ed. 871, L.R.A.1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959; Boston Store v. American Graphophone Co. 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447.

A manufacturer cannot appropriate exclusively a series of numbers, with which he designates his product, where there is no attempt at deception, even though another uses the same numbers in the same way and for a similar purpose.

Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. 68 C. C. A. 263, 135 Fed. 625; Deering Harvester Co. v. Whitman & B. Mfg. Co. 33 C. C. A. 558, 62 U. S. App. 689, 91 Fed. 378; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 55, 25 L. ed. 993, 994; Marcus Ward & Co. v. Ward, 61 Hun, 625, 40 N. Y. S. R. 792, 15 N. Y. Supp. 918; Hoyt v. Hoyt, 143 Pa. 623, 13 L.R.A. 343, 24 Am. St. Rep. 575, 22 Atl. 755.

Knappen, Circuit Judge, delivered the opinion of the court:

Plaintiff manufactures the so-called "B. V. D." underwear, consisting of two-piece suits not protected by patent, as well as union suits, as to which rights under patent are claimed. It sells only to a selected list of jobbers, about three hundred fifty in number out of about eight hundred fifty applicants. Previous to the decision of the Sanatogen Case (Bauer v. O'Donnell) 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, it sold its union suits under a strict price maintenance agreement. As to the two-piece suits, there was no such agreement. Since December 7, 1916 (more than three years after the Sanatogen decision), plaintiff's acknowledgments of receipts from jobbers of orders for goods, both union and two-piece suits, have been accompanied by a form letter expressly designed to secure price maintenance in fact. The statement not only says: "We consider it important that in the distribution of these goods the prices to be received therefor shall not be either greater or less than those which are fairly reasonable to all concerned. A schedule of prices which we deem fair to all under present conditions is herein set forth;" but also: "Any B. V. D. goods which shall be shipped to you should not therefore be sold at prices greater or less than our latest retailers' prices."

Defendant is a jobber at Cincinnati. It had been unable to buy directly from plaintiff, although it had offered complete assurance that prices would not be cut. It was thus compelled to buy from others. Several years before the Sanatogen decision plaintiff inaugurated a system of placing a selected serial number upon the bottom of each carton contained in a given case. This secret mark, being entered on plaintiff's books, furnished means of identifying the jobber to whom the box had been shipped, and plaintiff claims this enabled it to prevent fraudulent

substitution. Defendant claimed and exercised the right to remove these secret marks from cartons containing plaintiff's goods. It was to enjoin this action that the bill was filed. Defendant justifies its action as necessary to protect the jobbers from whom it has bought against the consequences of selling below plaintiff's prescribed prices.

The district court dismissed the bill on the grounds, first, that plaintiff parted with the title to its goods and their inclosing cartons when it sold them, and that it had no concern with defendant's treatment of the cartons after the latter had acquired full ownership; and, second, that one of the purposes, if not the real purpose, of plaintiff in putting the secret mark on the cartons is to enable it to determine which of its wholesalers is cutting prices, with a view of striking the offender from the selected list of jobbers.

The district court was clearly right in dismissing the bill. The broad rule that the seller of merchandise outright parts with all control over it is no longer open to question. While the decisions to this effect have been for the most part in suits where the protection with respect to price maintenance was claimed under patent, copyright, or trademark, yet the rule stated was applied, not because of such features, but in spite of them, and upon the fundamental ground that the control of the owner over the article sold ended with the complete passing of title. *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Sanatogen Case*, *supra*; *Straus v. Victor Talking Mach. Co.* 243 U. S. 490, 61 L. ed. 866, L.R.A. 1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; *Motion Picture Patents Co. v. Universal Film Mfg. Co.* 243 U. S. 502, 61 L. ed. 871, L.R.A. 1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959; *Boston Store v. American Graphophone Co.* 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447.

The question of price restriction

apart, there is no merit in the claim that plaintiff has retained such an interest in preserving its own good will as will support its claimed right to relief. The sale of

Sale—effect—  
restrictions—  
validity.

its goods was absolute, and completely passed title, not only to the goods themselves, but to their inclosing cartons. No authorities are cited, nor have we found any, which, since the line of decisions above referred to, lend support to plaintiff's claim. In *Coca-Cola Co. v. Bennett*, 151 C. C. A. 449, 238 Fed. 513 (so far as material here), it was merely held unfair competition for the purchaser of plaintiff's goods in bulk to sell them in bottles bearing plaintiff's name and trademark when plaintiff had already sold to others the sole bottling privilege. *Ingersoll v. Doyle* (D. C.) 247 Fed. 620, was a case of trademark infringement. The recent "*Associated Press*" decisions seem to us not at all in point. Neither is there application in cases like *Wells & R. Co. v. Abraham* (C. C.) 146 Fed. 190, s. c. 79 C. C. A. 228, 149 Fed. 408; and *Dr. Miles Medical Co. v. Goldthwaite* (C. C.) 133 Fed. 794, where (before the *Sanatogen* decision) provisions expressly designed to enforce price restrictions were sustained.

The case of *B. V. D. Co. v. Kommel*, 119 C. C. A. 39, 200 Fed. 559, specially relied upon by plaintiff, is not persuasive of its contention. Not only was that case decided several years before the *Sanatogen Case*, but what was there said favorable to plaintiff is merely obiter, and apparently not even the unanimously accepted view of the court. Manifestly, cases involving protection of marks on articles still belonging to a plaintiff have no application. Conceding that plaintiff's secret system is susceptible of entirely legitimate and proper use, and even that it was not used illegitimately in the present case, the action below was nevertheless right. There was here no invasion of trademark, and no breach or attempted breach of any legitimate trust relation on the part

of either defendants or their vendors.

The suggestion that the erasure of the serial number will enable the sale of former season goods as if put out during the current season, and thus affect plaintiff's good will, relates to a condition too remote and unsubstantial to justify the attempted restriction, especially as the purchasers from the plaintiff's jobbers were under no obligation even to retain or use the boxes in which the goods were originally sold, and sales of past season goods were not forbidden.

It cannot, however, be said that the conclusion of the district court that plaintiff's reason for using its secret marking system embraced at least the enforcement of its price maintenance system, and thus was an unlawful restraint of trade, is without justification. To say the

least, equity will not lend its aid to an attempt of that nature. True, the testimony of plaintiff's president denied such purpose, but in view of all the other testimony in the case, the court was not bound to accept that statement at its face value. The district judge heard and saw the witnesses, and his conclusions should not be disturbed.

The decree of the District Court is affirmed.

**NOTE.**

The decision in the reported case

(B. V. D. Co. v. ISAAC, ante, 440) rests upon two postulates: first, that the serial number placed by the complainant on the carton in which its goods were packed served no other purpose than to enable it to maintain its price restrictions; and, second, that the maintenance of the retail price is a matter with which a patentee who receives from the wholesaler all that he expects to receive for the goods sold by him has no concern. The validity of the second postulate is discussed in the annotation appended to UNITED STATES v. COLGATE & Co. post, 449, on "Right of manufacturer, producer, or wholesaler to control retail price."

If, however, as is indicated by the COLGATE & Co. CASE, a manufacturer has an absolute and unqualified right to refuse to sell to price cutters so long as the retail price which he is seeking to maintain is a reasonable one and the refusal to sell is not part of a scheme to maintain a monopoly, it would seem that it might logically be held that he is entitled to protection in the use of serial numbers which are employed by him for the purpose of detecting price cutters. Whether the courts will take this view or not, however, will probably depend upon their attitude upon the question of the desirability of permitting a manufacturer to name the price to be paid by the ultimate consumer. Those who refuse to interpose for the protection of the manufacturer may justify their decision by holding that the right to refuse to deal with another is merely a permissive rather than a protected right.

**UNITED STATES OF AMERICA, Plff. in Err.,  
v.  
COLGATE & COMPANY.**

*United States Supreme Court — June 2, 1919.*

(250 U. S. 300, 63 L. ed. 992, 39 Sup. Ct. Rep. 465.)

**Monopoly — unlawful combination — maintaining resale prices.**

1. Conduct of a manufacturer which, as intended, has the effect of procuring adherence on the part of its wholesale and retail customers to resale prices fixed by it, does not offend against the unlawful combination pro-

visions of the Sherman Anti-trust Act of July 2, 1890, where there was no agreement which obligated any dealer not to resell except at the fixed prices, his course in this respect being affected only by the fact that he might, by his action, incur the displeasure of the manufacturer, who could refuse to make further sales to him.

[See note on this question beginning on page 449.]

**Appeal — by government in criminal case — scope of review.**

2. The Federal district court's interpretation of the indictment must be accepted by the Federal Supreme Court on a direct writ of error sued out under the Act of March 2, 1907, to review a judgment sustaining a demurrer to the indictment, which is based upon the construction of the statute upon which the indictment is founded. Review in such case is confined to the question of the construction of the statute involved in the decision below.

**Monopoly — combination — right to select customers.**

3. In the absence of any purpose to create or maintain a monopoly, the Sherman Anti-trust Act of July 2, 1890, does not restrict the long-recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal, and to announce in advance the circumstances under which he will refuse to sell.

[See 19 R. C. L. 72, 153 et seq.]

**ERROR** to the District Court of the United States for the Eastern District of Virginia (Waddill, District J.) to review a judgment sustaining a demurrer to an indictment charging the existence of a combination forbidden by the Sherman Anti-trust Act. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. G. Carroll Todd, Assistant Attorney General, and Henry S. Mitchell, for plaintiff in error:

Combinations or other arrangements between manufacturers and dealers to whom they have sold their products, for the purpose of maintaining resale prices fixed by the manufacturers, are illegal.

*Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; *Straus v. American Publishers Asso.* 231 U. S. 222, 58 L. ed. 192, L.R.A.1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; *Straus v. Victor Talking Mach. Co.* 243 U. S. 490, 61 L. ed. 866, L.R.A. 1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; *Motion Picture Patents Co. v. Universal Film Mfg. Co.* 243 U. S. 502, 61 L. ed. 871, L.R.A. 1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959; *Boston Store v. American Graphophone Co.* 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447.

It is immaterial whether the combination or agreement is effected through

formal written contracts or through a mere meeting of the minds of the parties.

*Thomsen v. Cayser*, 243 U. S. 66, 84, 61 L. ed. 597, 605, 37 Sup. Ct. Rep. 353, Ann. Cas. 1917D, 322; *Eastern States Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 612, 58 L. ed. 1490, 1499, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; *United States v. United States Steel Corp.* 223 Fed. 160; *Frey & Son v. Welch Grape Juice Co.* 153 C. C. A. 150, 240 Fed. 114; *Lowe Motor Supplies Co. v. Weed Chain Tire Grip Co.* (May 5, 1917; Southern Dist. N. Y.) unreported; *Bauer v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; *Boston Store v. American Graphophone Co.* 246 U. S. 8, 62 L. ed. 557, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; *Straus v. Victor Talking Mach. Co.* 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; *United States v. American Tobacco Co.* 221 U. S. 106, 181, 55 L. ed. 663, 694, 31 Sup. Ct. Rep. 632; *United States v. Kellogg Toasted Corn Flake Co.* 222 Fed. 725, Ann. Cas. 1916A, 78.

Prior cases may not be distinguished on the ground that they merely held resale price-fixing combinations and

agreements unenforceable, and not positively unlawful.

United States v. Kellogg Toasted Corn Flakes Co. supra; Frey & Son v. Welch Grape Juice Co. 153 C. C. A. 150, 240 Fed. 114; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; Straus v. American Publishers Asso. 231 U. S. 222, 58 L. ed. 192, L.R.A. 1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; Straus v. Victor Talking Mach. Co. 243 U. S. 490, 498, 61 L. ed. 866, 870, L.R.A. 1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; Boston Store v. American Graphophone Co. 246 U. S. 25, 62 L. ed. 558, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; Lowe Motor Supply Co. v. Weed Chain Tire Grip Co. (May 5, 1917; Southern Dist. N. Y.) unreported.

Messrs. Charles E. Hughes, Charles Wesley Dunn, and Mason Trowbridge, for defendant in error:

In deciding the question as to the construction of the statute, this court takes the construction placed upon the indictment by the district court.

United States v. Carter, 231 U. S. 492, 493, 495, 58 L. ed. 830-332, 34 Sup. Ct. Rep. 173; United States v. Miller, 223 U. S. 599, 602, 56 L. ed. 568, 569, 32 Sup. Ct. Rep. 323; United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 338, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141; United States v. Winslow, 227 U. S. 202, 217, 57 L. ed. 481, 485, 33 Sup. Ct. Rep. 253; United States v. Keitel, 211 U. S. 370, 386, 398, 53 L. ed. 230, 240, 244, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 518, 53 L. ed. 305, 309, 29 Sup. Ct. Rep. 181; United States v. Mescall, 215 U. S. 26, 31, 54 L. ed. 77, 79, 30 Sup. Ct. Rep. 19; United States v. Stevenson, 215 U. S. 190, 195, 196, 54 L. ed. 153, 155, 156, 30 Sup. Ct. Rep. 35; United States v. Kissel, 218 U. S. 601, 606, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 108, 57 L. ed. 742, 749, 33 Sup. Ct. Rep. 443.

The Sherman Act does not deprive the manufacturer of his liberty to manufacture or not, as he pleases, or to sell or not, as he pleases.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 540;

Northern Securities Co. v. United States, 193 U. S. 197, 391, 48 L. ed. 679, 722, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 56, 55 L. ed. 619, 643, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 180, 55 L. ed. 663, 697, 31 Sup. Ct. Rep. 632; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 614, 58 L. ed. 1490, 1500, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Great Atlantic & P. Tea Co. v. Cream of Wheat Co. 141 C. C. A. 594, 227 Fed. 46.

The conduct here involved does not constitute a combination in restraint of trade, in violation of the act.

Great Atlantic & P. Tea Co. v. Cream of Wheat Co. supra.

Mr. Justice McReynolds delivered the opinion of the court:

Writs of error from district courts directly here may be taken by the United States "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." Act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1916, § 1704, 6 Fed. Stat. Anno. 2d ed. p. 149. Upon such a writ "we have no authority to revise the mere interpretation of an indictment, and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision." United States v. Carter, 231 U. S. 492, 493, 58 L. ed. 330, 331, 34 Sup. Ct. Rep. 173; United States v. Miller, 223 U. S. 599, 602, 56 L. ed. 568, 569, 32 Sup. Ct. Rep. 323.

Appeal—by government in criminal case—scope of review.



Being of opinion that "the indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law before it is haled into court to answer the charge of a commission of a crime," and holding that it "fails to charge any offense under the Sherman Act or any other law of the United States," that is to say, as to the substance of the indictment and the conduct and act charged therein, the trial court sustained a demurrer to the one before us. Its reasoning and conclusions are set out in a written opinion. 253 Fed. 522.

We are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. Counsel differ radically concerning the meaning of the opinion below, and there is much room for the controversy between them.

The indictment runs only against Colgate & Company, a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination. After setting out defendant's organization, place, and character of business and general methods of selling and distributing products through wholesale and retail merchants, it alleges:

"During the aforesaid period of time, within the said eastern district of Virginia and throughout the United States, the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the eastern district of Virginia and throughout the United States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them aforesaid) to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, thus suppressing competi-

tion amongst such wholesale dealers, and amongst such retail dealers, in restraint of the aforesaid trade and commerce among the several states, in violation of the act entitled, 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' approved July 2, 1890 [26 Stat. at L. 209, chap. 647, Comp. Stat. 1916, § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644]."

Following this is a summary of things done to carry out the purposes of the combination: Distribution among dealers of letters, telegrams, circulars, and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto, and placing their names upon "suspended lists;" requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers, followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

Immediately thereafter comes this paragraph:

"By reason of the foregoing, wholesale dealers in the aforesaid products of the defendant in the eastern district of Virginia and throughout the United States, with few exceptions, resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant, and refused to resell such products at lower prices to retail dealers in the states where the respective wholesale dealers did business and in other states. For the same reason retail dealers in the aforesaid products of the defendant in the eastern district of Virginia and throughout the United States

resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant and by the aforesaid wholesale dealers, and refused to sell such products at lower prices to the consuming public in the states where the respective retail dealers did business and in other states. Thus competition in the sale of such products, by wholesale dealers to retail dealers, and by retail dealers to the consuming public, was suppressed, and the prices of such products to the retail dealers and to the consuming public in the eastern district of Virginia and throughout the United States were maintained and enhanced."

In the course of its opinion the trial court said:

"No charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce,—the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant; and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers, and retail dealers, and by the latter to the consuming public.

"In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not

thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination with others, may be conceded. *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 614, 58 L. ed. 1490, 1500, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person.

"The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the

fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment,—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act. Counsel for the government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices; and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins, "In the view taken by the court," etc. On the other hand, defendant maintains that, looking at the whole opinion, it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.

Considering all said in the opinion (notwithstanding some serious doubts), we are unable to accept the construction placed upon it by the government. We cannot, e. g., wholly disregard the statement that "the retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make

further sales to him, as he had the undoubted right to do." And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

Monopoly—  
unlawful combination—  
maintaining resale prices.

The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary.

The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce,—in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not

—combination—  
right to select customers.

restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. "The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases." *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 320, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 614,

58 L. ed. 1490, 1500, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951. See also Standard Oil Co. v. United States, 221 U. S. 1, 56, 55 L. ed. 619, 643, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 784; United States v. American Tobacco Co. 221 U. S. 106, 180, 55 L. ed. 663, 694, 31 Sup. Ct. Rep. 632; Boston Store v. American Graphophone Co.

246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.* supra, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be affirmed.

## ANNOTATION.

### Right of manufacturer, producer, or wholesaler to control resale price.

- I. Existence of restrictions as to resale price, 449.
- II. Validity of various devices employed to control resale price:
  - a. In general; reasons for and against, 451.
  - b. The rebate system, 458.
  - c. The contract system:
    1. In general:
      - (a) Essential validity, 458.
      - (b) Under state and Federal anti-trust laws, 472.
    2. Patented articles, 477.
    3. Copyrighted productions, 481.
    4. Trademarked goods, 482.
    5. Goods made by secret process, 482.
  - d. The agency system, 484.
  - e. Refusal to sell to price cutters: comment on the COLGATE CASE, 485.

- III. What amounts to a violation of resale price agreement, 488.
- IV. Right of manufacturer to enforce contract made by retailer with middleman, 488.
- V. Protection against interference with price control system:
  - a. As against one who has violated his agreement, 489.
  - b. As against one who has procured goods by deception, 489.
  - c. As against one who has procured goods by inducing another to violate his agreement, 490.
  - d. As against one who has procured goods without fraud or knowingly inducing a violation of contract, 490.
  - e. As against one who falsely represents himself to be the manufacturer's agent, 491.
  - f. As against one who erases serial numbers, 491.
  - g. Equitable relief, 491.

### I. Existence of restrictions as to resale price.

The right of a manufacturer or other producer to fix the resale price of his product, where it can be exercised at all, must rest in contract. He cannot project his control beyond his own sales by imposing conditions as to the price at which goods can be resold which will follow them into the hands of third persons with whom he has no contractual relation. Such conditions are void as obnoxious to the public interest and repugnant to the absolute title conveyed. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Straus v. Victor Talking Mach. Co.* (1917) 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 7 A.L.R.—29.

37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; *Ingersoll v. McColl* (1913) 204 Fed. 147; *Ford Motor Co. v. International Automobile League* (1913) 209 Fed. 235; *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502; *B. V. D. Co. v. ISAAC* (reported herewith) ante, 440; *Garat v. Hall & L. Co.* (1900) 179 Mass. 588, 55 L.R.A. 681, 61 N. E. 219; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144; *Gillette v. Rea* (1910) 15 Ont. Week. Rep. 345, 1 Ont. Week. N. 448; *Taddy v. Sterious* [1904] 1 Ch. (Eng.) 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102; *McGruther v. Pitcher* [1904] 2 Ch. (Eng.) 306, 3 B. R. C. 292, 73 L. J. Ch. N. S. 653, 20 Times

L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678; National Phonograph Co. v. Menck [1911] A. C. (Eng.) 336, 80 L. J. P. C. N. S. 105, 104 L. T. N. S. 5, 27 Times L. R. 239, 28 Rep. Pat. Cas. 229, 48 Scot. L. R. 733.

Thus, in *Straus v. Victor Talking Mach. Co.* (1917) 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955, it is said that attempts to sell property for a full price, and yet to place restraints upon its further alienation, have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest.

So, also, in *National Phonograph Co. v. Menck* [1911] A. C. (Eng.) 336, 80 L. J. P. C. N. S. 105, 104 L. T. N. S. 5, 27 Times L. R. 239, 28 Rep. Pat. Cas. 229, 48 Scot. L. R. 733, it is said that the owner of ordinary goods is not, apart from any contractual obligation he may assume, bound by any restrictions in regard to the use or sale of the goods, the court saying that "it would be contrary to the public interests and to the security of trade, as well as to the familiar rights attaching to ordinary ownership, if any other principle applied."

It is immaterial that the purchaser of the goods may have bought with notice of the condition. *Garst v. Hall & L. Co.* (1900) 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219; *Taddy v. Sterious* [1904] 1 Ch. (Eng.) 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102; *McGruther v. Pitcher* [1904] 2 Ch. (Eng.) 306, 3 B. R. C. 292, 73 L. J. Ch. N. S. 653, 20 Times L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678.

Nor can the manufacturer create the necessary privity of contract between himself and persons into whose hands the goods may come, by notice attached thereto. *Bobbs-Merrill Co. v. Straus* (1908) 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; *Authors & Newspapers Asso. v. O'Gorman Co.* (1906) 147 Fed. 616; *Ingersoll v. McColl* (1913) 204 Fed. 147; *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502; *United States v. Kellogg Toasted Corn Flake Co.*

(1915) 222 Fed. 725, Ann. Cas. 1916A, 78; *Garst v. Wissler* (1902) 21 Pa. Super. Ct. 532; *Taddy v. Sterious* [1904] 1 Ch. (Eng.) 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102; *Gillette v. Rea* (1910) 15 Ont. Week. Rep. 345, 1 Ont. Week. N. 448.

Thus, no contract between one who offers a book for sale to the general public and a purchaser of the book without previous knowledge of a restriction upon its resale is created by the latter's acceptance of a copy containing a notice upon the inner side of the cover, by which the seller seeks to impose such restriction. *Authors & Newspapers Asso. v. O'Gorman Co.* (1906) 147 Fed. 616.

A sale by a manufacturer of his product at a price which represents all that he expects to receive as a result of the transaction is not rendered conditional by a notice accompanying the goods, stating that "this package and its contents are sold conditionally by us with the distinct understanding, which understanding is a condition of the sale, that the package and contents shall not be retailed nor advertised nor offered for sale at less than 10 cents per package." *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78.

No contract between a manufacturer and one who purchases his product from a third person, paying the full retail price therefor, may be implied, so as to subject the purchaser to an action for the stipulated liquidated damages, from the presence of a notice on the box, stating: "This box of Phenyo-Caffein is sold to be consumed only, and the title continues in the Phenyo-Caffein Company, to prohibit a resale thereof by any purchaser at retail, except that it may be resold for not less than 25 cents, or 5 boxes for \$1. The acceptance of this box by any person is assent to this condition of sale and a direct agreement with the Phenyo-Caffein Company, that for each violation the possession of the box may be recovered, and the party selling will pay the said company \$21 as liquidated dam-

ages, it being impossible to ascertain the exact damages which the said company will suffer by violation,"—although the defendant and plaintiff had corresponded in regard to the sale of the plaintiff's product, and the former knew of the terms of the contract. *Garst v. Wissler* (1902) 21 Pa. Super. Ct. 532.

If any contract is to be created by the purchase by a retailer from a factor of an article upon the container of which is printed a condition that the article is not to be resold for less than the specified price, it is not one of which the manufacturer may claim the benefit. *McGruther v. Pitcher* [1904] 2 Ch. (Eng.) 306, 3 B. R. C. 292, 74 L. J. Ch. N. S. 653, 20 Times L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678.

No contract between the manufacturer of goods and a retailer who has purchased them from a wholesaler, which will bind the retailer to maintain the minimum selling price fixed by the manufacturer, is created by attaching to the goods a label or notice stating that acceptance of the goods will be deemed a contract between a purchaser and the manufacturer, that he will observe the conditions fixing the retail price, and that, in the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of the manufacturer. *Taddy v. Sterious* [1904] 1 Ch. (Eng.) 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102.

A notice by a book publisher to dealers, that the book must not be sold at less than a specified net retail price, violation of which will be treated as infringement of the copyright, will not entitle the publisher to an injunction and accounting against a dealer who does not obey the notice, on the theory that the purchase of books completed a contract to maintain the price, since the only penalty to which the dealer can be assumed to have assented is the stated one of having his act treated as an infringement of the Copyright law. *Bobbs-Merrill Co. v. Straus* (1906) 15 L.R.A. (N.S.) 787, 77

C. C. A. 607, 147 Fed. 15, affirmed on another ground in (1908) 210 U. S. 389, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722.

But where, at the time of the sale, and as a part of it, a written statement of terms, containing an agreement not to resell for less than a certain price, is read to the purchaser and delivered to him, such agreement containing the stipulation that the acceptance of the goods with notice of the conditions of the sale should be an assent to the terms, the acceptance of the goods by the purchaser without an expression of dissent constitutes a contract. *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174.

It should be noted, however, that, under certain circumstances, one who is not contractually bound to maintain the fixed resale price may nevertheless be required to do so, under penalty of being held answerable in damages. Thus, where a party, by the exercise of fraud or deception, obtains goods without signing the required agreement, he may be subject to the same liabilities as if he had been bound thereby. See *V. b, infra*. And one who knowingly induces or procures another to violate his contract to maintain a certain resale price may likewise be held answerable, where such agreement is one which the courts would enforce as between the immediate parties thereto. See *V. b, infra*.

## *II. Validity of various devices employed to control resale price.*

### *a. In general; reasons for and against.*

The devices which have been employed to control the price at which an article shall be resold may, for the purposes of this note, be described as the rebate system, the contract system, the agency system, and the plan pursued in *UNITED STATES v. COLGATE & Co.* (reported herewith) ante, 443, of refusing to sell to persons who fail to conform to the expressed wish of the manufacturer as to the prices at which his goods shall be resold.

Under the rebate system, the manufacturer undertakes to refund to deal-

ers maintaining the selling price a portion of the purchase price paid by them. This, while operating as an inducement to the dealer to resell only at the price named, in no way binds him to do so.

The contract system is of various forms. In some cases the manufacturer deals directly with the retailer, who contracts to resell only at the fixed price. In other cases, it consists of contracts between the manufacturer and wholesalers whereby the latter agree to supply the trade at a stated price, and to sell only to such dealers as shall agree with them to maintain the fixed retail price. In still other cases, the contracts with the wholesalers require them to sell only to dealers approved by the manufacturer, with whom the manufacturer contracts directly that, in consideration of their being supplied with his product, they will sell only at the fixed retail price. The observance of these contracts is usually insured by affixing serial numbers to the packages in which the goods are to be retailed, to permit their being traced, and by requiring the wholesalers to make reports as to sales of goods effected by them. In another variant form, which, however, has been held only colorable, the contract with the wholesaler purports to make him a distributing agent for the manufacturer.

Under the agency system, the manufacturer is the retailer of his own products, maintaining agencies in various localities for the purpose. This method of marketing one's product is to be distinguished from that in which the so-called agent is really a vendee; albeit the dividing line is sometimes difficult to trace. See II. d, *infra*.

The only one of these devices concerning the essential validity of which (apart from any question of unlawful combination) there is any dispute is the contract system. This is due to a difference in judicial opinion as to whether a manufacturer or producer, having parted with the title to his goods, and having received for them all that he expects to receive, has any legitimate interest in regulating the

price at which they shall be resold, so that the contract which he makes for that purpose may be regarded as something other than a cover for a combination among the dealers not to compete with one another; and as to whether or not, conceding such interest to exist, such contracts, are, upon the whole, detrimental to the public welfare.

As remarked by Mr. Justice Brandeis in *Boston Store v. American Graphophone Co.* (1918) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447: "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely, it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles."

And in *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502, it was said by McPherson, J., in discussing the question of the standard by which the reasonableness of a restraint of trade is to be determined: "Where is a court to find the standard of reason? It seems to us that it must be found in the gradually accumulated results of general experience and observation in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated and of high importance to large classes and to many individuals. Obviously, a standard should have a true relation to the subject measured; and since the inquiry here is whether in a given case trade is likely to be or has actually been unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge."

Some consideration of the arguments by which it has been sought to demonstrate the advantages which accrue to the manufacturer and to the

public from the maintenance of a fixed retail price is, therefore, appropriate.

**Arguments in favor of price control.**

The advantages alleged to accrue from the maintenance of a fixed retail price, and the effects which may follow the cutting of such price by dealers, are set forth by Mr. Gilbert H. Montague in his book, "Business Competition and the Law" (published by G. P. Putnam's Sons, New York), as follows: "In terms of distribution, the difference between unbranded goods and popular-branded goods is this: Unbranded goods are backed only by the selling force of the reputation and personal equation of a dealer trying to pose to the purchaser as a principal, while the purchaser is instinctively regarding him as only an agent. Popular-branded goods, however, are backed by the combined selling forces of the reputation and personal equation of the identified manufacturer, whom the purchaser regards as the real principal with whom he is dealing, and also of the reputation and personal equation of the dealer, whom the purchaser regards, and prefers to treat, as really only an agent between the manufacturer and himself. In the marketing of popular-branded goods the selling force of the manufacturer's own reputation and responsibility begins, as in the case of unbranded goods, with the manufacturer's immediate customers; but instead of stopping there, it continues down through all the wholesalers, middlemen, dealers, and retailers until the last retailer has parted with the goods to the ultimate consumer. After the wholesalers, or the middlemen, or the dealers, or the retailers have bought the popular-branded goods, and they in turn offer them to their respective customers, they appeal to audiences that are all in a very different mood from those which judge unbranded goods. If the brand is firmly and favorably fixed in the popular mind, the customer is measurably convinced at the outset regarding the quality of the goods and the reputation and responsibility of the manufacturer. If to this knowledge be now added knowledge of the standard price at which the goods may

be bought of any dealer, and this standard price is also measurably satisfactory, then practically every factor that is determining in a sale is already favorably active. Wholesalers' salesmen do not need to call so frequently upon retailers, nor to exert so much effort in obtaining their orders. Retailers are relieved from the necessity of spending so much time assuring consumers regarding the price and quality of popular-branded goods. The manufacturer counts in each transaction of sale and resale, and his reputation and personal equation are the chief selling forces that at every stage sell popular-branded goods. Every dealer benefits equally in this selling force added by the manufacturer. For every purchaser knows that no matter from whom he buys these popular-branded goods, he will receive the same quality for the standard price. Competition, therefore, becomes transformed, and vastly increased, and expands into national dimensions. Every popular brand of goods competes with all unbranded goods of the same general class, and with all other brands of goods of the same general class. Prices on any popular brand of goods are prevented by this competition from being too high. For any excess in price of one brand over that of unbranded goods or other brands of goods of the same general class cannot exceed the sum that the consumer will be willing to pay for this insurance of quality and reliability. The pull of the consumer's reliance, that draws popular-branded goods swiftly through the hands of wholesalers, middlemen, dealers, and retailers, and into the hands of the ultimate consumers, and the preconceived conviction of purchasers in favor of the goods at every stage along the line, and the fortification of innumerable places where the purchasers' whim might otherwise break down the line,—achievements all of which the manufacturer himself, unaided except by his own labor and capital, creates by aggressive popularization of his brand,—all these are forces as real and potent as physical laws. Collectively, they are the forces



that constitute 'goodwill.' While the manufacturer's popularization of his brand is to-day frequently accomplished through advertising the particular merit of the goods, this is only because advertising—as contrasted with the word-of-mouth salesmanship of the manufacturer's salesmen and the dealer's clerks—is the least costly way by which the manufacturer can increase distribution soon enough, and to such an extent as will enable him to expand his production and to obtain the lower costs that alone can justify the price at which he markets his goods. The traveling men's pay rolls, railroad tickets, and hotel bills, the solicitors' wages and expense accounts, the store and show-room rents, the overhead charges and the clerk hire that would be needed in order to offer for sale any specialty simultaneously in every city, town, and hamlet in the country so that every dealer and consumer in the United States could see it, would infinitely exceed the cost at which practically the same result can be accomplished through country-wide advertising in newspapers and periodicals and other mediums of local and national circulation. . . . Through some or all of these means, however, and always through unceasing delivery of quality, the manufacturer of branded goods must vest his brands with goodwill, before he can harness to them this pull of the consumer's reliance, or make the selling forces of his own reputation and responsibility the factors that shall play the chief part in the sales and resales of his branded goods down to the final sale of the last retailer to the ultimate consumer. Here, then, is the elemental reason why the manufacturer of popular-branded goods, who has achieved all this, feels the necessity, and claims the right, to fix the standard price beyond his immediate customers: It is the manufacturer's reputation, responsibility, personal equation, and goodwill, and not the wholesaler's or middleman's or dealer's or retailer's efforts, that constitute the chief selling force in each successive sale and resale. In the marketing of popular-branded goods, middlemen

and dealers, in the business sense as distinguished from the legal sense, are really only agents of the manufacturer. The manufacturer is the real principal, and the real seller of the goods; and to the extent that he is the principal and the seller, the manufacturer claims the right that everyone else has always had to fix the price of his own goods to his own customers. The manufacturer of popular-branded goods has an interest in the success of his goods to the extent of the entire volume of sales of all the dealers that handle them. Each dealer has an interest in the success of those goods only to the extent of the relatively small quantity he handles. The manufacturer of popular-branded goods has his constant expenses for advertising and solicitation to increase the volume of their distribution. Middlemen and dealers in those goods do not have this burden, though it operates for their benefit. Nor is this extra cost passed on to the public. For the standard price on every popular brand of goods is first put at the figure which will take off the volume necessary in order to keep the manufacturer's costs low enough to justify the price. Increased volume thus lessens costs and permits increased quality for the same standard price; and this in turn increases volume again, with the result that the quality delivered to the consumer is several times compounded. The standard price on popular-branded goods does not tend to keep the manufacturer's profit per article high. Competition from unbranded goods and from other brands of goods of the same general class, as we have already seen, prevents that. The function of the standard price, in the distribution of popular-branded goods, is simply to enlarge the distribution, and to keep it large through continual fostering of the consumer's reliance; and thus, while keeping the manufacturer's profit per article low, to keep the number of articles sold, and therefore the number of these low profits, just as plentiful as the consumer's demand will dictate. Since the manufacturer of popular-branded goods assumes the chief part of the sales-

manship in each successive sale and resale of the goods, and the consuming public does not have its standard price increased,—for competition, as we have seen, prevents this,—it would seem to be in the public interest to permit the manufacturer to use this reasonable means to expand his business for the sake of more effective competition with his rivals. . . . 'Price cutting' of unbranded goods necessarily can affect only the small field and narrow interest comprising the price cutter's own trade. Since the goods are unbranded, and therefore not readily comparable with others of the same general class, the price cutter's competitors have almost as good an opportunity as before to avail of their own reputation, personal equation and good will to preserve the confidence of their trade in the quality and prices of the goods on their shelves. No verdict expressed by the price cutter's customers, or the customers of his competitors, can, therefore, possibly prejudice other dealers handling the same goods elsewhere. For there is no ready way by which these unbranded goods can be identified with the other unbranded goods that the price cutter is sacrificing. Nor can it embarrass the manufacturer of the unbranded goods. For he is unknown in the transaction of the retail sale, and, indeed, in any sale beyond the sale which the manufacturer himself made to the middleman. 'Price cutting' of unbranded goods, therefore, has substantially no ulterior bad effects. 'Price cutting' of popular-branded goods, however, affects not only the price cutter's trade and competitors, but also everyone trading in that particular brand, up as high as the manufacturer himself and down as far as the ultimate consumer. As regards the economic forces involved in their distribution, unbranded goods and popular-branded goods, we have already found, are utterly different. Since the latter are all ear marked and standardized, and their price and quality have been familiarized widely by known brands, there can be no question of their quality nor of the manufacturer's rela-

bility; and no appeal by the price cutter's competitors to their own personal equation can overcome this difference in price. Against 'price cutting' on popular-branded goods, therefore, the price cutter's competitors can present no ready argument. Until they throw out this brand, and take up another line, the 'price cutting' of their competitors on this brand threatens the dealers' actual existence. 'Price cutting' on popular-branded goods, therefore, affects their entire national distribution. The capture by the price cutter of his competitor's customers, under these circumstances, is seldom due to any enduring efficiency on the part of the price cutter. More often it is only a sudden raid, timed by the price cutter so as to produce the greatest possible demoralization and stampede of his competitor's trade, not only in the lines on which he is cutting prices but also in all other lines, and executed at a large initial loss to the price cutter in the confidence that, under cover of the resulting demoralization and stampede, he can more than recoup upon other lines. So immediate and so deadly is this kind of 'price cutting' that if a price cutter misses killing his dealer-competitor,—whom he generally aims to kill whenever he resorts to this kind of 'price cutting,'—he not infrequently kills, and always seriously hurts, the manufacturer of the popular-branded goods,—toward whom the price cutter, to give him credit, seldom has any real ill feeling whatsoever. For to the extent that the manufacturer has popularized his brand and developed a volume of trade, he begins to suffer the moment that dealers affected by the 'price cutting' of others become unable to handle the goods at a profit and cease to handle them at all. The manufacturer's own ability to distribute economically then stops. He cannot nationally distribute his goods direct to consumers—save, perhaps, in the case of a few high-priced articles—except at a vastly increased cost as compared with the normal basis. Since the goods are all identified by popular brands, the sensation which the 'price

cutter' creates at the expense of his competitors fixes in the minds of consumers generally a depreciated price for the goods on the shelves of all other dealers who handle them, and prejudices every dealer in his struggle to obtain among his own trade the reputation for being an efficient and reliable dealer. Dealers everywhere, therefore, begin to avoid the goods like pestilence; distribution falls off, production has to be curtailed, the manufacturer's costs increase, and his ability to continue marketing the goods at the same price and quality is threatened, so that through the resulting loss in the reputation of the goods among dealers and consumers the manufacturer's business is always seriously hurt, and not infrequently is killed."

So, also, in deciding *UNITED STATES v. COLGATE & CO.* (reported herewith) ante, 443, in the court below (253 Fed. 527), it was said by Waddill, District Judge: "It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of the kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices

after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted."

In *Fisher Flouring Mills Co. v. Swanson* (1913) 86 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144, it is said: "In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest, because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business; and this for the simple reason that, in the absence of a monopoly, either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition. Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in the competition in prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both; hence is

on all scores against public policy. But where a given product is not in the hands of one man or a combination of men, there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to enable him to maintain an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest, so far as it is touched by the contract, is in sympathy with it, because served by it. . . . Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. *Mazetti v. Armour & Co.* (1918) 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633, Ann. Cas. 1915C, 140. His reputation

as a manufacturer, one of his chief assets, is bound up in them."

Another way in which price cutting may operate to the manufacturer's detriment is, that other dealers, instead of meeting the cut price and making a small profit or no profit at all, will endeavor to persuade their customers to purchase something else in which there is more money for the dealers.

Another argument in favor of resale price maintenance is that it enables the small producer to secure for himself the advantages which otherwise might only be achieved by one with sufficiently large capital to enable him to establish a system of actual agencies.

#### **Arguments against price control.**

The arguments against it, which are enumerated in the Annual Report of the Federal Trade Commission for the fiscal year ending June 30th, 1918, are that: (1) The power to fix prices will usually be abused by the allowance of too large profits; (2) resale price maintenance protects and encourages inefficient jobbers and prevents elimination in the overcrowded field of middlemen; (3) it tends to secure the co-operation of dealers and to prejudice them against brands whose prices are not fixed; (4) it forces other dealers to attempt the control of prices; (5) it encourages general standardization of prices and elimination of normal competition among dealers; and (6) it forces the ultimate consumer to pay higher prices and leaves him no bargaining power with respect to the article concerned.

In the arguments which are made in favor of price control, the advantages accruing to the manufacturer, and the evils attendant upon permitting the retailer to fix his own price, are doubtless rather highly colored. Even in the days of unrestricted price cutting, manufacturers contrived to remain in business and to accumulate comfortable fortunes; and the aggressive price cutter seldom, if ever, succeeded in eliminating competition. The little fish were not invariably gobbled up by the big ones, but pre-

served their existence by displaying superior activity.

Admitting, however, that some advantage accrues to the manufacturer from the maintenance of a uniform retail sale price, the question remains as to whether a fair share of the resultant benefits is returned to the man who foots the bill,—the ultimate consumer. The benefit claimed to be received by him is the lowering of price incident to quantity production, and an insurance that goods sold under a tradename will maintain a uniform quality which the manufacturer will seek not only to maintain, but to improve. But unfortunately these claims are not always justified by the facts. The consumer does not always share in the economies effected by increased production, nor does the quality of branded goods remain uniform. The public is not always attracted by the equally good article sold at a less price, or by the better article at the same price, but is prone to purchase the article which it has been in the habit of buying, or which is most effectively advertised. Accordingly the manufacturer, especially when confronted by increased cost of production, is subjected to the temptation of attempting to preserve his margin of profit by reducing quality and increasing his advertising appropriation.

#### *b. The rebate system.*

A manufacturer may agree to allow a rebate to those who will maintain a selling price indicated by him. *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1903) 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

A contract whereby the purchaser, in consideration of a certain rebate, agrees not to retail goods at less than the trade price fixed by the manufacturer, is not void as being in restraint of trade, even so far as it relates to goods which may be purchased of other dealers. *Clark v. Frank* (1885) 17 Mo. App. 602.

An agreement between the vendor and the purchaser of certain goods, that if the purchaser will for a designated period buy all his supply exclusively from the vendor's distribut-

ing agent, and will not resell it at any lower prices than the list prices of such distributing agent, the vendor will, upon a proper certificate of such fact, pay a rebate to such purchaser, is not in restraint of trade, since it places the purchaser under no contractual or other restraint in respect of prices at which the goods may be resold, but simply offers an inducement not to undersell the vendor's agent, and only secures to the vendor a reasonable protection in his business. *Re Greene* (1892) 52 Fed. 104.

Nor is such an arrangement a violation of the Federal Anti-trust Law, as an attempt to monopolize interstate commerce. *Ibid.*

#### *c. The contract system.*

##### *1. In general.*

##### *(a) Essential validity.*

A contract is not necessarily invalid, because it may operate in restraint of trade. If it is reasonable as between the parties themselves, and not at variance with the public interest, it will be recognized and enforced by the courts:

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, it was said by the court, through Mr. Justice Hughes: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case for the protection of the covenantor. Otherwise restraints of trade are void as against public policy. . . . Public welfare is first considered; and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained."

In an early Ohio case, it is pointed out that the cases upon the question of the validity of contracts in restraint of trade may be separated into two

classes, in one of which the question is whether the contracting party has, to a greater extent than fairly required for the protection of his private interests, disabled himself from carrying on his trade or business, and so not only deprived society of a useful member, but created a strong probability of adding to its burdens by reason of idleness or crime. The public in this class of cases is affected only indirectly, through the individual contracting. In the other class, the question arising upon agreements creating combinations of persons engaged or interested in the same kind of business is, whether their object and effect are directly to affect the public by preventing competition and enhancing prices. In the first class of cases, the interests of the public and those of the party are to a great extent the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases, the immediate interests of the public and those of the contracting parties are in conflict. The former desire lower, and the latter higher, prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in the business cannot carry it on without a loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition, and so increasing prices. *Hoffman v. Brooks* (1884) 6 Ohio Dec. Reprint, 1215.

And in *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144, it is said: "In considering this question much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the

subject, have been designated as 'contracts in restraint of trade,' and those more correctly designated as 'contracts in restraint of competition.' The term 'contracts in restraint of trade' has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts when without limit as to time or place, are invalid. *Long v. Towl* (1868) 42 Mo. 545, 97 Am. Dec. 355. The broader doctrine inhibiting, as contrary to public policy, all contracts which, by any other means, tend unreasonably to restrict competition, is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. See notes to *Harding v. American Glucose Co.* 64 L.R.A. 738, 74 Am. St. Rep. 238, 239; *Noyes, Intercompany Relations*, § 336; 2 *Eddy, Combinations*, §§ 719, 722; *Cooke, Combinations, Monopolies & Labor Unions*, 2d ed. § 160. This broader doctrine is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained, or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last we are not here concerned. It is manifest that in case of such contracts the public interest is not conserved by mere limitations either as to time or space. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. *Noyes, Intercompany Relations*, 2d ed. § 357. Since limitations of time

and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration."

In applying these principles to contracts by which a manufacturer has sought to control the resale price of his product, the courts have reached various conclusions.

The validity of such contracts is denied on the ground that they are not reasonably necessary for the protection of the manufacturer, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Boston Store v. American Graphophone Co.* (1918) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Waltham Watch Co. v. Keene* (1913) 202 Fed. 225, affirmed without opinion in (1913) 126 C. C. A. 668, 209 Fed. 1007; *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78; *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156; *Ford Motor Co. v. Benjamin E. Boone* (1917) 156 C. C. A. 621, 244 Fed. 335; *B. V. D. Co. v. ISAAC* (reported herewith) ante, 440; *W. T. Rawleigh Medical Co. v. Walker* (1917) — Ala. App. —, 77 So. 70 (semble); *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803; *Stewart v. W. T. Rawleigh Medical Co.* (1916) 58 Okla. 344, L.R.A.1917A, 1276, 159 Pac. 1187; *Hunt v. W. T. Rawleigh Medical Co.* (1918) — Okla. —, 176 Pac. 410.

Other courts have held such contracts valid as reasonably necessary to the protection of the good will of the manufacturer, and not injurious to the public interest, so long as the

restriction does not cover all or a controlling fraction of a given commodity, and the price fixed is fair to the public in that it furnishes only a reasonable profit to the contracting parties, and also so long as a controlling number of the manufacturers or wholesale dealers in such commodity have not made identical contracts with the retailers in such locality. See *Ford Motor Co. v. Benjamin E. Boone* (1917) 156 C. C. A. 621, 244 Fed. 335; *Grogan v. Chaffee* (1909) 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; *D. Ghirardelli Co. v. Hunsiker* (1912) 164 Cal. 355, 128 Pac. 1041; *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737; *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174; *Garst v. Charles* (1905) 187 Mass. 144, 72 N. E. 839; *Robert H. Ingersoll & Bros. v. Hahne & Co.* (1917) 88 N. J. Eq. 222, 101 Atl. 1030, s. c. on final hearing (1918) 89 N. J. Eq. 332, 103 Atl. 128; *Walsh v. Dwight* (1899) 40 App. Div. 513, 58 N. Y. Supp. 91; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144; *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. (Eng.) 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. (Eng.) 847, 8 B. R. C. 221, [1915] W. N. 184, 84 L. J. K. B. N. S. 1680, 113 L. T. N. S. 386, 31 Times L. R. 399, 79 Sol. Jo. 439, Ann. Cas. 1915D, 714. And see also, as more or less directly recognizing the validity of such contracts, *W. T. Rawleigh Medical Co. v. Osborne* (1916) 177 Iowa, 208, L.R.A.1917B, 803, 158 N. W. 566; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1896) 50 N. Y. Supp. 1064; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1903) 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 335, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201,—set forth infra.

An agreement by a jobber to adhere to prices and conditions of sale prescribed by the manufacturer is illegal

where such contract is one of the instrumentalities by which a monopoly is sought to be secured. *Standard Sanitary Mfg. Co. v. United States* (1912) 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9, affirming (1911) 191 Fed. 172.

Territorial restrictions cannot make valid a price restriction otherwise invalid. *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156.

There is nothing in the Clayton Act of October 15, 1914, chap. 323, 38 Stat. at L. 730, Comp. Stat. § 8835A, 9 Fed. Stat. Anno. 2d ed. p. 730, or the Federal Trade Commission Act (Act of September 26, 1914, chap. 311, 38 Stat. at L. 717, Comp. Stat. § 8836a, 4 Fed. Stat. Anno. 2d ed. p. 575), validating price restrictions by a vendor on resale of property sold absolutely by him. *Ford Motor Co. v. Union Motor Sales Co.* (1917) (Fed.) supra.

Cases supporting the view that contracts to control prices are invalid as being in undue restraint of trade.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, contracts between a manufacturer of proprietary medicines and the dealers whom he permitted to sell his product, comprising most of the dealers in similar articles throughout the country, which fixed the price for all sales, whether at wholesale or retail, were held to operate as a restraint of trade, unlawful both at common law, and, as to interstate commerce, under the Anti-trust Act of July 2, 1890. The court said: "The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Now we are dealing with a single transaction, conceivably unrelated to

the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them. The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system. But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People v. Sheldon* (1893) 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Judd v. Harrington* (1893) 139 N. Y. 105, 34 N. E. 790; *People v. Milk Exch.* (1895) 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *United States v. Addyston Pipe & Steel Co.* (1898) 46 L.R.A. 122, 29 C. C. A. 141,



54 U. S. App. 723, 85 Fed. 271, on appeal in (1899) 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *W. W. Montague & Co. v. Lowry* (1904) 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Chapin v. Brown Bros.* (1891) 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; *Craft v. McConoughy* (1875) 79 Ill. 346, 22 Am. Rep. 171; *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803. The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, created a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

Mr. Justice Holmes dissented upon the ground that the interests of the public, at least where the necessities of life are not involved, are not unduly prejudiced by agreements seeking to maintain a fixed retail price, saying: "The only question is whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price. This is the important question in this case. I suppose that in the case of a single object, such as a painting or a statue, the right of the artist to make such a stipulation hardly would be denied.

In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack, if it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause. But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can

have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

The decision of the Supreme Court in the foregoing case is followed without discussion in *Kellogg Toasted Corn Flake Co. v. Buck* (1913) 208 Fed. 383.

And in *Boston Store v. American Graphophone Co.* (1913) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447, it was likewise held that a contract between the general sales agent of a manufacturer and a dealer in its manufactured product, restricting the price at which such products shall be resold, is contrary to the general law, and, so far as it affects interstate commerce, a contravention of the Federal Anti-trust Law.

And in *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156, it is said to be the gen-

eral and well-settled rule that a system of contracts between a manufacturer and retail dealers by which the manufacturer, in connection with absolute sales of his product, attempts to control the retail prices for all sales by all dealers, eliminating all competition and fixing the amount which the ultimate purchaser shall pay, amounts to a restraint of trade, and is invalid both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-trust Act.

In *Stewart v. W. T. Rawleigh Medical Co.* (1916) 58 Okla. 344, L.R.A. 1917A, 1276, 159 Pac. 1187, it is said that the general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturer attempts to control the prices for all sales by all retailers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumers shall pay, amounts to restraint of trade, and is invalid, both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-trust Act,—citing *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78. And this decision is followed in *Hunt v. W. T. Rawleigh Medical Co.* (1918) — Okla. —, 176 Pac. 410.

One who parts with the title to merchandise has no further concern with the price at which it may be resold. *B. V. D. Co. v. ISAAC* (reported herewith) ante, 440.

Public policy forbids the affixing of a condition to the sale of an article whereby the purchaser and dealer must sell at a price fixed by the manufacturer. *Waltham Watch Co. v. Keene* (1913) 202 Fed. 225, affirmed without opinion in (1913) 126 C. C. A. 668, 209 Fed. 1007, writ of certiorari denied in (1914) 232 U. S. 724, 58 L. ed. 815, 34 Sup. Ct. Rep. 602.

In *John D. Park & Sons Co. v. Hartman* (1907) 82 C. C. A. 158, 153 Fed. 24, reversing on this point (1906) 145 Fed. 358, 12 L.R.A. (N.S.) 135, it was held that a system of contracts whereby a manufacturer, who required wholesalers handling his products to

resell for a certain price and only to such dealers as should contract with the manufacturer to maintain the retail price, the effect of which was to destroy competition between wholesalers and retailers of his goods, was not shown to impose only such restraints as are necessary to protect the manufacturer by averments that the competition theretofore in force had "demoralized," "confused," "troubled," and "damaged" complainant's business. The court, speaking through Judge Lurton, said: "The general averment that, under the 'cut-rate' plan of doing business, demoralization and damage resulted, while, under the 'contract system' enlarged sales and increased emoluments have and will follow, does not answer the question as to why such covenants are necessary to protect complainant against consequences which may fairly require protection. Looking to the averments of the bill as a whole, and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract, and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complainant, their prime purpose is neither the protection of the retained business of the complainant, nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than

necessary for the purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. No instance has been called to our attention where the main purpose and principle, if not only result, is to protect buyers against the competition of each other. If such a principle shall find lodgment in the law, it must be upon economic reasons which are in conflict with those which now prevail. The single direct effect of the 'system of contracts' is to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way. Each obtains a price enhanced by the 'system' over the 'cut-rate' or 'cut-price' method which had before prevailed, and which it was the object of the new plan to abolish. It may be that sales went on as before, but at a higher price to the consumer than would otherwise have been paid."

In *W. T. Rawleigh Medical Co. v. Walker* (1917) — Ala. App. —, 77 So. 70, the court, although finding it unnecessary to decide the question, expressed the opinion that a provision in a contract by which one party agrees to sell the other on credit and at wholesale prices, for resale to consumers, certain articles manufactured and put up by it, that such goods should be resold only at regular retail prices, to be indicated by the manufacturer, was void as tending to place a burden upon the alienation of property not necessary for the protection of the parties.

But compare *W. T. Rawleigh Medical Co. v. Osborne* (1916) 177 Iowa, 208, L.R.A.1917B, 803, 153 N. W. 566, as set out under catchline, "Cases supporting the view that contracts to control prices may be valid."

In *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 30 L.R.A. (N.S.) 327, 127 N. W. 803, the court, adopting the reasoning in *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24, held that a system of contracts by which a manufacturer of medicine under a secret formula undertakes to control the retail price by fixing the price at which it shall be

sold, and the dealers who may secure it, is void as in restraint of trade.

Where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to fix and control the price paid therefor by the consumer is not determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The manufacturer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic. *Stewart v. W. T. Rawleigh Medical Co.* (1916) 58 Okla. 344, L.R.A.1917A, 1276, 159 Pac. 1187.

In *Stewart v. W. T. Rawleigh Medical Co.* (Okla.) *supra*, it is said: "Recurring to the facts of the case at hand, it will be seen that plaintiff's plan or scheme of sale of its manufactured products eliminated all form of competition therein. Its goods were sold only to those who entered into a contract to sell to the consumer at the prices fixed by plaintiff. While but a single contract is involved here, it was admitted that the plaintiff transacted business only in pursuance of like contracts. It was shown that the medical company had a capital and surplus of over \$1,000,000 invested in its business, and that an 'army of Rawleigh men' was engaged in selling its products throughout the United States. There was no competition in its products between its so-called agents and others, for its sales were confined to those who entered into its restrictive contracts. There was, or could be, no competition between its so-called salesmen, and in no other means than through a purchase from such salesmen could the consumer buy its products. The contracts left no room for the usual competition between the dealers in the products sold by plaintiff; and this was the obvious purpose of the plan. It was not shown, nor can we conceive it to be the case, that the restraints fixed by the manufacturer upon the price to be paid by the consumer were necessary to its retained business, and therefore

ancillary to the principal purpose of the agreement; but, on the other hand, the plain effect of its system of contracts was to destroy all competition in the sale of its manufactured products. Well may we, in this connection, use the language of the court in *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 185, 82 C. C. A. 158, 158 Fed. 24. Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to anyone who will buy "necessary," to use Judge Taft's phrase, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party?" In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, "such only, as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public?" *Horner v. Graves* (1831) 7 Bing. 785, 131 Eng. Reprint, 284, 5 Moore & P. 768, 9 L. J. C. P. 192. To sustain the validity of the restrictive agreements of plaintiff would be to give effect to a system of doing business by which all the sales of all its products would be, under all circumstances, controlled by it. Applied to modern conditions, the public interest is of first importance in determining the validity of contracts in restraint of trade. If the restraint is sustained, it can only be in cases where it is found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee. The fact that here there was no agreement between different manufacturers, wholesalers, jobbers, or others, to fix and maintain a selling price, is, in the language of Justice Hughes in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, unimportant. In that case

it was said: "The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of the dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system."

**Cases supporting the view that contracts to control prices may be valid.**

Where the view is taken that contracts to control prices may be valid, the question where the line is to be drawn between a lawful and unlawful restriction of competition must depend largely upon the facts and circumstances of each case; and this fact makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of a contract looking toward the maintenance of a fixed retail price. *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144.

In *Fisher Flouring Mills Co. v. Swanson* (Wash.) *supra*, the court, after alluding to the difficulty of laying down the rule by which the valid-

ity of such a contract is to be determined, said: "Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain, a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy."

Under an economic system founded upon competition, every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable, being neither fairly necessary to the protection of the manufacturer, who already has a monopoly, nor beneficial to the public, because it does not tend to create an incentive to increase the excellence of the product in order to maintain the better price. *Ibid.*

The fact that the contract does not involve the whole of the product to which it relates, as in cases where the manufacturer is not the sole producer of that product, is material in the determination of the question whether such restraint of trade as results from the contract is such as to render the contract void as imposing an unreasonable restraint. *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041.

If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers in a given locality, as the result of an agreement between them all, such contracts would be invalid as in aid of a combination in restraint of competition.

**Fisher Flouring Mills Co. v. Swanson** (Wash.) *supra*.

But the possibility that all, or nearly all, of the dealers in a given commodity in a given area, have made contracts of the same character with all retailers for the maintenance of a fixed retail price for their products is too remote to furnish a reason for declaring a contract with a single manufacturer, who has no monopoly or approximation thereto, void. *Ibid*.

The validity of a condition that the dealer shall adhere to the retail selling price fixed by the manufacturer is sustained in **Ford Motor Co. v. Benjamin E. Boone** (1917) 156 C. C. A. 621, 244 Fed. 335, in which it is said: "It being a well-recognized principle of law that the vendor may retain title to the thing sold until the full stipulated consideration therefor shall have been paid (**Bailey v. Baker Ice Mach. Co.** (1915) 239 U. S. 268, 60 L. ed. 275, 36 Sup. Ct. Rep. 50), it would seem that, if we are to hold the stipulation to that effect in this contract invalid, it must be because, under the circumstances of the case, such a transaction would be violative of some rule or principle of public policy. But, when the conditions are analyzed, what public interest would be subserved by striking down the contract and thwarting the intent of the parties thereto? As already suggested, it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. But, were it otherwise, what benefit would result to the public by opening the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. If, as was admitted to be the fact in Motion

**Picture Patents Co. v. Universal Film Mfg. Co.** (1917) 243 U. S. 502, 61 L. ed. 871, L.R.A.1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959, the plaintiff's car were wholly indispensable to the carrying on of a great industry, and if its plan of marketing were such as to constitute an instrument of oppression or favoritism, then the courts should perhaps be astute to discover means by which to disorganize its system and to encourage competitive effort as between the salesmen or distributors of its product; but such is not the case. Whatever its merits, the Ford car is not, except in the most remotely relative sense, essential to the well-being of the public or any group thereof, or any individual. There are other automobiles in great variety available to anyone who has need and desires to purchase, some cheaper, some more expensive, some less efficient, some more efficient, some less attractive in appearance, others more attractive. **Cole Motor Car Co. v. Hurst** (1915; C. C. A. 5th C.) 142 C. C. A. 572, 228 Fed. 280. Obviously, therefore, the public already has competition to the fullest extent desirable; not a competition entailing the waste of duplication and overlapping effort in marketing the product, with sporadic price cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly different. Is not each manufacturer now under the highest sort of pressure from without? Must it not be alert to discover new improvements and conveniences and to keep down to the minimum the cost of construction and distribution? It is a matter of public knowledge that fortunes are spent in advertising these competitive products, in an effort to attract and cultivate public favor. Under such conditions will the public be benefited by requiring the manufacturer to assume the further burden of internal guerrilla competition, with the confusion and waste entailed thereby? It is futile to say that such a burden will fall not upon the manufacturer or the public, but upon the local dealer or distributor. If there

were ten dealers selling Ford cars in Portland, where there is now but one, would not the expense of marketing be greatly increased, and if, as is contended, the contract under consideration is harsh to the 'dealer,' does it not follow that, with the trade divided into ten parts, and with the expense of rentals and personal service multiplied, the price of the car to the public would increase? Does anyone suppose that such dealers would for any considerable length of time cut the price? In the light of experience, is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most economical method, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies? At least, we do not think that we would be warranted in holding that the contract here is inherently vicious. If, in fact, it is prejudicial to the public interest because to an unreasonable degree it operates in restraint of trade and interferes with the free play of wholesome competition, the defendants may plead and show the facts. When we come to consider the decided cases, we find that no decision cited by either party from the Supreme Court of the United States involves the precise question, and that court, it is to be noted, appreciating from an early day the growing complexity of our industrial life and the importance of curtailing the liberty of contract only in so far as positive law or considerations of public policy might from time to time clearly require, has been careful to limit its decisions strictly to the matters directly in issue. *Adams v. Burke* (1873) 17 Wall. (U. S.) 453, 21 L. ed. 700; *Bauer v. O'Donnell* (1913) 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.

(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150. And in reading the cases these considerations should be kept in mind: There is no attempt here to bind the purchasing public by a mere notice attached to the machine, nor is there any claim that a patent is of such force that a violation of the warning or the provisions of a notice of that character constitutes an infringement. If involved at all, the rights of the public are only remotely affected. The issue is between the patentee manufacturer and the consignee, who have expressly contracted with each other. In the second place, as we have seen, the plaintiff is not in the exclusive control of a useful or desirable article of commerce, whether patented or copyrighted, for which there is no substantial substitute; that is, it is without the power to oppress the public by fixing grossly excessive prices or imposing onerous and unreasonable conditions upon the use of its product. It controls but one of many similar devices which may be purchased upon the open market. In the third place, the plaintiff makes no attempt to restrain trade in unpatented or copyrighted articles of commerce by requiring the use thereof upon or in connection with its cars."

In *Grogan v. Chaffee* (1909) 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745, it was held that a contract by one producing olive oil, with persons selling it at retail, that they will maintain the price fixed by him, was not void as in restraint of trade. The court said that the producer was in the first instance under no obligation to sell his oil, and when he did sell it he had the right to exact as part of the consideration for the sale a promise by the purchaser that he would not sell it at less than a stipulated price. "There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained."

In *D. Ghirardelli Co. v. Munsicker* (1912) 164 Cal. 355, 128 Pac. 1041, it was held that an agreement by a re-

tailer to maintain the fixed retail selling price of plaintiff's product was valid as being no more than necessary to afford a fair protection to the business of the complainant, and not so large as to interfere with the interests of the public, where the output of the manufacturer did not constitute the whole supply of the product in question.

In *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737, an action for damages under the California Anti-trust Act, it is said that a manufacturer or wholesaler not only has the right to fix his own price, but also the right to establish the price at which his goods are to be sold by retail dealers to whom such goods are sold for retail sale, so long as those acts are not the direct effect or result of a combination formed and maintained by himself and others to create restrictions in trade or commerce, or to maintain a monopoly of the trade.

In *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174, which was an action to recover a sum of money stipulated as liquidated damages for breach of a covenant not to sell a proprietary medicine purchased by the defendant of the plaintiff below a stipulated price, it was held that the contract was not in unlawful restraint of trade, the court saying: "When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license in the form of a restriction of the price at which he may sell is proper enough." The sentence above quoted has caused this decision to be regarded by some courts as turning upon the circumstance that the article in question was made under a secret formula; while other courts regard this as being simply an accidental feature of the case, which they accordingly cite as authority for the proposition that a restriction of the seller's right to fix the retail price of an article is not of itself an undue restraint of trade.

The restraint imposed by a contract between a manufacturer of watches

sold under a tradename and advertised at a fixed retail price, and a retailer, that the watches shall not be resold at less than the fixed retail price without first removing the name, trademark, and guaranty, is valid as being reasonable both with respect to the public and to the parties, and limited to what is fairly necessary in the circumstances of the case for the protection of the covenant, where it appears that the only way in which the watches can be sold for the low price fixed by the manufacturer is to manufacture them in immense quantities, and the only way to produce customers upon a big scale is by extensive advertising, and that the direct effect of a cutting of the fixed retail price by a dealer is that other dealers in the neighborhood cannot sell the watches at such price, and consequently will discontinue their sale. *Robert H. Ingersoll & Bro. v. Hahne & Co.* (1918) 89 N. J. Eq. 332, 108 Atl. 128. In this case, the court said: "In those cases in which the right to fix a resale price has been under consideration, the prohibition against the resale has been against the resale of the article itself. The name or trademark or what not has been so much an integral part of the article as that a resale of the article without reference to the trademark or tradename would be practically impossible. In the case at bar the prohibition is not against the resale of the article, nor is it impracticable to resell the article without reference to the tradename. Indeed, complainant offers to manufacture watches similar to those marked with its tradename without the tradename. Complainant does not seek to retain any right in the article itself; it merely seeks to restrain the use of its tradename and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its tradename and good will under such conditions as it sees fit. It has an interest in addition to that of mere protection to its tradename and good will, for it guarantees the article sold, and scrupulously performs its guaranty, maintaining a large and expensive repair department for this purpose.



It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the resale of the article itself and the case at bar, where the nature of the restraint is not such."

The owner and manufacturer of a proprietary medicine may lawfully enter into agreements with dealers that they will not sell it for less than a specified retail price. *Garst v. Charles* (1905) 187 Mass. 144, 72 N. E. 839.

Contracts by which a manufacturer agrees with jobbers and dealers to supply them with his products at a reduced price in consideration of their agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price, are not illegal as in restraint of trade, or as tending to create a monopoly. *Walsh v. Dwight* (1899) 40 App. Div. 513, 58 N. Y. Supp. 91.

In *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1896) 50 N. Y. Supp. 1064, it is said that it is lawful for manufacturers individually to agree with their customers that those customers shall sell the particular goods manufactured by the vendor for a certain price, so far as not to render the manufacturer liable to third parties thereby affected for doing an unlawful act.

In *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144, a contract by the manufacturer of a particular brand of flour sold in a certain market, with retailers, as ancillary to his wholesaling the product to them, that they would maintain a minimum price, was held to be valid if it was necessary to the continued production of his product, involved less than a controlling part of that commodity in the market, and the price fixed was fairly necessary to his protection, and afforded only a fair profit to the contracting parties. The complaint in this case alleged that the cost of manufacturing plaintiff's flour was greater than that of ordinary flour, that the plaintiff had incurred great expense in advertising it to the public, that it was necessary to operate the mill to

its full capacity in order to continue the business at a profit, and that, as it was necessary to sell the flour to all retail dealers in his community, rather than through one or two, the good will of the retail dealers was necessary to the success of the company, and that, in order to keep this good will, it was necessary to maintain a minimum retail price, offering a reasonable profit to the retailer, and that by reason of defendant's price cutting for the purpose of attracting customers to his store, the sales of plaintiff's flour had been decreased by rendering it unpopular with the retailers.

In *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. (Eng.) 847, 8 B. R. C. 221, [1915] W. N. 184, 84 L. J. K. B. N. S. 1680, 118 L. T. N. S. 386, 31 Times L. R. 399, 59 Sol. Jo. 439, Ann. Cas. 1915D, 714, a price maintenance contract was said by Lord Dunedin to be "not in itself unfair," and one which the manufacturer "has a legitimate interest to enforce."

A contract between the manufacturer of goods and wholesale dealers, whereby such dealers bind themselves not to resell the goods for less than certain specified prices, and, if they sell to the trade, to procure a similar signed agreement from every retailer who pays the price, is not unlawful as being in undue restraint of trade, since the manufacturers are not bound to sell or to manufacture their products, and in selling have the right to impose such conditions as they see fit. *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. (Eng.) 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 582, 84 L. T. N. S. 858.

Contracts between a manufacturer of phonographs and records, and wholesalers handling such goods, that they shall not be sold to dealers on the manufacturer's suspended list, will not be considered void as being an unreasonable restraint of trade where it appears that the sale of a phonograph carries with it a considerable business in records. Per Lord Alverstone, in *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 385, 6 B. R. C. 42, 77 L. J.

Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

A case which is frequently cited as upholding the validity of contracts of the kind under consideration is *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1903) 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136. This was an action brought to recover damages for alleged injuries to plaintiff's business through a conspiracy on the part of the defendants, and involved the validity of the plan devised by an association of wholesale druggists, and adopted at their instance by manufacturers of proprietary medicines, looking to the maintenance of prices, and intended to do away with the advantage enjoyed by the larger dealers,—such plan being that the manufacturers should sell at fixed prices, with a rebate only to concerns who could be relied upon to maintain the selling price, and should accept orders only from such concerns. The majority opinions, however, appear to proceed upon the supposition that the plaintiff was not prevented from purchasing goods at the so-called "long" price. It was held that such plan was not in restraint of trade, *Haight, J.*, writing the principal opinion, saying: "It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trademarks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the

commissions agreed upon therefor." This decision has accordingly been explained (as in *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24) as based upon the assumption that the proprietary medicines forming the subject of the contracts there involved were made under patents, and so fall within a special class of cases which will be hereinafter discussed.

The suggestion has been made that where the seller has undertaken to sell an unlimited quantity of goods and to extend credit therefor, and the amount of the respective instalments to be paid is to be measured by an aliquot part of the sales made during the previous period, a provision for the maintenance of a fixed retail price, with a limitation of the territory within which the goods are to be resold, and a stipulation that the buyer shall devote his time and attention exclusively to the sale of such goods, may be considered as tending to operate as security for the payment of the purchase price, and, as affording merely a reasonable protection to the seller, not to be illegal and void as being an unreasonable restraint of trade. *W. T. Rawleigh Medical Co. v. Osborne* (1916) 177 Iowa, 208, L.R.A.1917B, 803, 158 N. W. 566. But compare *W. T. Rawleigh Medical Co. v. Walker* (1917) — Ala. App. —, 77 So. 70, as set out under catch line, "Cases supporting the view that contracts to control prices are invalid as being in undue restraint of trade."

A contract between a company engaged in the manufacture and distribution of artificial gas, whereby it agreed to purchase a natural gas franchise and a supply of natural gas from another company, which, although giving the natural gas company the right to fix the price of natural gas to consumers, is subject to the qualification that the natural gas company shall meet any reduction in price offered by others, is not one in restraint of trade, since by its terms the distributor's pipes are open to every producer who should apply for admission at a lower rate, the necessary result of which was to bring down the price of gas to the

consumer to the lowest possible price at which it could be supplied on a remunerative basis to the distributor. *Ft. Smith Light & Traction Co. v. Kelley* (1910) 94 Ark. 461, 127 S. W. 975.

*(b) Under state and Federal anti-trust laws.*

**Under Federal Anti-trust Act.**

As to the circumstances under which a refusal to sell to price cutters is a violation of the Federal Anti-trust Act, see II. e, *infra*.

As to whether an agency agreement fixing the price at which goods shall be resold effects an unlawful combination under the Federal Anti-trust Act, see II. d, *infra*.

As to whether the operation of the Federal Anti-trust Act is affected by the circumstance that the goods to which the contracts relate are protected by patent, copyright, or trademark, see II. c, 2, 3 and 4, *infra*.

The view taken by the courts of the essential validity of contracts giving the manufacturer control of the retail price is largely determinative of their attitude upon the question whether such contracts are in violation of the Federal Anti-trust Act. As holding that a system of contracts between an individual manufacturer and wholesale or retail dealers constitutes an unlawful combination under the Sherman Act, see *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Boston Store v. American Graphophone Co.* (1918) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; *Wheeler-Stenzel Co. v. National Window Glass Jobbers Asso.* (1907) 10 L.R.A. (N.S.) 972, 81 C. C. A. 658, 152 Fed. 864; *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78; *Ford Motor Co. v. Union Motor Sales Co.* (1917) 166 C. C. A. 584, 244 Fed. 156; *Stewart v. W. T. Rawleigh Medical Co.* (1916) — Okla. —, L.R.A. 1917A, 1276, 159 Pac. 1187; *Hunt v. W. T. Rawleigh Medical Co.* (1918) — Okla. —, 176 Pac. 410.

But in *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 855, 128 Pac. 1041, the opinion was expressed that agreements for the maintenance of a

fixed retail price of a certain commodity which do not involve the whole market supply of such commodity, entered into for the benefit of the manufacturer, are not unenforceable as being in restraint of trade under the Sherman Act; although, as the case did not involve any question of interstate commerce, the effect of the act was not properly involved.

And in *Robert H. Ingersoll & Bro. v. Hahne & Co.* (1918) 89 N. J. Eq. 332, 108 Atl. 128, it is held that the restraint upon the resale of an article, imposed by a notice subject to which it is sold, that it shall not be sold, offered, advertised, or displayed for sale at any other retail price than that named without first removing such notice and the manufacturer's name, trademark, and guaranty, the manufacturer agreeing either to repurchase the article, if then merchantable, at its cost, or, if damaged, at such rate as shall be agreed upon, or to leave the dealer free after removing the manufacturer's name, trademark, and guaranty to dispose of the article as he shall see fit, is not invalid under the Sherman or Clayton Acts. The court said: "To say that Congress intended to prohibit an act which had the effect of stimulating interstate commerce and stimulating competition rather than putting a restraint upon either is, I think, to state an absurdity. The proofs before me demonstrate that, if defendant and others are permitted to pursue their practice of price cutting, the business of complainant will be ruined and thereby the volume of interstate trade be reduced, or a method of distribution will have to be adopted which will greatly increase the price to the consumer, which will necessarily result in reducing the volume of interstate traffic; that in either event competition will be effectively reduced. And to what useful purpose? So that retailers may make use of the tradename and good will established after extensive advertising, to the extent that the public have associated with the article a standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut

price, all other goods sold are similarly low priced; in other words, to defraud the public. It is no answer to say that full value is given by the retailer for each article sold. If such be the fact, a person is defrauded if he buys an article at full price for which he has no immediate need, because he is induced to believe it is a bargain, and thereby deprive himself of the use of the purchase price for other purposes for which he might have used it if he did not think he was getting a bargain."

There can be no doubt, however, that such contracts are necessarily violative of the Federal Anti-trust Act where they are the instrument by which a combination of manufacturers attempts to obtain a monopoly in interstate commerce. See *Continental Wall Paper Co. v. Louis Voight & Sons Co.* (1909) 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280, in which a contract between a jobber and a corporation which was the selling agent of a combination of wall paper manufacturers, which in effect bound him to buy from such corporation all the wall paper needed in his business at certain fixed prices, and to sell only according to a schedule of prices and terms of credit stipulated therein, which was but one of a system of identical agreements whereby the combination sought to monopolize the wall paper business, was held illegal under the Anti-trust Act of July 2, 1890.

In *Wheeler-Stenzel Co. v. National Window Glass Jobbers Asso.* (1907) 10 L.R.A. (N.S.) 972, 81 C. C. A. 658, 152 Fed. 864, the court, in holding a system of contracts between a manufacturer and wholesale dealers throughout the United States, by which the former was to give the latter terms more favorable than he gave other dealers, and they were to sell his product exclusively, and have the quantity of the product taken by them determined by him, and which fixed the price to be charged retailers, to be illegal under the Sherman Anti-trust Act, said: "It is argued with much force and ingenuity by the defendant in error that the combination set out in the declaration was only an agree-

ment by which a certain number of wholesalers were to trade exclusively with a certain manufacturer; with the reciprocal understanding that the manufacturer was to sell to no one else, except at a price higher than that paid by the parties to the contract; that this was, in effect, nothing more than an agreement to sell to one person, or to several, at a price advantageously lower than the general price, on condition that such person or persons would buy exclusively from the manufacturer so agreeing. In other words, the American Window Glass Company had the right to select its customers and charge one price to one and another price to another; it had the right to offer certain inducements to certain customers in exchange for their exclusive trade; and it had the right to do all or any of these things. But it is always to be borne in mind, in considering arguments of this kind, that the act of Congress has made, and was intended to make, illegal, many sorts of contracts and agreements that, prior thereto, were not only legal, but were regarded as meritorious and beneficial; and has materially restricted the area within which freedom of contract may be exercised. There is something more, however, set forth in the declaration affecting the character and operation of this contract. Prices to retail dealers were to be arbitrarily fixed by those wholesale dealers, to which prices they were all required to conform. The quantity of glass to be purchased by each of said wholesale dealers was to be arbitrarily determined by the American Window Glass Company, and they were to be prohibited from purchasing from any manufacturer who should not close his factories and restrict the output of glass when and as required so to do by the American Window Glass Company. These stipulations clearly tended toward the creation of a monopoly, and, if adhered to and carried out, manifestly restricted the scope of competition in the commodity referred to. It may be quite true that such an agreement would have been valid at common law, or, if invalid as to the parties, would not have been illegal;

but the act of Congress has affected it with illegality so far as the trade or commerce restrained by it is interstate in its character."

In *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78 (a suit in equity charging a violation of the Sherman Act), it was held that a manufacturer selling to jobbers, who were not merely the agents, but the vendees, of the manufacturer, sales not being conditional, but absolute, violated the Federal Anti-trust Act in exacting from the jobber an agreement to charge the retailer a specified price, under a penalty of discontinuance of future dealings, and in seeking, by a notice printed on the carton, to fix the price at which the goods should be resold at retail, notwithstanding such notice did not constitute a legally effective and enforceable contract between the manufacturer and the retailer; the court saying: "The system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-trust Act."

A contract of absolute sale, made by a manufacturer, of its various manufactured preparations, in which the purchaser agrees to sell the goods purchased "at regular retail prices to be indicated by" the manufacturer, whose entire product is sold throughout the country only by the means of like restrictive contracts, operates as a "restraint of trade" unlawful as to interstate commerce, under the Anti-trust Act of July 2, 1890. *Stewart v. W. T. Rawleigh Medical Co.* (1916) — Okla. —, L.R.A.1917A, 1276, 159 Pac. 1187.

#### Under state anti-trust laws.

As to the applicability of a state anti-trust law where the goods to which the contracts relate are patented, see II. c. 2, *infra*.

As in the case of the Federal Anti-

trust Law, the courts which hold that a system of contracts by which an individual manufacturer seeks to control the retail price serves a legitimate purpose likewise uphold the validity of such contracts under the local anti-trust laws.

As holding such contracts not to be violative of the state anti-trust laws, see *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041; *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737; *Com. v. Grinstead* (1901) 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; *Walsh v. Dwight* (1899) 40 App. Div. 513, 58 N. Y. Supp. 91.

As holding such a system of contracts to be invalid, see *J. R. Watkins Medical Co. v. Johnson* (1913) — Tex. Civ. App. —, 162 S. W. 394; *W. T. Rawleigh Medical Co. v. Gunn* (1916) — Tex. Civ. App. —, 186 S. W. 385; *W. T. Rawleigh Medical Co. v. Fitzpatrick* (1916) — Tex. Civ. App. —, 184 S. W. 549; *Armstrong v. W. T. Rawleigh Medical Co.* (1915) — Tex. Civ. App. —, 178 S. W. 582; *W. T. Rawleigh Medical Co. v. Mayberry* (1917) — Tex. Civ. App. —, 193 S. W. 199; *Pictorial Review Co. v. Pate Bros.* (1916) — Tex. Civ. App. —, 185 S. W. 309; *Butterick Pub. Co. v. Mistrot-Munn Co.* (1915) 167 App. Div. 632, 153 N. Y. Supp. 61, affirmed on opinion below in (1916) 217 N. Y. 678, 112 N. E. 1055 (construing Texas Anti-trust Act); *Wampole v. F. E. Karn Co.* (1906) 11 Ont. L. Rep. 619.

But such contracts are necessarily to be regarded as violative of the Anti-trust Law where they are the instrumentality of an unlawful combination. See *International Harvester Co. v. Com.* (1907) 124 Ky. 543, 99 S. W. 637, set forth *infra*.

In *Ft. Smith Light & Traction Co. v. Kelley* (1910) 94 Ark. 461, 127 S. W. 975, it was held that a contract between a company engaged in the manufacture and distribution of artificial gas, whereby it agreed to purchase a natural gas franchise and a supply of natural gas from another company, was not void under the Arkansas Anti-trust Law of 1905, subjecting to a penalty any corporation, partnership, or

individual who shall become a party to any agreement or combination to regulate or fix the price of any commodity or thing whatsoever,—by reason of a provision therein giving the natural gas company the right to fix the price of natural gas to the consumers for all purposes except for illumination, where, under the contract, the right to fix the price was subject to the qualification that the natural gas company should meet any reduction in price offered by others.

An agreement for the maintenance of the retail price fixed by a manufacturer of ground chocolate whose output does not constitute the whole supply of such product, the object of which is to enable the manufacturer to conduct his operations at a reasonable profit, is not invalid under the Cartwright Act (Stat. 1907, p. 984), as amended in 1909 (Stat. 1909, p. 593),—especially in view of the proviso in the amendatory Act of 1909 that “no agreement, combination or association shall be deemed to be unlawful or within the provisions of that act the object and business of which are to conduct its operations at a reasonable profit.” *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041.

The refusal of a manufacturer to sell at the usual trade discount to a dealer who fails to maintain the fixed retail price will not subject it to an action for damages under the provisions of the Cartwright Anti-trust Law (Cal. Stat. 1907, pp. 984, 987), *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737, where it does not appear that the prices at which the manufacturer and others connected with him sell the articles to retail dealers, or the price at which the retail dealers are required to sell to the public, are in excess of what ought to afford only a fair and reasonable profit.

An agreement with the manufacturer not to resell the goods furnished by him at less than a specified price is not within Ky. Stat. § 3915, for the suppression of conspiracies and trusts. *Com. v. Grinstead* (1901) 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427.

But in *International Harvester Co.*

*v. Com. (Ky.) supra*, it was held that a corporation engaged in the manufacture and sale of harvesting machinery, which had become the owner of the businesses of several formerly competing concerns, in making contracts with its sales agents whereby such agents were bound to sell all machines or property received under the contract at such prices and on such terms as might be fixed by the company, and to confine their sales to a certain territory, and stipulating that if they should sell outside such territory, their commissions should be paid to the agent within that territory, was properly found guilty of violating § 3915 of the Kentucky Statutes, which provides that if any corporation, partnership, company, firm, or individual, or any association of persons, shall create, establish, organize, or enter into, or become a member of or party to or in any way interested in any pool, trust, combine, agreement, consideration, or understanding, of any other corporation, partnership, individual, or a person or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles, or property of any kind, it shall be deemed guilty of the crime of conspiracy.

An agreement on the part of the purchaser of goods, in consideration of a reduced price, not to resell such goods, or the goods of any other manufacturer, at less than the stipulated price, is not within § 1 of chap. 716 of the Laws of 1893, which provides that every contract or combination whereby competition in the supply or price of any article or commodity in common use may be restrained or prevented, for the purpose of advancing prices, is illegal; since there is nothing in the contract in question that restrains or prevents competition in the supply or the price of any article or commodity. *Walsh v. Dwight* (1899) 40 App. Div. 513, 58 N. Y. Supp. 91.

In *J. R. Watkins Medical Co. v. Johnson* (1913) — Tex. Civ. App. —, 162 S. W. 394, it was held that a contract by which a manufacturer agreed to furnish to other party thereto its

medicines at the usual wholesale prices, to be sold by him at the regular retail prices in certain territory, he agreeing that he would sell no other goods or articles during the term of the contract except those purchased by him from the manufacturer, and that he would sell them only to customers at their residences in the prescribed district, was to be treated as a contract for the sale of goods, and as such violative of the Texas Anti-trust Law, it clearly showing by its terms an intention to combine the capital, skill, and acts of the parties to fix and maintain a standard of prices upon a certain commodity, and to prevent competition in a given territory.

A stipulation in a contract by which the purchaser is bound not to resell except at prices fixed by the manufacturer is unlawful under the Texas Anti-trust Act of March 31, 1903. *Butterick Pub. Co. v. Mistrot-Munn Co.* (1915) 167 App. Div. 632, 153 N. Y. Supp. 61, affirmed on opinion below in (1916) 217 N. Y. 678, 112 N. E. 1055.

In *W. T. Rawleigh Medical Co. v. Gunn* (1916) — Tex. Civ. App. —, 186 S. W. 385; *W. T. Rawleigh Medical Co. v. Fitzpatrick* (1916) — Tex. Civ. App. —, 184 S. W. 549; *Armstrong v. W. T. Rawleigh Medical Co.* (1915) — Tex. Civ. App. —, 178 S. W. 582; and *W. T. Rawleigh Medical Co. v. Mayberry* (1917) — Tex. Civ. App. —, 193 S. W. 199, it was held that provisions in a contract of sale whereby the purchaser bound himself to buy from no one but the seller, and to resell the goods purchased by him at certain fixed prices, and further agreed to have no other business or employment, rendered the contract void as in violation of the Texas Anti-trust Law.

A contract for the purchase of patterns and books by which the purchaser agreed not to sell them for less than catalogue prices, and not to deal in any other publication, is illegal under the Texas Anti-trust Act, which defines a trust as a combination of capital, skill, or acts by two or more persons, firms or corporations, to create, or which may tend to create, restrictions in trade or commerce, to

fix, maintain, increase, or reduce the price of merchandise, to fix or maintain a standard price, or to make, enter into, maintain, execute, or carry out any contracts binding persons to sell or to refrain from selling any goods. *Pictorial Review Co. v. Pate Bros.* (1916) — Tex. Civ. App. —, 185 S. W. 309; *Segal v. McCall Co.* (1916) 108 Tex. 55, 184 S. W. 188.

In *Wampole v. F. E. Karn Co.* (1906) 11 Ont. L. Rep. 619, it was held that an agreement between the manufacturers of certain proprietary medicines and preparations manufactured by them under their private formula, by which the defendant, in consideration of the plaintiffs supplying their preparations at a schedule of prices set out in the agreement, undertook not to sell at wholesale any of such preparations at a price below those mentioned in the agreement, and not to sell such preparations to any retailer except at the schedule of prices mentioned in the agreement, and then only when such retailer should have signed an agreement with the plaintiff to the same effect, was contrary to the provisions of the Canada Criminal Code which declares everyone guilty of an indictable offense who conspires, combines, agrees, or arranges with any other person to unduly prevent or lessen competition in the production, manufacture, purchase, barter, or sale of any article. The court said: "This agreement is used not simply in relation to these commodities between the plaintiffs and their various customers, but is the form adopted by the committees representing a large part of the wholesale and retail trade of Canada. It means that nearly every commodity in common use is to be subject to a hard-and-fixed contract which fixes the manufacturer's price, the wholesale price, and the retail price, below which none can sell, and no one can purchase who is not a member of the association and agrees to sign the contract in question. It means that competition is not only unduly prevented or lessened in the purchase, barter, and sale of this article, but is absolutely destroyed. In the present case the evidence also

shewed, I think, that the price was unreasonably enhanced by reason of this agreement."

### *B. Patented articles.*

The fact that an article is patented was formerly supposed to have the effect:

(a) To enable the patentee to impose by notice accompanying the goods a restriction as to the resale price which would accompany them into the hands of subsequent purchasers, so as to render them liable as contributory infringers if they knowingly violated such restriction (see *Edison Phonograph Co. v. Kaufmann* (1901) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (1902) 116 Fed. 863; *The Fair v. Dover Mfg. Co.* (1908) 92 C. C. A. 43, 166 Fed. 117; *Winchester Repeating Arms Co. v. Olmsted* (1913) 121 C. C. A. 615, 203 Fed. 493);

(b) To settle any question as to the validity of contracts with purchasers thereof, fixing the price at which such purchasers might resell (see *Edison Phonograph Co. v. Pike* (1902) 116 Fed. 863; *Victor Talking Mach. Co. v. The Fair* (1903) 61 C. C. A. 58, 123 Fed. 424; *National Phonograph Co. v. Schlegel* (1904) 64 C. C. A. 594, 128 Fed. 733; *Hartman v. John D. Park & Sons Co.* (1906) 145 Fed. 358, s. c. on appeal (1907) 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Fonotipia Limited v. Bradley* (1909) 171 Fed. 951; *Edison v. Smith* (1911) 138 Fed. 925; *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502; *American Graphophone Co. v. Boston Store* (1915) 225 Fed. 785, reversed in (1918) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257; *Straus v. American Publishers Asso.* (1908) 193 N. Y. 496, 86 N. E. 525, affirming (1908) 127 App. Div. 935, 111 N. Y. Supp. 830; *Butterick Pub. Co. v. Rose* (1910) 141 Wis. 533, 124 N. W. 647);

(c) To take such contracts out of the operation of the Federal or local anti-trust acts (see *Edison Phonograph Co. v. Pike*; *Victor Talking Mach. Co. v. The Fair*; and *National Phonograph Co. v. Schlegel* (Fed.)—*supra*; *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 135, 82

C. C. A. 158, 153 Fed. 24; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (1907) 83 C. C. A. 336, 154 Fed. 358; *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.* (1907) 83 C. C. A. 343, 154 Fed. 365; *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502; *Butterick Pub. Co. v. Rose* (Wis.) *supra*).

But the law, as settled by the decisions of the United States Supreme Court, now is that a patentee cannot, by virtue of his statutory monopoly, impose conditions as to the resale price so as to render one who fails to observe them a contributory infringer of the patent (*Bauer v. O'Donnell* (1913) 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 38 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; *Straus v. Victor Talking Mach. Co.* (1917) 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; *Waltham Watch Co. v. Keene* (1913) 202 Fed. 225, affirmed without opinion in (1913) 126 C. C. A. 668, 209 Fed. 1007; *Kellogg Toasted Corn Flake Co. v. Buck* (1913) 208 Fed. 383; *Ford Motor Co. v. International Automobile League* (1913) 209 Fed. 235; *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502; *Victor Talking Mach. Co. v. Straus* (1915) 222 Fed. 524, affirmed in (1917) 140 C. C. A. 519, 225 Fed. 535); and that after the right of sale has been once exercised and the patentee has received his price, the article passes beyond the limits of the monopoly; and, in considering the validity of a contractual restraint as to the price at which the article is to be resold, either at common law or under an anti-trust act, the case is to be considered as if there were no patent (*Boston Store v. American Graphophone Co.* (1918) 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; *Waltham Watch Co. v. Keene* (1913) 202 Fed. 225, affirmed without opinion in (1913) 126 C. C. A. 668, 209 Fed. 1007; *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78; *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156, affirming (1915) 225 Fed. 373; *Ford Motor Co.*



v. Benjamin E. Boone (1917) 156 C. C. A. 621, 244 Fed. 385).

In *Waltham Watch Co. v. Keene* (1918) 202 Fed. 225, affirmed without opinion in (1918) 126 C. C. A. 668, 209 Fed. 1007, it is said: "If several owners of patents or licensees under patents, capable of conjoint use, and having the right to manufacture and sell or not to manufacture and sell at all, as they please, agree that they will not manufacture and sell, they have but agreed to not do that which they have a right not to do. But, when agreeing to both manufacture and sell, they go beyond, and not only fix the sale price at which they will sell, thus doing away with competition between themselves, but fix the price at which all future sales must be made by jobbers and dealers generally, thus doing away with all competition between jobbers and retail dealers as to articles which they have put on the market, they have clearly agreed and combined to restrain trade, and every jobber and dealer who comes in and assents becomes a party to such illegal combination, which is illegal principally because it has for its purpose the fixing prices for sales to the general public, the consumers, and the destruction of competition, which, if existing, would inure to the benefit of such consumers. Can it be that a patentee, himself manufacturing under his patent and the sole manufacturer, and thus controlling the entire output of the article, can bring into combination with himself all jobbers and dealers, or all jobbers and dealers in that article, and by agreement fix not only the price, including royalty, at which the patentee sells, but the prices on resale to consumers, and thus do away with all competition and deprive the public of the benefits of competition? If the one transaction of combination transcends what is 'necessary' to protect the use of the patent or the monopoly which the law conferred upon it,' it seems to me clear that the other does. The effect on the public is precisely the same in both cases. If two patentees, or licensees of a patentee, cannot combine with each other and jobbers to control prices on the sales

of articles made by such patentees or licensees, how is it that one patentee or licensee who manufactures under his patent can so combine? There is a combination in both cases, and, so far as the public is concerned, the one is as detrimental to the public interests as the other."

The fact that the article sold is packed in a patented container does not prevent contracts controlling the price of resale from being violative of the Federal Anti-trust Act, whether the value of the container is negligible as compared with the value of the contents, and its purchase is a mere accident in the contract of sale, or whether the carton itself has a substantial value, where the sales are not conditional, but absolute, and the container was not sold for use with subsequent purchases of the article. *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78.

**Right of patentee to fix price to be charged by assignee or licensee.**

There is, however, a distinction between the sale of the patented articles themselves and an assignment of the right to produce and vend such articles.

Thus, in *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, it was held that the Federal Anti-trust Law clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. With reference to the stipulation as to the price to be demanded, the court said: "The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled

to do. The owner of a patent may assign it, or sell the right to manufacture and sell the article patented, upon the condition that the assignee shall charge a certain amount for such article."

And it has been held that the requirement of a licensee to join other licensees in a combination or pool to control the prices and output of the patented article does not violate the Federal Anti-trust Law, as it does not touch any matter outside of the monopoly under the patent. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (1907) 83 C. C. A. 385, 154 Fed. 358, writ of certiorari granted in (1907) 207 U. S. 589, 52 L. ed. 354, 28 Sup. Ct. Rep. 255, but dismissed in (1907) 210 U. S. 439, 52 L. ed. 1138, 28 Sup. Ct. Rep. 764.

**Transaction as a sale or a license.**

In consequence of the distinction above pointed out, the attempt has sometimes been made to give the transaction the character of a license to use a patented invention, but without success.

In *Bauer v. O'Donnell* (the Sanatogen Case) (1913) 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, it is held that attaching a notice to a patented article which states that the article is licensed for sale and use at a specified price, that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in the event of a violation of the restrictions, cannot convert an otherwise apparently unqualified sale into a mere license to use the invention.

In the course of the opinion, it is said: "It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed 'for sale and use at a price not less than \$1;' that a purchase is an acceptance of the conditions; and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use

the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon, or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than \$1. In other words, the title transferred was full and complete, with an attempt to reserve the right to fix the price at which subsequent sales could be made. . . . The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were neither the agent nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee, and without making any further payment than had already been made in the purchase from the agent of the patentee."

In *Victor Talking Mach. Co. v. Straus* (1915) 222 Fed. 524, affirmed in (1917) 140 C. C. A. 519, 225 Fed. 535, it was held that one who had acquired from an authorized dealer, by paying the full list price, talking machines manufactured under patents, the manufacturer of which assumes to convey only a right to use during the life of the patent for a stated royalty to be paid in advance, upon the expiration of such patent the goods to become the property of the licensee if he shall have observed the conditions of the license, cannot be treated as an infringer because he proposes to dispose thereof at less than the list price. The court said: "Whether the various documents evidence a lease of each machine for a stated period, with privilege to the lessee at the end of such period to take full title provided he has complied with the con-

ditions of the lease, as to use solely of complainant's needles, records, etc., or whether it be a conditional sale, need not be decided. It seems clear that if the license to use one of these machines on the named conditions has passed from complainant through its distributors or dealers to one of the public, who has paid the full list price for the same, the person who has thus acquired license to use in accordance with the specified conditions may assign such license to any other member of the public, who, by such assignment, will himself obtain the right to use in accordance with the specified conditions. We are not satisfied that there is any obligation on the part of any one member of the public who thus assigns his lease, or whatever it may be, to another member of the public, to exact any particular sum from the latter as a consideration for the transfer. We do not see why he may not give the lease to whomsoever he pleases for no consideration at all, as a free gift, provided he has not himself violated any of the conditions, and turns the machine over with the license label or other company marks affixed to the machine intact and unaltered, so that his assignee may be fully advised of the conditions under which use of the machine is licensed."

The illegal function of controlling the price at which a patented machine may be resold after the manufacturer has been paid therefor, and after it has passed into the hands of dealers and the public, is the sole purpose that can be attributed to the attaching of a notice to such machine which states that such machine is licensed for the term of the patent having the longest time to run, and that it may not be delivered to any unlicensed member of the general public until "the full license price" stated in the notice is paid, since this notice is not intended as a security for any further payment, as the full price, called a "royalty," is paid before the manufacturer parts with the possession of the machine, and is not to be used as a basis for keeping the manufacturer informed as to the condition or use of the machine, as no report of any character is re-

quired from the "ultimate user" after he has paid the stipulated price, and since such notice, notwithstanding its apparently studied avoidance of the use of the word "sale," and its frequent reference to the word "use," omits the most obvious requirements for securing a bona fide enforcement of the restrictions of the notice as to "use," and under it, even by its own terms, the title to the machines ultimately vests in the "ultimate users" without any further payment or action on their part upon the expiration of patents which, so far as the notice shows, may or may not be incorporated in the machine. *Straus v. Victor Talking Mach. Co.* (1917) 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955.

In *Edison v. Ira M. Smith Mercantile Co.* (1911) 188 Fed. 925, it is said that the force of restrictions as to the price at which a patented article may be resold, as running with such article, depends in each case upon the transaction by which the patentee embarks the article upon its voyage. Such transaction is not necessarily unconditional and absolute because it is denominated a "sale;" nor is it necessarily any less than a complete sale because denominated a "conditional sale" or "license." Its dominant character is a question of construction in each case.

A provision made in contracts between a manufacturer of phonograph records and jobbers and dealers, and in a notice on the carton containing the records, that they shall not be resold except for a specified price, and that "upon any breach of said conditions the license to use and vend this record implied from such sale immediately terminates," is a license condition attaching to the article, and not merely a personal covenant by the first purchaser,—at least, until the article has reached the ultimate user and has been used. *Ibid.*

In *Waltham Watch Co. v. Keene* (1913) 202 Fed. 225, affirmed without opinion in (1913) 126 C. C. A. 668, 209 Fed. 1007, the court, in discussing the question whether the violation of a

so-called license agreement or restriction fixing the price at which plaintiff's product might be resold by dealers constituted infringement of the patent, said that the alleged right under the contract to retake the property on paying to the purchaser the price paid by him in case it is less than that fixed by the patentee or his assignee does not operate to make the sale in the first instance a conditional one which the law will recognize.

**Competency of resale price restriction not for the purpose of protecting the patentee.**

Although the holding of the United States Supreme Court that the right to impose price restrictions is no part of the monopoly enjoyed by a patentee renders the subjoined decision of no practical value, it is herein set forth for the information of the reader.

If a license restriction fixing the resale price is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Anti-trust Act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor "a condition suitable to protect the use of their patent and to secure its benefits." *Ingersoll v. McColl* (1913) 204 Fed. 147.

A license restriction nominally for the purpose of protecting a patent will not be upheld where it appears that the manufacturer sells other goods embodying the patent without such restriction. *Ibid.*

**Right of licensee to impose restriction.**

Although the denial by the Supreme Court of the right of a patentee to impose price restrictions has rendered the following decisions of purely academic interest, they are herein set forth for the information of the reader.

Where the owner of a patent has neither imposed any restriction as to the price at which the patented article may be sold to the ultimate purchaser at retail, nor has authorized its imposition, an exclusive licensee to sell cannot impose such a restriction. *Ingersoll v. Snellenberg* (1906) 147 Fed. 522.

In *Edison v. Ira M. Smith Mercantile Co.* (1911) 188 Fed. 925, it was held to be immaterial that the sales were made and the license conditions inaugurated, not by the patentee, but by a licensee operating under a grant of exclusive right to make, use, and sell the patented invention throughout the United States, the court saying that the opinion in *Ingersoll v. Snellenberg* (Fed.) *supra*, holding that such restrictions are not valid when imposed by a licensee, appears to rest upon the idea that the license there in question was not shown to be exclusive, so as to supersede the rights of the patentee.

**English and Canadian decisions.**

In *National Phonograph Co. v. Menck* [1911] A. C. (Eng.) 336, 80 L. J. P. C. N. S. 105, 104 L. T. N. S. 5, 27 Times L. R. 239, 28 Rep. Pat. Cas. 229, 48 Scot. L. R. 733, a case arising under the Australian Commonwealth Patent Act, which, so far as material to the matters in issue in the case, is identical with the British Patent Design and Trademark Act (46 & 47 Vict. chap. 57), it was held that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that a person purchasing them with knowledge of the conditions attached by the patentee, clearly brought home to himself at the time of sale, shall be bound by that knowledge, and accept the situation of ownership subject to the limitations.

In *Gillette v. Rea* (1910) 15 Ont. Week. Rep. 345, 1 Ont. Week. N. 448, it is stated that under the Canadian patent act the sale of a patented article conveys an absolute title, and that this is fatal to any attempt to impose conditions as to price, extending beyond the first purchaser.

### *3. Copyrighted productions.*

As in the case of patented articles, so also in the case of copyrighted productions, it was formerly supposed that the exclusive right to produce and vend enjoyed by the owner of the copyright included the right to fix a

price at which the copyrighted production might be resold.

It was accordingly held that agreements between the purchasers of copyrighted books and the proprietor of the copyright, as to the price at which such books shall be resold, were not illegal. See *Straus v. American Publishers' Asso.* (1904) 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107, affirming (1903) 85 App. Div. 446, 83 N. Y. Supp. 271, s. c. on subsequent appeal in (1908) 198 N. Y. 496, 86 N. E. 525, affirming (1908) 127 App. Div. 935, 111 N. Y. Supp. 830; *Murphy v. Christian Press Asso. Pub. Co.* (1899) 38 App. Div. 426, 56 N. Y. Supp. 597.

But the authority of these cases is virtually nullified by the subsequent decisions of the Supreme Court.

In *Bobbs-Merrill Co. v. Straus* (1906) 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, affirming (1906) 15 L.R.A.(N.S.) 767, 77 C. C. A. 607, 147 Fed. 15; and *Scribner v. Straus* (1908) 210 U. S. 352, 52 L. ed. 1094, 28 Sup. Ct. Rep. 735, it is held that the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose by notice a limitation as to the price at which the books shall be sold at retail by future purchasers with whom there is no privity of contract, so as to subject such purchasers to an action for infringement.

The owner of a copyright cannot, by virtue of the copyright statute, restrain the sale of copies of the copyrighted books the title to which he has transferred, but which are being sold in violation of an agreement entered into between himself and the purchaser, but the only remedy of the original owner is by action for a breach of contract. *Harrison v. Maynard, M. & Co.* (1894) 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689.

A copyright is not infringed by selling in violation of express restrictions placed on the dealer as to the mode of sale or price at which the copyrighted work is to be sold. *Authors & Newspapers Asso. v. O'Gorman Co.* (1906) 147 Fed. 616.

In *Garst v. Hall & L. Co.* (1901) 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219, it is said, obiter, that even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains, has parted with all his title to the book, and has conferred an absolute title to it upon the purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership of personal property.

The copyright monopoly conferred by the Federal laws does not protect, as against condemnation under the Sherman Anti-trust Act of July 2, 1890, agreements between associations embracing probably 75 per cent of the book publishers and a majority of the booksellers in the United States, which operate to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and result in almost completely destroying competition in such books at retail. *Straus v. American Publishers' Asso.* (1913) 231 U. S. 222, 58 L. ed. 192, L.R.A.1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369.

#### 4. *Trademarked goods.*

It is settled that the fact that an article is trademarked gives the owner of the trademark no greater right to impose restrictions as to the resale price than he would otherwise enjoy.

Thus, the owner of a trademark cannot control the price of the trademarked article in the hands of a dealer with whom he has no contractual relations (*Ingersoll v. McColl* (1913) 204 Fed. 147), though the dealer knows that the manufacturer sells only subject to such stipulation (*Garst v. Hall & L. Co.* (1901) 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219).

And in determining the validity of a price maintenance agreement, the fact that the product to which it relates is trademarked is immaterial. *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041.

#### 5. *Goods made by secret process.*

In some cases the view has been taken that contracts seeking to control the resale price of goods manufactured by a secret process, or medicines

compounded under a secret formula, are but in aid of a natural monopoly, and so are exempt from the principles which apply to contracts which tend to create a monopoly or restrain trade in other articles. See *Dr. Miles Medical Co. v. Goldthwaite* (1904) 133 Fed. 794; *Dr. Miles Medical Co. v. Jaynes Drug Co.* (1906) 149 Fed. 838; *Dr. Miles Medical Co. v. Platt* (1906) 142 Fed. 606; *Wells & R. Co. v. Abraham* (1906) 146 Fed. 190, affirmed in (1907) 79 C. C. A. 228, 149 Fed. 408; *Jayne v. Loder* (1906) 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 Ann. Cas. 294; *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 154; *Garst v. Wissler* (1902) 21 Pa. Super. Ct. Rep. 532.

It is said in support of this view that as the goods to which the agreement relates are such as the purchaser presumably would have no chance to sell at a profit at all, but for the manufacturer's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough. *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 154.

But this view fails to distinguish between the necessary monopoly of the secret itself and the unnecessary monopoly of the articles made according to the secret process and offered for sale and resale to the consuming public; and the weight of authority, both in courts which hold contractual limitations on the retail price to be in undue restraint of trade, and in courts which uphold such limitations under certain conditions, is to the effect that a restraint of trade which would be unlawful as to other manufactured articles cannot be justified because the article in question is made by a secret process or under a secret formula. *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 158 Fed. 24, affirming (1906) 145 Fed. 358; *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041; *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803.

In *Dr. Miles Medical Co. v. John D.*

*Park & Sons Co.* (1908) 90 C. C. A. 579, 164 Fed. 803, Judge Lurton, in holding that the fact that the manufacture of an article is a trade secret will not warrant the regarding of contracts in respect of such article as either outside of the mischief intended to be remedied by the Federal Anti-trust Law or the rules of the common law, or within the statutory protection afforded by the patent and copyright statutes, said: "Any other conclusion would be to sanction a monopoly in that class of goods vastly more far-reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it the inventor must put on record his invention. At the end of the term the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in their formula, they may not only preserve it through all time, but continue to restrain prices and prevent competition in the sale of the product. It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article when it has once passed under the dominion of a buyer. A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world. 2 Co. Litt. § 360. The mere fact that one article or class of articles is made un-

der an unknown and private formula, and another class is not, is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade."

*d. The agency system.*

No unlawful restraint of trade is involved in the fixing by a manufacturer of the price at which its agent shall sell its product (*Cole Motor Car Co. v. Hurst* (1915) 142 C. C. A. 572, 228 Fed. 280); nor does a contract which creates the relation of principal and agent between the parties, and binds the agent to adhere to the selling price fixed by the manufacturer, constitute such a combination as is within the purview of anti-trust laws.

Thus, a contract by which a manufacturer constitutes another an exclusive sales agent and fixes the list price of the product does not violate the prohibition of the Sherman Act against combinations in restraint of commerce. *Virtue v. Creamery Pack-aga Mfg. Co.* (1913) 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. Rep. 202.

And the Texas Act of March 30, 1889, defining trusts and conspiracies against trade, does not apply to a contract which is not one of sale, but which merely creates the relation of principal and agent between the parties, there being in such case no union or association of otherwise independent separate and possibly competing capital, skill, or acts, and hence no combination. *Welch v. Phelps & B. Wind Mill Co.* (1896) 89 Tex. 653, 36 S. W. 71.

In *Locker v. American Tobacco Co.* (1914) 184 C. C. A. 247, 218 Fed. 447, it was held that an agreement whereby a manufacturer made a certain jobber its sole agent in certain territory on condition that it should not sell the manufacturer's product at more than list prices did not violate the Federal Anti-trust Law.

But it is immaterial that the contracts in question purport to be of bailment or agency, and not of sale, where, according to the meaning and

intent of such instrument as a whole, the purchaser must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of the manufacturer. *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1908) 90 C. C. A. 579, 164 Fed. 803.

In *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24, it is said: "The transactions described in the bill plainly constitute sales of complainant's medicine, and the general title passes to every such purchaser and subpurchaser. . . . To call such a purchaser an agent is to juggle with words."

A jobber by whom goods are purchased is to be considered as the vendee, and not merely the agent of the manufacturer in entering into an agreement as to the resale price. *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78.

In *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156, a contract between an automobile manufacturer and dealers handling its products, which styled the one party as the "manufacturer-licensor" and the other party as "dealer-licensee," and in terms granted the "full right and license to use and vend" the manufacturer's product within the licensed territory, the manufacturer agreeing to "sell its product to the dealer-licensee" at a certain discount from list prices, and to allow a certain additional rebate, scaled on the "net amount of business" done, the dealer agreeing to take deliveries and to "purchase the said Ford automobiles," preserving title to the articles sold only until the full purchase price should be paid, with right of repossession only in case of default in such payment, and under which the manufacturer was under no obligation to take back any of the goods purchased by the dealer, and which expressly stated that the "dealer-licensee is in no way the legal representative or agent of the manufacturer-licensor,"—was held to be essentially a contract of absolute, as distinguished from conditional, sale.

On the other hand, in *Ford Motor Co. v. Benjamin E. Boone* (1917) 156 C. C. A. 621, 244 Fed. 335, a presumably identical contract, binding the "agent" to sell cars only to users residing in certain defined territory, and only at the list retail prices fixed by the manufacturer, to pay 85 per cent of such list price in advance at the time of ordering the cars, and to pay freight charges and other expenses as well as taxes and insurance, and to suffer any loss that may be sustained by injuries to the cars from the time they leave the factory until they are delivered to the purchasing user, and under which the manufacturer, although receiving only the 85 per cent cash advance, retains complete title until a bill of sale signed by it has been delivered to the ultimate purchaser, the contract also providing for additional compensation for the "agent" over and above the 15 per cent of the retail price by way of graduated commissions, depending upon the aggregate amount of sales during the year,—did not operate to transfer an unqualified title to the "agent," so that the title to the cars would pass only upon a compliance with the other conditions of the contract, as well as that of paying the 85 per cent.

*c. Refusal to sell to price cutters: comment on the Colgate Case.*

As to the validity of contracts between a manufacturer and wholesalers handling his goods, not to resell to dealers on the manufacturer's suspended list, see II. c, 1, *supra*.

The courts have uniformly recognized the principle applied in *UNITED STATES v. COLGATE & Co.* (reported herewith) ante, 443, that the inherent right of every individual to refuse to deal with any person, for any reason, or for no reason whatever, includes the right to refuse to deal with one who refuses to comply with his wishes as to the price at which his products shall be resold. See *Union P. Coal Co. v. United States* (1909) 97 C. C. A. 578, 173 Fed. 787; *Great Atlantic & P. Tea Co. v. Cream of Wheat Co.* (1915) 224 Fed. 566, affirmed in (1915) 141 C. C. A. 594, 227 Fed. 46;

*Cudahy Packing Co. v. Frey & Son* (1919) — C. C. A. —, 261 Fed. 65; *Welch Grape Juice Co. v. Frey & Son* (1919) — C. C. A. —, 261 Fed. 68, writ of certiorari denied in (U. S. Adv. Ops. 1919-20, p. 67) 251 U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 56; *New York Ice Co. v. Parker* (1851) 21 How. Pr. (N. Y.) 302; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1896) 50 N. Y. Supp. 1064; *Locker v. American Tobacco Co.* (1907) 121 App. Div. 443, 106 N. Y. Supp. 115, affirmed on opinion below in (1909) 195 N. Y. 565, 88 N. E. 289.

In *Locker v. American Tobacco Co.* (N. Y.) *supra*, it is said: "It is the well-settled law of this state that the refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully for reasons he deems sufficient, or for no reasons whatever; and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice, or malice. It is a part of the liberty of action which the Constitutions, state and Federal, guarantee to the citizen. It is not within the power of the courts to compel an owner of property to sell or part with his title to it, without his consent, and against his wishes, to any particular persons."

In *Great Atlantic & P. Tea Co. v. Cream of Wheat Co.* (1915) 224 Fed. 566, affirmed in (1915) 141 C. C. A. 594, 227 Fed. 46, it was likewise held that a manufacturer may lawfully refuse to sell to a dealer who refuses to maintain a fixed retail price, the court saying: "Let it be assumed that defendant declines business with all who refuse to maintain prices. If such refusal affected a necessity of life, or even a staple article of trade, the matter might be serious, and history might be appealed to for instances of statutory punishment,—e. g., the engrossing acts. But mere abstention from dealing cannot per se be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforceable. To call defendant's acts price fixing is inaccu-



rate, and evades obvious legal questions; viz., whether defendant has the right to decline business, and whether it is anybody's business why the business is declined."

In *Union P. Coal Co. v. United States* (Fed.) *supra*, it was held that the mere refusal of a coal company to sell coal to a retail dealer unless he would discontinue an advertisement he had caused to be inserted in the newspapers to the effect that he would sell coal at a price which was less than the regular retail price then prevailing was not a violation of the Federal Anti-trust Act.

In *Cudahy Packing Co. v. Frey & Son* (1919) — C. C. A. —, 261 Fed. 65, it was held, upon the authority of the *COLGATE & Co. CASE*, that a jobber who was unable to obtain goods at the usual discount from the list price, in consequence of his noncompliance with the manufacturer's request that he maintain a fixed resale price, could not maintain an action for damages under the Federal statute forbidding combinations and discrimination in restraint of trade, the court saying: "Since the defendant, under the *COLGATE & Co. CASE*, merely exercised the right reserved by the Clayton Act (Act of Congress, Oct. 15, 1914, chap. 323, § 2, 38 Stat. at L. 730, Comp. Stat. § 8835b, 9 Fed. Stat. Anno. 2d ed. p. 731) to dealers of 'selecting their own customers in bona fide transactions, and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price."

A similar decision, upon the authority of the foregoing case, was made in *Welch Grape Juice Co. v. Frey & Son* (1919) — C. C. A. —, 261 Fed. 68, writ of certiorari denied by the Supreme Court (U. S. Adv. Ops. 1919-20, p. 67), 251 U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. 56.

A dealer in ice who has failed to live up to his agreement to resell at a certain price ice purchased by him of the defendant, under penalty of having his supply stopped, cannot, upon breaking his agreement and having his supply cut off, recover damages therefor. *New York Ice Co. v. Parker* (1851) 21 How. Pr. (N. Y.) 302.

**In combination with other manufacturers.**

While it is lawful for a manufacturer to refuse to sell to any customer for any reason, however capricious, any goods manufactured by him, it is in restraint of trade and unlawful for such manufacturer to become a party to a combination which shall prevent any of his customers obtaining other goods of other manufacturers because those customers have violated the agreement with him in respect to cutting of prices, and to make such violation the cause of a general exclusion of customers from the power to purchase any kind of goods from any of the other members of the association. *Mines v. Scribner* (1906) 147 Fed. 927; *Jayne v. Loder* (1906) 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 Ann. Cas. 294; *Denver Jobbers' Asso. v. People* (1912) 21 Colo. App. 326, 122 Pac. 404; *Straus v. American Publishers' Asso.* (1904) 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* (1896) 50 N. Y. Supp. 1064.

But, as pointed out in *Jayne v. Loder* (1906) 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 Ann. Cas. 294: "It is true that a common plan or policy does not necessarily mean a combined one. The individual manufacturer or proprietor may be persuaded, for example, that the retailer or jobber who cuts the medicines of his neighbor to-day, will likely cut his medicine to-morrow, and so decide not to sell him; and it will not make out a conspiracy that others are of the same mind."

A manufacturer may shape his own policy, and sell or withhold from selling as he pleases, according to supposed self-interest or when, fixing the prices and naming the terms and conditions at and upon which alone he will do so, refusing to sell to those who will not comply. And so far as this is confined to his own goods, and pursued by independent and individual action, it cannot be challenged. It is quite a different matter, however, when two or more combine and agree that neither will sell to anyone who

cuts the prices of any of the others. This concerted policy, by which it is sought not only to maintain by each the price of his own goods, in which he alone is interested, and which he has alone the right to control, but also the prices on those of all who are thus banded together, is manifestly a direct interference with and restraint upon the freedom of trade and commerce between the states which it was the object of the Federal Anti-trust Act to preserve. *Ibid.*

In *Mines v. Scribner* (Fed.) *supra*, it was held that a dealer who could not buy books because of a rule adopted by a publishers' association controlling 90 per cent of the book business of the country, that they would not sell any books to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices, had a cause of action under the Federal Anti-Trust Law for damages to his business occasioned thereby.

An agreement between publishers and dealers in books, whereby the publishers agree not to sell books of any kind to dealers who shall be suspected of selling copyrighted books at less than the net price fixed by the publishers, or to dealers who shall supply books to dealers who are suspected of making such sales, violates the provision of the New York Anti-trust Law (Laws 1899, chap. 690, § 1) that "every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use, is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented or whereby for the purpose of creating, establishing or maintaining a monopoly within this state, of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy, illegal and void." *Straus v. American Publishers' Assn.* (1904) 177 N. Y.

473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107, affirming (1903) 85 App. Div. 446, 88 N. Y. Supp. 271.

**Comment on the Colgate Case.**

To those who believe that the experience of mankind teaches that, in the long run, the public interest is best served by free and unrestricted competition, and that such competition is "worth what it costs," the decision of the Supreme Court in the COLGATE CASE (reported herewith) ante, 443, comes as a distinct disappointment, in that it permits to be accomplished by indirection an end which the Supreme Court has previously held to be at variance with sound public policy. To say that the announced policy of refusing to have further dealings with those who may not comply with the manufacturers' known wishes imposes no restraint on trade because "the retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit," is a mere quibble. It is idle to suppose there are such numbers of retailers who are willing to forego the advantages of handling the Colgate or any other widely advertised goods, that the public can obtain them at prices fixed upon a competitive basis.

As a matter of fact, and notwithstanding certain incidental advantages to the manufacturer and even to the public (pointed out in II. a, *supra*), the dealer is the chief beneficiary of the policy of retail price maintenance, since he is absolutely protected against price competition from his fellow dealers. Court records disclose that this policy has not always originated with the manufacturer, but has often been adopted at the insistence of a dealers' association. It is not to be wondered at that the president of the largest association of retail dealers in the United States—an association avowedly formed for the purpose of promoting price maintenance and price protection—publicly referred to the decision in the COLGATE CASE as "a distinct victory, not alone for the Colgate Company, but also for the cause of price maintenance." See report of the 21st Annual Convention, National Association of Retail Druggists, pub-

lished in N. A. R. D. Journal, vol. 28, pp. 1222-1225.

Although the decision in the COLGATE CASE is not subversive of Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376,—the two together amounting to a declaration that while the Federal courts will not enforce or protect contracts for the maintenance of a fixed retail price, neither will they visit an individual manufacturer with the penalties of the Sherman Act because he follows the policy of refusing to sell goods to known price cutters,—it, at least, suggests the speculation whether the Supreme Court has repented of its attitude towards retail price fixing schemes, or, at least, whether the minority whose dissent is registered in its earlier decisions, and who believe that excessive or unfair prices are held in check by the operation of economic laws, has received reinforcement.

The COLGATE CASE, however, is not to be taken as affirming that the right of a manufacturer to refuse to deal with price-cutters is absolute and unqualified. It does not appear therein that the resale prices fixed by the defendant were other than fair and reasonable; or that such right was employed by the defendant in furtherance of a purpose to create or maintain a monopoly. What these presumptive limitations of the scope of this decision may amount to, only the future can determine.

### III. What amounts to a violation of resale price agreement.

A contract whereby a purchaser, in consideration of certain rebates in price, agrees to maintain a certain price in selling at retail a brand of goods thus purchased, is violated by selling such brand of goods at a lower price than that agreed upon, although the goods so sold are purchased of a third person. *Clark v. Frank* (1885) 17 Mo. App. 602.

In *Edison v. Ira M. Smith Mercantile Co.* (1911) 188 Fed. 925, the court held that the manufacturer of a patented article who sold it under contracts with jobbers and retail dealers, containing a restriction as to the re-

tail price, was entitled to an injunction restraining a sale under such price by a dealer who, with knowledge of such restriction, had purchased the articles from a salvage company to which they had been sold by an insurance company after the destruction by fire of the stock of a presumably authorized dealer.

See also in this connection, *Lovell-McConnell Mfg. Co. v. International Automobile League* (1913) 120 C. C. A. 619, 202 Fed. 219, set forth in V. e. infra.

### IV. Right of manufacturer to enforce contract made by retailer with middleman.

In England, it has been held that a manufacturer who has sold goods of his manufacture to a middleman, who agreed, in consideration of a stipulated discount, to buy a given quantity of goods within a specified time; also, not to sell or offer such goods at less than the list price, with a right, however, to allow a discount to genuine trade customers, and to obtain from such customers a similar undertaking, and to forward such undertaking to the manufacturer,—is a stranger to the consideration for an agreement so obtained from a retailer, purporting to be made between the middleman and the retailer in consideration of the allowance of a certain discount, and therefore, cannot enforce it. *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. (Eng.) 847, 8 B. R. C. 221, [1915] W. N. 184, 84 L. J. K. B. N. S. 1680, 113 L. T. N. S. 386, 31 Times L. R. 399, 59 Sol. Jo. 439, reversing [1914] W. N. 59, 83 L. J. K. B. N. S. 923, 110 L. T. N. S. 679, 30 Times L. R. 250.

But the English doctrine that (with certain exceptions which need not be here enumerated) a third person for whose benefit a contract is made cannot maintain an action thereon, although followed in Connecticut, Delaware, Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Pennsylvania, and Wyoming, has been, nominally at least, rejected in the majority of the state courts; although it is questionable whether some of the decisions which purport to

reject it are not really referable to some of the exceptions thereto. However, cases are not wanting which have gone the length of holding that if the person for whose benefit the contract is made has either a legal or an equitable interest in its performance, he need not necessarily be privy to the consideration. See 6 R. C. L., title, "Contracts," § 271.

And under the Code provisions of some states the contract must be made expressly for the benefit of the third person in order to entitle him to sue thereon.

But even in those jurisdictions in which one benefited by the performance of a contract may enforce it, though a stranger to the consideration, the question still remains whether a price maintenance agreement made between a middleman and a retailer may, in view of the fact that it is made by the middleman in order to exonerate himself from liability under his own contract to the manufacturer, be considered as having been entered into primarily for the benefit of the manufacturer.

In one instance, however, it has been held that an agreement made between a retailer and a jobber from whom the retailer purchased goods, that he would not resell them for less than the retail selling price fixed by the manufacturer, is enforceable by the manufacturer under a statute (Cal. Civ. Code, § 1559) providing that "a contract made expressly for the benefit of third person may be enforced by him at any time before the parties thereto rescind it." *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041.

#### *V. Protection against interference with price control system.*

##### *a. As against one who has violated his agreement.*

Where an agreement to maintain a fixed retail price is regarded as valid, the promisee may maintain an action thereon for actual (*Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A. (N.S.) 522, 137 Pac. 144) or liquidated (*Garst v. Harris* (1908) 187 Mass. 72, 58 N. E. 154) damages;

or may obtain an injunction against its breach (*Grogan v. Chaffee* (1909) 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745; *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041; *Robert H. Ingersoll & Bro. v. Hahne & Co.* (1917) 88 N. J. Eq. 222, 101 Atl. 1030, s. c. on final hearing (1918) 89 N. J. Eq. 382, 108 Atl. 128; *Fisher Flouring Mills Co. v. Swanson* (Wash.) supra).

But the court will not enjoin the breach of an agreement to maintain a retail price where such agreement is contrary to law. *Wampole v. F. E. Karn Co.* (1906) 11 Ont. L. Rep. 619.

##### *b. As against one who has procured goods by deception.*

If one by the exercise of fraud or deception obtains goods without signing the required agreement, he may be subject to the same liability as if he had been bound thereby. *Edison Phonograph Co. v. Kaufmann* (1901) 105 Fed. 980; *Authors & Newspapers Assn. v. O'Gorman Co.* (1906) 147 Fed. 616; *Edison Phonograph Co. v. Pike* (1902) 116 Fed. 863; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 335, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

A manufacturer who sells his goods to wholesalers upon the terms of an agreement which provides that the wholesalers shall sell only to dealers who will sign a retailer's agreement in the form provided by the manufacturer, both agreements providing that the goods shall not be sold at less than the specified current list prices applicable respectively to wholesalers and retailers, or to dealers on the manufacturer's suspended list, has a right of action against a dealer who, being on the suspended list, procures others to obtain goods from wholesalers who had signed the agreement by falsely representing themselves as independent dealers and dealing in fictitious names, irrespective of whether such act was intended to damage the manufacturer, and though the immediate party to the contract, having acted innocently, may not himself be liable, *National Phonograph Co. v.*

Edison-Bell Consol. Phonograph Co. (Eng.) *supra*.

*c. As against one who has procured goods by inducing another to violate his agreement.*

One who knowingly induces or procures another to violate his contract to maintain a certain resale price may be held answerable in damages therefor, or may be enjoined from attempting to induce further violations, if the contract is one which the courts would enforce as between the immediate parties thereto. See *Dr. Miles Medical Co. v. Goldthwaite* (1904) 133 Fed. 794; *Dr. Miles Medical Co. v. Platt* (1906) 142 Fed. 606; *Wells & R. Co. v. Abraham* (1906) 146 Fed. 190, affirmed in (1907) 79 C. C. A. 228, 149 Fed. 408; *Bobbs-Merrill Co. v. Straus* (1906) 15 L.R.A. (N.S.) 767, 77 C. C. A. 607, 147 Fed. 15; *Dr. Miles Medical Co. v. Jaynes Drug Co.* (1906) 149 Fed. 838; *Ford Motor Co. v. International Automobile League* (1913) 209 Fed. 235; *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156; *Garst v. Charles* (1903) 187 Mass. 144, 72 N. E. 839; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A. (N.S.) 522, 137 Pac. 144; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 385, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

A person who unlawfully or maliciously persuades another person to break his contract with a third person, to the injury of such third person, is liable for the damages which are the natural result of such act; and when by reason thereof he has acquired title to property wrongfully, he may be adjudged a trustee *ex maleficio* in respect to such property, and enjoined from disposing thereof. *Bobbs-Merrill Co. v. Straus* (1906) 15 L.R.A. (N.S.) 767, 77 C. C. A. 607, 147 Fed. 15.

It has been held that an action is maintainable against a third person who has procured a violation of contract by fraud and misrepresentation, even though, as between the immediate parties to the contract, there is no right of action in respect of the violation. *National Phonograph Co. v.*

*Edison-Bell Consol. Phonograph Co.* (Eng.) *supra*. The general question whether an action for procuring a breach of contract will lie where there is no right of action as between the immediate parties is, however, one upon which the decisions are at variance. See note in 6 B. R. C. 80.

Where a contract by which the manufacturer seeks to control the resale price is invalid, one who causes it or attempts to cause it to be broken does the manufacturer no wrong cognizable by the law. *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *Ford Motor Co. v. Union Motor Sales Co.* (1917) 156 C. C. A. 584, 244 Fed. 156; *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 30 L.R.A. (N.S.) 327, 127 N. W. 803.

*d. As against one who has procured goods without fraud or knowingly inducing a violation of contract.*

Where there is no privity of contract between the complainant and the defendant, the latter may resell at any price he sees fit goods obtained from dealers under contract with the complainant, unless there was fraud or deceit in the transaction. *Ford Motor Co. v. International Automobile League* (1913) 209 Fed. 235.

One may not be enjoined from selling or disposing of goods purchased by him where it is not shown that he has procured their sale to him at a price less than that which the dealer has agreed to charge. *L. E. Waterman Co. v. Waterman* (1898) 27 App. Div. 133, 50 N. Y. Supp. 131.

In the absence of notice on the part of the defendant of the contract between the complainant, the author of a book, and his sales agents who purchased such books from the author as they might sell, to sell by subscription only, and not to the trade, for the full retail price, the defendant will not be restrained from selling or advertising for sale books purchased from such agents, at any price the defendant may see fit, although less than that fixed by such contract, it not appearing that

the defendant tried to induce the agent to sell the books or to break any contract; but the author's remedy is against the agent for a violation of the contract. *Clemens v. Estes* (1885) 22 Fed. 899.

A manufacturer has no right of action in respect of a transaction by which the defendant obtained goods through a retail dealer who, not knowing the defendant to be on the suspended list, let him, as matter of accommodation, have goods at the price which he himself paid for them, no fraud or misrepresentation being employed. *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 385, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.

The fact that all means of identification are removed has been held sufficient to show that the goods were purchased from a person interdicted by contract from selling. *Wells & R. Co. v. Abraham* (1906) 146 Fed. 190, affirmed in (1907) 79 C. C. A. 228, 149 Fed. 408.

*e. As against one who falsely represents himself to be the manufacturer's agent.*

It is unfair competition for one who sells below the retail price fixed by the manufacturer to represent himself as the manufacturer's agent. *Ford Motor Co. v. Benjamin E. Boone* (1917) 156 C. C. A. 621, 244 Fed. 335.

*f. As against one who erases serial numbers.*

Where a contract for maintenance of a uniform retail price is legal and enforceable, the manufacturer is entitled to enjoin a third person from mutilating the packages and destroying the numbers thereon, so they cannot be identified. *Dr. Miles Medical Co. v. Goldthwaite* (1904) 133 Fed. 794.

But where the system of contracts under which the goods are marketed is in unlawful restraint of trade, the court will not enjoin a third person from obliterating the serial numbers placed upon goods for the purpose of enabling the manufacturer to trace them. *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A.(N.S.) 125, 82 C. C. A. 158, 153 Fed. 24; *W. H.*

*Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 80 L.R.A.(N.S.) 327, 127 N. W. 803.

In *B. V. D. Co. v. ISAAC* (reported herewith) ante, 440, it was held that an injunction would not lie to prevent a jobber from removing from cartons in which a manufacturer delivered his goods, secret marks intended to aid the manufacturer in price maintenance, by enabling it to determine which of its wholesalers cut prices, in order that it might refuse to have further dealings with him. As to whether this decision can stand in the face of the Supreme Court's decision in the *COLGATE CASE* (reported herewith) ante, 443, see comment made thereon in the note appended thereto.

No right to protection in the use of a serial number as a means employed by a manufacturer to identify his goods is conferred by a statute making it a misdemeanor knowingly to sell, offer, or expose for sale, any goods which are represented to be the manufacture of another "unless such goods are contained in the original packages, box or bottle, and under the labels, marks or names placed thereon by the manufacturer who is entitled to use such marks, names, brands or trademarks." *B. V. D. Co. v. ISAAC*.

*g. Equitable relief.*

In the majority of cases it has been held that where the system of contracts by which the selling price is sought to be maintained is not invalid as being in undue restraint of trade, a manufacturer is entitled to equitable relief against violations of such contracts or other acts of interference with his system of price maintenance, such as the cutting of prices by one who has fraudulently obtained goods, or inducing persons under contract to maintain the price to violate such contract, or the erasure of serial numbers. See *Edison Phonograph Co. v. Kaufmann* (1901) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (1902) 116 Fed. 863; *Dr. Miles Medical Co. v. Goldthwaite* (1904) 133 Fed. 794; *Dr. Miles Medical Co. v. Platt* (1906) 142 Fed. 606; *Bobbs-Merrill Co. v. Straus* (1906) 15 L.R.A.(N.S.) 767, 77 C. C. A.

607, 147 Fed. 15; *Authors & Newspapers Asso. v. O'Gorman Co.* (1906) 147 Fed. 616; *Dr. Miles Medical Co. v. Jaynes Drug Co.* (1906) 149 Fed. 838; *Wells & R. Co. v. Abraham* (1906) 146 Fed. 190, affirmed in (1907) 79 C. C. A. 228, 149 Fed. 408; *Grogan v. Chaffee* (1909) 156 Cal. 611, 105 Pac. 745, 27 L.R.A. (N.S.) 395; *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041; *Garst v. Charles* (1908) 187 Mass. 144, 72 N. E. 239; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 51 L.R.A. (N.S.) 522, 137 Pac. 144; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 335, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 44 Times L. R. 201.

This is on the ground that there is no complete and adequate remedy at law. *Garst v. Charles* (1908) 187 Mass. 144, 72 N. E. 839.

But in *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. (Eng.) 275, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532, 84 L. T. N. S. 858, the court refused to enjoin a breach of contract on the part of a purchaser to maintain the selling price, upon the ground that the plaintiffs had the remedy in their own hands, by refusing to supply their products except upon their own terms.

But equitable relief will, of course, not be granted where the system of price control for which protection is sought is regarded as an unlawful restraint of trade. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 873, 65 L. ed. 502, 31 Sup. Ct. Rep. 376; *John D. Park & Sons Co. v. Hartman* (1907) 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Ford Motor Co. v. Union Motor Sales Co.* (1916) 156 C. C. A. 534, 244 Fed. 156, affirming (1915) 225 Fed. 373; *B. V. D. Co. v. ISAAC* (reported herewith) ante, 440; *W. H. Hill Co. v. Gray & Worcester* (1910) 163 Mich. 12, 80 L.R.A. (N.S.) 327, 127 N. W. 803; *Wampole v. F. E. Karn Co.* (1906) 11 Ont. L. Rep. 619.

#### **Sufficiency of bill.**

Sufficient damage to justify the granting of an injunction to restrain a dealer in phonographs and their accessories from unlawfully interfering with the contractual relations between

the plaintiffs, who were manufacturers of phonographs and phonographic records, and persons handling their goods, whereby the latter undertook not to sell to dealers on the manufacturers' suspended list, is established by evidence that purchasers of machines through authorized dealers are more likely to purchase records of the plaintiffs' manufacture, and that, in fact, there has been a falling off in their sale of records since the time when the defendant interfered with their system, coupled with the inference which may fairly be drawn from the fact that the defendant, a firm of some standing, should have cared so much to get hold of plaintiffs' machine that it condescended to a system of deception in order to attain this object. *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. (Eng.) 335, 6 B. R. C. 42, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 44 Times L. R. 201.

A bill for an injunction which sets forth with great fullness the title and rights of the complainant, and the violation of those rights, and which alleges in various forms and with sufficient definiteness the substantial facts of collusion, combination, and persuasion by the defendants with wholesale and retail dealers who are under contract with the complainant, is sufficiently certain although it does not name the particular dealers with whom the defendants have combined and conspired, where it appears from the bill that the defendants obliterate the identifying serial numbers upon the packages they sell, by which means the complainant is prevented from ascertaining the jobber or retailer to whom the package was originally sold. *Dr. Miles Medical Co. v. Jaynes Drug Co.* (1906) 149 Fed. 838.

#### **What amounts to violation of injunction.**

An injunction against an automobile owner's association which sells accessories to members at manufacturers' prices, from violating a license restriction inhibiting it from selling a certain article at less than the stipulated retail price, is evaded where the association, although charging the full re-

tail price, returns a discount to the purchaser in the form of a check drawn to the order of some charitable association to be designated by him.

Lovell-McConnell Mfg. Co. v. International Automobile League (1913)  
120 C. C. A. 619, 202 Fed. 219.  
E. S. O.

J. W. DOWD, Plff. in Err.,  
v.  
HERCULES POWDER COMPANY.

*Colorado Supreme Court (Dept. No. 8)—June 2, 1910.*

(— Colo. —, 181 Pac. 767.)

**Sale — of quantity required in business — right to purchase for speculation.**

1. A contract to furnish during its term such supplies of a specified kind as the purchaser may require for his own consumption or in the conduct of his own business does not require the seller to fill an order entered just before the expiration of the term for the purpose of speculating on the advance or rising market price of the commodity.

[See note on this question beginning on page 493.]

**Appeal — burden of showing evidence insufficient.**

2. A plaintiff in error has the burden of showing wherein the evidence is not sufficient to support the judgment.

[See 2 R. C. L. 220.]

— most favorable view.

3. What appears in the record as to matters of fact is to be viewed in the light most favorable to the successful party.

[See 2 R. C. L. 221.]

**ERROR** to the District Court for Eagle County (Cavender, J.) to review a judgment in favor of plaintiff in an action brought to recover the price of certain goods sold and delivered by plaintiff to defendant, in which defendant filed a cross complaint for damages for alleged breach of contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hogan & Bonner and H. Riddell for plaintiff in error.

Messrs. Dana, Blount, & Silverstein and Richard A. Smith for defendant in error.

Allen, J., delivered the opinion of the court:

This is an action brought by the Hercules Powder Company, hereinafter designated as the plaintiff, against J. W. Dowd, defendant, to recover the price of certain goods sold and delivered. The defendant filed a cross complaint for damages for an alleged breach of contract. Issues were joined and upon trial the court found for the plaintiff.

The defendant was denied any recovery upon his counterclaim.

The cause is brought here for review by the defendant, and the matters complained of, or presented for our consideration, relate only to the defendant's counterclaim for damages and the trial court's denial of the same.

The contract, upon which the defendant relies, was entered into on January 6, 1914, and continued in effect for a period of two years from that date. The contract was made between the defendant, designated therein as "purchaser," and the Independent Powder Company, described as "vendor." The plaintiff



is the successor to the last-named company, and now stands in its place under the contract.

Paragraph 2 of the contract reads as follows:

"2. Witnesseth: That, in consideration of all the business of the purchaser, the vendor hereby agrees to sell to the purchaser, and the purchaser, in consideration of the prices and terms hereinafter stated, hereby agrees to buy from the vendor all the dynamite and other blasting supplies which may be required by the said purchaser during the term of this contract, for his own consumption or in the conduct of his own business at Red Cliff, Colorado, district."

The defendant alleged in his cross complaint that "within and during the life of this contract he placed with said plaintiff orders for goods to an amount of 250,000 caps, 100 cases of White Monarch fuse, and one carload of powder; . . ." that plaintiff refused to furnish the goods; and that by such act of the plaintiff the defendant was damaged.

The plaintiff interposed several defenses to the defendant's counterclaim, one of which appears from the following allegations: "That if defendant ordered . . . the caps, fuse and powder referred to, . . . such merchandise was not required by defendant during the term of said contract for his own consumption or in the conduct of his own business, . . . and was ordered by defendant, . . . in quantities, which as he then well knew, were far beyond the requirements of himself or his business, and for the purpose of obtaining such merchandise at cheap prices and selling it during the years 1916 and 1917, and thereafter at such advanced prices as he would then be able to obtain."

At the trial, evidence relevant to this defense was received by the court. It is incumbent upon the plaintiff in error to show wherein the evidence is insufficient to support the

judgment. *Dailey v. Aspen Democrat Pub. Co.* 46 Colo. 145, 150, 103 Pac. 303. In our opinion, the plaintiff in error has failed to do this. The presumption therefore obtains that the evidence supports the judgment. 4 C. J. 786. What appears in the record as to <sup>—most favorable</sup> matters of fact is <sup>view.</sup> to be viewed in the light most favorable to the successful party. *Sebold v. Rieger*, 26 Colo. App. 209, 142 Pac. 201.

Reviewing the record in the light of the principles above stated, we find that the evidence fairly sustains the defense above mentioned, and that the trial court would have been warranted in finding the issue, in this respect, for the plaintiff, and for that reason denying defendant any recovery upon his counterclaim.

The term of the contract expired January 6, 1916. The order for goods, given by the defendant, and which the plaintiff refused to fill, was made on January 1, 1916, at a time when the defendant knew that the period fixed by the contract for furnishing goods was about to expire. The evidence also warrants the inference that the defendant knew that if the order was filled by the plaintiff, the goods could not be delivered until after the expiration of the term fixed by the contract. At the time the order was given the defendant already had on hand a reasonable quantity of material of the kind ordered. The evidence shows that the single order of January 1, 1916, was for more material than had been ordered during the previous month, and that the December, 1915, and January, 1916, orders together amounted to more material than the defendant had ordered during the entire remainder of the two-year term of the contract. The record appears to uphold the contention of the plaintiff, to the effect that the testimony fails to show that the defendant required the dynamite and blasting materials, ordered January 1, 1916, to meet the demands of his business during the term of the contract, and that the

Appeal—burden  
of showing  
evidence  
insufficient.

order was given as an attempt to use the terms of the contract for the purpose of speculating on the advanced and rising market price of the materials. The contract in question does not require or provide that the plaintiff furnish all the material sought by defendant, but only so much "as may be required by the said purchaser (the defendant) during the term of this

*Sale of quantity required in business—right to purchase for speculation.*

contract, for his own consumption or in the conduct of his own business."

The contract does not permit the defendant to stock up, to an undue extent, with goods just before the term of the contract should terminate.

In our opinion the evidence is sufficient and of such a character to uphold the judgment of the trial court, and the same is therefore affirmed.

Garrigues, Ch. J., and Bailey, J., concur.

#### NOTE.

The general question as to the construction of contracts for the sale of a commodity to the extent of the buy-

er's requirements is the subject of an annotation appended to DIAMOND ALKALI Co. v. ÆTNA EXPLOSIVES Co. post, 498. As will appear from this annotation, the courts generally sustain the doctrine of the reported case (Dowd v. HERCULES POWDER Co. ante, 493) that a contract with a manufacturer to furnish his requirements of a designated commodity for a certain period of time has reference to the buyer's requirements in his business during the life of the contract. And the contract imposes upon the seller no duty to fill the buyer's order for a large quantity of the commodity, much more than he had ordered during the previous period of the contract, the order having been sent by the buyer at a time when the commodity could not be delivered during the life of the contract.

In this connection compare with DIAMOND ALKALI Co. v. ÆTNA EXPLOSIVES Co., which holds that under the contract in that case the buyer is entitled to the maximum quantity of the commodity contracted for although he does not need that amount in his manufacturing business, and intends to resell it at a profit. And see reference to this case in the annotation appended thereto.

### DIAMOND ALKALI COMPANY

v.

### ÆTNA EXPLOSIVES COMPANY, Appt.

*Pennsylvania Supreme Court—April 12, 1919.*

(264 Pa. 304, 107 Atl. 711.)

**Sale — contract for supply for manufacturing business — profit on resale.**

A manufacturer who, having contracted for his entire requirement during a certain year of a commodity used in his business, with a specified minimum and maximum quantity, is not bound to account to the seller for profits on a quantity of the commodity taken under the contract, and not used in his business but resold.

[See note on this question beginning on page 498.]

**APPEAL** by defendant from a decree of the Court of Common Pleas for Allegheny County in favor of plaintiff in a suit for an accounting. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. B. J. Jarrett and McCook & Jarrett for appellant.

Messrs. Edwin W. Smith and William M. Robinson for appellee.

Brown, Ch. J., delivered the opinion of the court:

The decree brought up on this appeal is that the appellant, the defendant below, account to the appellee for profits which it realized on the sales of soda ash delivered to it by the appellee in pursuance of a written contract between them, dated October 15, 1915. It is as follows: "The Diamond Alkali Company (seller) hereby agrees to manufacture for and sell to Ætna Explosives Company, New York, New York (buyer), and buyer hereby agrees to buy from seller: Quantity: Buyer's entire requirements during 1916; minimum quantity 180 tons per month and maximum 250 tons monthly. Also 230 tons for shipment in equal monthly quantities during November and December, 1915. Kind: 58 per cent light soda ash. Shipment: In carload lots. Price: \$1 per hundred pounds, basis 58 per cent, packed in bags. If shipped in bulk, 7½ c. per cwt. to be deducted from above price. Deliveries: F. o. b. Painesville, Ohio. Terms: Cash in ten days, less 1 per cent. Payable in New York or Pittsburgh exchange. Each shipment to constitute a separate sale, but failure of buyer to fulfil terms of payment or to accept any shipment tendered in accordance herewith shall, at seller's option, operate as an express refusal to receive any and all further shipments. Buyers must give sellers at least thirty days' notice of their requirements for each ensuing month. Claims for errors, deficiencies, or imperfections must be made in writing by buyer to seller within ten days after receipt of goods. Serious fires, strikes, differences with workmen, accidents to machinery, shortage of cars, or any other causes unavoidable or beyond seller's reasonable control, shall ex-

cuse any delay in shipments caused thereby. There are no understandings or agreements relative to this contract or its subject-matter that are not fully expressed herein."

The case was disposed of below on bill and answer, from which the learned chancellor found six facts; the third and fifth being the only ones material in considering the question before us. They are:

"Third. The shipments of soda ash, pursuant to orders from defendant, were less than the minimum specified in the agreement."

"Fifth. Defendant purchased and plaintiff delivered soda ash which defendant did not use in its business as a manufacturer of explosives, and the excess quantity so obtained was sold by defendant at a profit."

The decree was made on this last finding; the court below sustaining the chancellor's construction of the contract, that under it the appellant could order only such quantities of soda ash between the minimum and maximum limits as were required in its manufacture of explosives. There is not a doubtful or ambiguous word in the contract, and its concluding clause is: "There are no understandings or agreements relative to this contract or its subject-matter that are not fully expressed herein."

Notwithstanding this explicit declaration by the parties, the court below read into the contract: "Buyer's entire requirements in its business as a manufacturer in 1916."

What the appellant's business was at the time the contract was entered into cannot be gathered from it. As a matter of fact it was a manufacturing concern, and the requirements of its business as a manufacturer during 1916 may not have been 180 tons of soda ash a month; but, whether they were or not, it was bound by the terms of its contract to take that quantity from the plaintiff. The latter furnished it less. The minimum and maximum quantities fixed in the contract were

not merely probable estimates of the quantities which the appellant was to take, as was the case in *Marx v. American Malting Co.* 95 C. C. A. 80, 169 Fed. 582, one of the authorities relied upon by learned counsel for appellee, but were definitely fixed quantities, which the appellant could demand and the appellee was required to deliver. The latter was bound to hold itself in readiness to make shipments ordered by the appellant under the contract, and it, in turn, was bound to receive from the appellee the minimum quantity contracted for. *Dimmick v. Banning, C. & Co.* 256 Pa. 295, 100 Atl. 871. Though the appellant was so bound, it could not, under the lower court's construction of the contract, resell any portion of the minimum quantity which it was required to take, if it found that the entire quantity was not actually required in its business. There is no averment in the bill that it had acted in bad faith, or even knew that its orders, when given, were in excess of its requirements. The mere averment is that it had ordered soda ash in excess of its requirements in its business of manufacturing explosives, and had resold the same. The question of bad faith on its part towards the appellee is not to be regarded as involved in this controversy between them. Their mutual rights and obligations under the contract are alone involved, and they are that for one year the appellee was to be prepared to deliver, and the appellant to take, not less than 180 tons of soda ash per month, with the right to demand 70 more each month. The right of each party to the contract is to enforce it against the other. The learned chancellor below, however, was of opinion: "If 250 tons monthly was the quantity required to meet defendant's needs, it could have called for delivery of that quantity; but if 50 tons were sufficient, it could not demand more."

The complaint of the appellee, sus-

tained by the court below, is that the appellant perverted the contract in reselling what it was bound to take from the appellee. What terms in the contract did it pervert? What did it do that it was forbidden to do? To find the appellant guilty of "perversion" of the contract, as styled by the court below, words must be written into it, in the face of the clearly expressed intention of the parties to it that there were to be "no understandings or agreements relative to this contract or its subject-matter that are not fully expressed herein." Reading of words into a contract was attempted in *Highlands Chemical Co. v. Matthews*, 76 N. Y. 145, where the contract provided that the plaintiff should supply the defendant with oil of vitriol for one year, "total amount to be called for during that time to be not more than ten thousand (10,000) or less than seven thousand (7,000) carboys." The defendant called for the maximum quantity, which the plaintiff failed to deliver. In a suit to recover for what had been delivered, the defendant claimed as a set-off the difference between the market price and the contract price of what had not been delivered to him. The plaintiff thereupon attempted to import into the contract words to the effect that the acid was to be used in the defendant's business, and that he had therefore no right to demand more than was required for that purpose. In holding that the contract could not be so construed, the court of appeals said: "The defendant was bound to take the minimum amount, whether he needed or desired it for the purposes of his business or not; and the correlative obligation rested upon the plaintiff to deliver any amount within the maximum fixed by the contract, if called for by the defendant. The contract of the plaintiff is not to supply an amount within the limits named; if needed by the defendant in his business. To introduce

this qualification would be adding a new term to the contract."

In the present case the parties to the contract fixed definitely the quantity of soda ash the appellant was obliged to receive and the appellee was obliged to deliver. It was therefore no concern of the latter what the former may have done with what it was bound to receive. If the price of the material had fallen, it would have been compelled

to bear the loss, and there is no right in the appellee to an accounting from it for what it did with what was delivered to it under the contract between them.

The fourth, fifth, seventh, and ninth assignments of error are sustained, the decree is reversed, and the bill dismissed, at the costs of the appellee.

*Sale—contract for supply for manufacturing business—profit on resale.*

## ANNOTATION.

### Construction of contract for sale of commodity to the extent of the buyer's requirements.

#### I. In general, 498.

#### II. Where a contract is for the requirements of the buyer without qualifying words:

##### a. Obligation imposed upon the seller as to the amount of commodity to be furnished:

1. In general, 500.
2. Obligation to furnish current needs of buyer although exceeding needs of preceding years, 500.
3. Obligation to furnish any amount the buyer may choose to demand, 501.
4. Obligation to furnish commodity for resale by buyer, 503.
5. Obligation to furnish commodity to be carried by buyer in stock beyond term of contract, 504.
6. Effect of fraud by buyer in ordering more of the commodity than his business requires, 505.

##### 1. In general.

The same general principles apply to the construction of contracts by one party to furnish to the other party certain articles or material to the extent of the latter's requirements in his business that apply to contracts in general,—that is, the intention of the parties controls. This intention is to be gathered from the language of the contract, aided by the surrounding facts and circumstances. As thus construed the term "requirements" is

#### II.—continued.

##### b. Obligation imposed upon the buyer:

1. In general, 506.
2. Effect of a sale of, or change in, the business of the buyer, 507.

#### III. Effect of qualifying words:

- a. In general, 507.
- b. Statement of maximum and minimum amount, 508.
- c. Statement of quantity:
  1. In general, 509.
  2. Not to exceed a certain quantity, 510.
  3. Approximately a designated quantity, 511.
  4. Estimated quantity, 511.
  5. Designated quantity, "more or less," 512.
  6. "About" a certain quantity, 512.

#### IV. Extrinsic evidence to aid construction, 514.

held to relate to and cover the quantity of commodity or material which the business of the buyer necessarily requires for the term of the contract, the buyer being engaged in some business which ordinarily will make it necessary for him to use a quantity of the commodity or material to which the contract relates.

*United States.—Merriam v. United States* (1883) 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; *Mueller v. United States* (1884) 19 Ct. Cl. 581;

**Manhattan Oil Co. v. Richardson Lubricating Co.** (1902) 51 C. C. A. 553, 113 Fed. 923; **Wolff v. Wells, F. & Co.** (1902) 52 C. C. A. 626, 115 Fed. 32; **Marx v. American Malting Co.** (1909) 95 C. C. A. 80, 169 Fed. 582; **Golden Cycle Min. Co. v. Rapson Coal Min. Co.** (1911) 112 C. C. A. 95, 188 Fed. 179; **T. W. Jenkins & Co. v. Anaheim Sugar Co.** (1918) L.R.A.1918E, 293, 160 C. C. A. 658, 247 Fed. 958.

**California.**—**Los Angeles Gas & E. Corp. v. Amalgamated Oil Co.** (1914) 168 Cal. 140, 142 Pac. 46.

**Colorado.**—**Dowd v. HERCULES POWDER Co.** (reported herewith) ante, 493.

**Illinois.**—**National Furnace Co. v. Keystone Mfg. Co.** (1884) 110 Ill. 427; **McLean County Coal Co. v. Bloomington** (1908) 234 Ill. 90, 84 N. E. 624; **Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co.** (1906) 120 Ill. App. 23.

**Indiana.**—**Semon Bache & Co. v. Coppes, Z. & M. Co.** (1905) 35 Ind. App. 351, 111 Am. St. Rep. 171, 74 N. E. 41.

**Iowa.**—**Drake v. Vorse** (1879) 52 Iowa, 417, 3 N. W. 465.

**Maryland.** — **Waddell v. Phillips** (1919) 133 Md. 497, 105 Atl. 771.

**Michigan.**—**E. G. Dailey Co. v. Clark Can Co.** (1901) 128 Mich. 591, 87 N. W. 761.

**Missouri.**—**Tull v. Fletcher** (1917) 196 Mo. App. 573, 196 S. W. 436.

**New York.**—**New York Cent. Iron Works Co. v. United States Radiator Co.** (1903) 174 N. Y. 331, 66 N. E. 967; **Miller v. Leo** (1898) 35 App. Div. 589, 55 N. Y. Supp. 165; **Moore v. American Molasses Co.** (1917) 179 App. Div. 505, 166 N. Y. Supp. 4.

**Pennsylvania.** — **McKeever v. Canonsburg Iron Co.** (1890) 138 Pa. 184, 20 Atl. 938.

**Texas.**—**Cullinan v. Standard Light & P. Co.** (1901) — Tex. Civ. App. —, 65 S. W. 689.

**West Virginia.**—**Home Gas Co. v. Mannington Co-op. Window Glass Co.** (1908) 63 W. Va. 266, 61 S. E. 329.

**Wisconsin.**—**Excelsior Wrapper Co. v. Messenger** (1903) 116 Wis. 549, 93 N. W. 459.

**England.**—**Whitehouse v. Liverpool New Gaslight & Coke Co.** (1848) 5 C. B. 798, 136 Eng. Reprint, 1093, 17 L. J. C. P. N. S. 237.

As to the meaning of the term "require" used in reference to the amount of material to be furnished by the seller to the buyer, in **Moran Bolt & Nut Mfg. Co. v. Caldwell** (1912) 240 Mo. 358, 144 S. W. 472, it is pointed out that "every word has its own radical meaning, which is the symbol of the idea expressed by it. If it had two such meanings, it could not represent one idea. No two terms of the same tongue are absolutely identical in etymological meaning. Synonyms do exhibit those nuances of thought and expression which give variety and vividness to speech and writing; they enrich language by obviating the narrow monotony of reiterated terms, and increasing its play and scope by giving expression to all the variations of meaning taken by words when used in a synonymous sense. The problem in this case is not to declare the delicate gradation [gradation] of meaning which the term 'require' takes when expanded as a synonym, but to ascertain its natural import and accepted meaning in the particular sentence of the contract under review. To do this, the law does not investigate the meaning of words in the abstract, but deals only with the concrete meaning in concrete contracts of the words used. All other inquiries are linguistic, not legal, quests. To serve its own purpose, the law puts itself in the shoes of the contracting parties and ascertains the natural and accepted sense of the words used in their agreement, viewed in the light of the objects had in view and the circumstances surrounding the actors."

It has been held that the word "required," as used in government contracts for stone to be delivered for a certain construction, refers to the needs of the government in that matter, and any unreasonable delay in construction entitles the seller to recover the damage occasioned him thereby. **Mueller v. United States** (1884) 19 Ct. Cl. (Fed.) 581.

**II. Where a contract is for the requirements of the buyer without qualifying words.**

**a. Obligation imposed upon the seller as to the amount of commodity to be furnished.**

**1. In general.**

Where the contract is to furnish a purchaser engaged in some business his requirements of a certain commodity which is used in such business, the contract will be construed to impose upon the seller the duty of furnishing the entire requirements of the buyer in that business, provided the latter acts in good faith and without fraud in ordering and using the commodity.

**United States.**—*Manhattan Oil Co. v. Richardson Lubricating Co.* (1902) 51 C. C. A. 553, 113 Fed. 923; *H. D. Williams Cooperage Co. v. Scofield* (1902) 53 C. C. A. 23, 115 Fed. 119; *Lima Locomotive & Mach. Co. v. National Steel Castings Co.* (1907) 11 L.R.A.(N.S.) 713, 83 C. C. A. 593, 155 Fed. 77; *Golden Cycle Min. Co. v. Rapson Coal Min. Co.* (1911) 112 C. C. A. 95, 188 Fed. 179.

**Colorado.**—*Dowd v. HERCULES POWDER CO.* (reported herewith) ante, 493.

**Georgia.**—*Albany Powder & Mfg. Co. v. Albany* (1909) 133 Ga. 375, 65 S. E. 886.

**Illinois.**—*McLean County Coal Co. v. Bloomington* (1908) 234 Ill. 90, 84 N. E. 624; *Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co.* (1905) 120 Ill. App. 23.

**Indiana.**—*Semon Bache & Co. v. Coppes, Z. & M. Co.* (1905) 85 Ind. App. 851, 111 Am. St. Rep. 171, 74 N. E. 41.

**Missouri.**—*Moran Bolt & Nut Mfg. Co. v. Caldwell* (1912) 240 Mo. 358, 144 S. W. 472; *Tull v. Fletcher* (1917) 196 Mo. App. 573, 196 S. W. 438.

**New York.**—*New York Cent. Iron Works Co. v. United States Radiator Co.* (1903) 174 N. Y. 331, 66 N. E. 967; *Moore v. American Molasses Co.* (1917) 179 App. Div. 505, 166 N. Y. Supp. 4; *Asahel Wheeler Co. v. Mendleson* (1917) 180 App. Div. 9, 167 N. Y. Supp. 435.

**Texas.**—*Cullinan v. Standard Light & P. Co.* (1901) — Tex. Civ. App. —, 65 S. W. 689.

**Wisconsin.**—*Excelsior Wrapper Co. v. Messinger* (1903) 116 Wis. 549, 93 N. W. 459.

**England.**—*Whitehouse v. Liverpool New Gaslight & Coke Co.* (1848) 5 C. B. 798, 136 Eng. Reprint, 1093, 17 L. J. C. P. N. S. 237.

In *National Furnace Co. v. Keystone Mfg. Co.* (1884) 110 Ill. 427, a contract by a manufacturer to purchase all his requirements of certain material was held to bind him to take his entire supply from the seller, that is, such quantity in view of the situation and business of the buyer as was reasonably required and necessary in its manufacturing business, and the seller was held bound to furnish that amount.

In *Semon Bache & Co. v. Coppes, Z. & M. Co.* (Ind.) supra, a contract for furnishing a buyer's requirements demanded during a certain period was held to impose upon the latter the duty of buying his requirements of such articles from the seller, and to impose upon the latter the duty of furnishing such articles of this character as the buyer required in his business.

In *Golden Cycle Min. Co. v. Rapson Coal Min. Co.* (1911) 112 C. C. A. 95, 188 Fed. 179, it is held that a contract to furnish a mining company with all the coal it would use in a certain mine within a designated period of time binds the seller to furnish all the buyer's requirements of coal during said time, and the buyer is bound to purchase his requirements of the seller.

**2. Obligation to furnish current needs of buyer although exceeding needs of preceding years.**

The fact that the buyer's business was such that he required a much larger quantity of the commodity than was indicated by his business for previous years is no ground for a refusal by the seller to furnish the additional amount where in good faith required by the buyer.

For example, in *New York Cent. Iron Works Co. v. United States Radi-*

ator Co. (1908) 174 N. Y. 331, 66 N. E. 967, it is held that a contract to deliver the buyer's entire radiator needs for a certain year includes the buyer's needs although largely in excess of its needs in prior years, which had also been furnished by the seller, and this is true although the needs of the buyer under the later contract was due in part to a large advance in material which the seller was to furnish.

Followed in Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory (1919) 189 App. Div. 843, 179 N. Y. Supp. 271, and applied to a contract to furnish a jobber his requirements. Jobber was held entitled to require much greater quantity of article last three months of contract than preceding nine months, although increased demand was due to jobber taking advantage of greatly increased market price of the article. This holding is attacked in a dissenting opinion.

In Excelsior Wrapper Co. v. Messinger (1903) 116 Wis. 549, 93 N. W. 459, it is held that an agreement to sell all of a certain kind of paper needed by the buyer in his business for a year requires the seller to furnish the quantity necessarily required by the buyer in its business, even though it exceeds the amount the buyer has used during previous years, it appearing that the character of the business was known to the seller and it had been customary for it to contract with the buyer in advance for the latter's supply. The court said that "the plaintiff had an established business, of character and magnitude well known to the defendant: It could not, with profit to itself, seriously modify the volume of that business for the mere purpose of increasing or diminishing the amount of any given class of supplies. The exact quantity of paper, therefore, which it would want or need in that business during a prospective year, while uncertain at the time of the making of the contract, was sure to become reasonably certain in the course of the year; and the contract was not merely an optional one with the plaintiff, but bound it as well to take, as it did the defendant to furnish, such paper, of the quantity

designated, as should be needed for that business."

In E. G. Dailey Co. v. Clark Can Co. (1901) 128 Mich. 591, 87 N. W. 761, it is held that in the absence of fraud on its part, the fact that a purchaser of all the cans it should use in its canning plant for a certain period of time greatly increased the capacity of the plant during the life of the contract does not entitle the seller to refuse to carry out the contract by refusing to furnish the buyer with all the cans his increased capacity in business requires, although greatly in excess of the quantity he had formerly used.

*3. Obligation to furnish any amount the buyer may choose to demand.*

The doctrine that a contract by the seller to furnish the buyer his requirements in a certain commodity is to be construed to impose on the seller the obligation to furnish the amount of the commodity which the buyer in good faith requires in his business during the term of the contract places an apparent limitation upon the quantity of the commodity which the buyer is entitled to under the contract, the term "requirement" being construed in this regard to mean the actual needs of the buyer in his business during the life of the contract. Hence it is held that the buyer is entitled under the contract, and the seller is under obligation to furnish, only the quantity of commodity which the former's business actually requires as distinguished from the amount which he might choose to order or want.

United States.—Manhattan Oil Co. v. Richardson Lubricating Co. (1902) 51 C. C. A. 553, 113 Fed. 923; H. D. Williams Cooperage Co. v. Scofield (1902) 53 C. C. A. 23, 115 Fed. 119; Lima Locomotive & Mach. Co. v. National Steel Castings Co. (1907) 11 L.R.A.(N.S.) 718, 83 C. C. A. 593, 155 Fed. 77.

Colorado.—DOWD v. HERCULES POWDER Co. (reported herewith) ante, 493.

Illinois.—Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co. (1905) 120 Ill. App. 23.



New York.—*Moore v. American Molasses Co.* (1917) 179 App. Div. 505, 166 N. Y. Supp. 4; *Asahel Wheeler Co. v. Mendleson* (1917) 180 App. Div. 9, 167 N. Y. Supp. 435.

Texas.—*Cullinan v. Standard Light & P. Co.* (1901) — Tex. Civ. App. —, 65 S. W. 689.

England.—*Whitehouse v. Liverpool New Gaslight & Coke Co.* (1848) 5 C. B. 798, 136 Eng. Reprint, 1093, 17 L. J. C. P. N. S. 237.

In this regard it is pointed out in *Russell, Burdsall & Ward v. Excelsior Stove Mfg. Co.* (Ill.) *supra*, that a contract to furnish a manufacturer its requirements of certain material means the amount of such material which it needs in the regular course of its business, and not what it may choose to require.

In *Lima Locomotive & Mach. Co. v. National Steel Castings Co.* (1907) 11 L.R.A.(N.S.) 718, 83 C. C. A. 593, 155 Fed. 77, in sustaining the validity of an agreement to furnish a manufacturing company all their requirements of steel castings for a designated period of time the court said that the seller was not proposing to make castings beyond the current requirements of the buyer's business, and would not have been obligated to supply castings not required in the usual course of that business.

In *Whitehouse v. Liverpool New Gaslight & Coke Co.* (Eng.) *supra*, a contract by a manufacturer of iron to furnish a gas company with all pipes which should from time to time be required by it during a certain period of time was held to bind the seller to furnish the buyer all the pipes which it might reasonably require for such works as it was actually carrying on, under the authority of its incorporation. The seller, however, was not under any obligation to furnish more pipes than those needed, although ordered by the buyer.

In *Asahel Wheeler Co. v. Mendleson* (N. Y.) *supra*, it appeared that defendants contracted to furnish the plaintiff their supply of a certain material for a period of one year, the quantity not to exceed 25 tons; the defendants had furnished material of

this character to the plaintiff in previous years, a large part of which remained in the plaintiff's hands at the time he ordered practically the entire amount of material to be furnished by the defendants under the later contract. This order was not given until about one month before the expiration of the contract, the plaintiff not having ordered any material thereunder for the preceding eleven months. This material had in the meantime greatly increased in price. Under these circumstances it was held that the burden of proof was upon the plaintiff to show that he needed this large amount of material in his business for the short period of time the contract was to run.

In *Moore v. American Molasses Co.* (N. Y.) *supra*, under a contract to supply the plaintiff with all the molasses he should require in his regular business as veterinarian and dealer in stable supplies, which contract was the continuance of a contract which had previously existed between the same parties, the defendant supplied plaintiff with over 100 barrels of molasses more than he had ever used in previous years, and he refused to furnish more, although the plaintiff ordered nearly 8,000 more barrels. Under these circumstances it was held that unless the molasses which the plaintiff ordered was needed by him in his usual business, the defendant was under no obligation to furnish it.

In *Dowd v. Hercules Powder Co.* (reported herewith) *ante*, 498, a contract to furnish all the dynamite and other blasting supplies which would be required by the buyer for his own consumption or for the conduct of his own business during a certain period of time was held to justify the seller in refusing to furnish a very large order of the buyer made but a few days before the expiration of the contract, and which could not be filled during the life thereof, the size and date of the order clearly indicating that the material could not be used during the life of the contract.

Compare on this point with *McCaw Mfg. Co. v. Felder* (1902) 115 Ga. 408, 41 S. E. 664, where, in a contract of

this character, the term "require" was construed to refer merely to such articles as the buyer might want during the period of the contract, the term "want" being used in the sense of desire, and hence not to impose on the buyer the obligation to purchase of the seller any of his requirements.

Where the buyer makes a claim for damages for breach of contract by the seller, on the ground that the latter failed to furnish all the commodity it ordered, the buyer should make definite proof that it actually needed in its business the amount of the commodity which it had ordered of the seller and which the latter had failed to furnish. *Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co.* (1905) 120 Ill. App. 23, *supra*. And see also *Asahel Wheeler Co. v. Mendleson* (1917) 180 App. Div. 9, 167 N. Y. Supp. 435, *supra*.

#### 4. *Obligation to furnish commodity for resale by buyer.*

Under the rule that, by a contract for the purchase of the buyer's requirements of a certain commodity in his business, the seller is bound to furnish such a quantity of the commodity as the business of the buyer necessitates, the business necessities of the buyer are the test of the quantity of the commodity he is entitled to have the seller furnish him, and the latter is under no obligation to furnish the buyer with such commodity for the purpose of resale by the latter. *H. D. Williams Cooperage Co. v. Scofield* (1902) 53 C. C. A. 28, 115 Fed. 119; *Cullinan v. Standard Light & P. Co.* (1901) — Tex. Civ. App. —, 65 S. W. 689.

In *Cullinan v. Standard Light & P. Co.* (Tex.) *supra*, it is held that a contract to furnish oil at a designated price per barrel, the buyer agreeing to receive oil sufficient to run its plant for a certain period of time only, requires the seller to furnish the amount of oil required by the buyer in the operation of its plant, and where the buyer, under pretense of securing oil to be used in its plant, had large quantities of oil shipped to it, and then diverted the shipment and

sold the oil to others at a profit, this conduct amounted to a fraud upon the seller, rendering the buyer liable for the loss thereby occasioned the former. The court said: "It is manifest that appellee was bound, under the contract, to receive only a limited quantity of oil,—that is, an amount sufficient to run its plant for the specified time,—and appellant was not bound to furnish any greater amount. It is clear from the language of the contract that it was not the intention of the parties thereto that the oil company should be bound to deliver more oil than appellee was bound to accept. That the oil was sold for a special purpose is disclosed by the terms of the contract. The stipulations concerning the putting in of burners and tanks, and of the purchase thereof by the oil company in certain contingencies, as well as the provision guaranteeing a price not exceeding 50 cents per barrel, show that the principal, if not the only, inducement to the sale, was to introduce the oil to appellee as a successful and profitable substitute for coal, and thus secure to the oil company a permanent customer, and widen the market for its product. It is plain that the oil was not sold to appellee to be used by it in speculation. Such being the case, had appellee demanded of appellant that he furnish it with oil to be used, compliance with the demand could not have been enforced, even though the quantity demanded had been within the amount necessary to operate its plant. . . . In other words, appellee, having bought the oil for its own use, and having thereby secured special terms, could not require appellant, under the contract, to supply it with oil for other purposes. The pretense that the oil bought was to be appropriated to the purposes of the contract, when in fact it was diverted therefrom and sold on profit to strangers, was, in legal contemplation, a fraud upon appellant, and justified this proceeding."

But a mere resale of a portion of the commodity ordered under a contract of this character as a matter of convenience to another party does not necessarily constitute a breach of the

contract. *H. D. Williams Cooperage Co. v. Scofield* (Fed.) *supra*. Upon this point it is said that, "whether the sale of these barrels was such a breach as operated to discharge the contract depends, in our judgment, upon whether they were originally ordered in good faith by the plaintiffs for their own use, and to meet the supposed requirements of their business during the year 1899, or for such ulterior purpose as was alleged in the defendants' answer. It cannot be, we think, in a case like the one in hand, where by the contract the quantity of goods agreed to be sold and delivered was uncertain, and depended upon the requirements of the plaintiffs' trade, that the plaintiffs could not sell any barrels which they had ordered in good faith for their own use without discharging the opposite party from its agreement. An unexpected decrease in the demand for oil, and other causes, might render it necessary to dispose of a part of a stock of barrels which the plaintiffs had accumulated in good faith with the expectation of using them. It must be presumed that the parties to the contract foresaw that such events might occur, and that it was also understood that the plaintiffs would conduct their business in the usual way, extending such courtesies to rival concerns as were customary in the trade."

As hereinafter more specifically pointed out, the term "requirement" as used in contracts of this character may be qualified by other language in the contract indicating more specifically the actual amount of the commodity to be furnished. For example, it has been held that where the contract calls for the buyer's requirements of a certain commodity for a certain period of time without indicating that it is his requirements in the business in which he is engaged, and with a specific statement as to the minimum and maximum amount the seller is obliged to furnish, this latter statement will control to the extent that the buyer is entitled to the maximum quantity of the commodity without reference to whether or not he actually needs that amount in his

business, even though his purpose is to resell it. *DIAMOND ALKALI CO. v. ÆTNA EXPLOSIVES CO.* (reported herewith) ante, 495.

*5. Obligation to furnish commodity to be carried by buyer in stock beyond term of contract.*

The buyer is entitled to order a reasonable amount of the commodity in advance of his actual needs, and where the custom of the buyer is to carry over some of the commodity from one season to another, he may require the seller to furnish the usual amount of commodity to be carried over to the next season although it is beyond the life of the contract.

For example, where the contract is for a certain commodity used in the buyer's factory up to a certain date, not less than a certain amount or more than a certain amount, the buyer is entitled to the maximum amount of the commodity if this amount is necessary to keep the requisite supply on hand for the buyer's future use up to the date designated, even though this amount had not been actually used by the buyer up to that time. *Staver Carriage Co. v. Park Steel Co.* (1906) 220 Ill. 412, 77 N. E. 174.

In *McLean County Coal Co. v. Bloomington* (1908) 234 Ill. 90, 84 N. E. 624, a contract to furnish a city its supply of coal, ordered by the city as required or needed, was construed to give the city some discretion as to the quantity it should order in advance of its actual needs, and one month's supply in advance was held not an unreasonable requirement. It was, however, held that the contract did not give the city the right to order in advance practically its entire supply of coal for the life of the contract. The court said: "The intention of the parties in making this contract plainly authorized appellee to order coal as required or needed by its various departments, but it would not be a reasonable construction to say that, in anticipation of a strike, during the first month of the contract it could order at once all the coal which it had the right to order during the whole life of the contract. While a certain amount of discretion under this con-

tract rested with appellee as to the amount it might order at any given time, this discretion must be reasonably exercised. What constitutes such reasonable discretion? Taking into consideration the words 'ordered,' 'directed,' 'required,' and 'needed,' as used in their various connections in the request, bid, and contract, we think it would not be an unreasonable construction to say that the discretion rested with appellee to order coal at least a month in advance."

Compare with *Manhattan Oil Co. v. Richardson Lubricating Co.* (1902) 51 C. C. A. 553, 113 Fed. 923, holding that a contract to furnish all the oil the buyer should require for its own use in its manufacturing business for a designated period of time did impose upon the seller the obligation to furnish the buyer only as much oil as it would require for use in its manufacturing business within the time designated. It authorized the buyer to use more or less as long as it observed good faith and did not reduce or increase its consumption beyond the legitimate requirements of its manufacturing business. The buyer could not, however, require the seller to furnish oil for use beyond the term of the contract.

In *H. D. Williams Cooperage Co. v. Scofield* (1902) 53 C. C. A. 23, 115 Fed. 119, it is held that a contract to furnish all the barrels required by a certain company for a season imposed upon the seller the duty to furnish all the barrels required by the buyer in its business for that season, but it did not require the seller to furnish barrels to the buyer for use the following season or for the purpose of reselling the same at a profit.

*6. Effect of fraud by buyer in ordering more of the commodity than his business requires.*

A covenant by the seller to supply a sufficient quantity of an article to meet the requirements of the buyer, and the implied covenant by the latter to order only such quantity of such article as he needs in his business, are dependent, and not independent, covenants, hence a breach of the covenant by the buyer ordering more goods than

he needs in his business for the time specified discharges the seller from the duty of making further deliveries. *H. D. Williams Cooperage Co. v. Scofield* (1902) 53 C. C. A. 23, 115 Fed. 119.

In order for the foregoing rule to apply, it is not necessary that the seller shall have known of the breach of the contract in this regard by the buyer at the time he refused to make further deliveries under the contract. *Ibid.*

Upon this point the court said: "If the plaintiffs ordered from the defendants barrels which were not needed for use in their business during the year 1899, with intent to stock up for the year 1900, or to sell the barrels so ordered at a profit, they violated a material obligation which was imposed on them by the contract, and did so deliberately. The implied promise to order only such barrels as they needed for the year 1899 was a substantial part of the consideration for the defendants' promise to furnish barrels during that year at the price specified. If the defendant company had been requested to supply barrels to meet the requirements of the plaintiffs' business during a period of two years, or to enable them to sell barrels to third parties at a profit, it might, and very likely would, have charged a higher price for its barrels than the price specified in the contract. The breach of the contract complained of was not one of those unintentional or enforced violations of the provisions of a contract in some minor particular, which will sometimes be excused to the extent that the opposite party will only be allowed to take advantage of the breach by recouping his damages."

If the buyer fraudulently orders and receives more of the commodity than is necessary for use in his business, for the purpose of reselling the same at a profit, his conduct in this regard constitutes a fraud upon the seller, entitling the latter to maintain an action against the buyer for the fraud thus practised upon him, in which the seller may recover the loss he suffers by reason of the fraud. *Cullinan v.*

Standard Light & P. Co. (1901) —  
Tex. Civ. App. —, 65 S. W. 689.

*b. Obligation imposed upon the buyer.*

*1. In general.*

A contract for the sale of the buyer's requirements in a certain commodity, where the buyer is in some established business requiring the use of such commodity therein, imposes upon him the duty of purchasing from the seller the amount of such commodity which he actually requires for use in said business during the life of the contract.

United States.—Golden Cycle Min. Co. v. Rapson Coal Min. Co. (1911) 112 C. C. A. 95, 188 Fed. 179; T. W. Jenkins & Co. v. Anaheim Sugar Co. (1918) L.R.A.1918E, 293, 160 C. C. A. 658, 247 Fed. 958.

California.—Los Angeles Gas & E. Corp. v. Amalgamated Oil Co. (1914) 168 Cal. 140, 142 Pac. 46.

Georgia.—Albany Power & Mfg. Co. v. Albany (1909) 133 Ga. 375, 65 S. E. 886.

Illinois.—National Furnace Co. v. Keystone Mfg. Co. (1884) 110 Ill. 427.

Indiana.—Semon Bache & Co. v. Coppes Z. & M. Co. (1905) 35 Ind. App. 351, 111 Am. St. Rep. 171, 74 N. E. 41.

Iowa.—Drake v. Vorse (1879) 52 Iowa, 417, 3 N. W. 465.

New York.—Miller v. Leo (1898) 35 App. Div. 589, 55 N. Y. Supp. 165.

Pennsylvania.—McKeever v. Canonsburg Iron Co. (1890) 138 Pa. 184, 20 Atl. 938.

In *Miller v. Leo* (N. Y.) *supra*, a contract to furnish such material as the contractor may require in constructing certain buildings was held to obligate the buyer to purchase his entire requirements of such material from the seller. The court said that the term "required" was not used in the sense of "ask for," and added: "In our judgment that is not a proper construction of the word as used in this contract. The plain meaning of it is, that the delivery was to be of all the material necessary to complete the buildings, and that was what Miller was bound to deliver, and it is equally clear, in our judgment, that that was what he was entitled to have demand-

ed. It was either a contract which bound both parties in its entirety, or it was a mere proposal which bound neither. Either Miller was bound to deliver all the material of that nature necessary to be used upon those buildings, or he was bound to deliver none, and was at liberty to stop whenever he saw fit. If he was bound to deliver all the material, it is clear that there must have been a corresponding obligation on the part of Leo to order from Miller the material which Miller was bound to furnish. The word 'require' here must be construed in view of that reciprocal obligation, and, thus construed, it seems plain that the contract not only bound Miller to furnish whatever brick, lime, and cement were necessary to finish the buildings, but it bound Leo reciprocally to order all those things from him. Therefore, when Leo refused to order the lime from Miller, he had violated the contract, and, so far as Miller was concerned, he was not in fault for refusing to deliver any more brick."

In *T. W. Jenkins & Co. v. Anaheim Sugar Co.* (Fed.) *supra*, in sustaining the validity of a contract by a wholesale house to purchase its requirements of sugar for a certain period of time from the defendant, the court said the buyer agreed to confine its purchase to the sugar company and that its normal requirements were alone involved, this amount being known approximately by the seller.

In *Los Angeles Gas & E. Corp. v. Amalgamated Oil Co.* (Cal.) *supra*, a contract provided for the purchase by the defendant of sufficient oil to operate its plant for a given period of time, over and above the amount of oil which the buyer had contracted to purchase of another company. This latter contract provided for a maximum and minimum amount; it appeared, however, that sometimes the buyer purchased under this latter contract more than the maximum amount and sometimes more than the minimum amount. This was held to constitute a breach of the contract involved in the suit, even though the amount actually received by the buyer for the entire

period of time did not exceed the maximum amount.

In *Albany Power & Mfg. Co. v. Albany* (Ga.) *supra*, a contract to furnish a stated quantity of electric current each twenty-four hours and so much more as the buyer might require for his own purposes is construed to require the seller to furnish such reasonable quantity of current as the exigencies of the buyer might call for over and above the amount stated, but not to require the buyer to take or pay for any additional quantity which he did not require in his business.

But see *McCaw Mfg. Co. v. Felder* (1902) 115 Ga. 408, 41 S. E. 664, holding that a contract for the purchase of all of the boxes of a certain kind which the buyer would require during a certain period of time referred merely to such boxes as the buyer might want during that period of time, the term "want" being used in the sense of desire, and hence not to impose any obligation upon the buyer to purchase of the seller his requirements in boxes.

*2. Effect of a sale of, or change in, the business of the buyer.*

Where the buyer exercises good faith and is free from fraud in disposing of, or making a change in, his business, such change will have the effect of releasing him from the obligation of the contract to purchase his requirements of a certain commodity used in his certain business, to the extent that the change in the business does away with the necessity for the use of the commodity.

Thus, in *Drake v. Vorse* (1879) 52 Iowa, 417, 3 N. W. 465, it is held that under a contract to furnish a manufacturer with all the castings of a certain kind which he may want during a designated period of time, where the buyer discontinues the manufacturing business individually and engages in it with another as a partnership, he is under no obligation to take any castings as an individual and the partnership is under no obligation under the contract.

In *McKeever v. Canonsburg Iron Co.* (1890) 133 Pa. 134, 20 Atl. 938, a contract to furnish all the coal of differ-

ent kinds the purchaser requires to operate its mill for a given period of time is held to be breached by the buyer in purchasing and using coal of a different kind than that designated in the contract, but it did not breach the contract by installing gas and using gas in the place of coal. The court said: "It is obvious that no limit was, by the contract, put upon the discretion of the defendants as to the amount of coal they were to use in the mill. It might be much, little, or none at all. What coal was necessary for consumption in their works they must take from the plaintiffs. This was all they were bound to do, and all the plaintiffs were bound to furnish them; and it was of no consequence whether the falling off in that consumption was occasioned by the contraction of their business, or by the introduction of gas. In either case, less coal was necessary for the defendants' manufactory, and they were not obliged to pay for what they did not require."

On the other hand, where the buyer disposes of the business with reference to which he has purchased a commodity to the extent of his requirements, the seller is under no obligation to furnish such commodity to the purchaser of the business, nor is he under any obligation to furnish the same to the original buyer.

This is the holding of *Laclede Constr. Co. v. T. J. Moss Tie Co.* (1904) 135 Mo. 25, 84 S. W. 76. In this case a contract to furnish a railroad company the number of ties which it would need for a certain period of time, not exceeding a specified number, was held not to bind the seller to furnish such ties to another railroad company which acquired the railroad company with which the contract was made.

*III. Effect of qualifying words.*

*a. In general.*

As hereinafter more specifically pointed out, the agreement to furnish the requirements of the buyer for certain articles or material may be qualified by specific language indicating the intentions of the parties in making such qualification, as, for example, the

inclusion after the agreement to furnish the buyer's requirements, of the statement of a maximum and minimum amount to be furnished, or a statement of the maximum amount, or the statement of the amount qualified by such terms as "about, approximately, more or less, not more than," etc.

**United States.**—*Brawley v. United States* (1878) 96 U. S. 168, 24 L. ed. 622 (about, more, or less); *Merriam v. United States* (1883) 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536 (more or less); *Staver Carriage Co. v. Park Steel Co.* (1900) 43 C. C. A. 471, 104 Fed. 200 (maximum and minimum); *Budge v. United Smelting & Ref. Co.* (1900) 43 C. C. A. 665, 104 Fed. 498 (about); *Wolff v. Wells, F. & Co.* (1902) 52 C. C. A. 262, 115 Fed. 32 (about); *Marx v. American Malting Co.* (1909) 95 C. C. A. 80, 169 Fed. 582 (about).

**Illinois**—*Staver Carriage Co. v. Park Steel Co.* (1906) 220 Ill. 412, 77 N. E. 174 (maximum and minimum); *Bloomington Canning Co. v. Union Can Co.* (1901) 94 Ill. App. 62 (approximately).

**Maryland.**—*Waddell v. Phillips* (1919) 183 Md. 497, 105 Atl. 771 (about).

**Michigan.**—*Fletcher v. Germain* (1890) 82 Mich. 247, 46 N. W. 368 (maximum); *F. B. Holmes & Co. v. Detroit* (1909) 158 Mich. 187, 122 N. W. 506 (more or less); *Stuart v. Home Teleph. Co.* (1910) 161 Mich. 123, 125 N. W. 720 (about).

**Missouri.**—*Laclede Constr. Co. v. T. J. Moss Tie Co.* (1904) 185 Mo. 25, 84 S. W. 76 (maximum).

**New York.**—*Heisel v. Volkmann* (1900) 55 App. Div. 607, 67 N. Y. Supp. 271 (maximum and minimum); *H. D. Taylor Co. v. Niagara Bedstead Co.* (1907) 52 Misc. 356, 102 N. Y. Supp. 173 (maximum and minimum); *Rosenthal v. Empire Brick & Supply Co.* (1908) 128 App. Div. 503, 108 N. Y. Supp. 347 (about); *Asahel Wheeler Co. v. Mendleson* (1917) 180 App. Div. 9, 167 N. Y. Supp. 435 (maximum).

**Ohio.**—*Mills-Carleton Co. v. Huberty* (1911) 84 Ohio St. 81, 95 N. E. 383 (estimate).

**Pennsylvania.**—**DIAMOND ALKALI**

**Co. v. AETNA EXPLOSIVES Co.** (reported herewith) ante, 495.

**Texas.**—*Gulf Ref. Co. v. Brown-Lloyd Co.* (1914) — Tex. Civ. App. —, 167 S. W. 162 (maximum).

*b. Statement of maximum and minimum amount.*

It has been held that a contract for the sale of all the tire steel used in a buyer's factory up to a certain date, not less than a certain amount or more than a certain amount, entitled the buyer to the maximum amount if necessary to keep a requisite supply on hand for the buyer's future use, up to the date designated, although that amount was not actually used by the buyer up to that time. *Staver Carriage Co. v. Park Steel Co.* (1906) 220 Ill. 412, 77 N. E. 174.

In *DIAMOND ALKALI Co. v. AETNA EXPLOSIVES Co.* (reported herewith) ante, 495, it is held that where the contract calls for the buyer's requirements for a certain period of time, and contains a statement as to the minimum and maximum amount, the latter statement will control to the extent that the buyer is entitled to the maximum quantity of the commodity without reference to whether or not he actually needs that amount in his business. In this case, some point is made of the fact that the statement in the contract as to the buyer's requirements did not recite that it was for his requirements in the manufacturing business in which he was engaged.

In *Staver Carriage Co. v. Park Steel Co.* (1900) 43 C. C. A. 471, 104 Fed. 200, a contract to furnish the amount of certain material which the buyer would use in his works prior to a certain time, not to be less than a stated amount or to exceed a certain amount, to be ordered at least a certain period of time prior to the expiration of the contract, was held to bind the seller to furnish and the buyer to take, within the amounts specified, his entire supply of such material which he reasonably and necessarily required in his works within the time specified.

In *Marx v. American Malting Co.* (1909) 95 C. C. A. 80, 169 Fed. 582, a contract to furnish a malting company

its requirements of malt, which contained a statement that the amount of malt used would be between 15,000 and 20,000 bushels, was construed to require the seller to furnish the entire requirements of the buyer, although greatly in excess of the maximum amount stated. The court said that, "coming to the construction of the contract, we are of opinion that, in respect to the quantity of the malt contracted for, the dominating specification is found in the words, 'all their requirements to December 31, 1907,' and that the words below, 'amount of malt to be used will be between 15,000 and 20,000 bushels,' are a mere estimate of the probable requirement intended by the seller as a memorandum to be considered as advisory in the conduct of its own business, or possibly an assurance that the purchaser would want at least that quantity. There are several reasons for this conclusion. In the first place, it seems improbable that the vendee, evidently contemplating the enlargement of his business and then making provision for it, would have limited himself while contracting for his requirements for the ensuing year to the requirements of his old business. Nor could the vendor have supposed that the old limits would be adequate to the new conditions. So far as appears there was no reason why the vendor should desire such a limitation. The words of the sentence are themselves indefinite, and seem to indicate that they were employed as rather a negligible expression than as a substantive term of the contract. Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose. It is clear enough that these parties had in mind, not the sale of a certain number of bushels of malt, but so much as the business of the vendee would require during the period mentioned. And the rule just stated would require that the particular language upon which the vendor relies

should, if possible, be held to be the expression of an estimate merely of the probable requirements. And we think it is easily possible to give the language that construction. In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason be sacrificed altogether for the promotion of the general purpose of the agreement. Another reason for adopting a more harmless meaning to this language than one which should defeat the main purpose is that the instrument was prepared by the vendor and the rule is that in case of doubt or ambiguity arising from the use of words, they should be construed most favorably to the other party."

In *Heisel v. Volkmann* (1900) 55 App. Div. 607, 67 N. Y. Supp. 271, it is held that under a contract to furnish the requirements of the purchaser of gum for a designated period, stating a maximum and minimum number of pieces, the purchaser is bound to accept the minimum number of pieces.

In *H. D. Taylor Co. v. Niagara Bedstead Co.* (1907) 52 Misc. 356, 102 N. Y. Supp. 173, a contract to ship 100 to 125 tons of an article at a designated price, with a statement in the contract, "our requirements approximately," was construed to require the purchaser to take at least 100 tons of the article, although he did not use that quantity in his business.

#### *c. Statement of quantity.*

##### *1. In general.*

In *Gulf Ref. Co. v. Brown-Lloyd Co.* (1914) — Tex. Civ. App. —, 167 S. W. 162, it is held that an agreement to furnish a designated number of gallons of gasoline, or such quantity of such product as the buyer may require for its own consumption during a certain period of time, does not entitle the buyer to the entire amount specified, unless such quantity is necessary for its use in its business. Hence, where, ten days before the expiration of the contract, the buyer ordered a large quantity of the material, being



the balance of the quantity specified which had not been delivered, and being largely in excess of the amount it would or could use in its business during the short period of time remaining under the contract, the seller is under no obligation to furnish it. The court said that "in construing such contracts precisely, what the parties intended must be determined according to the plain import and the ordinary or popular significance of the language used therein. By the provisions of the contract under discussion, the appellant agreed to furnish appellee 5,000 gallons of gasoline, or as much as was required by appellee for its own consumption. The latter portion of the clause undeniably modifies what precedes it, and in our opinion it cannot intelligently be maintained that the purpose of the contract, as evidenced by its terms and the testimony of appellee's witnesses, was other than to furnish appellee whatever amount of gasoline it might require for its own consumption, whether the amount so required was more or less than 5,000 gallons. Such conclusion is sufficiently supported by the modifying portion of the contract, but is also sustained by appellee's witness, who concedes the consumption or use of gasoline by appellee was only for mixing paints, and that they contracted for no other purpose. The 5,000 gallons specified could not have been intended as an absolute sale at all events of that much gasoline, for, if it had been, both parties would have concluded the agreement with such clear, unequivocal specification. Counsel for appellee recognize the force of such conclusion, as we have said, and seek to avoid same by the claim that the parties intended to sell the 5,000 gallons outright, and in addition thereto as much more as appellee required for its own consumption, and argue that the word 'and' should be substituted for 'or,' which is a rule of law in some cases, and that the word 'require' should be given its literal meaning, rather than the meaning intended by the parties as gathered from the contract and the testimony. We think the contention unsound.

However, the meaning to be given the word 'require' is immaterial, since to construe it to mean all the gasoline 'called for,' as urged by appellee, would only mean all 'called for' 'for its own consumption,' and it is undisputed that such amount was furnished. To substitute 'and' for 'or' would make it necessary to destroy almost entirely the modifying clause placed in the contract by the parties, since, in order to make complete appellee's construction, it would also be necessary to strike out the word 'consumption' so as to make the concluding paragraph read as appellee argues the parties intended it should, i. e., 'and in addition such quantity of the above product as second party may call for during the period of the contract.' As we have said, the rule is that to words contained in a contract there shall be applied the ordinary and popular sense, unless there is something to show they were used in a different sense. Here the contract was to furnish 5,000 gallons of gasoline, modified by the parties as meaning more or less if appellee required it in its business, and, since such is the last word, the conclusion is inescapable that the specification of the number of gallons was but an estimate of the probable requirements of appellee, and, since it is conceded that appellee demanded more than was necessary for such purpose, and refused to accept an amount that would have met its actual needs, it was not entitled to recover any sum." To the same effect see *Gulf Ref. Co. v. Pegues Mercantile Co.* (1914) — Tex. Civ. App. —, 164 S. W. 1113.

*2. Not to exceed a certain quantity.*

In *Fletcher v. Germain* (1890) 82 Mich. 247, 46 N. W. 868, it is held that a contract to buy its coming season's wants, not to exceed a designated quantity, does not impose upon the buyer the duty of taking the maximum amount where the season's needs were less than that amount.

In *Ready v. J. L. Fulton Co.* (1904) 179 N. Y. 399, 72 N. E. 317, the contract was for the sale of not less than a certain number of cubic yards of

material, and not more than a certain number of cubic yards, with the provision that if more than the named amount was required, a certain notice was to be given. The court said that the provision that if the additional amount was required, notice was to be given, indicated that this additional amount was regarded by the parties as an extra amount which the buyer might or might not require, and was to be received and furnished only in case it should be required by the buyer and the proper notice given; in other words, the requirement provided for by the contract was the requirement by the buyer, and could only be rendered effective by notice furnished, and was not a necessity which should exist by reason of some contract or business which formed no part of the agreement. In this regard, the court distinguished *Miller v. Leo* (1898) 35 App. Div. 589, 55 N. Y. Supp. 165, affirmed without opinion in (1900) 165 N. Y. 619, 59 N. E. 1126 and *Brawley v. United States* (1878) 96 U. S. 168, 24 L. ed. 622. As to these cases, the court said: "An examination of those cases at once discloses that they have no bearing upon the question involved in this case, as the facts and the principles which were there applied are wholly unlike those involved or applicable here. In the *Miller Case* the contract specifically related to material to be furnished for the erection of two houses, and the agreement between the parties was to sell and purchase all the materials of the class mentioned that were necessary or required for such building. There the amount and character of the materials were to be determined by the requirements of certain work; while in this case the agreement in no way related to any particular work or job to be performed by the defendant, but the character and amount of the material to be furnished were expressly provided for by the contract. As to 5,000 cubic yards, the agreement was absolute to purchase and sell. As to the 3,000 it depended upon the defendant's option and its giving notice requiring its delivery. In the *Brawley Case*, when examined, it will be found

that there the question as to the amount of wood which was to be delivered was to be determined by the post commander. Although the amount mentioned in the contract was 880 cords, it was held that where the commander notified the contractor that he required but 40, his determination was final, and the government was not liable for any number of cords beyond the 40 delivered."

### *3. Approximately a designated quantity.*

In *Bloomington Canning Co. v. Union Can Co.* (1901) 94 Ill. App. 62, it is held that a contract by a manufacturer of cans to furnish a canning company its requirements for a certain season, approximately a designated number of cans, requires the seller to furnish such number of cans as the buyer uses in its business during the life of the contract, not exceeding the number designated, since this designation limits the contract, and the buyer, although he uses a large number more than the number designated, cannot require the same to be furnished under the contract. The court said: "We think by the use of the words of the contract, 'your order for your season's requirements of cans, approximately as follows,' giving the number of each class of cans to be furnished, were intended to fix a limit beyond which appellee could not be forced to go. In other words, appellant, by the use of that language, in effect said that the number of cans required would approach the figures named, nearly,—it might not be quite so many,—but not beyond, or over. If demanded, appellee was bound to furnish the quantities named in the contract, but no more. In this sense the expression 'more or less' is far from being synonymous with 'approximately,' for the former words imply going beyond or over the quantity or amount named, while the latter does not; therefore the arguments and authorities in the briefs of counsel, based upon their assumed analogy, have no proper application to the contract in question."

### *4. Estimated quantity.*

In *Mills-Carleton Co. v. Huberty* (1911) 84 Ohio St. 81, 95 N. E. 383,

the facts were that the defendant agreed to pay for all the lumber furnished for the use of the contractor for the construction of a certain building, estimated at a designated quantity. It was held that this estimate was a mere approximate calculation of the lumber required, and might be altered during the construction.

*5. Designated quantity, "more or less."*

In *Callmeyer v. New York* (1880) 83 N. Y. 116, the contract was executed in accordance with bids given in answer to an application for bids, a provision of which was that the contract was for a certain period from the date thereof, and the material contracted for must be delivered as called for by the requisition of the treasurer. In referring to the quantity of material to be furnished, the words "more or less" following the statement of the quantity, it was held that this contract was not an agreement for the delivery of a definite and fixed quantity of material, but the quantity was flexible, and this construction was not changed by the fact that the specifications contained the statement of the proper amount needed, guarded by the qualification of "more or less."

In *Merriam v. United States* (1883) 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536, a contract to furnish the United States government a designated number of thousand pounds of grain or such other quantity, more or less, as might be required from time to time, for the wants of designated stations, was held not to give the seller the right to insist upon furnishing all of the grain used at these particular stations during the period covered by the contract, being an amount in excess of the quantity specifically designated, it appearing that a much larger quantity of grain was advertised for than that to which this particular contract related, and that other contracts were made with different parties for more grain of the same kind.

In *F. B. Holmes & Co. v. Detroit* (1909) 158 Mich. 137, 122 N. W. 506, a contract to furnish a city all its requirements of cement for a stated period of time, 5,000 barrels more or less,

was held to bind the seller to furnish the entire amount of cement required by the city during the life of the contract, although greatly exceeding the estimate. The court said that "this contract covered all the cement required by defendant during the year ending January 31, 1907, for the use of the department of public works. It was a mutual agreement, binding upon both parties. We find no difficulty in ascertaining the prime object and purpose of these parties as expressed in the writings considered. They had in mind so many barrels of cement as the operations of this department would require during this period. The exact amount of cement which would be required could not be known at the time of entering into the contract, as the first meeting of the board of estimates does not occur until in March. The clause '5,000 barrels of Portland cement, more or less,' was the expression of an estimate, subject to the controlling object of the agreement expressed in the words of the contract, 'all the Portland cement that may be required by the city of Detroit and ordered by the department of public works,' the last clause expressing the method required to secure the delivery of the property to defendant."

*6. "About" a certain quantity.*

It has been held that where a contract is to furnish the amount of certain material to be used in constructing a designated building, and there is a statement as to about the amount, this latter statement is a mere estimate of the parties, and is not controlling. In this regard it is the duty of the seller to furnish, and the buyer to receive the amount actually and necessarily required in the construction of the building. *Wolff v. Wells, F. & Co.* (1902) 52 C. C. A. 262, 115 Fed. 32.

In *Brawley v. United States* (1878) 96 U. S. 168, 24 L. ed. 622, a contract to furnish an army post with about a certain amount of wood, more or less, as should be determined to be necessary by the commander of the post, was construed to require the furnishing of wood only to the extent found

to be necessary by the post commander, although a much less quantity than the estimate, since the statement of the amount under the circumstances was to be regarded merely as an estimate. The court said that if "the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So, where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, 'say a thousand to twelve hundred gallons of naphtha per month,' the designation of quantity is qualified not only by the indeterminate word 'say,' but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. This was the precise decision in *Gwillim v. Daniell* (1835) 2 Crompt. M. & R. 61, 150 Eng. Reprint, 26, where Lord Abinger says: 'The agreement is simply this, that the plaintiff undertakes to accept all the naphtha that the defendant may happen to manufacture within the period of two years. The words, "say from one thousand to twelve hundred gallons (per month)," are not shown to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that, in the ordinary course of his manufacture, the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract.'

"We think that there is manifest

reason in this decision, and that the present case is within it. The contract was not for the delivery of any particular lot or any particular quantity, but to deliver at the Post of Fort Pembina 880 cords of wood, 'more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1st, 1871.' These are the determinative words of the contract, and the quantity designated (880 cords) is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post commander for the regular supply for the year, in accordance with army regulations. The post commander, as soon as he learned of the contract, and within four days after it was signed, informed the claimant that but 40 cords of wood would be required thereon, and forbid his hauling any more to the government yard. About a fortnight later, on the 1st of July, 1871, written notice to the same effect was served on the claimant, signed by the post commander. And the court of claims finds as a fact, that the Post of Fort Pembina did not need for the fiscal year in question more than the 40 cords of wood which were accepted by the defendants, thus precluding any plea that in fixing and determining the amount required, the post commander was actuated by any want of good faith."

In *Wolff v. Wells, F. & Co.* (1902) 52 C. C. A. 626, 115 Fed. 32, a contract was construed as not requiring the delivery of any particular quantity of cement, but to require the delivery of such amount as might be required in constructing the building referred to, although in addition to the agreement to furnish the cement necessary for the construction of a certain building, it was designated as about 5,000 barrels, more or less. The court said that the quantity designated as about 5,000 barrels, more or less, should be con-

strued as an estimate of what the parties supposed might be required, but if the amount actually required exceeds the estimate, it is the duty of the seller to furnish it.

In *Budge v. United Smelting & Ref. Co.* (1900) 43 C. C. A. 665, 104 Fed. 498, a contract to furnish all the mining timbers required and used by a mining company for a year, to be delivered at certain places in quantities designated by the buyer, and which specifies about the amount of timber which will be required, constitutes a distinct agreement upon the part of the buyer to receive and pay for about the amount of timber specified. The qualification imported by the word "about" is not such as to admit any material variation in the quantity named, even though a much less quantity is actually used by the buyer. The court said that the buyer is not to be released from his contract because the plaintiff, by the terms of the contract, upon his part, stipulated to furnish him such timbers as should be required and used by him during the year, on the ground that a small proportion of the whole amount was in fact used, and added: "We think he must be held by the terms of his own covenants to pay for 600 of the one and 15,000 of the other kind of timber, as specified in the contract. The determining words of the contract are the quantities of timber which are specified in the defendant's promise to pay, and not the words 'all mining timbers required and used,' contained in the plaintiff's covenants. The contract was not one in which the quantity of material to be delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the contracting parties had in mind the construction of a particular work, and the supply of the necessary material therefor; the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated. We may assume from the complaint that the defendant alone had knowledge of the number of pieces of timber he would require. He expressed that knowledge in definite figures in the agreement,

and for the quantity thus expressed he promised to pay. The plaintiff, upon his part, has in good faith complied with his contract, and furnished the specified quantity. It would not only be unjust, but contrary, we think, to the fair intendment of the terms of the contract, to deny him his right to recover."

In *Waddell v. Phillips* (1919) 133 Md. 497, 105 Atl. 771, an agreement with a canning company to furnish their season's requirements of cans, about a designated number, was held not to require the seller to furnish cans in excess of the number stated, although this did not amount to the buyer's requirements during the life of the contract.

In *Stuart v. Home Teleph. Co.* (1910) 161 Mich. 123, 125 N. W. 720, a contract to furnish the buyer's requirements, about a designated number, is held to require the seller to furnish all the articles of the character referred to which the buyer requires in his works not exceeding the number designated.

In *Rosenthal v. Empire Brick & Supply Co.* (1908) 123 App. Div. 503, 108 N. Y. Supp. 347, a contract to furnish all the mason's material used in the construction of certain buildings, about a certain number of brick, the brick to be furnished before a stated time, requires the seller to furnish such brick if ordered before the date specified.

#### *IV. Extrinsic evidence to aid construction.*

Evidence is admissible to ascertain the subject-matter of a contract with reference to which the parties proceeded to negotiate, including their situation and the surrounding circumstances, so that the court may stand in substantially the same light in reading the words of the contract as did the parties when adopting those words. *Excelsior Wrapper Co. v. Messinger* (1903) 116 Wis. 549, 93 N. W. 459.

In construing contracts of this character, the court will look not only to the language employed, but also to the subject-matter of the contract and the surrounding circumstances, to the end that it may avail itself of the same

light which the parties possessed when the contract was made. *Merritt v. United States* (1883) 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536.

In *Wolff v. Wells, F. & Co.* (1902) 52 C. C. A. 626, 115 Fed. 32, a contract to furnish the amount of cement which the builder would require in the construction of a certain building, about 5,000 barrels more or less, was held to be uncertain and ambiguous, and hence parol evidence was admissible to ascertain the sense in which the language was used, including evidence of the attending and surrounding circumstances, in order to place the court in the same situation and give it the same advantage for construing the instrument as was possessed by the parties thereto.

Where the communications between the parties at or prior to the execution of the contract serve merely to establish the situation or surroundings, they differ not at all from other evidence of the same facts and are equally admissible in evidence; so far, however, as such communications relate to the terms of the agreement between the parties they are not admissible, since the writing must be taken as their final expression. *Excelsior Wrapper Co. v. Messinger* (Wis.) *supra*.

In *Waddell v. Phillips* (1919) 133 Md. 497, 105 Atl. 771, it is held that evidence is inadmissible of conversations between the parties at the time of entering into a contract to furnish the season's requirements of a certain article "about" a given quantity, in order to explain the meaning of the parties in the use of the term "about."

In *Marx v. American Malting Co.* (1909) 95 C. C. A. 80, 169 Fed. 582, evidence was admitted, apparently without objection, that at the time the contract in question was entered into, the buyer had erected a nearly completed extensive addition to its plant, which would make it possible to use a much larger amount of malt than it had used in former seasons, and the amount it had used in former seasons had run between 15,000 and 20,000 bushels. In construing the contract as it did, the court was apparently

largely influenced by this evidence. The court said: "Accordingly all evidence given or offered to show the conditions and circumstances in which the contract was made, and in reference to which the parties were dealing, was, either directly or by the effect of instructions, put aside. There could be no complaint of this if the view which the court took of the contract was correct. The evidence referred to, however, was for the information of the court, and to enable it to rightly construe the agreement; and the effect of the ruling was to say that the language was clear and no aid was needed to interpret it. As we have said, we reach a different conclusion. We think such evidence was competent for the purpose for which it was offered. It was not disputed, and it disclosed highly important facts in aid of the right construction of the agreement. We do not say that all of the evidence offered was admissible for this purpose. Mere words passing from one to another of the parties about matters which were subsequently reduced to writing were not admissible to alter, cut down, or enlarge the terms of the contract; but whatever had reference to the conditions and the probable requirements of the business which the vendee expected, and the knowledge of these conditions and expectations by the respective parties, was admissible. Within the rule, we think it was competent to prove by parol evidence that the vendor was informed of the conditions of the vendee's business and of the enlargement of the plant and of the probable increase of the requirements resulting therefrom."

In *Home Gas Co. v. Mannington Co-op. Window Glass Co.* (1907) 63 W. Va. 266, 61 S. E. 329, the seller contracted to supply the buyer with gas sufficient to operate his window-glass factory, having at least a certain number of pots. It was held that evidence was not admissible of prior or contemporaneous conversations or stipulations not carried into the contract, in order to fix a maximum amount of gas to be furnished under the contract.

It has been held that the common-

law rule that all prior understandings are merged in the final contract cannot be so strictly applied to government contracts, since they are required to be made by advertisements, bids, and acceptances. *Mueller v. United States* (1884) 19 Ct. Cl. (Fed.) 581.

Ordinarily, the term "requirements" as used in the contract of sale to indicate the quantity of commodity which is the subject-matter of the contract is recognized to be ambiguous, and hence to authorize recourse to the surrounding facts and circumstances explaining the ambiguity and thereby determine the intention of the parties in employing the term to indicate the quantity. It has been held, however, that where a contract was for the buyer's entire requirements for a given period of time, "minimum quantity of 180 tons per month, maximum quantity 250 tons per month," the contract was not ambiguous, and oral evidence was not admissible to show that the contract was only intended to cover the quantity of commodity which the buyer would use in his manufacturing business during the period of the contract. In line with this holding, it is held that the buyer is entitled to the maximum amount of the commodity designated without reference to the requirements of his business. *DIAMOND ALKALI CO. v. ÆTNA EXPLOSIVES CO.* (reported herewith) ante, 495.

The holding of the court in that case may perhaps be subject to the criticism that in its effect it ignores and fails to give force or significance to the specific language of the contract that the Diamond Alkali Company agrees to manufacture and to sell to the Ætna Explosives Company, and

the latter hereby agrees to buy, his entire requirements of soda ash during 1916, and that it overemphasizes the force and significance to be given to another clause of the contract that there were no understandings or agreements relative to this contract or its subject-matter that were not fully expressed herein. It will be noted that the court held in this regard that this latter clause precluded parol evidence relative to the surrounding facts and circumstances and the condition of the parties and the business in which they were engaged at the time of the execution of the contract in order to show that the buyer was a manufacturer and the purpose was to contract with reference to his requirements in his manufacturing business. The general rule, however, is that evidence of this character does not vary or contradict the written terms of the contract, but it merely identifies the quantity of the subject-matter and makes clear what the parties meant by the use of the ambiguous term "requirements," that is to say, the buyer, by the terms of the contract, agrees that his requirement, in his business, of the commodity to which the contract relates shall not be less than the minimum amount or more than the maximum. And the sellers agree to furnish the buyer such quantity of the commodity as he necessarily uses in his manufacturing business to be not less than the minimum or more than the maximum amount stated. This construction gives effect to the entire language of the contract, and is not inconsistent with the provision against other understandings or agreements.

A. G. S.

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VERA PAYNE  
v.  
KING F. GRAHAM.

*Maine Supreme Judicial Court — September 10, 1919.*

(— Me. —, 107 Atl. 709.)

**Statutes — emergency — power to prevent taking effect.**

1. A constitutional provision that the facts upon which an emergency

bill can be made to take effect immediately shall be set forth in the preamble is a limitation on legislative power; and the court may prevent the immediate taking effect of a statute in which an emergency is declared, unless the facts are so set forth.

[See note on this question beginning on page 519.]

**Constitutional law — when question considered by courts.**

2. Questions of constitutional law should not be passed upon by the court

unless strictly necessary to a decision of the cause under consideration.

[See 6 R. C. L. 76.]

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Cumberland County, and petition for a writ of habeas corpus, to secure her release from custody to which she had been committed for violation of an alleged emergency act making more stringent the provisions of a statute for the prevention and punishment of sexual crimes. *Sustained. Writ granted.*

The facts are stated in the opinion of the court.

Messrs. John J. Devine and Samuel L. Bates for petitioner.

Messrs. Carroll L. Beedy and Clement F. Robinson for respondent.

Deasy, J., delivered the opinion of the court:

In May, 1919, Vera Payne was indicted and convicted in the superior court, Cumberland county, for violation of chapter 112 of the Public Laws of 1919, which act, approved March 27, 1919, makes more stringent the provisions of statute for the prevention and punishment of sexual crimes.

She presents her petition for writ of habeas corpus, upon the ground that at the time of her indictment and conviction chapter 112 had not become effective as law.

Section 7 of the act is as follows: "In view of the emergency cited in the preamble this act shall take effect when approved."

But the petitioner says that chapter 112, notwithstanding this legislative pronouncement, is not an emergency act, and that it did not take effect until ninety days after the recess of the legislature, which period expired after her conviction.

The amended Constitution of Maine, article 4, part 3, § 16, is as follows: "No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legisla-

ture, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

The petitioner contends that the act in question is not immediately necessary for the preservation of the public peace, health, or safety, and that the court should so declare.

But the state maintains that the question presented is one for final legislative determination.

The leading case touching this matter is *Kadderly v. Portland*, 44 Or. 120, 74 Pac. 710, 75 Pac. 222. The opinion in this case sustains



the state's contention. See also to same effect *Hanson v. Hodges*, 109 Ark. 479, 160 S. W. 392; *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 559; *Re Menefee*, 22 Okla. 365, 97 Pac. 1014; *Re Senate Resolutions*, 54 Colo. 269, 130 Pac. 336; *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 Pac. 863.

But in the case of *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11, the doctrine of the Oregon court is by a majority opinion denied, and its conclusions rejected. Other cases also hold that the question is one for court review. *State ex rel. Richards v. Whisman*, 36 S. D. 260, L.R.A.1917B, 1, 154 N. W. 711; *Miami County v. Dayton*, 92 Ohio St. 215, 110 N. E. 728; *Atty. Gen. ex rel. Barbour v. Lindsay*, 178 Mich. 542, 145 N. W. 98.

Obviously the test is the extent to which legislative power is limited by the Constitution. Constitutional limitations are subjects of judicial interpretation and effectuation. Questions of public policy, such as the justice, expediency, necessity, or urgency (immediate necessity) of laws, are for final legislative determination. But the control by the legislature of even these questions may be qualified by express constitutional limitation.

The only Maine case touching the subject is *Lemaire v. Crockett*, 116 Me. 267, 101 Atl. 302. This case is not directly in point, because it involves one of the express limitations of the Constitution. Though it may deem an act which is an "infringement of the right of home rule for municipalities" to be immediately necessary, the legislature is forbidden by the positive mandate of the Constitution to give it immediate effect. Whether a given act is such an infringement is a judicial question. The case of *Lemaire v. Crockett* does not reach the question concerning which courts differ so radically; i. e., whether the words, "an emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or

safety," or other similar language, creates a limitation upon legislative power which the courts have jurisdiction to interpret and give effect to.

We are mindful of the long-established rule that questions of constitutional law should not be passed upon, unless strictly necessary to a decision

Constitutional law—when question considered by courts.

of the cause under consideration. We therefore defer expressing a final opinion upon the question concerning which, as appears above, courts are at variance, because, for another reason not touched upon in any of the above-cited cases, we hold that chapter 112 did not take immediate effect as an emergency act.

Of the states that have provided for giving emergency acts immediate effect, generally in connection with the initiative and referendum the Constitutions of nearly all provide in effect that emergency legislation shall include only such measures as are immediately necessary for the preservation of the public health, peace, or safety. But our Constitution goes further and requires that the emergency, "with the facts constituting the emergency, shall be expressed in the preamble of the act." The only state Constitutions containing similar language are those of California: art. 4, § 1; Ohio, art. 2, § 1d; North Dakota, art. 2, § 67; Mississippi amendment of 1914 (see Laws 1914, chap. 520); Massachusetts, amendment of 1918. In neither of these is the language precisely like that of the Maine Constitution, but all require that the facts constituting or reasons for, an emergency be expressed or set forth in the preamble or some part of the act. Our investigation does not disclose that either of these states such constitutional provisions have been judicially interpreted. The case of *Roanoke v. Elliott*, 123 Va. 393, 96 S. E. 821, construes that clause of the Virginia Constitution reading: "The emergency shall be expressed in the body of the bill" (Const. § 53). The Vir-

ginia Constitution does not require the facts or reasons to be expressed, and it is held that in the absence of an explicit constitutional mandate the facts need not be set forth.

We think it clear that the above-quoted language of the Maine Constitution creates a limitation upon legislative power, and that without conforming to it no act can be made an emergency act, and as such be given immediate effect.

The preamble of chapter 112, is as follows: "The necessity of health in general, and more stringent measures, to prevent prostitution, and for the preservation of the public health in the emergency measure." The facts, as

required by the Constitution, and no facts that are even suggestive of an emergency.

In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that, while an armistice had been declared, large bodies of troops were still assembled; that for preventing the spread among these troops of sexual disorders, destructive of military efficiency, existing laws were inadequate; and that the Federal authorities had requested the co-operation of the state in meeting these conditions.

But these facts are not, as the Constitution requires, expressed in the preamble. The facts constituting the emergency are expressed in the briefs of counsel, instead of in the preamble of the act. Chapter 112 is therefore not an emergency act as defined by the Constitution. It did not take effect until after the petitioner's indictment and conviction. Her detention is therefore not warranted, and the entry must be: Exceptions sustained.

Writ of habeas corpus to issue.

### ANNOTATION.

iveness of legislative declaration of emergency.

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a stipulated time unless the legislature shall otherwise direct. It seems clear that the legislative declaration is final under such a provision.

The constitutional provision involved in *Carpenter v. Montgomery* (1845) 7 Blackf. (Ind.) 415, is not set out but is

stated by the court to provide that statutes shall not be enforced until they are published in print, unless in cases of emergency. It is held that of the existence of the emergency the legislature must necessarily be the judge, and when the legislature deems it to exist the right to declare a statute in force from and after its passage exists. See *Gentile v. State* (1868) 29 Ind. 409, *infra*.

But in order that such determination be given effect it must be expressed in a clear, distinct, and unequivocal provision. *Wheeler v. Chubbuck* (1855) 16 Ill. 361. A declaration in an act approved in January, "that upon and after a certain day of March, next, it shall not be lawful for any person or persons," etc., is not such

a declaration that the act shall take effect before the expiration of sixty days from the end of the time on which the act is passed, as prescribed in a general provision of the Constitution. Ibid. See II. d, *infra*.

*II. Under ordinary constitutional provision.*

*a. In general.*

As shown in I., *supra*, some constitutional provisions authorize the legislature to declare that an act shall go into effect immediately without any restriction. The constitutional provisions under consideration in the present subdivision restrict the acts that may go into effect immediately to certain specified acts. A typical constitutional provision is that the act shall not take effect until a specified number of days after the end of the session at which it is passed, except that the legislature may give immediate effect to acts immediately necessary for the preservation of the public peace, health, or safety. Such acts are ordinarily spoken of as emergency acts. Such a provision is restrictive of the legislature's power, and the question arises as to who determines when an act is within the restriction. There are two diametrically opposed theories as to the conclusiveness of the legislative determination of an emergency requiring the immediate going into effect of a law enacted by the legislature. A similar question—on which there is the same difference of theory—arises over the conclusiveness of the legislative determination that an act shall not be subject to referendum. Under some statutes what is termed an emergency is required to free an act from the referendum, but ordinarily all acts are made subject to the referendum except laws necessary for the preservation of the public peace, health, and safety. Some constitutional provisions limit the laws which may be put into immediate effect as emergency legislation to laws necessary for the preservation of the public peace, health, and safety. The two questions, therefore, are very similar and both are included herein. The pur-

pose of declaring an emergency for the purpose of having the law take immediate effect must be distinguished, however, from the legislative declaration that a proposed law is necessary for the preservation of the public peace, health, and safety, for the purpose of freeing it from the referendum.

*b. Theory that legislative determination is subject to review by courts.*

According to one line of authorities the legislative determination of an emergency is not conclusive; it is held to be within the province of the courts to finally determine the question. *Re Hoffman* (1909) 155 Cal. 114, 132 Am. St. Rep. 75, 99 Pac. 517, approved in obiter statement in *Rigdon v. San Diego* (1916) 30 Cal. App. 107, 157 Pac. 513 (obiter that declaration of municipal council is not conclusive). But see *Ex parte McDermott* (Cal.) *infra*; *PAYNE v. GRAHAM* (reported herewith) *ante*, 516. See discussion of *Lemaire v. Crockett* (1917) 116 Me. 263, 101 Atl. 302; *Strange v. Levy* (1919) — Md. —, 107 Atl. 549; *Atty. Gen. ex rel. Barbour v. Lindsay* (1914) 178 Mich. 524, 145 N. W. 98; *Miami County v. Dayton* (1915) 92 Ohio St. 215, 110 N. E. 726; *State ex rel. Richards v. Whisman* (1915) 36 S. D. 260, L.R.A.1917B, 1, 154 N. W. 707, impliedly overruling *State ex rel. Lavin v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605; *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11; *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162.

The declaration of the state legislature that an act passed by it provides for the usual and current expenses of the state and shall therefore take effect immediately is not conclusive. *McClure v. Nye* (1913) 22 Cal. App. 248, 133 Pac. 1145.

Some doubt is thrown upon the rule in California by the decision in *Ex parte McDermott* (1919) — Cal. —, 183 Pac. 437, where the legislature, in putting into immediate effect an act defining criminal syndicalism, declared that "inasmuch as this act concerns and is necessary to the immediate preservation of the public peace

and safety, for the reason that at the present time, large numbers of persons are going from place to place in this state, advocating, teaching, and practising criminal syndicalism, this act shall take effect upon approval by the governor." The court holds this to be a strict compliance with the constitutional requirements of a statement in one section of the act of the facts making it necessary in the judgment of the legislature that a law shall go into immediate effect where the legislature considers that it is necessary "for the immediate preservation of public peace, health, or safety;" and adds: "The court may not say that this conclusion of the legislature was not justified."

See *Oklahoma City v. Shields* and other Oklahoma cases cited in II. c, *infra*, with reference to specific exceptions to the power to declare emergency measures.

In *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, the question was whether the legislature could free the act from a referendum. The constitutional provision relating to emergency legislation was that "no law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct." One constitutional provision relating to the referendum was as follows: "No act, law or bill, subject to referendum, shall take effect until ninety days after the adjournment of the session at which it was enacted." Another provision of the Constitution, in defining the act which was subject to the referendum, was as follows: "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law or any part thereof passed by the legislature except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions." The question in the case was, therefore, really wheth-

er the declaration of the legislature, that the act was one for the immediate preservation of the public peace, health or safety, was conclusive, so as to free the act from a referendum.

Doubt will be resolved in favor of the legislative determination. *McClure v. Nye* (1913) 22 Cal. App. 248, 133 Pac. 1145; *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162; *State ex rel. Case v. Howell* (1915) 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231. The court in *McClure v. Nye* (Cal.) *supra*, states that "if it appeared that this determination of the legislature might be a lawful and rational conclusion from facts submitted for the consideration of the legislators, then we would be bound to draw the same inference. But we are not dealing with a question involving a possible conflict of evidence or one permitting a different rational solution. The facts appear upon the face of the enactment, and the only reasonable conclusion is that such an appropriation is not for the 'usual current expenses of the state.' The said legislative declaration has no greater effect and is no more binding upon the court than if the legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the legislature, and of a provision of the Constitution, and that is a judicial question." It was held in this case that appropriations of money for the completion of a dam and reservoir at a state hospital, for the construction of temporary buildings at a state normal school, for building and furnishing cottages and dormitories at a school of industry, for the construction of a power house, power plant, equipment, tanks, pipe line, and improvements in drainage, water heating and electrical systems, on the premises of the state normal school, for the development and extension of a water system of a state polytechnic school, and an appropriation for the purpose of paying the transportation of certain veterans of

the Civil War, to Gettysburg, Pennsylvania, on the occasion of the fiftieth anniversary of the battle of Gettysburg, were not appropriations for the usual and current expenses of the state, and therefore the act making the appropriation did not take effect until the usual time.

*c. Theory that legislative determination is final.*

According to another line of authorities, the legislative determination of an emergency is conclusive. *Biggs v. McBride* (1889) 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878; *Kadderly v. Portland* (1903) 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *Day Land & Cattle Co. v. State* (1887) 68 Tex. 526, 4 S. W. 865; *Orrick v. Ft. Worth* (1908) 52 Tex. Civ. App. 308, 114 S. W. 677; *Roanoke v. Elliott* (1918) 123 Va. 393, 96 S. E. 819 (obiter).

The constitutional provision under which *Biggs v. McBride* (1889) 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878, was decided was to the effect that "no act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." This constitutional provision was amended, and at the time of the decision in *Kadderly v. Portland* (1903) 44 Or. 118, 74 Pac. 710, 75 Pac. 222, excluded from the power of the legislature to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety.

It is stated obiter in *Gentile v. State* (1868) 29 Ind. 409, that the declaration of an emergency by the legislature is conclusive; and the court cannot review this under a constitutional provision that no act shall take effect until the same shall have been published and circulated in the several counties of this state by authority "except in case of emergency, which emergency shall be declared in the preamble or in the body of the act." See *Carpenter v. Montgomery* (1845) 7 Blackf. (Ind.) 415, *supra*.

The legislative determination of

whether or not a measure is immediately necessary for the preservation of the public peace, health, or safety is conclusive. *Oklahoma City v. Shields* (1908) 22 Okla. 265, 100 Pac. 559; *Re Menefee* (1908) 22 Okla. 365, 97 Pac. 1014; *Brown v. State* (1910) 3 Okla. Crim. Rep. 475, 106 Pac. 975.

The legislative determination that an act is one necessary to the immediate preservation of the public peace, health, or safety, for the purpose of freeing it from the referendum, is conclusive. *Arkansas Tax Commission v. Moore* (1912) 103 Ark. 48, 145 S. W. 199; *Hanson v. Hodges* (1913) 109 Ark. 479, 160 S. W. 392; *Re Senate Resolution* (1913) 54 Colo. 262, 130 Pac. 333; *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, approved in *People ex rel. Kiefer v. Ramer* (1916) 61 Colo. 422, 158 Pac. 146; *Kadderly v. Portland* (Or.) *supra*.

The theory of the supreme court of California in *Ex parte McDermott* (1919) — Cal. —, 183 Pac. 437, is not clear. See *supra*, II. b.

After stating that only certain acts can be emergent acts, or acts free from the referendum, the supreme court of Oregon in *Kadderly v. Portland* (1903) 44 Or. 118, 74 Pac. 710, says: "But the vital question is, What tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the state, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health, and prosperity of the state. *Tiedeman, Pol. Power*, § 1. But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety,

whether they impose restraints on persons and property, or come strictly within the police powers, or not. The laws excepted from the operation of the amendment do not depend alone upon their character, but upon the necessity for their enactment in order to accomplish certain purposes. As to such laws, the amendment of 1902 does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the governor. As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare what shall be deemed laws of the character indicated, who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety. . . . The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final."

The supreme court of Colorado says in *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108: "The argument of counsel for petitioner that the courts are vested with authority to determine whether an act is of the character which excepts it from the referendum, notwithstanding the declaration by the general assembly that it is, is based upon the assumption that unless the courts exercise the power to determine that question, the

people can be deprived of the right to refer a law, if the legislature, either intentionally or through mistake, declares falsely or erroneously that a law is necessary for the immediate preservation of the public peace, health, or safety. The answer to this proposition is that under the Constitution the general assembly is vested with exclusive power to determine that question, and its decision can no more be questioned or reviewed than the decision of this court in a case over which it has jurisdiction. It will not be presumed that the general assembly will disregard its duty or fail to observe the mandates of the Constitution, or not act honestly. Neither can it be assumed that the courts are better able to determine whether a law is immediately necessary for the preservation of the public peace, health, or safety than the legislature. Power may be abused, but that is not a valid reason for one co-ordinate branch of the government to assign for limiting the power and authority of another department. The judicial department is as much bound by constitutional provisions as any other. 'It cannot run a race of opinions upon points of right reason and expediency with the lawmaking power.' The courts do not make Constitutions or change them. They can only construe the provisions of that instrument. So that the only power we can exercise in solving the question presented is to ascertain where the authority to determine, when a law is exempt from the referendum, is lodged. The cases cited by counsel for petitioner from Washington and California, holding that the question of whether a law is necessary for the purposes specified is subject to review by the courts, appear to be grounded upon the assumption that the constitutional provisions, with respect to the initiative and referendum should be construed so as to make effective the power of the referendum. *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11; *McClure v. Nye* (1913) 22 Cal. App. 248, 133 Pac. 1145. In the Washington case, and also in a Michigan case, cited by counsel (*Atty. Gen. ex*

rel. *Barbour v. Lindsay* (1914) 178 Mich. 524, 145 N. W. 98), it was held that the authority of the legislature to make the declaration that an act is necessary for the immediate preservation of the public peace, health, or safety is confined to such laws as the legislature may legally enact under the police power of the state. Neither of these reasons furnish the test by which to ascertain whether the courts have authority to determine if a law is of the character which exempts it from the referendum, or inquire whether the declaration of the legislature that it is, is false or erroneous. The only test is, what department of government is authorized, under the Constitution, to determine whether an act is necessary for the purposes specified. This authority, as we have pointed out, is vested in the general assembly, and if that body erroneously or wrongfully exercises that authority, the remedy is with the people. It is not subject to review by the courts or any other authority, except the people. Under the reserved power of the initiative and referendum, after the declaration by the general assembly that a law is necessary for the immediate preservation of the public peace, health, or safety, when not referred to the people for their judgment, it still remains with them, if they are dissatisfied with it, to cause a measure to be submitted at the next general election for its repeal. If, from experience, it appears necessary to deprive the general assembly of the power to declare a law necessary for purposes specified, the people have the power to initiate an amendment to the Constitution which will take from the general assembly the authority which they have vested in it. But this cannot be accomplished by the courts usurping a power they do not possess."

The determination of the legislature is conclusive even though it should, through mistake or intentionally, declare erroneously that a given law was of the excepted class. *Kadderly v. Portland* (1903) 44 Or. 118, 74 Pac. 710, The court says: "But, it is argued, what remedy will the people have if the legislature, either inten-

tionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated? The obvious answer is that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision of the highest court in a case over which it has jurisdiction. Nor should it be supposed that the legislature will disregard its duty, or fail to observe the mandates of the Constitution. The courts have no more right to distrust the legislature than it has to distrust the courts. The Constitution has wisely divided the government into three separate and distinct departments, and has provided that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided. Or. Const. art. 3, § 1. It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one co-ordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people and must be found, as said by Mr. Justice Strahan in *Biggs v. McBride* (1889) 17 Or. 640, 5 L.R.A. 115, 21 Pac. 878, in the ballot box. We are of the opinion, therefore, that the findings and declarations of the legislature, that the Act of 1903 for the incorporation of the city of Portland was necessary for the immediate preservation of the public peace, health, and safety, are conclusive on the courts, and consequently the charter was not subject to the referendum power, and was in force and effect from and after its approval."

Some of the cases which adhere to this theory that the legislative determination is conclusive as to what laws are immediately necessary for the preservation of the public peace, health or safety have held otherwise as to other limitations upon the right to declare an emergency. For exam-

ple, the constitutional provision involved in *Oklahoma City v. Shields* (1908) 22 Okla. 265, 100 Pac. 559, restricts emergency measures by declaring that such measures shall not include the granting of franchises or license to a corporation or individuals for a longer period than one year, nor shall they include provisions for the purchase or sale of real estate, nor the renting or encumbrance of real property for a longer term than one year. In this case the court examines the act involved and determines that it contemplated encumbrances of real property for a longer term than one year, and therefore did not become effective until the regular time after the adjournment of the legislature notwithstanding the declarations of the legislature that it should become effective immediately. That the legislature cannot put into immediate effect as emergency laws, laws which come within some of the specific exceptions, is held also in *Re Menefee* (1908) 22 Okla. 365, 97 Pac. 1014; *Riley v. Carico* (1910) 27 Okla. 33, 110 Pac. 738; *Gayman v. Mullen* (1916) 58 Okla. 477, 161 Pac. 1051.

#### *d. Sufficiency of declaration.*

The general question as to the formal sufficiency of the legislative declaration is not considered herein. It may be stated, however, that some constitutional provisions require a certain form of declaration of the emergency. Failure to comply with the required form defeats the purpose of the legislative declaration. *Mark v. State* (1860) 15 Ind. 98. The legislative declaration in an act that it shall be in force on and after its passage and publication does not render the act operative before the time prescribed, generally, in the Constitution for acts to become operative "except in case of emergency; which emergency shall be declared in the preamble or in the body of the law." The declaration in the act in question is not regarded by the court as complying with this requirement of the Constitution, and therefore the act is not in force until the regular time. *Ibid.* A declaration in a proposed law, that

"it is hereby adjudged and declared that existing conditions are such that this is necessary for the immediate preservation of the public peace, health and safety; therefore an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect, from, and after its approval by the governor," is sufficient to give immediate effect to the law. *Bennett Trust Co. v. Sengstacken* (1911) 58 Or. 333, 113 Pac. 863. The objection in this case was that the legislative assembly is required to set out in detail the ultimate facts it relies upon as authorizing the declaration of an emergency, in order that the court called upon to construe the act may consider the facts as alleged by the legislative assembly, and determine whether the emergency is a proper conclusion to be drawn from such fact. The court affirms the exclusive power of the legislature to declare that its enactments are necessary for the immediate preservation of the public peace, health, and safety, and to declare an emergency requiring the act to go into effect at once, and sustains the legislative declaration as sufficient to make the act take effect at once. In *State v. Pacific Exp. Co.* (1908) 80 Neb. 823, 18 L.R.A. (N.S.) 664, 115 N. W. 619, an act which merely provides, "This act shall take effect on and after its passage and approval" is held not to express an emergency under constitutional requirements that no act shall take effect until three calendar months after the adjournment of the session at which it is passed unless in case of emergency, being expressed in the preamble or body of the act. The declaration of the legislature enacting a charter for a city, that there had been a rapid growth in the population in the city, so that the existing charter was wholly insufficient and unsuited for the existing conditions, and there was immediate necessity for enlarged powers for the proper government of the city, "therefore, there is an imperative public necessity and emergency requiring the suspension of the constitutional rule which provides that bill shall be read on three several



days. It is, therefore, hereby enacted that said rule shall be and is hereby suspended, and this act shall take effect and be in force from and after its passage, subject, however, to the result of the election hereinafter provided for,"—is a sufficient declaration of an emergency to authorize the law's immediate effect under a constitutional provision that no law passed by the legislature except a general appropriation act shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted unless otherwise directed in case of an emergency, which must be expressed in the preamble or body of the bill. *Orrick v. Ft. Worth* (1908) 52 Tex. Civ. App. 308, 114 S. W. 677. The court states that it seems apparent from a consideration of the emergency clause quoted, that not

only did the legislature hold that an emergency existed, requiring a suspension of the rules, but also that such emergency required the law to take effect at once; that the facts stated in the emergency clause apply to both phases of the question.

The decision in the reported case (*PAYNE v. GRAHAM*, ante, 516) is based upon the failure of the declaration of the emergency to contain statement of "the facts constituting the emergency . . . in the preamble of the act," as required by the Constitution.

See *Roanoke v. Elliott* (1918) 123 Va. 393, 96 S. E. 819, set out in the reported case (*PAYNE v. GRAHAM*).

See *Ex parte McDermott* (1919) — Cal. —, 183 Pac. 437, supra, II. b. W. A. E.

## RE INTERROGATORIES BY OLIVER H. SHOUP, GOVERNOR OF THE STATE OF COLORADO.

*Colorado Supreme Court (In Banco) — June 2, 1919.*

(— Colo. —, 181 Pac. 197.)

### Statutes — immediate effect — emergency and safety clauses.

1. Upon amendment of a Constitution providing that no act shall become a law until ninety days after passage, except in case of emergency, by a provision that a referendum may be ordered except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for support of the government, an act to go into immediate effect must contain both the emergency and safety clauses.

[See note on this question beginning on page 530.]

### — provision for referendum — effect on emergency clause.

2. Under a constitutional provision that all measures referred to the people shall become the law upon approval by a majority of the voters

thereof, and not otherwise, a statute cannot be put into effect by an emergency clause prior to the time within which it may be referred.

[See 25 R. C. L. 801-803.]

**SUBMISSION** to the Supreme Court by the Governor, of certain interrogatories for its consideration and determination. *Interrogatories answered.*

The interrogatories are stated in the opinion.

Messrs. Victor E. Keyes, Attorney General, and H. E. Curran, First Assistant Attorney General, for the Governor:

When a state adopts the constitu-

tional or legislative provisions of another state, it also adopts the construction given to such provisions by the decisions of the courts of the state from which they are taken.

(— Colo. —, 181 Pac. 197.)

**Lace v. People**, 43 Colo. 199, 95 Pac. 302; **Van Kleeck v. Ramer**, 62 Colo. 4, 156 Pac. 1108; **Kadderly v. Portland**, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

No act that is subject to the referendum can be made to go into operation for ninety days after the adjournment of the session or its approval by vote.

**Sears v. Multnomah County**, 49 Or. 42, 88 Pac. 522; **Arkansas Tax Commission v. Moore**, 103 Ark. 48, 145 S. W. 199; **State ex rel. Richards v. Whisman**, 36 S. D. 260, L.R.A.1917B, 1, 154 N. W. 707; **People ex rel. Kiefer v. Ramer**, 61 Colo. 426, 158 Pac. 146.

**Messrs. Charles Hayden and Paul W. Lee**, in behalf of Statute Revision Commission:

An act embodying the general emergency clause is immediately operative even although subject to referendum under art. 5, § 1, of the Constitution.

**Re Senate Resolution**, 54 Colo. 262, 130 Pac. 333; **People ex rel. Kiefer v. Ramer**, 61 Colo. 422, 158 Pac. 146; **Van Kleeck v. Ramer**, 62 Colo. 4, 156 Pac. 1108; **Harrington v. Harrington**, 58 Colo. 154, 144 Pac. 20; **Bennett Trust Co. v. Sengstacken**, 58 Or. 333, 113 Pac. 863; **State ex rel. Langer v. Crawford**, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; **State ex rel. Lavin v. Bacon**, 14 S. D. 394, 85 N. W. 605.

**Bailey, J.**, delivered the opinion of the court:

Certain interrogatories have been propounded to this court by the governor, as follows:

1. Does an act of the general assembly which contains the emergency clause, but does not contain the so-called safety clause, go into effect immediately upon the passage and approval thereof?

2. In the absence of the so-called safety clause, is an act of the general assembly subject to the referendum, notwithstanding it contains the emergency declaration that the same shall take effect from and after its passage and approval?

3. When does an act of the general assembly passed with the emergency clause, but without the so-called safety clause, take effect and become operative?

The emergency clause alluded to above is found in § 19, article 5, of the Constitution, as follows: "No act of the general assembly shall take effect until ninety days after its passage, except in case of emergency (which shall be expressed in the act) the general assembly shall, by a vote of two thirds of all the members elected to each house, otherwise direct."

The so-called safety clause is in § 1, article 5, as amended by the adoption of the initiative and referendum, as follows:

"The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.

"The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions, against any act, section or part of any act of the general assembly, either by a petition signed by 5 per cent of the legal voters or by the general assembly. Referendum petitions shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section or part of any act, shall not delay the remainder of the act from becoming operative. The veto power of the governor shall not extend to the measures initiated by, or referred to the people. All elections on

measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the Constitution when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the right to enact any measure."

Before the emergency clause can be incorporated with an act of the legislature a two-thirds vote of both houses is required, and a separate vote is required to be taken upon the incorporation of the clause.

The questions of law raised by the interrogatories are of first impression with us. In *People ex rel. Kiefer v. Ramer*, 61 Colo. 422, 158 Pac. 146, an effort was made to have this court determine the effect of the passage of an act having the emergency clause without the safety clause attached, but since that question did not then appear to be properly before the court in that case it expressly declined to determine it.

The precise questions involved were, however, determined in *Sears v. Multnomah County*, 49 Or. 42, 88 Pac. 522, where the initiative and referendum amendment is, as noted in *Van Kleeck v. Ramer*, 62 Colo. 4, 156 Pac. 1108, practically identical with our own. There it was sought to establish the rule that an act passed with the emergency clause, but without the safety clause, could not be submitted to the voters under the referendum amendment, upon the theory that the two provisions were in this respect identical in effect. In discussing this question the court said: "That an act may take effect under a general emergency clause, and yet be subject to the referendum, is clearly contrary to the intent of the amendment, and would produce disastrous results. The clause in the amendment which

reads, 'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise,' clearly means that a law upon which the referendum is invoked cannot take effect prior to its approval by the vote; and consequently no act that is subject to the referendum can be made to go into operation for ninety days after the adjournment of the session or its approval by vote."

In concluding that the emergency clause alone is ineffectual as a safety clause that court said: "Therefore we conclude that if the act comes within the amendment of § 1 of article 4 of the Constitution, and the legislature desires to have it take effect upon its approval, it must so declare, and set it forth in the preamble or body of the act, and, as the emergency clause contained in this act does not pretend to bring it within the exception of the amendment of § 1 of article 4, it cannot operate to give it immediate effect, and therefore it became effective ninety days from the approval thereof by the governor, and the demurrer to the complaint should have been sustained."

So also in *Arkansas Tax Commission v. Moore*, 103 Ark. 48, 145 S. W. 199, where the court used the following language: "Under this initiative and referendum amendment only 'laws necessary for the immediate preservation of the public peace, health or safety,' are exempted from the provisions, and no power is reserved by the people to pass directly upon such laws. All other laws are subject to its operation, and ninety days being given by its terms from the final adjournment of the session of the legislature which passed them in which to demand or order the referendum thereon, they cannot take effect or go into operation till the expiration of ninety days after such adjournment, nor thereafter until approved by the people, if the referendum is ordered or invoked."

In South Dakota, where the pro-

(— *Colo.* —, 181 Pac. 197.)

visions of its Constitution are very similar to ours, a contrary view to the one applied by the Oregon court was originally expressed. *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605. However, that state in a more recent decision modified its views as announced in the *Bacon Case*, *supra*, and practically aligned itself with the holdings of the Oregon and Arkansas courts. This latter opinion is reported in *State ex rel. Richards v. Whisman*, 36 S. D. 260, L.R.A.1917B, 1, 154 N. W. 707. In effect the court receded from its holdings in *State ex rel. Lavin v. Bacon*, *supra*, as is plainly indicated by this extract from the later opinion: "Sections 1 and 22 of article 3 should be construed and read together as if forming different parts of but one section. *State ex rel. Lavin v. Bacon*, *supra*. The emergency measures mentioned in § 22 must and can only refer to the same emergency measures mentioned in the referendum clause exception contained in § 1. It therefore follows that the legislature, by necessary implication, is only authorized to declare emergencies in that class of measures specified in the said exception to the referendum clause. As to all emergency measures and acts within the purview of this exception, the legislature may declare an emergency to exist, for the purpose and to the end that such enactment may at once go into effect, and such declaration and finding as to the existence of such emergency is final, and not within the power or province of the courts to question. But as to any measure, law, enactment, clearly not within the class of emergency measures specified within said exception, the legislature has no power or authority to declare an emergency to exist in relation thereto, by any vote, however large the same may be; and the action of the legislature in embodying emergency clauses in measures clearly not comprehended within the said exception are wholly unwarranted and void, and should be so held by the courts. Not that

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the act itself would be void, but the emergency clause would be void, . . . with the result that, in the event of a proper referendum petition being filed as required by law, such enactment would not go into effect until approved by a majority vote of the electors of the state."

So, it may be safely stated that there is no case to be found at variance with those above cited, except *State ex rel. Langer v. Crawford*, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955. The conclusion there was by a divided court, three to two, in which every judge filed an opinion expressing his individual views. The prevailing opinions do not appeal to us as correctly interpreting the law, or as either logical or persuasive.

The emergency and so-called safety clauses here involved have separate and distinct functions. They are not interchangeable. After the adoption of the referendum amendments the emergency clause as to all referable laws, as a means of making such acts immediately effective, became inoperative. Nor does the safety clause alone make an act effective at once. It is only when both safety and emergency clauses are incorporated in, or attached to, an act, that it is immediately in force.

Statutes—  
immediate effect  
—emergency and  
safety clauses.

The following language of the referendum constitutional amendment: "All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the Constitution, when approved by a majority of the votes cast thereon, and not otherwise" [art. 5, § 1], is stated in such clear and definite language so plainly expressing the purpose and intent of the act that construction is not possible. It simply states that no act which is subject to the referendum shall take effect until approved by a majority of the votes thereon, and that ends the matter. This provision

cannot by any course of logical reasoning be held to mean that such an act can be put into effect through the emergency clause prior to the expiration of the time within which it may be referred. No other conclusion is possible, without doing violence to the meaning of the language which gives expression to the clear purpose and object of the people in adopting this amendment.

The conclusion is irresistible that no act, not of the excepted class, can have the force of law, or can become operative until after ninety days from the adjournment of the assembly at which passed, and if referred, then not until approved by a majority of the people by vote at a general election.

It is argued that the emergency clause of the Constitution above recited was not repealed by the initiative and referendum amendment. This requires no argument. It was not so repealed. It is as effective now as it was before the amendment in so far as the legislature has power to finally enact statutes. When the general assembly had the absolute power to enact all legislation, the emergency provision was applicable to all acts of the body. But when the power to finally enact legislation was withdrawn from the general assembly except as to certain classes, then manifestly the

emergency provision could apply only to acts within the power of the legislature to finally enact. Plainly the legislature cannot act in an emergency where it has no power to act at all. It can only apply the emergency clause of the Constitution to an act to which it has the power to give finality.

We therefore reach these conclusions:

1. That all referable acts of the general assembly which contain the emergency clause, but not the so-called safety clause, if not referred, take effect ninety days after the adjournment of the session of the general assembly at which passed, and not before.

2. In the absence of the so-called safety clause, all acts of the general assembly, although they carry the emergency clause, declaring that they shall take effect from and after their passage, are still subject to reference.

3. All acts of general assembly not referable because the safety clause is attached or because they show upon their face that they are excepted from the referendum provision, not carrying the emergency clause, go into effect ninety days after their passage and approval by the governor.

4. All acts having both the emergency and safety clause go into effect immediately upon their passage and approval by the governor.

## ANNOTATION.

### Effect of declaring an emergency in the enactment of a law without declaring it free from the operation of the referendum.

A provision authorizing the legislature to put into immediate effect laws of a certain character, whereas other laws go into effect a stated time after adjournment of the legislature, is quite generally contained in state constitutions. In those states in which the acts of the legislature are subject to the referendum it is quite generally provided that all laws shall be subject to such referendum except laws necessary for the immediate pres-

ervation of the public peace, health, and safety. The exceptions to the laws that are subject to the referendum vary, but the above stated exception is typical. In some states, at least, a declaration of the legislative intent to free an act from the operation of the referendum is regarded as a declaration of a different purpose than that contemplated by a declaration intended to put the act into immediate effect. In states taking this

—provision for  
referendum—  
effect on  
emergency  
clause.

view the question under annotation herein arises as to the effect of a declaration of an emergency without a declaration intended to free the act from the referendum.

There are two general theories as to the effect of the legislative declaration of an emergency in passing an act, without enacting the safety clause to free it from the operation of the referendum. According to one view, the declaration of an emergency without the enactment of the safety clause is ineffectual to cause the act to go into effect at once, but such act does not go into effect until the expiration of the time fixed for the filing of referendum petitions. *Arkansas Tax Commission v. Moore* (1912) 103 Ark. 48, 145 S. W. 199; *RE SHOUP* (reported herewith) ante, 526; *Birdzell, J., and Grace, J., in State ex rel. Langer v. Crawford* (1917) 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; *Sears v. Multnomah County* (1907) 49 Or. 42, 88 Pac. 522; *State ex rel. Richards v. Whisman* (1915) 36 S. D. 260, L.R.A. 1917B, 1, 154 N. W. 707, overruling *State ex rel. Lavin v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605.

Or after its approval by the people if the referendum is invoked. *Arkansas Tax Commission v. Moore* (Ark.) supra.

In *Arkansas Tax Commission v. Moore* (Ark.) supra, the legislative act in question concluded as follows: "This act shall take effect and be in force from and after its passage." It seems this was treated as the declaration of an emergency, but it was also urged that by this declaration the legislature thereby determined that the act in question belonged to the class excepted from the operation of the referendum. This contention was denied, and the court, after stating what is quoted in the reported case (*RE SHOUP*, ante, 526), continued: "It was not intended that an act passed by the legislature should take effect conditionally, and subject to the referendum, and continue in force from its passage if the referendum was not ordered, or that an act once in force should be suspended by the referendum till its approval by the people.

. . . The concluding provision of the Revenue Act and the others fixing dates for the performance of certain things before the act could become operative under the constitutional amendment, unless it comes within the exception, do not manifest an intention upon the part of the legislature to put it into effect as a law necessary for the immediate preservation of public peace, health, or safety, and were not meant for and are not a legislative determination that the act should take effect as such; and it could not, therefore, take effect until ninety days after the final adjournment of the session of the legislature at which it was passed, or after its approval by the people, if the referendum is revoked."

It is stated in *Sears v. Multnomah County* (1907) 49 Or. 42, 88 Pac. 522, that the view that an act may take effect under a general emergency clause and yet be subject to the referendum is clearly contrary to the intent of the amendment, and would produce disastrous results.

It has been held that the legislature cannot constitutionally confer upon a county the referendum as to acts that have taken effect, since that involves the power of repeal. *Meade v. Dane County* (1914) 155 Wis. 634, 145 N. W. 239.

It is the view of some of these courts that the general constitutional provision relating to emergency legislation is amended by the provision relating to the referendum; and that emergency legislation is confined to legislation of the character specified in the latter provision. This is the view of *Birdzell and Grace, JJ., in State ex rel. Langer v. Crawford* (1917) 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955, *Grace, Judge*, thus expresses his thought: "Section 67 [the constitutional provision relating to general emergency legislation] as it originally stood and before amended and in part repealed is entirely inconsistent with the later constitutional amendment thereto contained in the referendum law. Either § 67 in so far as it is inconsistent with the referendum law must fall, or the later express will of

the people in the referendum law must fall. They are inconsistent. They cannot stand together. One or the other must be inoperative. There cannot be two emergency clauses." Grace, Judge, then refers to the limitations placed upon the enactment of emergency legislation by stating that the "people in their sovereign capacity amended § 67, so as to meet all such emergencies, and they said that the only emergencies that would necessitate the immediate enactment of a law would be such necessity as would affect the health, peace, or safety of the people of the state."

That the general constitutional provision relating to emergency legislation is amended by the provision relating to the referendum is the view, also, of the court in *Sears v. Multnomah County* (1907) 49 Or. 52, 88 Pac. 522. This is the view also of *State ex rel. Richards v. Whisman* (1915) 36 S. D. 260, L.R.A.1917B, 1, 154 N. W. 707, overruling *State ex rel. Lavin v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605. This seems to be the theory of *Bennett Trust Co. v. Sengstacken* (1911) 58 Or. 333, 113 Pac. 863.

Other courts hold that the legislative declaration that an act shall go into operation immediately is effective to put the law into immediate operation notwithstanding there is no declaration intended to free it from the referendum. *State ex rel. Collins v. Jackson* (1919) 119 Miss. 727, 81 So. 1; *Bruce, Ch. J., and Robinson, J., in State ex rel. Langer v. Crawford* (N. D.) supra.

The fact that the law is in effect is held, however, not to prevent the filing of a referendum petition, but it is in effect until such a referendum petition is filed, in which event its operation is suspended and its fate as a law is determined by a vote of the people. *State ex rel. Collins v. Jackson* (Miss.) supra. *Bruce, Ch. J., in State ex rel. Langer v. Crawford* (N. D.) supra, is of the opinion that an emergency act is subject to a referendum although it takes immediate effect, but no opinion is expressed whether the act is suspended by the filing of a referendum petition or only by an adverse result

at the referendum election. *Robinson, J.,* expresses no opinion whether an act put into immediate effect is subject to the referendum.

The court in *Arkansas Tax Commission v. Moore* (1912) 108 Ark. 48, 145 S. W. 199, supra, takes the view that in providing for the referendum it was not intended to provide for a referendum upon acts that had already gone into effect, while the opposite view is taken by the Mississippi court.

The Constitution of Mississippi was regarded as persuasive of this question by the court in *State ex rel. Collins v. Jackson* (Miss.) supra. It expressly provided that in case of laws necessary for the immediate preservation of public peace, health, or safety, the legislature might declare such to become immediately effective, and that "if a referendum petition is filed against such emergency measure, such measure shall be a law until it is voted upon by the people, and if it is then rejected by a majority of the voters voting thereon, it shall be thereby repealed." The court states that a law passed under this provision is of a higher nature than a law otherwise passed, in that it becomes effective immediately, and cannot be suspended by the filing of referendum petitions, but remains in force and effect until an adverse vote of the people upon it, in which case it is repealed; while in case of other laws that have been put into immediate effect, under the general constitutional provision, the law is suspended by the filing of the referendum petition. A dissenting opinion by *Ethridge, J.,* takes the view that the constitutional provision relating to the referendum clearly implies that the act is not operative in any of its parts by the filing of a petition for referendum.

Apparently this question was involved in *Keator v. Whittaker* (1912) 104 Tex. 628, 143 S. W. 607, but the facts are not sufficiently stated in the report of that case to enable the questions there involved to be determined.

The emergency declaration, and the declaration intended to free the act from the operation of the referendum, seem not to be distinguished

under the Maine Constitution, which contains an emergency clause in connection with the initiative and referendum as follows: "Section 16. No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, at either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency (which, with the facts constituting the emergency, shall be expressed in the preamble of the act), the legislature shall, by a vote of two thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health, or safety; and shall not include (1) an infringement of the right of home rule for municipalities," etc. In *Lemaire v. Crockett* (1917) 116 Me. 263, 101

Atl. 302, an act of the state legislature, to which was attached an emergency clause, but which violated the provision of the Constitution that an emergency bill should not include an infringement of the right of home rule for municipalities, was held not to take effect until ninety days after the recess of the legislature, thus becoming a nonemergency act, permitting in the meantime the invoking of the referendum, instead of taking effect immediately. The court said that the act itself was valid, but the emergency clause was invalid, and the legislature was expressly prohibited from attaching it, but the two are clearly separable, and the act stands while the emergency provision falls.

In Maryland, certain classes of legislation are excepted from the operation of the referendum, and as to these classes the general constitutional provision relating to emergency legislation is held to apply. *Beall v. State* (1917) 131 Md. 669, 103 Atl. 99.

W. A. E.

## CLINTON C. GAGE

v.

BOARD OF CONTROL OF PONTIAC STATE HOSPITAL, Plff. in  
Certiorari.

*Michigan Supreme Court — May 29, 1919.*

(206 Mich. 25, 172 N. W. 536.)

**Workmen's compensation — liability for medical attention — neglect to give notice.**

1. An employer who is not notified immediately of an accidental injury to his employee is liable for his reasonable expenses in procuring medical treatment for the remainder of the three weeks after receiving notice, under a statute making him liable during the first three weeks after the injury to furnish free medical and hospital services and medicine when necessary.

[See note on this question beginning on page 545.]

— necessity of notice of injury.

2. Ordinarily, to render an employer liable for the expense of medical services rendered an employee under a statute making him liable for such services during the first three weeks after injury, he must be notified of the injury

and given an opportunity to select the physician and furnish the needed service himself.

— excusing failure to give notice.

3. Notice to the employer which is necessary to render him liable for medical services rendered an injured



employee is excused where the injury is of such nature that the delay in giving the notice and awaiting the employer's service will endanger the employee's life.

**Trial** — question of fact — emergency requiring prompt medical attention.

4. Whether or not the emergency is

such, in case of an injury to an employee, as to justify his procuring medical service without notifying the employer of his injury, where the employer is made liable by statute for the necessary medical service for a specified time after the injury, is a question of fact.

**CERTIORARI** to the Industrial Accident Board to review its award to plaintiff in a proceeding brought under the Workmen's Compensation Act to recover compensation for accidental injuries sustained by him while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Alexander J. Groesbeck, Attorney General, and Clare Retan, Assistant Attorney General, for plaintiff in certiorari:

By the provisions of § 5434 of the Compiled Laws of 1915, defendant was entitled to furnish medical and hospital services if it so desired.

*Milwaukee v. Miller*, 154 Wis. 652, L.R.A.1916A, 7, 144 N. W. 688, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149; *Keigher v. General Electric Co.* 173 App. Div. 207, 158 N. Y. Supp. 939.

Defendant was entitled to notice of plaintiff's injury and a reasonable opportunity to furnish medical and hospital service.

*Milwaukee v. Miller*, supra; *Colfax County v. Butler County*, 83 Neb. 803, 120 N. W. 444; *Parker v. Monroe*, 128 La. 951, 55 So. 587; *United States v. Sheridan-Kirk Contract Co.* 149 Fed. 809; *Mallon v. Water Comrs.* 144 Mo. App. 104, 128 S. W. 764.

Mr. A. Floyd Blakeslee for defendant in certiorari.

Steere, J., delivered the opinion of the court:

In this case defendant questions the validity of an award of \$189 made against it by the State Industrial Accident Board in favor of plaintiff, for medical, surgical, and hospital expenses incurred by him as the result of an accidental injury which he sustained on September 15, 1917, while in defendant's employ.

The necessity for such services and the reasonableness of the charges made therefor are apparently not questioned, but it is contended that defendant was entitled under the Employers' Liability Law to notice of plaintiff's injury and

need of medical attendance by reason of it, and a reasonable opportunity to itself furnish all needed medical, surgical, and hospital service, before plaintiff could legally secure the same of others at defendant's expense. This contention is based on the provisions of § 4, pt. 2, of the Workmen's Compensation Act (Comp. Laws 1915, § 5434), which is as follows: "During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

Plaintiff's injury was a hernia. The facts are practically undisputed, and the case has been adjusted in all other respects by appropriate proceedings before the Industrial Accident Board, based on an agreement in regard to compensation approved by the board.

The issue raised is pointedly presented and concisely argued by counsel on both sides, and by them narrowed to the question of whether, under the claimed exigencies shown here, the injured party may, pending reasonable notice to the employer of the necessity for medical and surgical attention, and until the latter after reasonable notice furnishes the same, secure such attention at the expense of the employer. Counsel for plaintiff frankly concedes it inferable from the duty imposed by the statute that in the majority of cases and as a general rule the employer should be entitled to furnish, or dictate where an injured employee shall obtain, the necessary

medical, surgical, and hospital attendance, and broadly admits such general rule proper for the protection of both parties, "in order to prevent an unscrupulous physician from exploiting the injury to his own benefit and to prevent, perhaps, a possibility of malingering on the part of the injured employee." But no such evil elements are claimed or suggested as present in this case, and it is urged for plaintiff to be also fairly inferable, from the act as a whole and the particular subject to which the section applies, that the injured party may secure such services at the expense of the employer in exceptional cases involving manifestations of emergency and demanding prompt attention, as in the instant case, and whether such excepting conditions existed is a question of fact for the accident board to determine.

Plaintiff's home was on Johnson avenue in the city of Pontiac. He was when injured, and had been for many years, employed by defendant at the Pontiac State Hospital for the Insane, in its building department. On the day of his injury he was working in a tunnel, where it was somewhat dark, and in attempting to lift or carry out some material experienced an injury, the nature of which he did not then apparently understand or localize, but which caused him to suspend work, telling his "boss," who was the superintendent, that he was sick and had to go home, which he did, arriving there between 9 and 10 o'clock, as his wife testified, not yet knowing what ailed him. Shortly before noon he discovered that he was suffering from a hernia. During the day he experienced increasing pain and grew weaker. His wife summoned their family physician, Dr. Fox, who called shortly after supper, and found plaintiff suffering with a strangulated femoral hernia, which in the doctor's opinion demanded prompt surgical action, and he at once called in for consultation a surgeon in whom he had confidence, named Dr. Howlett, and an

immediate operation was deemed by them necessary to save the patient's life. He was thereupon taken in an ambulance to the Pontiac City Hospital before dark that evening, and operated upon almost immediately, remaining in the hospital nineteen days. He made a good recovery, and at the time of hearing before the board had returned to his work in defendant's employ. The bill in question is for surgical and medical attendance, ambulance and hospital expenses, the largest item being \$100 for the operation, furnished within three weeks after the injury. Of the necessity for prompt action after the physicians had determined Gage's condition Dr. Fox testified in part as follows:

Q. Was there any particular urgency there?

A. Very much so; yes.

Q. What was the hurry?

A. What we call strangulated hernia. It is where the bowel goes down and becomes strangulated. It is strangulated there, and the bands go round to the outer part, and the circulation is shut off. It is sometimes only a few hours before gangrene will set in in the bowels, which means almost certain death.

Q. For that reason you considered that an immediate operation was necessary?

A. Yes, sir.

Q. In your opinion a delay would have been fatal?

A. Yes, sir. In the morning this man would have been beyond help.

The Pontiac State Hospital is one of the state asylums for the insane, formerly designated as the "Eastern Michigan Asylum" (Comp. Laws 1915, § 1311), but given its present name in 1911, without change of character or functions, by an act devoted to "changing the names of the Michigan asylums for the insane" (Comp. Laws 1915, § 1365). These institutions have, under the statute providing for them, a medical superintendent, with adequate medical and surgical staff for the purposes of the insti-

tution, which is the care and treatment of insane inmates committed to them by the probate courts and designated in the act as "patients." Dr. Christian was then medical superintendent of the institution. Mr. Halsey, its steward, testified it was customary to furnish medical attendance and hospital service to its employees in need of the same; that they did surgical work there, but had a surgeon, Dr. Mack, in Detroit, whom they called in to do "the surgical work,—the complicated work."

Defendant contends that reasonable notice and opportunity were not given it of plaintiff's injury and needs, and, as the statute makes it mandatory for the employer to furnish the same, plaintiff was not authorized to secure such service at its expense. The only notice plaintiff gave in relation to the matter was when he quit work in the middle of the forenoon, telling his boss, the superintendent, that he was sick and had to go home. This, while not definite notice of an accidental injury, was at least notice of a sudden physical affliction, which rendered him incapable of continuing at work. Plaintiff, who testified he never was advised and did not then know he could receive medical attention at the hospital, states that his condition was such that "everything was hurly-burly" with him anyway, and his "mind was occupied in other ways;" that he never notified them himself, and did not know who did. His wife, who first cared for him after he reached home, testified that she tried to get their family physician some time before she succeeded; that after he came and she learned of the seriousness of her husband's condition she "took on and cried," for he had to be taken to the hospital immediately; but that she notified defendant the next morning, which she says was "the first chance I had;" that she promptly went up there the next morning, and tried to see Dr. Christian, to notify him, but he was not in, and she told his assistant,

Dr. Butler, about it,—of the operation and that her husband was in the city hospital,—and asked if they could do anything for him, saying "he was entitled to have something done by them for him, if they did anything for any of their employees," to which Dr. Butler replied he would report the matter to Dr. Christian as soon as he returned, and, when she asked if it was necessary for her to do so, he replied it was not.

It appears undisputed that within twenty-four hours after the accident defendant was fully notified of it, and told where plaintiff then was by his wife, who requested aid in his behalf. Defendant then had notice, with a request for proper attention, certainly giving opportunity to offer, and, so far as shown, to furnish from that time on, all needed medical and hospital services during the remaining twenty days of the prescribed three weeks. It is not shown or claimed that defendant at any time furnished or offered to furnish plaintiff any free medical or hospital services or medicines for his accidental injury while in its employ. After such notice, request, and reasonable opportunity to furnish or offer the required treatment, and failure to act, defendant was clearly liable for plaintiff's reasonable expenses in securing the same during the remainder of the three weeks after the injury.

Workmen's  
compensation  
—liability for  
medical atten-  
tion—neglect to  
give notice.

The more serious question is that of the expenses incurred in the claimed emergency prior to notice. Of this contention the board found and held as follows: "It would seem that ordinarily the employer should be notified of an accident and given an opportunity to provide medical and surgical treatment to an injured workman. However, in a case like the instant one, where the employee is in such a serious condition as to require an immediate operation, and where his life would be endangered by any delay, the board believes that he should

have the right to secure the necessary attention as soon as possible, and that the employer should bear the expense of the same. . . .

Respondent failed and neglected to offer any medical services, even after receiving notice of the injury. The board believes that because of applicant's serious condition, the undisputed testimony of his physician being that an immediate operation was imperative in order to save his life, the case was brought within the emergency class, and respondents should pay the expenses incurred by the applicant for medical and hospital services during the first three weeks after his injury as provided by law."

In *Honnold on Workmen's Compensation*, vol. 1, § 193, where the admitted general rule of the employer's right to select the physician and furnish the necessary services for treatment of an injured employee is discussed, the author adds as a constructive corollary: "But this does not militate against the employee's right to obtain medical and surgical treatment at the expense of his employer in the interim between the happening of the injury and time for notice to the employer of the employee's needs, subject to the right of the employer or insurer to change physicians at the close of the emergency treatment."

The authority to support this text is found in 1 Cal. Industrial Acci. Cas. (Dec.) pp. 385-575. Counsel do not cite, nor have we found, any decisions by courts of last resort where this question has been directly involved. Counsel for defendant cite but two cases which relate to liability under a similar provision for medical services, where the employee has procured the same without the employer's knowledge or consent. *Keigher v. General Electric Co.* 173 App. Div. 207, 158 N. Y. Supp. 939, and *Milwaukee v. Miller*, 154 Wis. 652, L.R.A.1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149. While the cases deal with that subject, the ex-

act question at issue here was not involved. Counsel quote from the *Keigher Case* as follows: "But the duty to provide certain services, which is cast by the statute upon the employer, naturally implies the right of the latter to select his own agencies for the proper fulfilment of the duty, unless language is found in the statute indicating a contrary intent."

An examination of that case shows that defendant had provided for the injured employee a competent physician and surgeon, who took charge of the case and rendered professional service for a time, when the employee refused longer to accept his services, and requested the employment of a certain physician of his own selection, which defendant declined to do. The physician the employee desired thereafter rendered him medical services, which defendant declined to pay for. The court held that under these circumstances the general rule applied, and sustained the refusal. No question of intervening jeopardy before notice, or pressing emergency, was involved.

In *Milwaukee v. Miller*, *supra*, the employee, Miller, suffered an injury to his great toe, and without requesting medical service, or notifying the municipality of his injury, employed his own physician and nurse. Eleven days after the accident, amputation of the toe was deemed necessary by his physician, who then performed the operation. Ten days later, and three weeks after the accident, Miller for the first time notified the city of his injury and made claim for compensation, but even then gave no notice of his requiring medical services. Some time after receiving this notice the city tendered him the services of a competent physician, which he did not accept, and continued to employ his own physician until he had charged up 130 visits, and the bill for medical service and nursing, which Miller claimed the city should pay, amounted to over \$250. This the court declared "preposterous,"

in view of the nature of the accident and actual needs of the patient. No question of emergency was involved; but in discussing the facts, and applying the general rule of the employer's right to notice, etc., the court to a degree recognized an inferable exception to it under possible circumstances as follows: "The result is that Miller, since he failed to notify his employer of his need, never had competency to employ a physician at the expense of the city of Milwaukee, except for such reasonable length of time as necessarily intervened between his injury and reasonable opportunity after due notice for the city to exercise its privilege."

In that case the general rule, conceded here, that the law should be construed and applied so as to secure to the employer reasonable opportunity to conserve the related interests of both parties to the misfortune by supplying the medical and surgical needs of the injured is instructively discussed at length. Running through the discussion is an indicated recognition that by fair construction of the act there may be exceptional cases where it is permissible and in the interest of both parties for the injured party to promptly secure such services before notice, although "ordinarily" reasonable opportunity should be first accorded by him to the employer. It is pointed out that the reason of the provision is twofold: "First. As a rule an employer is more competent to judge the efficiency of the doctor employed and to provide efficient medical and surgical treatment. Second. It is to the interest of the employer to furnish the very best medical and surgical treatment, so as to minimize the result of the injury and to secure as early a recovery as possible. The more serious the result of the injury, the more the employer must pay."

In this case there was, as the result of prompt and efficient action after plaintiff's critical condition was discovered, an early and full

recovery, at small expense to defendant compared with a death loss, which was threatened and would have been the result of delay until the following morning, as the undisputed medical testimony shows. It is indicated that plaintiff, after his return home and his distress increased, was not in a physical or mental condition to judge or act in the matter. His wife is not shown to have then known he had sustained an accidental injury. She knew he was sick, and, when his condition indicated the need, called in their family physician, who recognized the emergency. It is undisputed that from that time immediate and proper action was successfully taken to save the patient's life by a prompt and critical major operation, which it can with some force be contended might have been delayed until too late by sending word to the hospital and waiting for them to investigate and call from Detroit Dr. Mack, who did their complicated surgery work. Broadly considered, the statute as to medical service to be paid for by the employer involves the combined interests of both parties. What services were actually and reasonably necessary to that end, and what is a fair compensation therefor, are the vital inquiries.

Unquestionably that construction of the statute is logical, and the adopted rule sound, which requires notice and opportunity to the employer to select the physician and furnish the needed service during the prescribed three weeks before the injured party can secure the same at the employer's expense, but in the many complications which arise in industrial activities it is not an unreasonable or strained construction of the statute, in view of its purpose, to recognize as inferable exceptions in extraordinary cases where the surrounding circumstances and critical condition of the injured party present emergencies or exigencies demanding prompt action, which reasonably

—necessity of  
notice of injury.

warrant the injured party in securing the then-needed service at the employer's expense without first

conclusions of the board in that particular.

The award will therefore stand affirmed.

~~excusing failure to give notice.~~

giving notice and opportunity to furnish or offer the

same. Such cases are, of course, distinctively exceptional and consequently rare. Where such exception is claimed, the question of a pressing necessity demanding and

~~Trial-question of fact—emergency requiring prompt medical attention.~~

excusing prompt action before reasonable time for notice and opportunity thereafter

for the employer to act becomes primarily an issue of fact. There is testimony in this case to support the

The liability under workmen's statutes of employer or insurance carrier for medical or hospital aid furnished to injured employees is discussed in the annotation on page 545, post. The reported case (GAGE v. PONTIAC STATE HOSPITAL, ante, 533) appears to be the only case which passes upon the question of the right of an injured employee to procure his own doctor when confronted by an emergency requiring immediate medical assistance.

#### NOTE.

ADOLPH RADIL, Appt.,

v.

MORRIS & COMPANY.

*Nebraska Supreme Court—January 4, 1919.*

(— Neb. —, 170 N. W. 363.)

#### Workmen's compensation — liability for services of physician.

1. Under § 3661, Rev. Stat. 1913, as amended by Laws 1917, chap. 85, § 6, an employer who offers to furnish without charge to an injured employee the reasonable services of a competent physician and medicines as and when needed, and within the value and for the time contemplated by the act, cannot be held liable for such services by such employee, who has refused such offer by the employer and has obtained such services and medicines elsewhere.

[See note on this question beginning on page 545.]

#### Statute — effect of proviso.

2. The general purpose of a proviso in a statute is to qualify the statute in part or in whole, but it is not always so used. The word "provided," as it is first used in § 3661, Rev. Stat. 1913,

as amended by Laws 1917, chap. 85, § 6, has the same meaning that the conjunction "and" or "but" would have, if used in its place.

[See 25 R. C. L. 985-988.]

Headnotes by DEAN, J.

APPEAL by plaintiff from a judgment of the District Court for Douglas County (Redick, J.) modifying an award by the compensation commissioner in an action brought under the Workmen's Compensation Act to recover damages for an accidental injury sustained by plaintiff while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Anson H. Bigelow, for appellant:

The proviso "unless the employee refuses to allow them to be furnished by the employer" should be strictly construed.

36 Cyc. 1162, 1164; *Ex parte Lusk*, 82 Ala. 519, 2 So. 140; *State v. Twin City Teleph. Co.* 104 Minn. 270, 116 N. W. 835; *State, Clark Thread Co., Prosecutor, v. Kearney Twp.* 55 N. J. L. 50, 25 Atl. 327; *Roberts v. Yarboro*, 41 Tex. 449; *Towson v. Denson*, 74 Ark. 302, 86 S. W. 661; *Clark's Appeal*, 58 Conn. 207, 20 Atl. 456; *Futch v. Adams*, 47 Fla. 257, 36 So. 575.

Plaintiff did not refuse company physician's services within the meaning of the statute.

*Oniji v. Studebaker Corp.* 196 Mich. 397, 163 N. W. 23; *Poniatowski v. Stickley Bros. Co.* 194 Mich. 294, 160 N. W. 569.

The second clause of § 111, instead of the first clause, governs this case.

36 Cyc. 1162, 1163; *Carroll v. State*, 58 Ala. 396; *Brace v. Solner*, 1 Alaska, 361; *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Campbell v. Jackman Bros.* 140 Iowa, 475, 27 L.R.A. (N.S.) 288, 118 N. W. 755; *Acker v. Richards*, 63 App. Div. 305, 71 N. Y. Supp. 929; *Waffle v. Goble*, 53 Barb. 517; *State, Clark Thread Co., Prosecutor, v. Kearney Twp.* 55 N. J. L. 50, 25 Atl. 327.

Mr. James C. Kinsler, for appellee:

Under the circumstances involving the medical care of the plaintiff, defendant cannot be liable for the medical bill which the plaintiff incurred.

*Bradbury, Workmen's Comp.* 3d ed. pp. 711-717; *Keigher v. General Electric Co.* 173 App. Div. 207, 158 N. Y. Supp. 939; *Epsten v. Hancock-Epsten Co.* 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067; *Milwaukee v. Miller*, 154 Wis. 652, L.R.A.1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

Dean, J., delivered the opinion of the court:

Plaintiff recovered an award from the compensation commissioner on account of an accidental injury sustained while in the employ of defendant at its packing house, and also \$129 expenses incurred for medical and surgical treatment by a physician other than the one regularly furnished by the employer. On

appeal to the district court by defendant, the award for compensation was affirmed, but the medical service bill for \$129 was disallowed. From that ruling plaintiff appealed to this court.

As a result of the accident a part of the second finger of plaintiff's left hand was bruised and fractured, and afterwards amputated at the first joint by the physician whose bill is the subject of inquiry here. It is conceded that amputation was necessary, and it is agreed that the only question to be decided is this: Did the court err in disallowing the bill for medical and surgical treatment, under § 3661, Rev. Stat. 1913, as amended by Laws 1917, chap. 85, § 6? For relief both parties rely on § 3661, as amended, which follows: "During the first twenty-one days after disability begins the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, not, however, to exceed \$200 in value, unless the employee refuses to allow them to be furnished by the employer: Provided, however, in cases of dismemberment or injuries involving major surgical operations, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed beyond as well as within the twenty-one day period, not, however, to exceed \$200 in value: Provided, further, that where the injured employee refuses or neglects to avail himself of such medical or surgical treatment, the employer shall not be liable for any aggravation of such injury due to said neglect or refusal."

Plaintiff argues that, because an operation became necessary, he was therefore at liberty to make his own selection of a physician, and that defendant under the act became liable for the reasonable expenses so incurred. His argument is based in part on the 1917 amendment, that begins with the word "provided," where it first occurs in the section under consideration, and ends with the word "value." He con-

tends that the amendment is a proviso, and hence operates to except the clause covered by it from the enacting clause, or to qualify it in some way. We do not think the authorities sustain his argument. It does not always follow that an amendment operates as a proviso in a technical sense, merely because it is preceded by the term "provided." Whether it is a proviso in effect, or merely a conjunction, must in part be determined from the context and from all the provisions of the act relating to the same subject-matter. With this in mind it seems that the word "provided," as used in the act,

Statute—effect of proviso.

has the same meaning that the conjunction "and" or "but" would have, if used in its place. With this interpretation, § 3661, as amended, seems to be in harmony with the entire act of which it forms a part. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; 3 Words & Phrases, 2d Series, 1321.

The employer having been made liable for the services contemplated by the act, it seems from the language used that it must have been the legislative intent that he should be permitted to furnish a physician of his own choice, and if his selection is such as would satisfy a reasonable man under like circumstances the employee would not then be heard to complain. That is the general rule in manufacturing centers, where Employers' Liability Acts with provisions similar to ours were in effect before our act was adopted. *Pecott's Case*, 223 Mass. 546, 112 N. E. 217; *Keigher v. General Electric Co.* 173 App. Div. 207, 158 N. Y. Supp. 939; *Re Davidson*, 228 Mass. 257, 117 N. E. 310; *Re McCaskey*, 15 N. C. C. A. 113, note III. p. 116; *Milwaukee v. Miller*, 154 Wis. 652, L.R.A.1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 148. The record shows that the physician furnished by the company, and his assistant, who administered first aid, are in all re-

spects competent physicians and surgeons.

Was plaintiff's conduct reasonable in the premises? It appears that immediately after the accident, at about 5 o'clock in the evening, plaintiff went with a foreman of defendant to the near-by office of the company physician, where, in his absence, first aid was administered by the assistant in charge, who told plaintiff to return that evening between 7 and 8 o'clock for further treatment by defendant's physician. Plaintiff never returned, and denied that he was requested to do so, notwithstanding both the foreman and the assistant physician testified that the request was made. The next morning at 9 o'clock, on advice of his mother, he went to their family physician, and he from that time retained the case. Plaintiff attempted to justify his employment of a physician by criticizing the first-aid treatment that he received, but on this point he called a physician as a witness, and his testimony was corroborative of the treatment so received in all essential particulars.

It seems to us that plaintiff's conduct was in effect and within the meaning of the act an unjustifiable refusal to allow defendant to furnish the reasonable services and medicines that the act contemplates, and that defendant is not therefore liable for the medical expenses that he incurred. We have examined the case de novo, and our conclusion is the same as that arrived at by the trial court.

Workmen's compensation—liability for services of physician.

The judgment is therefore affirmed.

Letton, J., not sitting.

Sedgwick, J., not participating.

Petition for rehearing denied.

#### NOTE.

The liability under Workmen's Compensation Statutes of employer or insurance carrier for medical or hospital



aid furnished to an injured employee is discussed in the annotation beginning on page 545, post. The great weight of authority sustains the position of the court in the reported case (*RADIL v. MORRIS & Co.* ante, 539),

to the effect that the employer or insurance carrier cannot be held liable for medical services to an employee who has refused the offer of the employer and obtained service and medicines elsewhere.

## RALPH OLMSTEAD

v.

E. P. LAMPHIER, Impleaded, etc.

*Connecticut Supreme Court of Errors — July 23, 1918.*

(93 Conn. 20, 104 Atl. 488.)

### Workmen's compensation — surgical aid — artificial limb.

1. The surgical aid to which an injured employee is entitled under the Workmen's Compensation Act includes an artificial limb if such appliance is necessary.

[See note on this question beginning on page 545.]

### — compensation for total and partial incapacity.

2. In case a workman loses a leg, which, under the Workmen's Compensation Act, constitutes total incapacity, and also injures his shoulder in the same accident, resulting in partial in-

capacity, he is entitled to compensation for total incapacity during the time allowed by the statute, and then for the partial incapacity during the time of its continuance, not exceeding the time provided by law.

(Prentice, Ch. J., dissents in part.)

RESERVATION by the Superior Court for Litchfield County (Reed, J.) upon an agreed statement of facts for determination by the Supreme Court of Errors, of questions arising upon appeal by defendant Lamphier from an award by the compensation commissioner to claimant in a proceeding by him to recover compensation for personal injuries by being thrown from a horse. *Judgment dismissing appeal advised.*

The facts are stated in the opinion of the court.

Mr. Harold J. Quinlan for respondent.

Mr. Wilson H. Pierce, for claimant:

Under the provisions of § 7 of the Workmen's Compensation Act of Connecticut, as amended in 1917, providing for the furnishing of medical and surgical aid to an injured employee by his employer, appellant owes to claimant the legal duty of providing for the latter an artificial leg.

5 Keen, Surgery, pp. 801, 803-806; *Kunasek v. New York Consol. Card Co.* 176 App. Div. 135, 162 N. Y. Supp. 361.

Claimant is entitled to compensation for the loss of his leg, and also compensation for incapacity from the injury to his shoulder, caused at the same

time and by the same accident, during the continuance of such incapacity not to exceed the period prescribed by law.

*Kaiser v. Pinney*, 1 Conn. Comp. Dec. 562; *Fasulo v. Andrew B. Hendryx & Co.* 1 Conn. Comp. Dec. 29; *Swanson v. Sargent & Co.* 1 Conn. Comp. Dec. 433; *Foley v. A. T. Demarest & Co.* 1 Conn. Comp. Dec. 661; *Batch v. Groton*, 1 Conn. Comp. Dec. 177; *Earle v. Hightstown Rug Co.* 87 N. J. L. J. 37; *George W. Helme Co. v. Middlesex Common Pleas*, 84 N. J. L. 531, 87 Atl. 72, 4 N. C. C. A. 674; *Fredenburg v. Empire United R. Co.* 168 App. Div. 618, 154 N. Y. Supp. 351, 9 N. C. C. A. 773; *Orlando v. F. Ferguson & Son*, 90 N. J. L. 553, — A.L.R. —, 102 Atl. 155.

Wheeler, J., delivered the opinion of the court:

On September 26, 1916, the claimant suffered the injuries described below by being thrown from a horse. His left leg was so lacerated that it had to be amputated above the knee. His shoulder was so injured as to cause a partial incapacity equal to one half total incapacity from the date of the injury to the time of the hearing, May 9, 1917, and it continued thereafter. The commissioner included in his award compensation at the rate of \$7.50 a week for 182 weeks, credit to be taken for payments already made; also, \$3.75 a week for the partial incapacity resulting from an injury to the shoulder, to continue during such incapacity, not to exceed the time provided by law; also, \$115, being the price of an artificial leg. The respondent appealed from so much of the award as gave compensation for the partial incapacity to the shoulder and that for the price of an artificial leg.

The questions submitted on the reservation were the following: (1) Whether or not the Workmen's Compensation Act of the state of Connecticut imposes a legal duty upon the appellant to purchase for the appellee an artificial leg in accordance with the provisions of § 7 of part B of that act, as amended in 1917, as a part of the surgical service and aid therein provided for. (2) Whether or not, under the provisions of said act, upon the foregoing facts, the appellant, respondent, is legally obliged to pay to appellee, claimant, compensation for partial incapacity arising from the injury to claimant's (appellee's) shoulder, in addition to the specific indemnity for the loss of the appellee's leg.

In *Franko v. William Schollhorn Co.* 93 Conn. 13, 104 Atl. 485, just decided, we construed § 11 (Rev. 1918, § 5331) of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting

in partial incapacity; the loss of the leg was also a distinct injury, resulting in total incapacity. For each injury, under our construction of this section, the injured employee was entitled to compensation. The fact that each injury resulted from one accident did not make

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partial incapacity.

of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. The superior court in New Haven county, in *Foley v. Demarest & Company*, pointed out with great force that a contrary construction, carried to its logical conclusion, might limit the compensation in a case of total incapacity to practically nothing. As that court said: "An injury attended with blood poisoning might incapacitate for an entire year, and the injured person would be entitled to compensation for that period, provided no amputation were necessary; but, if such injury was attended with the loss even of a small toe or the phalanx of the fourth finger, compensation would be limited to from six to thirteen weeks." Our act does not permit double compensation, and hence the trial court was correct in making these awards consecutive; the award for the total incapacity to precede in payment that for the partial incapacity.

The agreed facts on the reservation fall far short of those found by the commissioner. Who furnished the surgeon does not appear in the agreed statement, nor whether he found the artificial leg "reasonable or necessary." The commissioner found as a fact, upon evidence, that "surgical aid" included an artificial leg. There is no such finding in the agreed facts. We are left with the bald question whether surgical aid or service includes the furnishing of an artificial leg.

There is no specific provision for the furnishing of medicines or any material or apparatus required by

the physician. Yet it is clear that all these are included in the term "medical aid or service." It must also be clear that all necessary bandages, materials, splints, and apparatus required by the surgeon in effecting a cure are included under the term "surgical aid or service." The fact is that § 7, as amended by § 2 of chapter 368 of the Public Acts of 1917 (Rev. 1918, § 5347), is general in its terms and purposely so. In the New York act (Consol. Laws, chap. 67), there is a specification of various things to be furnished. We adopted a different course, and in our act used general terms, intending, as we think, to include all things which might reasonably fall within its provisions. The employer is required to furnish the employee a physician, and, in addition, "such medical and surgical aid or hospital service as such physician or surgeon shall deem reasonable or necessary." This language is broad and general. "Medical aid" is relief pertaining to the science of medicine. And "surgical aid" is relief pertaining to surgery or used in surgery. Webster's New Int. Dict. The term in its ordinary significance is not limited to the personal service of the surgeon, but includes all the means and instrumentalities used in surgery which will help effect a cure. Splints and crutches and apparatus for holding the limb manifestly are brought to the patient by the surgeon, adjusted by him, and usually paid for directly by the patient. It is part of the duty of the surgeon to prepare the stump of arm or leg for the artificial arm or leg. It is a part of his duty to adjust it. Why give the patient splints to hold the bones in place or crutches with which to walk, and regard these as used in surgery? Why supply a glass eye? Because it is the everyday duty of the surgeon to order these things for his patient, and they are included as of course under "surgical aid."

—surgical aid—  
artificial limb.

There is no difference in principle between supplying these and the arti-

ficial limb. That pertains to surgery and is used in surgery. The stump must be prepared by the surgeon to receive the artificial limb, and that must be adjusted to the stump by the surgeon. The only difference between the crutch and the artificial limb is that the latter costs more than the former.

Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employee to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of the modern science of medicine and surgery furnish. Humanity and economic necessity in this instance are in harmony in working for the accomplishment of the individual and of the public welfare. "Surgical aid" is a term of technical significance and has an established meaning in standard works on surgery. The duty of the surgeon does not end with the healing of the stump. "As soon as all sensitiveness has left the end of the bone, an artificial limb should be fitted and the patient urged to make efforts to use the extremity." 5 Keen's Surgery, p. 951. The duty of the surgeon continues until the artificial limb is adjusted and the patient has learned how, with the help of the surgeon, to use it properly. It would not be questioned that the entire bill of the surgeon for his services would fall under the head of "Surgical Aid." It would be difficult to justify this expenditure, as well as that for bandages or ointments or other material used by the surgeon in his treatment of the patient, and not make a like expenditure for the artificial leg in connection with which these things were used.

The commissioner notes that, as a rule, insurers and insurance companies furnish under compensation acts artificial teeth, eyes, and limbs when required. Undoubtedly, the common understanding revolted at the failure to provide the only

means by which the injured employee could be restored to the ranks of industry; and perhaps those in interest also had in mind the small cost of an artificial limb and the fact that the compensation awarded by our act was much less than in many other jurisdictions,—a fact due in some measure to the complete aid which the act gives to the cure of the injured.

Judgment is advised, in accordance with the foregoing opinion, dismissing appeal. In this opinion the other Judges concurred, except Prentice, Ch. J., who dissented as to the artificial leg.

Prentice, Ch. J., dissenting:

I am unable to concur in that portion of the majority opinion which approves of the commissioner's allowance for an artificial leg as one justified by the provision of the statute requiring an employer to furnish an injured employee such surgical aid as the at-

tending physician or surgeon shall deem reasonable. To my thinking the provision of artificial limbs for the improvement of physical efficiency following such repair of the consequences of injuries received as the circumstances will permit lies outside the sphere of the surgeon's professional activities as that sphere is commonly understood and established by actual practice. Such provision, as I understand it, partakes of the character of mechanical, rather than surgical, aid. I am further of the opinion that if it was the legislative intent to impose the burden of supplying such appliances upon the employer, more appropriate and certain language to that end would have been employed and some attempt made to assure the use of the money exacted of the employer for the purpose intended and to prevent its diversion to other purposes or squandered as the employee may prefer.

### ANNOTATION.

**Workmen's compensation: liability of employer or insurance company for medical and hospital aid furnished to injured employee.**

With some exceptions noted below, Compensation Statutes generally contain provisions with reference to the furnishing by the employer or insurance carrier of necessary medical and surgical aid to injured employees. The employer is given the privilege, however, in the first instance, of selecting the physician or hospital to render the necessary service, and the employee may select his own physician or hospital only where, after proper notice, the employer refuses or fails to furnish it.

Thus, the intent of the compensation act obviously is that the employer shall, in the first instance, have the right to designate and select the physicians who are to give treatment to the employee; the latter is authorized to make his own selection at the expense of the employer, only where the employer has neglected or refused to provide the necessary service. Leadbet-

tor v. Industrial Acci. Commission (1918) — Cal. —, 177 Pac. 449.

So, although an injured employee is entitled to medical, surgical, and other necessary treatment for sixty days after the accident, at the expense of the employer, the employer has the right to select the attending physician and the hospital. Junk v. Terry & T. Co. (1917) 176 App. Div. 855, 163 N. Y. Supp. 836.

"It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer." Goldflam v. Kazemier & Uhl (1917) 181 App. Div. 140, 168 N. Y. Supp. 87.

An employer is liable for medical and hospital services during the remaining twenty days of the three-week period, where, within twenty-four hours after the accident, he was notified of it, told where the workman was,

and that he desired aid, but at no time furnished, or offered to furnish, workman any free medical or hospital services or medicine for his injury. *GAGE v. PONTIAC STATE HOSPITAL* (reported herewith) ante, 533.

The word "furnish," as used in the Massachusetts act, was defined in *Panasuk's Case* (1914) 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688, as meaning "something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief."

These words import, again says the Massachusetts court in *Ripley's Case* (1918) 229 Mass. 302, 118 N. E. 638, "that some arrangement must be made in advance in the ordinary case, or at least that someone be at hand with authority to make the arrangement for medical relief."

Of course, the employer cannot be held liable for medical services in a case in which he has no knowledge at all that such services are required.

Thus, there does not rest upon the employer a duty to tender or supply additional medical treatment where the only knowledge which he possessed of the need of such treatment was a letter received from the employee in which there was a clear inference that the service had already been rendered, and the employee was merely interested in knowing whether or not the insurance company would pay the bill. *Leadbetter v. Industrial Acci. Commission* (Cal.) supra.

And under the Texas act an injured employee cannot recover for medical aid where the insurer was not notified of the injury and given an opportunity to furnish his own physician. *American Indemnity Co. v. Nelson* (1918) — *Tex. Civ. App.* —, 201 S. W. 686.

But the employer is not in a position to claim that there was no demand for medical assistance, where he knew that the injured employee was in the hospital and paid the bill there. *Junk v. Terry & T. Co.* (1917) 176 App. Div. 855, 163 N. Y. Supp. 836.

As a result of the privilege given the employer of selecting the physician or hospital to care for the in-

jured employee, it necessarily follows that the employer cannot be held liable in a case in which the employee refuses unreasonably to accept the services of the designated physician or hospital.

Thus, an employer is not liable for the services of a physician who attended an injured employee, when the latter arbitrarily refused to accept the services of a prominent physician and surgeon who had been provided by the defendant, and who attended the injured employee for several days immediately following the injury. *Keigher v. General Electric Co.* (1916) 173 App. Div. 207, 158 N. Y. Supp. 939.

So, an employee is not entitled to an award for hospital services, where he went to a hospital of his own choosing, although the employer's physician had directed him to go to another hospital, and had given him in writing the address of such other hospital. *Cella v. Industrial Acci. Commission* (1918) — *Cal. App.* —, 177 Pac. 490.

And there can be no award for medical attendance in a case in which the injured employee did not seek aid from the employer, but secured a physician of his own choosing. *Swift & Co. v. Industrial Commission* (1919) 288 Ill. 182, 123 N. E. 267.

Under the Nebraska act, an employer who offers to furnish, without charge, to an injured employee the reasonable services of a competent physician, and medicine as and when needed, and within the value and for the time contemplated by the act, cannot be held liable for such services by such employee, who has refused the offer of the employer and obtained services and medicine elsewhere. *RADIL v. MORRIS & Co.* (reported herewith) ante, 539.

Under the Massachusetts act an employee cannot recover for the services of a physician called by him, where the company had posted notices that only the services of certain physicians would be paid for, and the employee could read and understand the notices; and it is immaterial that the charges of the physician called by the employee were reasonable. *Pecott's*

Case (1916) 223 Mass. 546, 112 N. E. 217.

So, too, the insurer is not liable for the services of a physician selected by the employee where it had made arrangements with a hospital to furnish to employees injured in the course of their work necessary medical and physical treatment, and notices to this effect were posted conspicuously in different places in the factory of the insured employer, and the employee immediately, upon being injured, was urged to go to the designated hospital. *Re Davidson* (1917) 228 Mass. 257, 117 N. E. 310.

An employee is not entitled to hospital expenses, where, after spending some time in an emergency hospital to which he was first taken after the injury, he went to a hospital of his own selection, although, upon complaining to the employer, the latter offered to take him to another hospital. *Junk v. Terry & T. Co.* (1917) 176 App. Div. 855, 163 N. Y. Supp. 836.

In a few exceptional cases the injured employee has been held entitled to an award for the services of a physician or hospital of his own selection, notwithstanding the employer has designated otherwise.

Thus, an injured employee is justified in going to a family physician for treatment, where he was dissatisfied with the advice given him by the surgeon first selected by the insurance company, and, after being directed to go to another surgeon, finds the surgeon thus suggested to be out of town. *Massachusetts Bonding & Ins. Co. v. Pillsbury* (1915) 170 Cal. 767, 151 Pac. 419, 11 N. C. C. A. 426.

So, although a workman is not permitted generally to select his own physician or hospital, but is required to accept that which is provided for him by the employer, yet, in the case of an ignorant foreigner, unable to read, write, or understand the English language, who was not informed as to what he should do in case of injury, the employer will be required to pay the physician to whom he went, for necessary service rendered him. *Panasuk's Case* (1914) 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688.

The right of an injured employee to procure medical and surgical treatment for himself at the expense of the employer exists under the Wisconsin act for the reasonable time after the injury required to afford the employer opportunity to exercise his privilege; it is then suspended if the employer exercises such privilege, but revives and relates back to the time of suspension if necessary if the employer unreasonably neglects or refuses to exercise such privilege. *Milwaukee v. Miller* (1913) 154 Wis. 652, L.R.A. 1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

In cases of pressing emergency an employee may procure medical or hospital services at the employer's expense without notifying the employer.

Thus, in *GAGE v. PONTIAC STATE HOSPITAL* (reported herewith) ante, 533, the court held that the employer was liable for services rendered to an injured employee where he, upon reaching home after the injury, was not in a physical or mental condition to act, and his wife did not know that he had been injured, but believed that he was sick, and summoned the family physician, who hurried the workman to a hospital, where he was immediately operated upon for strangulated hernia, and the evidence showed that had there been the delay incident upon notifying the employer of his condition, the injury might have been fatal. The court said: "Unquestionably that construction of the statute is logical, and the adopted rule sound, which requires notice and opportunity to the employer to select the physician and furnish the needed service during the prescribed three weeks before the injured party can secure the same at the employer's expense, but in the many complications which arise in industrial activities it is not an unreasonable or strained construction of the statute, in view of its purpose, to recognize as inferable exceptions in extraordinary cases where the surrounding circumstances and critical condition of the injured party present emergencies or exigencies demanding prompt action, which reasonably warrant the injured party in securing the then-needed serv-

ice at the employer's expense without first giving notice and opportunity to furnish or offer the same. Such cases are, of course, distinctively exceptional and consequently rare. Where such exception is claimed, the question of a pressing necessity demanding and excusing prompt action before reasonable time for notice and opportunity thereafter for the employer to act becomes primarily an issue of fact."

In one case a question as to the liability for the services of a nurse as distinct from medical services was raised.

Thus, the Wisconsin statute does not provide for a separate allowance for the expense of a nurse as such; during the ninety-day period in which the injured employee is entitled to the services of a physician, an allowance for services of a nurse may be made only as a part of reasonably necessary medical and surgical treatment, proved to be such by the physician and surgeon in attendance; after the ninety-day period, expense for services of a nurse is not chargeable to the employer except as reflected in the allowance of the maximum percentage of disability indemnity. *Milwaukee v. Miller* (Wis.) *supra*.

The decision in *OLMSTEAD v. LAMPHIER* (reported herewith) ante, 542, to the effect that the "surgical aid" to which an injured employee is entitled under the Connecticut act includes an artificial limb if such an appliance is necessary, should be compared with the decision of the appellate division of the supreme court of New York in *Kunasek v. New York Consol. Card Co.* (1916) 176 App. Div. 135, 162 N. Y. Supp. 361, in which it was held that an employer cannot be required to furnish an artificial arm for an employee since such an artificial arm cannot be considered as included in the phrase "apparatus" as used in § 13 of the New York act, providing that the employer shall properly provide for an injured employee such medical or surgical attendance or treatment, nurse and hospital services, medicines, crutches, and apparatus as may be required or requested by the employee. It is to be noted that the language in

the Connecticut statute is very general, while that of the New York statute specifies particularly the kind of service to be rendered to the injured employee.

The Pennsylvania statute provides that if the employee shall refuse reasonable surgical, medical, and hospital services, etc., tendered to him by his employer, he shall forfeit all right to compensation for any injury or for any increase in his incapacity shown to have resulted from such refusal. Under this provision it was held in *Neary v. Philadelphia & R. Coal & I. Co.* (1919) 264 Pa. 221, 107 Atl. 696, that an employee's right to compensation is not affected by his act in putting himself in charge of his own physician after receiving the services of the employer's physician for a number of days, where there was no evidence at all that his incapacity was in any way increased by the change of physicians.

The statutes usually fix a time limit within which the employer is required to furnish medical aid to the employee.

Thus, the Industrial Accident Board cannot make an allowance for medical and hospital services for more than three weeks after the accident. *McMullen v. Gavette Constr. Co.* (1918) 200 Mich. 203, 166 N. W. 1019.

So, under the Nebraska act an injured employee is not entitled to medical expenses after the first three weeks after the injury, although such medical expenses were subsequently incurred after blood poisoning had developed from the wound. *Epsten v. Hancock-Epsten Co.* (1917) 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067.

After the thirty-day period no obligation rests upon the employer to furnish an attending physician, and the Industrial Board has no authority or discretionary power by which it may require such service after the expiration of said period. *Re Henderson* (1917) — Ind. App. —, 116 N. E. 315; *Born & Co. v. Durr* (1917) — Ind. App. —, 116 N. E. 428.

Under the Massachusetts act the medical service to be furnished by the employer is limited to two weeks after the injury or incapacity except in "un-

usual cases" when, in the discretion of the board, it may be extended.

However, the case of an employee who, two weeks after his injury, was able to go from his own home to that of a physician for treatment, is not an "unusual case" within the meaning of this provision. *Huxen's Case* (1917) 226 Mass. 292, 115 N. E. 426.

An employer may, by his act, obligate himself to pay for medical services beyond the statutory period.

Thus, the statement by the employer to a physician to take the injured employee to the hospital, give him close attention, and do the best that can be done for him, together with the employer's knowledge of the serious character of the injury, and the apparent solicitude of the employer about the treatment of the employee both before and after the expiration of the thirty-day period, warrants the inference that the employer intended to be liable for the treatments after such thirty-day period. *Re Myers* (1917) — Ind. App. —, 116 N. E. 314.

So, where the employer duly authorizes treatment by a physician of an injured employee beyond the first thirty days after his injury, the insurance carrier under the provisions of the Indiana act is liable therefor, and such claim may be enforced by the physician against the insurance carrier. *Kirkoff Bros. & McElwaine v. McCool* (1917) — Ind. App. —, 116 N. E. 439.

And an insurance carrier is, under the Indiana statute, liable for the services of a physician rendered beyond the first thirty days after the injury by authorization of the employer, where such services were absolutely necessary to effect a cure. *Re Kelley* (1917) — Ind. App. —, 116 N. E. 306.

In a case which is not "unusual" within the meaning of the Massachusetts act requiring the insurer to furnish medical services after the first two weeks' period, if the insurer agrees to pay \$1 a visit for the services of a physician, and the latter, with knowledge of this offer, continues to render service to the injured employee, he does so upon the terms offered by

the insurer. *Huxen's Case* (Mass.) supra.

And an employer cannot escape liability for services which could have been and should have been rendered to the employee within the period, merely by delay in the rendering of such service.

Thus, in *Re Henderson* (1917) — Ind. App. —, 116 N. E. 315, the court said: "So, if in this case the Industrial Board is of the opinion that the evidence before it shows that the emergency for the amputation of the employee's foot arose before the expiration of said thirty-day period, and that such amputation should have been and could have been performed before the expiration thereof, and that the employer was responsible for the delay that prevented the amputation before the expiration of such period, the board would be authorized, under the section of the act in question, in holding such employer liable for any surgical or hospital service and supplies that were in fact furnished or might have been furnished within said period, notwithstanding the employer's said notice, and notwithstanding such service may not have been in fact furnished, until after the expiration of said period."

There is a conflict of opinion as to the time when the period within which the employer must furnish medical aid to the injured employee begins to run.

Under the Indiana act the employer is liable for medical and hospital services reasonably required by an injured workman within the thirty-day period after the happening of the "injury;" and it has been held that the "injury" referred to in this provision means the occurrence of the disability, and not merely the occurrence of the accident, so that in a case in which the employee suffers from an accident which neither he nor the employer believes serious enough to require medical aid at the time, but thereafter disability results therefrom, the employer may be liable for medical aid although the thirty-day period has elapsed since the accident. *Re McCaskey* (1917) — Ind. App. —, 117 N. E. 268, 15 N. C. C. A. 113; *John A. Shumaker Co. v. Ken-*



drew (1918) — Ind. App. —, 120 N. E. 722.

In the latter case, the court said: "When the injury resulting from an accident is such that both the injured employee and the employer at the time regard and treat it as one of little or no consequence, and as not requiring the attention of a physician, and as not of the kind or character contemplated by the act, and later developments show an injury which does fall within the scope of said act, and one which does require the services of a physician or surgeon, the date for computing the time from which medical attention must be furnished in such a case, as in all others, is the date when the 'injury' develops within the meaning of the act, and this is so even though the development of such an injury is delayed thirty days or more after the happening of the accident which causes it."

The Massachusetts act expressly provides that the period begins from the time of the injury or from the time of the incapacity, if the incapacity does not immediately develop after the injury. *Huxen's Case* (1917) 226 Mass. 292, 115 N. E. 426.

A different rule, however, prevails in some states.

Thus, the three weeks after the accident during which the employer is required to furnish medical and hospital services for an injured employee begins to run at the time of the accident, and not from the time when the seriousness of the injury becomes known to the plaintiff. *McMullen v. Gavette Constr. Co.* (1918) 200 Mich. 203, 166 N. W. 1019.

So, a rule of the Commission that an award shall include medical services for two weeks after the "disability" is inconsistent with the statute which provides that medical services shall be rendered for two weeks after the "injury." *McKenna's Case* (1918) 117 Me. 179, 103 Atl. 69.

If the employer has furnished medical service at the time of the accident, he is not liable for medical services furnished more than thirty days thereafter, notwithstanding there later developed, as a direct result of the ac-

cident, a more serious condition, which was not susceptible of diagnosis and treatment during the period of the first attendance of the physician. *John A. Shumaker Co. v. Kendrew* (1918) — Ind. App. —, 120 N. E. 722.

The approval of the Industrial Accident Board is not required for a bill for professional attendance by a physician upon an employee after the expiration of the two-week period, since the Massachusetts act applies in no way to arrangements for professional attendance between a physician and an employee, for which the employee is liable and the insurer is not. *Holland v. Zeuner* (1917) 228 Mass. 142, 117 N. E. 1.

Under the Illinois statute, the total amount which can be awarded for first aid, medical, surgical, and hospital services, is the sum of \$200. *Butler Street Foundry & Iron Co. v. Industrial Bd.* (1917) 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 486; *Crescent Coal Co. v. Industrial Commission* (1918) 286 Ill. 102, 121 N. E. 171.

In *Villalobos v. Cudahy Packing Co.* (1919) 105 Kan. 106, 181 Pac. 599, an award of \$150 for doctor's bills and hospital and medical bills was sustained where the hospital and medicine bills amounted to \$87, and one physician testified that charges for his services would probably run from \$50 to \$75.

The burden of proof to establish to reasonable certainty the reasonableness of charges for medical and surgical treatment secured by the employee himself is upon the employee. *Milwaukee v. Miller* (1913) 154 Wis. 652, L.R.A.1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

A number of cases have passed upon the manner of enforcing an award for medical and hospital bills.

There is no authority in the New York Compensation Act for bringing a separate and independent action to recover necessary medical, surgical, or hospital services to an injured employee, which the employer has failed to furnish; the Industrial Commission has power to make an award for such services, to be recovered as a part of the compensation awarded. *Semmen*

v. Butterick Pub. Co. (1917) 101 Misc. 285, 166 N. Y. Supp. 993. To the same effect *Goldflam v. Kazemier & Uhl* (1917) 181 App. Div. 140, 168 N. Y. Supp. 87.

So, a physician has no cause of action against an employer for services rendered to an injured employee, although the award of compensation to the employee included an allowance for the physician's services and the injured employee had assigned the award to the physician. *Bloom v. Jaffe* (1916) 94 Misc. 222, 157 N. Y. Supp. 926.

The enforcement of any claim for compensation or for services of a physician in attending an injured employee is not by an action by the employee or by the physician, but by an action "to be instituted by the Commission in the name of the people of the state." *Hirsch v. Zurich General Acci. & Liability Ins. Co.* (1916) 97 Misc. 360, 161 N. Y. Supp. 380.

The New York statute does not provide for any award to a physician who has attended an injured employee, but it merely gives him a lien upon the compensation awarded to the workman. *Bloom v. Jaffe* (N. Y.) *supra*.

Where a hospital brings an action against employers for the care of an injured employee, basing the action upon contract, it cannot rely upon the terms and conditions of the Compensation Act. *Homeopathic Hospital v. Chalmers* (1916) 94 Misc. 600, 157 N. Y. Supp. 1000.

So, no right of recovery exists under the Illinois statute for injuries to the workman, because of the failure of the employer to furnish medical or hospital services, since no such right of recovery is given by the provisions of the statute. *Hill v. Kerens-Donnewald Coal Co.* (1918) 210 Ill. App. 560.

So, too, an employee cannot recover, under the Alaska act, for the employer's neglect to furnish him timely and sufficient surgical aid and medical and hospital care, since injury due to such neglect does not arise out of, and in the course of, the employment. *Ellamar Min. Co. v. Possus* (1918) 159 C. C. A. 474, 247 Fed. 420.

In proceedings to recover compen-

sation under the Minnesota act, where the joint answer of the employer and insurer alleged that defendants were ready and willing to pay plaintiff the compensation due him under the act, and willing to pay reasonable hospital and medical expenses, the plaintiff is not obliged to prove compliance with the provisions of the act necessary to make the insurer liable directly to him, and the defendants are barred from resisting the claim for medical expenses set up in the complaint on the ground that their own physician was ready to perform the services. *State ex rel. Globe Indemnity Co. v. District Ct.* (1917) 136 Minn. 147, 161 N. W. 391.

A number of cases upon various points of practice and procedure follow:

An action under an elective act is based on contract so that a count on the act and one on a contract made between the employer and employee with reference to benefits and hospital care may be joined in the same complaint. *Ellamar Min. Co. v. Possus* (Fed.) *supra*. The court distinguished between the Alaska act and the Washington act, and held that under the former act any recovery for failure of the employer to take proper care of the employee after his injury cannot be recovered, in a count based on the act.

In the absence of an application for reimbursement for expenditures for funeral services the Commission has no jurisdiction to make an allowance to a third person upon the sole ground that in the course of the proceeding it appeared that he, a stranger to the record, had made such disbursements. *Western Indemnity Co. v. Industrial Acci. Commission* (1917) 35 Cal. App. 104, 169 Pac. 261.

An award cannot be made "for services in the matter of the funeral and burial" of a deceased workman where there is nothing whatever in the record to indicate that the claimant had paid, or become liable for the payment of, any part of any funeral expenses, or had ever made any claim to that effect. *Tirre v. Bush Terminal Co.* (1916) 172 App. Div. 886, 158 N. Y. Supp. 883, 12 N. C. C. A. 64.

So, under the California act, an award of physician's fees to be paid by the employer or insurer "to the persons entitled to receive the same" is invalid, since it does not fix the amount to be paid nor the names of the persons entitled thereto. *Pacific Coast Casualty Co. v. Pillsbury* (1915) 171 Cal. 319, 153 Pac. 24.

Since the fees to a physician awarded under the Massachusetts act are to be fixed by a committee of arbitration in case of disagreement, it seems to follow necessarily from the terms of the act that where the physician is a party interested in that matter, he may be a party to the proceeding. *Huxen's Case* (1917) 226 Mass. 292, 115 N. E. 426.

In an employee's proceeding for compensation, issues upon a contract between the insurer and the hospital and doctors, to which the employee was not a party, have no place. *Hull v. United States Fidelity & G. Co.* (1918) 102 Neb. 246, 166 N. W. 628.

The mere fact that an injured employee did not pay a hospital for services rendered to him during the first two weeks after the accident, for which, under the Compensation Act, the insurer is liable, is not evidence that he elected to proceed under the act, where he did not refuse to pay for those services, had never been asked to pay for them, and it did not appear that the hospital authorities ever regarded him as responsible therefor. *Wahlberg v. Bowen* (1918) 229 Mass. 335, 118 N. E. 645.

The fact that the insurance carrier paid the doctors and the infirmary does not estop him from setting up the contention that no claim for compensation had been filed unless the payment was made with some representation by him justifying the claimant in a belief that his claim had been filed or would be filed with the Commission. *Twonko v. Rome Brass & Copper Co.* (1918) 224 N. Y. 263, 120 N. E. 638.

Neither the payment by the employer of the physician's bill for attendance during the first two weeks of disability after the accident, nor an agreement between the employer and

the employee that there shall be "no compensation," can properly be called an agreement such as may be reviewed by the court of common pleas under the authority of paragraph 21st of the New Jersey act, on the ground that the incapacity of the injured employee had subsequently increased or diminished. *Benjamin & Johns v. Brabban* (1917) 90 N. J. L. 355, 103 Atl. 688, affirmed for reasons given below in (1919) 92 N. J. L. 508, 105 Atl. 717.

An award of compensation is not vitiated by the inclusion of a gratuitous suggestion or recommendation that the employer render to the employee certain medical service in excess of that required by the statute to be furnished. *Marshall v. Ransome Concrete Co.* (1917) 33 Cal. App. 782, 166 Pac. 846.

In *State ex rel. Griffiths v. Superior Ct.* (1916) 92 Wash. 44, 159 Pac. 101, the supreme court authorized the printing of a proposed initiative measure upon the ballot, which measure provided that surgical and hospital services of injured employees should be provided for out of the state insurance fund.

The Indiana statute authorizes an appeal from an order of the Industrial Board allowing and approving the claim of a physician for services. *Kirkoff Bros. & McElwaine v. McCool* (1917) — Ind. App. —, 116 N. E. 439.

And under the California act an award for medical bills for claims to be approved by the Commission is not a final judgment subject to review in the court. *Garratt-Callahan Co. v. Industrial Acci. Commission* (1915) 171 Cal. 334, 153 Pac. 239.

The finding of the Industrial Accident Board that the employer or insurer had made no provision to furnish medical treatment for the injured employee must be accepted as a fact if there was any evidence by which to support it. *Ripley's Case* (1918) 229 Mass. 302, 118 N. E. 638.

In a few statutes there are no provisions with reference to the payment of medical or hospital bills for an injured employee.

The Kansas act contemplates no allowance on account of medical attend-

ance except where a workman dies as a result of his injuries leaving no dependents. *Cain v. National Zinc Co.* (1915) 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251.

A similar rule prevailed in New Jersey prior to the amendment of 1914. *Central R. Co. v. Kellett* (1914) 86 N. J. L. 84, 90 Atl. 1005, 5 N. C. C. A. 529; *Taylor v. Seabrook* (1915) 87 N. J. L. 407, 94 Atl. 399, 11 N. C. C. A. 710; *Hammill v. Pennsylvania R. Co.* (1915) 87 N. J. L. 388, 94 Atl. 313.

The provision of the Kansas act that "in fixing the amount of the payment, allowance shall be made for any payment or benefits which the workman may receive from the employer during his period of incapacity," authorizes an allowance for hospital charges of a reasonable amount actually and necessarily incurred for the benefit of the workman and paid by the employer. *Bundy v. Petroleum Products Co.* (1918) 103 Kan. 40, — A.L.R. —, 172 Pac. 1020.

So, under the same provision, an allowance for hospital charges and medical attendance of a reasonable amount actually incurred by the employer for the benefit of the workman is proper, and where the employer has been rendered liable for such expenses, the court is justified in ordering a stay of execution until the charges are paid and the employer released from liability. *Gadberry v.*

*Hutchinson Egg Case Filler Co.* (1919) 104 Kan. 72, 177 Pac. 834.

Under the English act the employer is required to pay hospital or medical expenses only in case of the death of the employee leaving no dependents; under such circumstances the employer is liable for the reasonable expenses of medical attendance and burial, not exceeding £10.

Expenses paid by an employer for treatment given to an injured workman at a hospital may be deducted from the compensation paid to the workman. *Suleman v. The Ben Lomond* (1909; County Ct.) 126 L. T. Jo. (Eng.) 308, 2 B. W. C. C. 499.

Maintenance and medical treatment received by an injured employee in a hospital, which were subsequently paid for by the employer, may be found to be a benefit received by the employee during the period of incapacity, for which deduction may be made from the amount of compensation payable. *Sorensen v. Gaff* [1912] S. C. 1163, 49 Scot. L. R. 896, [1912] 2 Scot. L. T. 137, 6 B. W. C. C. 279.

Under the Quebec act an employer is not responsible for medical aid furnished to a workman, where the injury does not result in death, but if he voluntarily pays out money for that purpose he cannot deduct it from the amount of compensation payable to the injured employee. *St. Maurice Lumber Co. v. Cadorette* (1916) Rap. Jud. Quebec 25 B. R. 410. W. M. G.

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LINN C. EAGLE, by Next Friend, Appt.,  
v.

G. M. PETERSON et al.

*Arkansas Supreme Court — September 30, 1913.*

(136 Ark. 72, 206 S. W. 55.)

**Evidence — adjudication of insanity — conclusiveness.**

1. An adjudication of lunacy is not conclusive, but *prima facie* evidence only, that insanity continues up to the time of making a subsequent contract, and one dealing with the lunatic may show that at the time of making the contract he had sufficient mental capacity to make it.

[See note on this question beginning on page 568.]

**Incompetent person — contract — validity.**

2. A contract by an insane person is voidable only, and not void.

[See 14 R. C. L. 582.]

**— ratification of contract.**

3. A conveyance by an insane person may be ratified by him after he is restored to reason.

[See 14 R. C. L. 595.]

**Evidence — delay in suit to set aside deed.**

4. Delay of two years after restoration to sanity, before institution of suit, by one who had conveyed property while insane, to set aside the deed, may be considered upon the question of confirmation of the conveyance.

**APPEAL** by plaintiff from a decree of the Lonoke Chancery Court (Martineau, Ch.) dismissing the complaint in a suit to cancel a deed. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Williams & Holloway and Carmichael, Brooks, & Rector, for appellant:

A deed made by an insane person is void.

Henry v. Fine, 23 Ark. 417; George v. St. Louis, I. M. & S. R. Co. 34 Ark. 626; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Pulaski County v. Hill, 97 Ark. 450, 134 S. W. 973; Langley v. Langley, 45 Ark. 392; Seawel v. Dirst, 70 Ark. 166, 66 S. W. 1058; Burgess v. Pollock, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218; Boyd v. Boyd, 123 Ark. 134, 184 S. W. 838; 27 Cyc. 1211, note; Wirebach v. First Nat. Bank, 97 Pa. 543, 39 Am. Rep. 821; Riley v. Carter, 76 Md. 581, 19 L.R.A. 489, 35 Am. St. Rep. 443, 25 Atl. 667; State v. Scott, 49 La. Ann. 253, 36 L.R.A. 732, 21 So. 271, 10 Am. Crim. Rep. 585; Reaves v. Davidson, 129 Ark. 88, 195 S. W. 19.

It is not necessary to return the consideration, if any is paid.

Dexter v. Hall, 15 Wall. 9-28, 21 L. ed. 73-80; Reaves v. Davidson, 129 Ark. 88, 195 S. W. 19; Henry v. Fine, 23 Ark. 417; George v. St. Louis, I. M. & S. R. Co. 34 Ark. 613.

Renunciation further than bringing suit is not necessary.

Henry v. Fine, 23 Ark. 417; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270.

Insanity once being shown, the burden is on the defendant to show that the deed was executed during a lucid interval.

7 Enc. Ev. "Insanity," 459; Dexter v. Hall, 15 Wall. 9-28, 21 L. ed. 73-79; Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Boyd v. Boyd, 123 Ark. 134, 184 S. W. 838; Beaty v. Swift, 128 Ark. 166, 184 S. W. 442; State v. Scott, 49

La. Ann. 253, 36 L.R.A. 732, 21 So. 271, 10 Am. Crim. Rep. 585; Graves v. White, 4 Baxt. 38; Kelly v. McGuire, 15 Ark. 555; Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; Ricketts v. Jolliff, 62 Miss. 440.

An insane person's rights are protected over those of bona fide purchasers for value without notice.

Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Philpot v. Bingham, 55 Ala. 435; Walker v. Winn, 142 Ala. 560, 110 Am. St. Rep. 50, 30 So. 12, 4 Ann. Cas. 537; American Trust & Bkg. Co. v. Boone, 102 Ga. 202, 40 L.R.A. 250, 66 Am. St. Rep. 167, 29 S. E. 182; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; Smith v. Ryan, 191 N. Y. 452, 19 L.R.A. (N.S.) 461, 123 Am. St. Rep. 609, 84 N. E. 402, 14 Ann. Cas. 505; Dickerson v. Davis, 111 Ind. 433, 12 N. E. 145; Voris v. Harshbarger, 11 Ind. App. 555, 39 N. E. 521.

Plaintiff was not barred by laches.

Tatum v. Arkansas Lumber Co. 103 Ark. 251, 146 S. W. 135; Reaves v. Davidson, 129 Ark. 888, 195 S. W. 19; McEvoy v. Tucker, 115 Ark. 430, 171 S. W. 888.

Messrs. Charles A. Walls and W. A. Leach for appellees.

**Hart, J.**, delivered the opinion of the court:

This is an appeal from a decree of the chancery court in the case of Victor Daughtry, as next friend of Linn C. Eagle, against G. M. Peterson, W. H. Young, J. V. Ferguson, and W. C. Ferguson. The object of the suit was to annul a deed executed by Linn C. Eagle to G. M. Peterson in March, 1912, and subsequent deeds to the same property from Peterson to Young, and deeds from

Young to the Fergusons to a part of said property. Linn C. Eagle owned a large quantity of lands in Lonoke county, Arkansas, which he inherited from his father. On the 1st day of March, 1912, Linn C. Eagle conveyed 240 acres of these lands to G. M. Peterson. In June, 1912, Peterson conveyed the land to W. H. Young for a consideration of \$925. Young subsequently conveyed a part of the lands to J. V. Ferguson, and a part of them to W. C. Ferguson. The lands were wild and unimproved at the time of the conveyance by Eagle to Peterson. Since that time a county road has been laid out across them, and they are within the boundaries of a drainage district which has greatly increased their value. Linn C. Eagle was about thirty-two years old at the time he executed the deed to Peterson, and had been, since early manhood, a confirmed drunkard and addicted to the use of morphine. In July, 1908, Linn C. Eagle was adjudged insane by the probate court of Lonoke county, and a guardian of his estate was appointed. There being no room in the state hospital for nervous diseases for him, the probate court ordered Eagle to be confined in a private hospital in the city of Little Rock. Eagle remained in this hospital for something over two months, when his brother procured his release from custody from the owner of the hospital. After his discharge from this private hospital, Eagle took charge of his own business affairs and has continued to have charge of them ever since. His guardian filed his final account current and was discharged in the year 1909.

Evidence was adduced by Eagle tending to show that he was insane from the excessive use of intoxicating liquors and morphine at the time he executed the deed to Peterson. On the other hand, evidence was adduced tending to show that he was mentally competent to transact business at that time. For the reasons given in the course of the

opinion, it will not be necessary to abstract this testimony in detail.

Peterson was in the employment of Eagle at the time the deed was executed to him. Soon after the execution of the deed by Eagle to Peterson, Eagle removed to the state of Oklahoma, and remained there until some time in the fall of 1912, when he returned to his old home in Lonoke county. On his return he found that Peterson had left there, and his whereabouts have since been unknown.

According to the testimony of Young, Peterson first asked him \$1,500 for the land, but he declined to give that much. They finally agreed on \$925, which was about one half of the real value of the land. During their negotiations Peterson wrote to the state of Oklahoma, where Eagle then resided, and got his affidavit to cure a defect in the title of the land. After Eagle returned, either in the fall of 1912 or in the spring of 1913, he went into the bank of which Young was cashier and asked to see the affidavit which he had made in regard to the title. Young showed the affidavit to Eagle, and also showed him the deed which he had received to the land from Peterson. Eagle told Young that the sale of the land was all right, but that Peterson owed him some money, and that he was hunting for him to make him pay it. Young also testified that he had never heard that Eagle claimed that fraud had been practised on him with regard to the execution of the deed until after the suit was brought.

According to the testimony of Eagle, his mind was so deranged by the excessive use of whisky and morphine at the time he executed the deed to Peterson in March, 1912, that he did not know what he was doing. He thought he was executing to Peterson an option deed, or was giving Peterson the power to sell the land for him. He never received any compensation from Peterson, and, according to his own testimony and that of other wit-

nesses, it was well known that Peterson did not have any money at that time. It was shown by witnesses for the defendants that Peterson had some money at the time the transaction took place. Eagle testified that he signed the affidavit to cure a defect in the title, thinking it was necessary in order to enable Peterson to sell the land for him. He quit the use of morphine in August, 1912, and thereafter, to a great extent, also quit the excessive use of whisky. He returned to Arkansas in the fall of 1912 to see about his affairs. He testified that he had never done or said anything to ratify the sale of the land to Young, and that Young knew that Peterson had never had money enough to buy the land from him, and that Young told him that he knew Peterson had never in reality owned the land.

The record shows that in 1908 Linn C. Eagle resided in Lonoke county, and that he was adjudged insane by the probate court and ordered to be confined in a private hospital. He was released from the hospital in about two months, but there was never any order of the court that he had been restored to his right mind.

Under this state of the record it is earnestly insisted by counsel for the plaintiff that an adjudication of insanity substitutes for the general presumption of sanity a presumption of insanity, and that contracts made by the insane person before he has been adjudged to be restored to reason are void, and not merely voidable. Hence they contend that, under the facts of the present case, it was incompetent to show that Eagle was capable of contracting at the time he executed the deed to Peterson. The authorities on this point are in conflict. In many of the states, by statute, the contracts of a person who has been judicially declared insane and placed under guardianship, made before an order that such person has been restored to his right mind, are absolutely void.

There is no statute of this kind in this state.

It is a matter of common observation and experience that many persons who are insane at a particular period are subsequently restored to their right mind. Such cases are not unusual, and the return of reason may be anticipated when the cause for the insanity has been removed. We think

the true rule to be that an adjudication of lunacy is not conclusive, but prima facie, evidence only, and that a person who deals with the supposed insane person may show that at the time the contract was made he had sufficient mental capacity to make it. *Clark v. Trail*, 1 Met. (Ky.) 35; *Parker v. Davis*, 53 N. C. (8 Jones, L.) 460; *Armstrong v. Short*, 8 N. C. (1 Hawks) 11; *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465; and 22 Cyc. 1134; and see *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407; also *Miller v. Rutledge*, 82 Va. 863, 1 S. E. 202; *Elston v. Jasper*, 45 Tex. 409; and *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299.

In the case of *Clark v. Trail*, supra, the court said: "An inquest of lunacy, or of unsoundness of mind, although conclusive evidence of the condition of the party at the date of the inquest, is only prima facie evidence of his condition at a subsequent period. Having been found a lunatic, the law presumes the state of his mind to continue unchanged until the contrary be made manifest. It is this presumption of the law that makes the inquest even prima facie evidence of his insanity at a subsequent time. Being a mere presumption, it may be repelled by oral testimony. There is no rule of evidence which requires another inquest to be found, in order that this presumption may be thereby rebutted."

This holding is in accordance with the principles of the common law. Mr. Justice Blackstone, in his Commentaries, states the doctrine as follows: "Idiots and persons of

Evidence—  
adjudication of  
insanity—  
conclusiveness.

nonsane memory, infants, and persons under duress are not totally disabled either to convey or purchase, but sub modo only, for their conveyances and purchases are voidable, but not actually void." 1 Cooley's Bl. Com. p. 666.

Chancellor Kent says: "By the common law, a deed made by a person non compos is voidable only, and not void." 2 Kent, Com. 14th ed. \*451.

Having reached the conclusion that the inquisition is only prima facie evidence, and that evidence contradictory is admissible, it remains for us to decide whether or not Eagle was mentally incompetent to contract at the time he executed the deed to Peterson in March, 1912, or, if so mentally incompetent at that time, did he, after his reason was restored, ratify and confirm the contract?

Under the doctrine that conveyances of insane persons are voidable, and not void, it is obvious that such instruments are subject to ratification as well as disaffirmance, and that the insane person may, when restored to sanity, ratify or confirm the conveyance which he made while insane. George v. St. Louis, I. M. & S. R. Co. 34 Ark. 613; 14 R. C. L. 595; and 22 Cyc. 1209.

The testimony on the question of the mental capacity of Eagle to execute the deed to Peterson in March, 1912, is very voluminous and is in direct and irreconcilable conflict. We have not set out the testimony on this point, and do not deem it necessary to do so, for if it be assumed that Eagle was mentally incompetent when he executed the deed to Peterson to the property in question, it is quite clear from the record that he ratified his act after he became sane. That Eagle was restored to his right mind in the fall of 1912 is abundantly shown by the record. It is shown by both the

testimony of Young and of Eagle himself. Their testimony only conflicts on the question of the ratification of the deed. Eagle testified that he quit using morphine in August, 1912, and also to a great extent, the use of intoxicating liquors. According to his own testimony, he returned to Arkansas that fall, and Young admitted to him that he knew Peterson did not have any money with which to purchase the land and that the title in reality was in Eagle. Young flatly denies this, and, on the other hand, states that he showed to Eagle the deed of Eagle to Peterson, as well as the affidavit of Eagle made to cure a defect in the title, and that Eagle acknowledged the same and ratified his contract with regard thereto. The testimony of Young is corroborated by the circumstances of the case. The conversation between Young and Eagle with reference to the execution of the deed from Eagle to Peterson was had in the fall of 1912, or in the early part of the year 1913. The present action was not instituted by Eagle until the 27th day of February, 1915, and no reasonable excuse is given by him for the delay.

The delay in bringing the suit is a circumstance to be considered in determining whether or not Eagle confirmed the execution of the deed made at the time when he at least thought himself to be mentally incompetent to execute the same. Another circumstance is that Eagle first had the suit brought in his own name, and it was afterwards changed to a suit by next friend because there had been no adjudication restoring him to sanity.

The court made a general finding for the defendants and dismissed the complaint of the plaintiff for want of equity. This included a finding that Eagle had ratified and confirmed the deed executed by him to Peterson in March, 1912. This finding is sustained by a preponder-

Incompetent  
person—contract  
—validity.

—ratification  
of contract.

Evidence—  
delay in suit to  
set aside deed.



ance of the evidence, and it follows that the decree must be affirmed.

**NOTE.**

The question considered in the reported case (*EAGLE v. PETERSON*, ante,

558) as to the admissibility and probative force of an adjudication of lunacy on an issue as to mental condition is considered in the annotation following *WESTERLAND v. FIRST NAT. BANK*, post, 568.

GEORGE HOLLIDAY et al.

v.

REASON SHEPHERD et al., Appts.

*Illinois Supreme Court — October 27, 1916.*

(269 Ill. 429, 109 N. E. 976.)

**Evidence — appointment of conservator for estate of incompetent.**

1. An adjudication appointing a conservator for the estate of an incompetent who was found by the verdict to be insane is admissible in evidence upon a subsequent proceeding to set aside his will on the ground of insanity, although the conservator might have been appointed for any cause rendering the incompetent incapable of managing and caring for his property.

[See note on this question beginning on page 568.]

— declarations as to intention — testamentary capacity.

2. Declarations of a testator either before or after the execution of his will as to his intentions are competent evidence on the question of testamentary capacity in a proceeding to contest the will.

Appeal — raising questions in reply brief.

3. Questions cannot be raised in the appellate court for the first time in the reply brief.

[See 2 R. C. L. 177, 178.]

— erroneous evidence — nonprejudicial error.

4. The erroneous admission in a proceeding to contest a will on the ground of incapacity of testator, of evidence as to the relationship of contestants, is not reversible error, since it could not have affected the issues as to testator's mental capacity.

[See 2 R. C. L. 247.]

— waiver of errors.

5. Errors assigned but not argued are waived.

[See 2 R. C. L. 178.]

**APPEAL** by defendants from a decree of the Circuit Court for Vermilion County (Kimbrough, J.) in favor of complainants in a suit to set aside the will of Jason H. McKinney, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. O. M. Jones, George R. Tilton, Charles G. Taylor, and William R. Lawrence for appellants.

Messrs. W. B. Wilson, Joseph A. Jenkins, Keeslar & Gunn, and Acton & Acton for appellees.

Carter, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Vermilion county setting aside the will of Jason H. McKinney, deceased. The bill

alleged that the instrument in question was not signed by the deceased, that he was not of sound mind and memory at the time of its execution, and that such execution was obtained by fraud and undue influence of certain of the beneficiaries. On a trial of the issues raised by the pleadings the verdict of the jury stated that the writing in question was not the last will and testa-

ment of the deceased, and the decree was entered accordingly.

Jason H. McKinney died March 20, 1912, leaving as his only heirs a half-brother, Albert McKinney, one of the appellees herein, and Malinda Nichols, a half-sister, to each of whom he left \$500, and George Holliday and Mary Stenger, children of a deceased sister. All of his property except the said two \$500 legacies, consisting mainly of an 80-acre farm, was divided by the will equally between Reason Shepherd, a cousin, and Josephine Lawrence, a distant relative, who was the wife of the attorney who drew the will. The instrument was executed on May 6, 1893. McKinney had lived all his life in Vermilion county. There is no positive testimony in the record as to his age, but we gather from what was stated that he was nearly seventy years old at the time of his death.

The principal question urged by appellants is that the evidence does not sustain the verdict and decree. From the testimony there is little question that McKinney was not well developed mentally. Some of the witnesses testified that he was feeble-minded, and one or two stated they would consider him an idiot or an imbecile. The great weight of the testimony of all the witnesses is to the effect that he was weak mentally. Testimony of more than sixty witnesses was heard by the jury,—about twenty-five for appellants and about forty for appellees. Four doctors, a number of business men, farmers, and others who knew the deceased at the time of the making of the will and previous thereto, testified for the appellants. About twenty of them testified they believed he knew his friends, what property he had and to whom he wished it to go. Many of them admitted he was of weak mental capacity, using different language, as "not bright," "not normal," "peculiar," "had an undeveloped mind," "was like a child," was considered "a joke" by those who knew him. Practically all the witnesses for ap-

pellees, many of whom had been intimately acquainted with him a long time, after stating the facts upon which they based their testimony, gave the opinion that he was not of sound mind, some saying he did not have sufficient mind to reason intelligently on any subject. Many witnesses stated that he was better at some times than at others. For years before he executed this will he lived on the farm in question with his mother. She died shortly before the will was executed. The great weight of the testimony is to the effect that when living with his mother she took charge of the farm, and while he helped her, went on errands and did small jobs, he rarely acted independently of her directions. While some of the witnesses for appellants say he was a good judge of stock and talked about horses and trading a good deal, no one ever took such talk seriously. He did little trading of any kind. The most he ever bought at the store was candy, tobacco, or something of like character. The testimony, we think, is uncontradicted that he often talked of getting married the same as he talked of making trades, buying and selling live stock, there being no real foundation for talk of this kind. Some of the witnesses stated that he was easily excited, would talk of doing certain things, but that no one ever took him seriously in regard to any of these matters. A tenant of his mother testified that McKinney would frequently call people his friends and other persons his enemies, when, as a matter of fact, the one he would call an enemy was a friend and the one he called a friend was not friendly to him. One witness testified he had given testator a dollar bill and the latter thought it was a ten dollar bill. The testimony is also to the effect that he was a great eater and never knew when to quit, eating so much that he would sometimes make himself sick; that when others had finished he would go to the table and eat from the various plates; that he

would go to the cellar and open cans of fruit and eat therefrom and drink from the crocks of milk.

In April, 1893, after his mother's death, on the petition of his half-brother, one of the appellees herein, a conservator was appointed to take charge of McKinney's property, which at that time, according to the petition, consisted of about 90 acres of land and about \$4,000 of personal property. This appointment was made the month preceding the execution of the will. The conservator was appointed and apparently acted for some time, and was followed by a successor, but there is no proof in the record as to whether a conservator had charge of his property up to the time of his death. One of the persons who had acted as conservator testified for appellants that McKinney had sufficient mental capacity to understand what property he had and how he wished to dispose of it.

The will was drafted and executed in Danville, in the law office of Attorney Lawrence, the husband of one of the beneficiaries. One of the attesting witnesses was called on at his store by Reason Shepherd and asked to act as such. This witness, M. S. Plaut, swore that he thought McKinney was of sound mind and memory at the time. The other witness, C. E. Jones, a near neighbor of the testator, testified that he was asked by McKinney to go to Danville to act as a witness. His testimony at the time the will was presented for probate was of such a nature the probate was allowed. On the trial in this case he testified that he did not think that the testator, judged by what he told witness afterwards, understood, at the time the will was executed, what he was about. It seems he drew this conclusion largely from the fact that the testator told him, a short time after the will was executed, that he did not know much about the will, but said he had left his cousin Josie \$500 and Reason Shepherd \$500, and "the balance of my property goes to my half-brother and sister." The

cousin Josie was Reason Shepherd's wife. The testimony of both attesting witnesses was that there was no discussion of the contents of the will at the time it was executed. Some of the witnesses testified that McKinney had been confined in an asylum for a time, but just how long the record does not show. One of the witnesses testified he had been there about two years. There was no attempt to show whether he was sent to the asylum at the time of the appointment of the conservator herein referred to, or whether there was another trial and finding upon which he was confined in the asylum.

We have not attempted to detail all of the evidence but have given the substance of the most material things bearing on the testator's mental capacity. We can reach no other conclusion than that the great weight of the evidence supports the verdict of the jury and the decree of the court on that question.

Counsel for appellants earnestly contend that the trial court erred in admitting the record of the county court to show that a conservator had been appointed for McKinney in April, 1893, on the ground that the statute under which that trial was held only required proof that he was unable, from any cause, to control, direct, or manage his property; that a conservator might have been appointed under that statute because McKinney was a spendthrift. The first section of the statute in force at the time of the appointment of the conservator (Hurd's Stat. 1891, p. 930) is somewhat similar in wording to the present statute. There was at that time another statute which provided for an inquisition in insanity if the person was to be confined because of mental unsoundness. Hurd's Stat. 1891, p. 926. While both of these statutes have been amended or revised since that time (Hurd's Stat. 1913, pp. 1581, 1588) they are, so far as they bear on this question, substantially like the ones then in force. The argu-

ment of counsel for appellants on this point is, that by the statute then in force, under which the conservator was appointed, it was only necessary to show that McKinney was incapable, for any reason, of managing and caring for his property, while the issue in the present case was whether he had sufficient mental capacity to make a will. No question is raised here that the record of the appointment of the conservator was not correctly certified to and properly admissible in evidence if it was competent on the issue here involved. Ordinary inquisitions in lunacy are held admissible in evidence as bearing on the question of the mental capacity of the person who was the subject of such inquisition, but such inquisitions or records are not generally conclusive except against the parties immediately concerned and their privies. 1 Greenl. Ev. 16th ed. § 556. Such a record is generally only prima facie evidence as to the sanity or insanity of the person at the time when the adjudication was made. 7 Enc. Ev. 477, and cases cited. It is true, as contended by counsel for appellants, that the proof under the two statutes as to lunatics in force at the time said conservator was appointed might have been different in the case of the mere appointment of a conservator than would be required if the patient was also to be confined in a hospital for the insane, but we do not think that fact would prevent the admission of the records of a proceeding under either statute on a hearing of this character. The general rule is that the admission in evidence of an adjudication of insanity does not depend upon whether it was founded upon an oath or not, but rather upon the public nature of the hearing and the public interests involved. 1 Greenl. Ev. 16th ed. § 556. The verdict of the jury upon which the appointment of the conservator was based found that McKinney was insane.

**Evidence—  
appointment of  
conservator for  
estate of in-  
competent.**

In view of the history of this man, as shown in this record, from the time of his boyhood, the record of the county court as to the appointment of a conservator for McKinney in 1898 was admissible, not as conclusive on the question of insanity, but to be considered by the jury for what it was worth. If the proof in this record had shown that the conservator was appointed for the sole reason that McKinney was a spendthrift or a drunkard a different question as to the admissibility of the county court record would be presented. The reasoning of this court in *Bollnow v. Roach*, 210 Ill. 364, 71 N. E. 454, on an analogous question, tends to support this conclusion. This court held in *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217, that the record of the appointment of a conservator three years after the will was made was too remote to the issue to be admissible. We do not consider that case as in any way conflicting with the conclusions already reached here as to the admissibility of the record in question in this case. The case of *Re Weedman*, 254 Ill. 504, 98 N. E. 956, was a hearing on an application for the probate of a will, and therefore is not in point on the admissibility of this record in this proceeding.

Counsel for appellants further contend that the testimony of the attesting witness Jones as to the conversation concerning the contents of the will, a few days after it was executed, was inadmissible, being, in effect, an attempt to revoke a will by parol evidence. At the time this testimony was offered the court ruled that it was admitted solely on the ground of its bearing on the mental capacity of the testator. The declarations of the testator, made either before or after the execution of an alleged will, as to his testamentary intentions, are competent on the question of his testamentary capacity. *Hurley v. Caldwell*, 244 Ill. 448, 91 N. E. 654; *Kellan v.*

—declarations as  
to intention—  
testamentary  
capacity.

Kellan, 258 Ill. 256, 101 N. E. 614. The admission of this testimony was therefore not error.

Counsel for the appellants further argue that the trial court, contrary to the holding in *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085, permitted witnesses for appellees to express opinions as to the ultimate facts to be determined by the jury. This question was raised in this court for the first time in the reply brief of appellants. Under the rules of this court and its long-settled practice, questions not raised by appellants in the original brief cannot be raised in the reply brief. A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply. This question, therefore, need not be considered.

**Appeal—raising questions in reply brief.**

Before the jury was impaneled and the issue as to the mental capacity of the testator taken up for a hearing, certain proof was offered by appellees as to the relationship of George Holliday and his co-complainants, and certain testimony of Albert McKinney as to why his sister, Malinda Nichols, did not join with him as a contestant. Counsel for appellants insist that the court erred in admitting any of this testimony, as it was given by parties who under the statute were not competent to testify. Conceding, for the

purposes of this argument, that counsel are right, we cannot see how it in any way injuriously affected the issues before the jury as to the testator's mental capacity.   
 —erroneous evidence—nonprejudicial error.

Numerous errors are assigned on the record, but few of them have been argued. Errors assigned and not argued are waived. *Lewis v. King*, 180 Ill. 259, 54 N. E. 330; *Sullivan v. Atchison, T. & S. F. R. Co.* 262 Ill. 317, 104 N. E. 707. The questions already considered are the only ones, as we read the briefs, that are argued therein by counsel for appellants.   
 —waiver of errors.

We find no reversible error in the record. The decree of the Circuit Court will therefore be affirmed.

#### NOTE.

The question considered in the reported case (*HOLLIDAY v. SHEPHERD*, ante, 558) as to the admissibility of an adjudication of incompetency on issue of testamentary capacity is treated in I. g. of the annotation following *WESTERLAND v. FIRST NAT. BANK*, post 568, on the general subject of the admissibility and probative force on issue as to mental condition of evidence that one had been adjudged incompetent or insane or had been confined in an asylum.

CARL WESTERLAND

v.

FIRST NATIONAL BANK OF CARRINGTON et al., Appts.

*North Dakota Supreme Court—July 9, 1917.*

(38 N. D. 24, 164 N. W. 323.)

#### Evidence — insanity — adjudication after transaction.

1. Where one brings an action to recover money paid under a contract, on the ground that at the time of the making of the contract (and the note and mortgage, which were parts of the same transaction) he was in-

Headnotes by GRACE, J.

sane, evidence that, at a point of time four years or more subsequent to the time of the making of the contract, he was adjudged insane by the board of insanity, is inadmissible and incompetent, and too remote to prove his mental condition at the time of the making of the contract, and, when admitted over the proper and timely objections of the defendant, is prejudicial and reversible error, for which new trial will be granted.

[See note on this question beginning on page 568.]

**Contract — capacity — insanity.**

2. Capacity to make a contract is not determined by whether one has much or little intellect. The true test is: Had the party who seeks to avoid the contract on the grounds of incapacity by reason of alleged insanity, sufficient mental capacity to know the nature of the contract and the terms thereof?

If he had, he may be required to perform it.

[See 14 R. C. L. 583.]

**—disaffirmance — laches.**

3. Disaffirmance of contracts and actions brought to recover money paid thereunder should be timely; otherwise, long delay tends to prove ratification.

[See 6 R. C. L. 932.]

(Robinson, J., dissents.)

**APPEAL** by defendants from a judgment of the District Court for Foster County (Coffey, J.) in favor of plaintiff in an action brought to recover money paid by plaintiff to defendants under an alleged contract. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Edward P. Kelly for appellants.

Mr. T. F. McCue, for respondent:

The records of the findings of the board of insanity for Foster county were competent and properly admitted.

Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Giles v. Hodge, 74 Wis. 360, 43 N. W. 163; Ashcraft v. De Armond, 44 Iowa, 229; Terry v. Buffington, 11 Ga. 342, 56 Am. Dec. 428; 1 Wigmore, Ev. § 233, p. 292; People v. Griffin, 117 Cal. 583, 59 Am. St. Rep. 216, 49 Pac. 712; Craig v. Southard, 148 Ill. 37; 35 N. E. 361; Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151; Baker v. Baker, 202 Ill. 595, 67 N. E. 410; Staser v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Bower v. Bower, 142 Ind. 194, 41 N. E. 523; Davis v. Calvert, 5 Gill. & J. 269, 25 Am. Dec. 282; Peaslee v. Robbins, 3 Met. 164; Com. v. Pomeroy, 117 Mass. 148; Howes v. Colburn, 165 Mass. 385, 43 N. E. 125; Laplante v. Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 914; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Toomes's Estate, 54 Cal. 516.

Grace, J., delivered the opinion of the court:

The complaint, among other things, alleges: That the defendant Newberry was the cashier of the First National Bank of Carrington,

of which plaintiff was a customer, and transacted his financial business; that is, such customer was in the habit of counseling with Newberry with reference to such financial business, and did confide in and take the advice of said Newberry in financial matters. That Newberry, on the 28th day of September, 1909, advised the plaintiff that it was plaintiff's debts that were causing him to worry and producing his ill health, and that to relieve the same (debts) he should sell his farm. At said time Newberry produced a writing, of which the following is a copy: "For \$1 in hand paid by G. S. Newberry, I hereby grant on him an exclusive option for sixty days on purchase or sale of the following lands: South  $\frac{1}{4}$  of 22, northwest  $\frac{1}{4}$  of 26, all in 147 R. 65, including windmills, buildings, and all other improvements on the farm. Price \$23 per acre net to me. Terms, \$3,000 cash; balance five annual payments at 6 per cent interest. Good paper. The privilege of withdrawing the option by notice in writing inside of thirty days is reserved. All plowing done to be paid for at \$1.25 per acre, and possession of

buildings retained until April 1st, 1910."

The plaintiff further alleges that at the time of the signing of said option the plaintiff did not know that said option provided for an exclusive sale, but plaintiff believed that such writing was necessary in order for the said Newberry to obtain a purchaser for said land. The plaintiff further alleges that at the time of signing such contract his mind was in such condition that he did not know what he was doing, or realize the binding effect of said writing, all of which was known to Newberry, and of which Newberry took advantage at said time. The plaintiff further states that on the 2d day of November 1909, the defendant Newberry told the plaintiff he was ready to carry out said contract for the purchase of said land and buy the same himself, and demanded of plaintiff a deed to said land, advising said plaintiff at said time that he, the defendant, would place a mortgage upon the premises for the purpose of paying the plaintiff \$3,000 cash provided in said option. Plaintiff refused to make such deed. Newberry demanded the sum of \$480 by way of damages. Plaintiff further alleges that defendant threatened suit against the plaintiff for said amount of money, and alleges that on account of his mental condition he was put in fear and caused to believe that, if he did not settle with said Newberry, he would lose his farm. The plaintiff then executed a note for \$860, which also covered other amounts owing by the plaintiff to the bank, which was secured by a mortgage on the land in question. Plaintiff alleges that at the time said mortgage and note were paid by the bank at Barlow the plaintiff was insane, and was afterwards placed in the insane asylum at Jamestown, North Dakota. Plaintiff alleges: that the offer which the defendant made to purchase said farm was not in good faith, and that the whole transaction was a conniving scheme for the purpose of defrauding the plaintiff of said money.

That at the time the plaintiff's mind was deranged, all of which was well known to the defendant.

The defendant Newberry, for his answer, makes, first, a general denial, and further, by way of defense, alleges that on the 28th day of September, 1909, the plaintiff solicited the defendant to purchase or procure the purchase of certain real estate then the property of plaintiff, and for a consideration did make, execute, and deliver to the defendant the option as hereinbefore set forth, which option was on the 28th day of October, 1909, assigned by the defendant to his wife, Mary G. Newberry. The answer further alleges that more than thirty days from the execution and delivery of said option, on the 2d day of November, 1909, the plaintiff again called upon the defendant and asked to withdraw said option, and that by mutual agreement of the parties, and the consideration of the surrender of said option, the plaintiff agreed to pay, and did pay, to the defendant, the sum of \$1 per acre, amounting to the sum of \$480. The answer further denies all allegations of fraud.

The facts in the case are as follows: The plaintiff was the owner of 480 acres of land. On the 28th day of September, 1909, he granted an option to the defendant for sixty days, which gave the said Newberry the right to find a purchaser to said land, or purchase the same himself, within the sixty-day period. The plaintiff also had a reservation in such option of withdrawing the same by notice in writing inside of thirty days. The plaintiff did not withdraw the option within thirty days, and did not attempt to do so until after the thirty-day period had expired. The plaintiff had transacted business, for quite a long period of time prior to the date of the option contract, with the First National Bank of Carrington, of which Newberry was cashier. After receiving such option, the defendant assigned the same to his wife. The plaintiff desired, after

the thirty-day period had expired, to withdraw the option and cancel the same, which Newberry refused to do, unless he was paid the sum of \$480, which was agreed to by the plaintiff, and a note for \$860 executed, which included, among other items, the \$480, which was secured on the land in question.

The first assignment of error by the defendant is one in which he complains that the court erred in receiving in evidence, over the objection of appellant, exhibits F, G, H, I, J, K, L, and M, inclusive, which exhibits constituted the record of the board of insanity for Foster county in the matter of the insanity proceedings against Carl Westerland, the plaintiff in this case, which proceedings as to the insanity of the plaintiff were had on the 28th day of June, 1913, a period of time of four years subsequent to the date of the transaction complained of and involved in this suit. This record concerning the insanity of the plaintiff was offered at the very commencement of the trial of the case. The defendant made proper objections to the introduction of such records, because of their incompetency, irrelevancy, and immateriality, which objection was overruled by the court, and such records were received in evidence.

The question presented is quite a novel one, and is as follows: Where it is claimed by the plaintiff that at the time of the execution of the contract he was insane, and had no capacity to execute such contract, is it competent to introduce testimony that four years subsequent to the date of such contract the plaintiff was declared to be insane by the board of insanity of the county in which he resided? Adverting to the question of insanity, an inquisition finding that a person is insane at the time of such inquiry, such finding is not evidence that he was insane at a previous date, and especially is this true where the date is long prior to the date of the inquiry. Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 901;

Rippy v. Gant, 39 N. C. (4 Ired. Eq.) 443. Such finding by the insanity board is no presumption of insanity at an earlier date. Lilly v. Waggoner, 27 Ill. 395; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Koons v. Benscoter, 2 Kulp, 451. The admission of such testimony is only competent to prove the incapacity of the person to have charge of his property at the time of the inquiry as to the sanity of the person examined; and where such person is found to be insane on such inquiry and examination, it is no evidence of insanity at a prior date, but is evidence only of the insanity of the person examined when the adjudication was made. Burnham v. Mitchell, 34 Wis. 134.

Evidence—  
insanity—  
adjudication  
after trans-  
action.

The only possible theory upon which such testimony could be admissible would be where there was competent testimony adduced, showing a continuance of the insanity from the date the act was done, or, in case of a contract, from the date the contract was made, for all the succeeding interval of time down to the date of the inquiry and adjudication of insanity; and such continuance of such insanity during all the interval from the time of the making of the contract to the adjudication of insanity is shown by a clear preponderance of evidence, of such a nature that it would strongly tend to prove the continuance of such insanity. Notwithstanding such connecting proof, the adjudication of insanity is not competent proof of insanity at a prior date, and the records of such adjudication of insanity of a certain date are entirely inadmissible, incompetent, irrelevant, and immaterial to prove insanity at a prior date. There is still another objection to the admission of the exhibits of the adjudication of the insanity of the plaintiff, in that the insanity was at a very remote time from the time of the making of the contracts in question, and because



of such remoteness they were inadmissible and incompetent; the time between the making of the contracts and the adjudication of insanity being a period of more than four years. As to remoteness of the testimony in this class of cases, see *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *Harden v. Hays*, 14 Pa. 91. A party alleging insanity has the burden of establishing it by a preponderance of evidence, and the ordinary rules of evidence as to admissibility, materiality, competency, and relevancy apply as in other cases.

The pivotal question in a case such as the one at bar is the capacity to contract with reference to property or its conveyance at the time the contract or conveyance was made. If a person at the time of making the conveyance or contract has sufficient mental capacity fully to comprehend the nature and effect of the act, the conveyance is valid. *Willwerth v. Leonard*, 156 Mass. 277, 31 N. E. 299; *Parker v. Marco* (C. C.) 76 Fed. 510. It may be said to be a sound principle of law, to make a binding contract does not require a very high order of intellect. While the contracts of a lunatic or an idiot, except for necessities, are of no binding force upon him, yet, if a man possess sufficient

Contract—  
capacity—  
insanity.      mental capacity to  
understand and  
know what he is  
doing, to know the nature of the  
contract, the terms thereof, and the  
time of its continuance, he may be  
required to perform it, unless the  
contract is unfair, fraudulent, or  
dishonest, when he might be re-  
lieved from the performance there-  
of, but most likely upon other  
grounds than insanity. The law  
does not presume to make a dis-  
tinction between much and little in-  
tellect. *Stewart, Legal Medicine*, §  
155. Sanity is always presumed to  
exist until the contrary appears.

The testimony in this case is quite voluminous. Much of it relates to the business transactions of Mr. Westerland prior to the time of the

execution of the contract in question. There is testimony that he transacted business with other business men in the vicinity. There is some testimony tending to show that Mr. Westerland worried about his debts; that he at times had crying spells; that he at times made disturbances with his family. There is also testimony that he used intoxicating liquors, and sometimes to excess, and that at times he kept intoxicating liquors at home. All such testimony was proper to be considered by the jury, and to be weighed by them in assisting them in determining whether or not, at the time of the execution of the contract in question, the plaintiff was of sufficient mental capacity to enter into the contract which he did. The main question to be determined in the case is whether or not the plaintiff Westerland had sufficient capacity and intellect, and knew what he was doing at the time he made the contract; and the business transactions of plaintiff, not too remote from the time of the making of the contract, his general conduct, his actions, eccentricities, if any, his habits, all may be shown by competent testimony, as bearing upon his capacity to execute the contract in question at the time it was executed. The contract in question was one which it was lawful to make. If the plaintiff Westerland had capacity to make it at the time when he did make it, he is legally bound by the consequences of his making the contract.

Another question which should be taken into consideration is that a disaffirmance of a contract should be timely, and the same disaffirmed —disaffirmance  
—laches.  
within a reason-  
able time, or, if money has been paid thereunder, an action brought to recover such money within a reasonable time after the contract is disaffirmed; otherwise, long delay tends to show a ratification. We are of the opinion that the admission of the records of the county court of Foster county, which showed the

result of the inquiry at which plaintiff was adjudged insane, which inquiry was some four years or more subsequent to the date of the making of the contract in question and the note and mortgage given in settlement, was too remote to be competent evidence; that it was inadmissible to prove the insanity of the plaintiff at a point of time four years or more prior thereto; and the admission of the same was prejudicial and reversible error.

The judgment is therefore reversed, and a new trial granted.

Robinson, J., dissenting:

In this case Cashier Newberry appeals to this court from a verdict and judgment against him for obtaining from the plaintiff \$480 and interest by fraud and undue influence. By some smoothness he obtained from the plaintiff a one-sided land-listing document, which is a fraud on its face. It is in this form:

September 28th, 1909.

For \$1 in hand paid by G. S. Newberry, I hereby grant him an exclusive option for sixty days on purchase or sale of the following lands: South  $\frac{1}{4}$  of 22, northwest  $\frac{1}{4}$  of 26, all in 147 R. 65, including windmills, buildings, and all other improvements on the farm. Price \$23 per acre net to me. Terms, \$3,000 cash; balance five annual payments at 6 per cent interest. Good paper. The privilege of withdrawing the option by notice in writing inside of thirty days is reserved. All plowing done to be paid for at \$1.25 per acre, and possession of buildings retained until April 1st, 1910.

Carl Westerland.

Witnesses: H. H. Steffens.

J. W. A. Fisher.

The plaintiff was a poor, illiterate, hard-working Norwegian of weak and unsound mind. He called on his banker, who posed as his confidential friend and heard his tale of woe, and advised him to get away from trouble by selling his land, and by giving his friend, the

banker, an exclusive right to sell it for him. The banker presented his listing document, and said to the weeping and distracted man, "Sign there;" and he signed it. Then the banker assigned the document to his innocent spouse and put it on record, so as to cloud the title of plaintiff's land. Of course, when the illiterate Norse came to think it over, the signing of that document caused him days and nights of worryment. Then he came to his banker friend and asked leave to withdraw the document, and was told that it had been transferred to some person (whom the banker declined to name); that the holder would give it up for \$480, and so the banker kindly took a mortgage on the land and advanced the \$480 to himself. In time the mortgage was paid; the maker went insane, went to the insane asylum, got out, and recovered a verdict and judgment inviting the banker to refund his \$480 and interest. How strange it is that any person should think of appealing such a case to the highest court of justice? Of course, the claim is made that in signing the document the Norse knew just what he was doing, and that he was not misled or deceived; but the claim is futile. The document is a fraud on its face. No sane man signs such a thing, only when he is deceived. It is needless to review the testimony showing the weak mental condition of the plaintiff, who finally committed suicide, and the way in which he was induced to sign the paper and to mortgage the land to pay \$480 and interest, without receiving any value whatever. It is high time for bank cashiers and others to stop trying to get money or property from poor people by such sharp and smooth practices. In a way it is worse than theft, because it is more likely to prey upon the mind and to drive one to insanity and suicide.

The judgment should be affirmed.

Petition for rehearing denied, August 23, 1917.

## ANNOTATION.

**Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum.**

### I. Admissibility:

- a. In general, 568.
- b. Effect of remoteness of adjudication, 571.
- c. Effect of character of proceeding:
  1. Commitment to insane asylum, 573.
  2. Guardianship proceedings, 575.
  3. Proceedings to determine sanity of prisoners awaiting trial, 576.
  4. Miscellaneous, 576.
- d. As against persons not parties or privies to, or without notice of, lunacy proceedings, 577.
- e. Invalid adjudications, 578.
- f. Incapacity to contract:
  1. Conveyances, 579.
  2. Bills and notes, 580.
  3. Miscellaneous, 580.
- g. Testamentary incapacity, 581.
- h. Criminal irresponsibility, 582.
- i. Mental unfitness for trial, 583.
- j. Disqualification as witness, 584.
- k. Miscellaneous, 584.

### II. Probative force:

- a. In general:
  1. Prior adjudication, 584.

### Scope.

This note does not include cases of direct attack, as upon traverse of the adjudication of insanity, but is confined to cases where the issue as to mental condition is collateral. It also excludes cases involving the admissibility or force of adjudications of sanity, or of restoration to reason.

#### I. Admissibility.

##### a. In general.

An adjudication of lunacy is, of course, competent evidence of the mental condition of the lunatic at the time it was rendered. *Re Loveland* (1912) 162 Cal. 595, 123 Pac. 801; *McAllister v. Rowland* (1913) 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006; *Rider v. Miller* (1881) 86 N. Y. 507; *Uecker v. Zuercher* (1909) 54 Tex. Civ. App. 289, 118 S. W. 149; *Burnham v.*

### II. a—continued.

2. Subsequent adjudication, 586.
- b. Presumption of continuance of insanity, 588.
- c. Effect of remoteness of adjudication, 590.
- d. Effect of character of proceeding:
  1. Commitment to insane asylum, 590.
  2. Inquisition of habitual drunkenness, 592.
  3. Guardianship proceedings, 593.
- e. Effect of interest in lunacy proceedings, 596.
- f. As against persons not parties or privies to, or without notice of, lunacy proceedings, 597.
- g. Incapacity to contract:
  1. Conveyances, 598.
  2. Bills and notes, 600.
  3. Marriage contracts, 601.
  4. Miscellaneous, 601.
- h. Testamentary incapacity, 602.
- i. Criminal irresponsibility, 605.
- j. Mental unfitness for trial, 606.
- k. Disqualification as witness, 606.
- l. Miscellaneous, 607.

*Mitchell* (1874) 34 Wis. 117; *Small v. Champeny* (1899) 102 Wis. 61, 78 N. W. 407.

The general rule is that an adjudication of insanity is admissible upon the issue of the mental condition of the alleged lunatic at the time of the transaction in question. It is so firmly established that in the majority of the cases no objection is raised to the admission of such evidence, the question being limited to its weight.

This rule applies where the adjudication is prior to the transaction in question:

District of Columbia.—*Blandy v. Blandy* (1902) 20 App. D. C. 535.

Illinois.—*HOLLIDAY v. SHEPHERD* (reported herewith) ante, 558; *Donnelly v. Chicago City R. Co.* (1911) 163 Ill. App. 7.

**Iowa.**—*Mileham v. Montagne* (1910) 148 Iowa, 476, 125 N. W. 664.

**Kansas.**—*State v. McMurry* (1899) 61 Kan. 87, 58 Pac. 961.

**Kentucky.**—*Hawkins v. Grimes* (1852) 13 B. Mon. 257.

**Michigan.**—*Chase v. Spencer* (1907) 150 Mich. 99, 113 N. W. 578.

**New Jersey.**—*Yauger v. Skinner* (1862) 14 N. J. Eq. 389.

**New York.**—*Hoyt v. Adeo* (1870) 3 Lans. 173; *Hart v. Deamer* (1831) 6 Wend. 497; *Lewis v. Jones* (1868) 50 Barb. 645; *Re Barney* (1919) 185 App. Div. 782, 174 N. Y. Supp. 242.

**Ohio.**—*Wheeler v. State* (1877) 34 Ohio St. 394, 32 Am. Rep. 372.

**Pennsylvania.**—*Com. use of Beatty v. Patterson* (1900) 13 Pa. Super. Ct. 136.

**South Carolina.**—*M'Cright v. Aiken* (1838) 24 S. C. L. (Rice) 56.

**South Dakota.**—*Davis v. Davis* (1910) 24 S. D. 474, 124 N. W. 715.

**West Virginia.**—*Kerr v. Lunsford* (1888) 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 498.

**Wisconsin.**—*Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

And also where the adjudication is subsequent to such transaction:

**Indiana.**—*Nichol v. Thomas* (1876) 53 Ind. 42.

**Kentucky.**—*Hopson v. Boyd* (1845) 6 B. Mon. 296; *Smedley v. Com.* (1910) 139 Ky. 767, 127 S. W. 485; *Davidson v. Com.* (1916) 171 Ky. 488, 188 S. W. 631.

**New York.**—*Van Deusen v. Sweet* (1873) 51 N. Y. 378; *Goodell v. Harrington* (1874) 3 Thomp. & C. 345.

**Pennsylvania.**—*Hutchinson v. Sandt* (1838) 4 Rawle, 234, 26 Am. Dec. 127; *Rogers v. Walker* (1847) 6 Pa. 371, 47 Am. Dec. 470; *Willis v. Willis* (1849) 12 Pa. 159; *Mulholland's Estate* (1907) 217 Pa. 65, 66 Atl. 150.

**Tennessee.**—*Bond v. State* (1913) 129 Tenn. 75, 165 S. W. 229.

**England.**—*Faulder v. Silk* (1811) 3 Campb. 126; *Portsmouth v. Portsmouth* (1828) 1 Hagg. Eccl. Rep. 355, 162 Eng. Reprint, 611.

While, in the great majority of the cases holding admissible adjudications of insanity rendered subsequently to

the transaction involved, such transaction is within the period of time in which the insanity is found to have antedated the adjudication, no point is made of such fact, so that it would appear that a subsequent adjudication is competent evidence on the mental condition of the adjudged lunatic at a time prior to the period covered by the finding, unless such time is too remote.

In *Rhoades v. Fuller* (1907) 139 Mo. 179, 40 S. W. 760, however, it was held that a record of an inquest held twenty days after the making of a deed, in which the grantor was adjudged to be of unsound mind and incapable of managing his own affairs, was inadmissible in evidence in an action to set aside the deed, the court saying: "The record was clearly inadmissible. The inquest was a judicial proceeding held after the trade. Defendant was not a party to it, had no connection with it, and his rights previously acquired could in no possible way be affected thereby. It raised no presumption as against him of Rhoades's insanity at the time of the trade, which was consummated something over twenty days before the date of the inquest. It is no uncommon occurrence for persons who have never manifested any evidences of insanity to become violently insane within a very short space of time. Neither party claimed under the proceedings in the probate court, and whether Rhoades was sane or insane at that time could in no way affect defendant's rights."

And in New York, since 1875, when by an amendment of the Code of Civil Procedure the inquiry in lunacy proceedings was expressly limited and confined to the competency of the alleged lunatic at the time of the hearing, the portion of an inquisition finding prior insanity is not admissible upon the question of the lunatic's previous incompetency, but the remainder of the adjudication is apparently still admissible. *Re Preston* (1906) 113 App. Div. 732, 99 N. Y. Supp. 812.

In *Dominick v. Dominick* (1887) 20 Abb. N. C. (N. Y.) 286, involving the capacity of a testatrix to destroy her will, where it was urged that the court

had erred in permitting an inquisition to be read in evidence by which the jurors had found the testatrix to have been a lunatic at the time of the destruction of the will, on the ground that under the Code the jury were not permitted to return an inquisition retrospective in this respect, it was held that the submission of the inquisition to the jury without any remark as to its effect, further than that it was not conclusive, was not open to such objection. The court said in this connection: "The limitation of the inquiry under the commission would restrict it as evidence to the time when the inquisition itself shall be taken. But this rule was not transgressed in the submission of this case to the jury. . . . Whether it should be given a retroactive effect by the jury was not within the direction of the court. If anything more particular than what was said had been deemed necessary, further instructions concerning the effect of the inquisition should have been asked on behalf of the plaintiff. But it was not. Neither was any objection or exception taken to the manner in which the inquisition was submitted as evidence to the jury. Accordingly, there was no ground for setting aside the verdict because any undue effect was allowed to be attributed to the inquisition as proved."

In *Sprinkle v. Wellborn* (1905) 140 N. C. 168, 3 L.R.A. (N.S.) 174, 111 Am. St. Rep. 827, 52 S. E. 666, an action to set aside a deed because of the grantor's mental incapacity, the court, in holding untenable an objection to the admission of the records of an inquisition of lunacy because they were not admitted as evidence generally, but only for the consideration of the court in order to decide upon the competency of a witness, said: "Those records, of course, were not and could not have been considered as evidence for the jury. They were made after the date when the deed was executed and the proceedings in which they were made were ex parte. If made before that time, they might have been competent, but not conclusive as to the insanity of Nancy Sprinkle."

And in *Uecker v. Zuercher* (1909)

54 Tex. Civ. App. 289, 118 S. W. 149, holding inadmissible a subsequent judgment of non compos mentis, the court said: "The question seems to be squarely presented as to the admissibility of such a judgment, rendered a year after the deed in question was executed, as evidence relevant to the question of the grantor's sanity a year previous. The courts have adopted a liberal rule of admitting evidence of acts, conduct, etc., of the person, both prior and subsequent to the time of the execution of the instrument in question, in inquiries of this nature. As stated in *Hamburger v. Rinkel* (1901) 164 Mo. 398, 64 S. W. 106: 'Evidence of the condition of the mind of the testator before and after making a will is admitted, of course, for the sole purpose of shedding light upon his mental condition at the time of executing the will.' See also *Williams v. Sapieha* (1901) — Tex. Civ. App. —, 62 S. W. 72. The acts, conduct, and peculiarities, etc., of the person before and after the time are allowed. The judgment offered was evidently one adjudging plaintiff of unsound mind as preliminary to the granting of guardianship of her person and estate. The determination of her mental capacity for that purpose was a matter within the jurisdiction of the county judge, but it was nothing more than an adjudication of her condition at that time. Perhaps the evidence on that hearing was much the same as that in this record, and it probably was, for there was evidence on this trial that no changes have taken place in plaintiff's condition for a considerable period. It seems to us an unsound and dangerous rule which would permit either side to use the judgment of the county judge to strengthen the facts. We presume that if the county judge had ruled that plaintiff was of sound mind, and had refused to appoint a guardian, appellees would have endeavored to have the prestige of that court's views to fortify their theory of the evidence. We think that while subsequent acts, conduct, etc., of the party are proper evidence, a subsequent judgment, such as we have here, declaring the person

to be of unsound mind at that later time, is not. Such judgment is in no sense the act or conduct of the party, and to allow it to be used as testimony would tend to the substitution of the judgment of the county judge upon the facts, for that of the jury who were there to try this case. It has been decided in this state that a contract made with one who has been adjudged insane and is under guardianship is void. *Elston v. Jasper* (1876) 45 Tex. 409. But it has not been held in this state that a contract is affected in any manner by such proceedings had after the making of the contract, nor that such subsequent proceedings can be looked to as a material fact in determining the state of the party's mind when the contract was made. What is said by the supreme court in *Boehme v. Sovereign Camp, W. W.* (1904) 98 Tex. 376, 84 S. W. 422, 4 Ann. Cas. 1019, and in *McCamant v. Roberts* (1886) 66 Tex. 260, 1 S. W. 260, is not in line with the view that the subsequent judgment sought to be used in this case was any evidence of insanity of plaintiff when she executed the papers in question."

And in *Rowan v. Hodges* (1915) — Tex. Civ. App. —, 175 S. W. 847, it was held, following *Uecker v. Zuercher* (Tex.) supra, that an adjudication of lunacy entered more than a year after the execution of a deed by the lunatic was inadmissible upon the question of his capacity to execute it.

An inquisition made over four months after the alleged lunatic parted with certain promissory notes is not admissible in an action of replevin by his guardian to recover such notes, upon the ground of the lunatic's incapacity to part therewith. The court, in stating the law upon this subject, said: "The general rule is that an adjudication as to mental soundness is direct evidence of the fact at the time of the adjudication, and presumptive evidence of the condition of the subject at a subsequent time, upon the theory that a condition of mind once shown to exist is presumed to continue. It is not evidence of itself of the mental soundness of the subject at any time prior to the adjudication.

In the absence of independent evidence showing that the same condition of mind existed at the prior time as at the time of the adjudication, and had been continued in the meantime, it is not admissible at all in a controversy as to such condition at such prior time. That is the state of the law as laid down in previous adjudications of this court, and no reason is perceived for departing from it. Such is the law also according to standard text-writers and courts generally." *Small v. Champeny* (1899) 102 Wis. 61, 78 N. W. 407.

*b. Effect of remoteness of adjudication.*

The question whether evidence tending to show the insanity of a testator is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court. No general rule can be given on the subject. Each case must depend upon its particular circumstances. Where the evidence tends to show that the insanity developed early in life and was of a fixed and permanent character, the period during which the insanity may be shown is of necessity greatly extended. Its persistent character can best be shown by proof of its existence during a long period of time, and evidence thereof is properly admissible in such cases. Hence, evidence of various adjudications of insanity, the earliest of which was more than fifty years before the death of the testator, is not necessarily too remote. *Re Baker* (1917) 176 Cal. 430, 168 Pac. 881.

In *People v. Farrell* (1867) 31 Cal. 576, it is said: "No rule can fix with precision the limits of time within which evidence of subsequent insanity on the score of competency shall be received and beyond which it shall be rejected. . . . Where the insanity sought to be proved is of a temporary character or interrupted by lucid intervals, which is apt to be the case where it results from personal injuries acted upon by casual and exciting causes, a wider range on the score of time should be allowed to the testimony than in cases where the insanity is of a more continuous and permanent character, and therefore its periods of commencement and ter-

mination more clearly defined and readily ascertained. But from the nature of the case no fixed rules as to the period of time over which an inquiry of this character should be extended can be established, and hence the particular conditions of each case must be allowed to fix the limits. To allow a wide range is certainly in keeping with the humanity of the law, which always prefers the escape of the guilty to the punishment of the innocent."

While large latitude should be allowed in determining the admissibility of an adjudication of insanity, and while there is no agreed limit of time within which the prior or subsequent condition is to be considered, the circumstances of each case, in the very nature of things, ought to control, and the discretion of the trial judge, though reviewable for abuse, ought to have weight. *Taylor v. Taylor* (1910) 174 Ind. 670, 93 N. E. 9.

Where one brings an action to recover money paid under a contract, on the ground that at the time of the making of the contract he was insane, evidence that, at a point of time four years or more subsequent to the time of the making of the contract, he was adjudged insane by the board of insanity, is inadmissible and incompetent, and too remote to prove his mental condition at the time of the making of the contract. *WESTERLAND v. FIRST NAT. BANK* (reported herewith) ante, 562.

Proceedings for the appointment of a guardian over the testatrix two years after the date of the will are properly excluded in a will contest. *Re Harvey* (1903) — Iowa, —, 94 N. W. 559.

The record of a proceeding in lunacy by which it appears that a person was found by a jury, and adjudged by the probate court, to be of unsound mind, and confined in an asylum for the insane, but subsequently discharged therefrom "not restored to his right mind," is receivable in evidence on the issue of insanity raised by the person, in defense to an information for crime alleged to have been committed by him between seven

and eight years after the inquisition of lunacy. *State v. McMurtry* (1899) 61 Kan. 87, 58 Pac. 961. In this case the court said: "The time intermediate the adjudication in the probate court and the date of the commission of the alleged offense was considerable, it is true, but the general rule is that a condition of insanity, if shown to exist, is presumed to continue. This presumption is, of course, a disputable one, and evidence of the actual condition of mind at any particular subsequent time is properly receivable; but on the question of sanity the record of a proceeding in lunacy is properly receivable for the purpose of proof of an insane state of mind at a particular time in question, and thereby to give rise to the presumption of its continuance from that date. We know of no subsequent time at which this presumption ceases. The lapse of much time, during which the patient has not been confined for his malady or known as a fact to be insane, may so materially weaken the presumption as practically to neutralize it, but nevertheless an accused person who alleges his insanity as an excuse for his act is entitled to introduce in his behalf all the admissible evidence he can command."

A judgment in proceedings for the appointment of a guardian of an incompetent person, rendered two months after the making of a will, cannot be said to be so remote that its exclusion does not constitute prejudicial error. Whether it is too remote is largely for the trial court to determine. *McAllister v. Rowland* (1913) 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006.

An order in guardianship proceedings, purporting to be an adjudication of the mental incapacity of the ward many years before the application for appointment of a guardian was made, is not admissible as evidence of his incapacity to make a prior settlement on a note to him, or of such unsoundness of mind as to prevent the running against him of the Statute of Limitations. *Burnham v. Mitchell* (1874) 34 Wis. 117.

It was held in *Giles v. Hodge* (1889)

74 Wis. 360, 43 N. W. 163, that an inquisition of lunacy was admissible in an action to set aside a prior deed of the lunatic, as evidence of his incapacity to execute such deed. The court distinguished the preceding case upon the ground that in that case the adjudication was offered to prove the mental incapacity of the lunatic reaching back thirty years before the adjudication, while in this case the petition was filed the next day after the deed was executed, and the adjudication was of the time when the petition was filed. The court said: "It is no doubt the general principle that the adjudication cannot relate back to a prior time as evidence of incapacity, and so, too, as to the future also, except by the presumption that it continued. . . . But when it is shown that the mental incapacity and condition had been the same for a considerable time, and was the same at the date of the act to be affected by it as when adjudication was had, the adjudication is none the less competent. . . . In a case where the mental weakness and incapacity are the concomitants of old age, and have been gradual and continuous for a considerable time, and not the result of any recent or intervening cause, but of gradual and natural decay, such evidence is competent to show that the conditions had not changed, but were the same as when the adjudication was had; and the adjudication itself is admissible as the foundation of such an inquiry."

In *Sergeson v. Sealey* (1742) 2 Atk. 412, 26 Eng. Reprint, 648, 9 Mod. 370, 88 Eng. Reprint, 513, an action to set aside a purchase of real estate by an alleged lunatic within the period overreached by the finding of an inquisition, the chancellor, in answer to an objection to the competency of the inquisition, because it was offered as evidence to affect the right of a third person, and because it had a retrospect of eight years, said that inquisitions of lunacy are always admissible, but that the inquisition was not conclusive even as to the point of time when taken, much less as to the retrospect of eight years.

#### *c. Effect of character of proceeding.*

##### *1. Commitment to insane asylum.*

The distinction between an adjudication of incompetency and the appointment of a guardian of an insane person, and an order made by the court for the commitment of a person to a state hospital for the insane as a fit subject for treatment and custody, is discussed in *Leggate v. Clark* (1873) 111 Mass. 308, as follows: "An inquisition of lunacy under the English system, and proceedings under our system to appoint a guardian of an insane person, are in the nature of proceedings in rem, and are designed to fix the status of the person proceeded against. Under our system careful provision is made for notice to the alleged insane person, and for a full hearing, and the decree fixes the status of the ward as an insane person, 'incapable of taking care of himself.' The statutes give the care and management of his person and estate to the guardian, and take from him the capacity to make contracts or to transfer his property. The necessary effect of the decree is that the ward is, in law, what the decree declares him to be,—incapable of taking care of himself, as to all the world. Otherwise, the object of the statute would be entirely defeated. Gen. Stat. chap. 109; *Chase v. Hathaway* (1817) 14 Mass. 222; *Leonard v. Leonard* (1838) 14 Pick. (Mass.) 280. But an order under the Statute of 1862, chap. 223, § 3, is not of this character. It does not pretend to declare the person committed to the hospital to be incapable of transacting business. It does not take from him the care and management of his estate. It affords a justification for the restraint of his person, but is not designed to fix his status."

This distinction is similarly brought out in *Dewey v. Allgire* (1893) 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276, where the record of proceedings under a statute, the sole object of which is to ascertain whether or not the person alleged to be insane is a fit subject for custody and treatment in the hospital for the insane, is held not admissible in evidence as tending to establish want of business capacity.



The proceedings in an examination by a commission as to the sanity of a certain person, for the purpose of determining whether she was a proper subject to be admitted for treatment to the hospital for the insane, are inadmissible as affecting the credibility of such person as a witness five years subsequently. *Hicks v. State* (1905) 165 Ind. 440, 75 N. E. 641.

The daily record of an accused while at a state hospital, kept as required by statute, is admissible on the trial of the issue of his sanity, under the familiar rule of evidence as to public records. *Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

In *Roe v. Nix*, L. R. [1893] P. 55, 68 L. T. N. S. (Eng.) 26, 62 L. J. Prob. N. S. 36, 1 Reports, 472, on proceedings to probate the will of one in an insane asylum after being found by inquisition to be a lunatic, the reports of the Lord Chancellor's visitors to the testatrix, although undoubtedly the best evidence extant as to the mental condition of the testatrix at the time of the execution of the will, were held inadmissible because of a statute requiring them to be kept secret, and because of the refusal of the Lords Justices to make an order permitting their contents to be divulged.

It was held in *Karnes v. Johnston* (1906) 58 W. Va. 595, 52 S. E. 658, that an order of a justice of the peace, finding that a person was insane, not committing him to a hospital for the insane, but leaving him freedom of person until the appointment of a committee, and then committing him to the custody of such committee, was not admissible as evidence of insanity in a proceeding before the county court to appoint a committee, on the ground that such finding was beyond the jurisdiction of the justice, under a statute limiting his jurisdiction to a finding of lunacy solely for the purpose of commitment to a hospital for the insane.

The commitment of one to an insane asylum is competent upon the question of his capacity to subsequently execute a will. *Mileham v. Montagne* (1910) 148 Iowa, 476, 125 N. W. 664; *Re Bar-*

*ney* (1918) 185 App. Div. 782, 174 N. Y. Supp. 242.

The commitment to, and confinement of one in, an insane asylum, is admissible on the issue of insanity, upon his prosecution for a crime. *McCully v. State* (1920) — Ark. —, 217 S. W. 453; *State v. McMurtry* (1899) 61 Kan. 87, 58 Pac. 961; *Wheeler v. State* (1877) 34 Ohio St. 394, 32 Am. Rep. 372; *Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

The transfer of a convict from the penitentiary to a lunatic asylum, under a statute authorizing the removal of an insane prisoner, is a circumstance to be considered with other evidence bearing on the question of such person's insanity. *Langdon v. People* (1890) 138 Ill. 382, 24 N. E. 874.

In *Re Maas* (1900) 10 Okla. 302, 61 Pac. 1057, where a defendant convicted of murder was brought into court for judgment and sentence, and filed a motion in arrest of judgment, and, in support thereof, introduced in evidence an order of the county board of insanity, adjudging him to be insane, and the court overruled such motion and sentenced the defendant, it was held that the correctness of such ruling could not be inquired into on a writ of habeas corpus. The court said: "The fact that the county board of insanity may have adjudged him insane prior to the time fixed for his sentence, even if the order of such adjudication was admitted in evidence or considered by the trial court, would not necessarily control its action, because such order is not an adjudication or finding of any court, and is not admissible upon a trial to prove the insanity of such person. Such an order amounts to no more than the expression of an opinion by any other person or persons out of court as to the mental condition of a defendant's mind, except where the right of the officers of the asylum to confine and treat such person is called in question, or in other cases of a kindred character which fall within the spirit of the law authorizing such finding by the board of insanity."

The reports of the examining physicians in judicial proceedings, resulting

in the commitment to the hospital for the insane of one accused of crime, are admissible on the trial of the special issue of insanity. *Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

But it was held in *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124, that the certificates of the examining physicians, in a proceeding for the commitment of a person to a state asylum for the insane, were inadmissible to show the insanity of the defendant in a criminal prosecution, being purely hearsay evidence.

## 2. *Guardianship proceedings.*

Proceedings for the appointment of a guardian or conservator are admissible upon the question of the ward's mental condition, the court holding in *McAllister v. Rowland* (1913) 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006, that the fact that the application was not to have testatrix declared insane, but only to have a guardian appointed because of the impairment of her mental faculties by reason of old age, and the consequent inability to manage her affairs, did not render the adjudication inadmissible.

Such proceedings were held competent evidence of testamentary incapacity in *Re Loveland* (1912) 162 Cal. 595, 123 Pac. 801; *HOLLIDAY v. SHEPHERD* (reported herewith) ante, 558; *Spiers v. Hendershott* (1909) 142 Iowa, 446, 120 N. W. 1058; *Rice v. Rice* (1883) 50 Mich. 448, 15 N. W. 545.

An adjudication of habitual drunkenness is competent evidence of subsequent testamentary incapacity. *Lewis v. Jones* (1868) 50 Barb. (N. Y.) 645.

It was held in *Mulholland's Estate* (1907) 217 Pa. 65, 66 Atl. 150, that an adjudication of weakmindedness of a testatrix, followed by the appointment of a guardian, was, because of its entry shortly after the making of the will, proper evidence for consideration in a conflict over the will.

A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible evidence in any litigation, to prove the mental condition of the person at the time the

judgment is rendered, or at any past time during which the judgment finds the person incompetent. *McAllister v. Rowland* (Minn.) supra.

In *Herndon v. Vick* (1898) 18 Tex. Civ. App. 583, 45 S. W. 852, an action to try title to land claimed by an alleged lunatic through his father, it was held that the fact that a foreign adjudication of lunacy and appointment of a guardian, involving land, was rendered by a court which had no jurisdiction over the land in question, did not render such adjudication inadmissible as evidence of the lunatic's unsoundness of mind, so as to bring him within the exception of incompetent persons in the Statute of Limitations.

An order of the probate court that a person is, by reason of mental infirmity, incompetent to have the charge and management of his estate, and appointing a guardian, where it otherwise appears that the condition of such person was continuing from boyhood to death, is proper to be considered as evidence of his mental capacity subsequently to execute a deed, although it does not appear that letters of guardianship were issued. *Chase v. Spencer* (1907) 150 Mich. 99, 113 N. W. 578.

In *Cathcart v. Sugenhimer* (1882) 18 S. C. 123, an action by a lunatic, after an adjudication superseding the commission of lunacy, to recover from the purchaser land sold by the plaintiff's committee to pay his debts, in proceedings alleging the lunacy of the plaintiff and the appointment of a committee for his person and estate, it was held that the record of such proceedings was admissible, though as to the lunatic *res inter alios acta* because he was not made a party, to show that he had been declared a lunatic, and that the court had ordered a sale of the land.

But it was held not error, in a proceeding to determine the validity of a will, to exclude from the consideration of the jury a court record showing that two or three years after the execution of the will a conservator was appointed over the estate of the testator, since, conceding that the ap-

pointment of the conservator was proper, it did not follow that the testator did not possess testamentary capacity to make a will. *Entwistle v. Meikle* (1899) 180 Ill. 9, 54 N. E. 217.

In *Re Harvey* (1908) — Iowa, —, 94 N. W. 559, subsequent proceedings for the appointment of a guardian over a testatrix were held properly excluded, apparently because too remote.

A verdict and judgment finding one mentally incompetent to manage his estate by reason of infirmity and age, and appointing a committee for him, are not competent evidence upon the question whether he had testamentary capacity six months previously. *Watson v. Watson* (1910) 137 Ky. 25, 121 S. W. 626.

*Re Pinney* (1880) 27 Minn. 280, 6 N. W. 791, 7 N. W. 144, holding that the record of the probate court, on an application to appoint a guardian for a person whose incapacity was due to the gradual decay of his mental faculties from great age, is properly excluded in determining his competency to make a will, was overruled in *McAllister v. Rowland* (1913) 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1606.

In *Schindler v. Parzoo* (1908) 52 Or. 452, 97 Pac. 755, the court said: "There can be no doubt, however, of the general principle that the adjudication by itself cannot relate to a prior time as evidence of incapacity, . . . but when it is shown that the mental condition of the ward had been the same for a considerable length of time, and was the same at the time of the act to be affected by it as when the adjudication was had, the adjudication is competent evidence of previous insanity. . . . And in a case where mental weakness and incapacity are the concomitants of old age, and have been gradual and continuous for a considerable time, and not the result of any recent or intervening cause, but of gradual and natural decay, such evidence is competent to show that the conditions have not changed, but are the same as when the adjudication was had."

In *Carter v. Gahagan* (1918) 102 Neb. 404, 167 N. W. 412, where the

proceedings for the appointment of a guardian for the testatrix were a nullity because instituted in the wrong county, it was held that the record of those proceedings should have been excluded, as the facts and circumstances surrounding the appointment afforded no reasonable ground for inferring an admission on the part of testatrix that she was in need of a guardian to manage her business.

### *3. Proceedings to determine sanity of prisoners awaiting trial.*

A finding of a jury, impaneled to try the question of sanity of one in custody on a criminal charge, that such person is insane, is competent evidence, on his being brought to trial, upon the question whether he was insane at the time of the commission of the supposed offense. *People v. Farrell* (1867) 31 Cal. 576.

And in *Bond v. State* (1913) 129 Tenn. 75, 165 S. W. 229, the court held admissible, on the question of the mental condition of the accused at the time of the offense, a verdict of the jury, on the accused being put to trial on his plea of present insanity, to the effect that he was then insane and incapable of defending the charge against him.

Proceedings in which one was adjudged insane, had on the day after the homicide, and based upon the provisions of a statute providing that it shall not apply to persons charged with criminal offenses and who plead insanity, are properly excluded from evidence upon the trial for homicide of the person adjudged to be insane, in which insanity was relied upon as a defense. *Davis v. State* (1902) 44 Fla. 32, 32 So. 822; *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40.

### *4. Miscellaneous.*

It was held in *Davis v. Davis* (1910) 24 S. D. 474, 124 N. W. 715, that an adjudication that the grantor was insane, in an action in another state by the grantor's heir to cancel the deed, was admissible in a subsequent action between the same parties to cancel a subsequent deed to other property by the alleged lunatic to the same grantee, as evidence of the mental condi-

tion of the alleged lunatic at the time of the execution of the prior deed.

*d. As against persons not parties or privies to, or without notice of, lunacy proceedings.*

Most of the cases which hold an adjudication of insanity or incompetency admissible on the issue of mental condition in a collateral action or proceeding assume without discussion that its admissibility is not dependent upon the party against whom it is offered having been a party or privy in the proceeding in which the adjudication was made. Some of the cases, however, discuss the point, and a few have rejected the adjudication on the ground that it was *res inter alios*.

The principle of the admissibility of an inquest against strangers seems to be that it is a public proceeding, had under public authority, and in which the public are interested, and that therefore, all persons being to some extent interested and represented in the proceedings, all should in some degree be bound by it. *Hopson v. Boyd* (1845) 6 B. Mon. (Ky.) 296.

An inquisition of lunacy is admissible upon the question of the lunatic's competency to testify, although his testimony is offered against one who was not a party to the proceedings in lunacy. *Hoyt v. Adees* (1870) 3 Lans. (N. Y.) 173.

In *State v. McMurtry* (1899) 61 Kan. 87, 58 Pac. 961, holding admissible the record of a proceeding in lunacy on the issue of insanity in a criminal prosecution, the court said: "Ordinarily, the judgment of a court is not receivable in a controversy to which a stranger to the judgment is a party, except merely to prove its existence and effect. . . . An exception, however, is made in the case of judgments in rem, declaring the status of persons or things. These are adjudications to which, in a sense, the whole world is a party."

And in *Osterhout v. Shoemaker* (1842) 3 Hill (N. Y.) 518, where it was unnecessary to pass upon the admissibility of an inquisition because, after its admission in evidence, it was withdrawn with the assent of the de-

fendant, the court said: "I see no principle upon which the inquisition taken on a commission of lunacy can be given in evidence to defeat the title of third persons who were strangers to the proceeding, and had no opportunity to offer or cross-examine witnesses. But it seems to be settled that such evidence is admissible, though not conclusive."

But it was held, in an action to annul a deed on the ground of the mental incapacity of the grantor, that the record of the lunacy proceedings by which the grantor was committed to the insane asylum several years before he made the deed was properly rejected as *res inter alios acta*, such proceedings being purely *ex parte*, and hence not binding upon the grantor nor upon his later privies in estate. *Frederic v. Wilkins* (1913) 182 Ala. 343, 62 So. 518.

An inquisition of lunacy found five years subsequent to the date of the will is, where the record does not disclose that the propounders of the will were parties or privies to that proceeding, *res inter alios acta*, and hence inadmissible. *Terry v. Buffington* (1852) 11 Ga. 337, 56 Am. Dec. 423.

The record of the appointment of a guardian, made nearly a year after the date of a deed, is not admissible as bearing on the question whether the grantor was of sound mind, at the time of its execution, such proceeding being *res inter alios*. *Hovey v. Chase* (1863) 52 Me. 304, 83 Am. Dec. 514.

In *Rhoades v. Fuller* (1907) 139 Mo. 179, 40 N. W. 760, the court gave, as one of the reasons for holding an adjudication of the insanity of the grantor inadmissible in an action to set aside a deed, that the defendant was not a party to the inquisition, had no connection with it, and that his rights previously acquired could in no possible way be affected thereby.

And in *Sprinkle v. Wellborn* (1905) 140 N. C. 163, 3 L.R.A. (N.S.) 174, 111 Am. St. Rep. 827, 52 S. E. 666, where an objection to the admission of an inquisition of lunacy was held untenable, because it was received only for the consideration of the court in order to decide upon the competency of

a witness, the court stated that the inquisition was, of course, inadmissible, for the reason, among others, that the lunacy proceedings were *ex parte*.

*e. Invalid adjudications.*

The adjudication is generally held inadmissible if the proceeding in which it was made was void, regardless of the nature of the defect which rendered the proceeding void.

The decree of a court of probate granting letters of guardianship of one as non compos mentis was held inadmissible, because void, in *Wait v. Maxwell* (1827) 5 Pick. (Mass.) 217, 16 Am. Dec. 391.

Where a proceeding to secure the appointment of a committee for an alleged incompetent is void on its face, it will be presumed that such person is competent. *Hanson v. Hanson* (1916) 148 C. C. A. 451, 234 Fed. 853.

In an action by one claiming title to property under a bill of sale, in which the defense was that at the date of the execution of the instrument the grantor was non compos mentis, an inquisition had by order of the court to ascertain the competency of such individual, of the pendency of which he had no notice, was improperly admitted in evidence. *McCurry v. Hooper* (1848) 12 Ala. 823, 46 Am. Dec. 280.

An adjudication of insanity in a proceeding, the hearing in which was had twenty-four hours before the time fixed in the order, is void for want of jurisdiction, and is, therefore, inadmissible in a subsequent proceeding to have a guardian appointed of the person and property of the alleged insane person. *Re Phillips* (1890) 158 Mich. 155, 122 N. W. 554.

A judgment of insanity without notice to the person adjudged insane, and without appearance, is not competent evidence to show that the purported maker of a deed was, at the date thereof, insane and in ward, such judgment being absolutely void. *Hunt v. Searcy* (1902) 167 Mo. 158, 67 S. W. 206.

The portion of an inquisition finding prior insanity is not admissible on the question of the lunatic's prior testamentary capacity, since the Code ex-

pressly limits and confines the inquiry as to competency to the time of the hearing. *Re Preston* (1906) 113 App. Div. 732, 99 N. Y. Supp. 312.

In *Carter v. Gahagan* (1918) 102 Neb. 404, 167 N. W. 412, the admission in a will contest of the record of a guardianship proceeding, which was a nullity because held in a county other than that in which the alleged incompetent resided, was held prejudicial error, the surrounding facts and circumstances affording no reasonable ground for inferring an admission on the part of the testatrix that she needed a guardian to manage her business.

And in *Karnes v. Johnston* (1906) 58 W. Va. 595, 52 S. E. 658, it was held that an order of a justice of the peace finding that a person was insane, but not committing him to a hospital for the insane, but committing him to the custody of a committee to be appointed, was inadmissible in a proceeding for the appointment of a committee before the county court, for the reason that such finding of the justice was beyond his jurisdiction, which was limited by statute to a finding of lunacy solely for the purpose of commitment to a hospital for the insane.

But in *Herndon v. Vick* (1898) 18 Tex. Civ. App. 583, 45 S. W. 852, it was held that the fact that a foreign adjudication of lunacy, involving land, was rendered by a court which had no jurisdiction over the land in question, did not render such adjudication inadmissible as evidence of the lunatic's unsoundness of mind, so as to bring him within the exception of incompetent persons in the Statute of Limitations.

In *Arrington v. Short* (1824) 10 N. C. (3 Hawks) 71, an action on the bond of one previously adjudged to be a lunatic, the trial court, upon objection to the introduction in evidence of the inquisition of lunacy on the ground of invalidity, permitted the lunacy proceedings to be read subject to such remarks as he might make thereon in instructing the jury, and, after explaining in his charge what the law intended by the reason and understanding sufficient to contract,

remarked on the proceedings that, if regular, they would be but *prima facie* evidence of defendant's incapacity, but that here they were irregularly taken and void as an inquisition, though the jury might give to them the same weight which they would to the opinion of any twelve respectable men. The appellate court, on granting a new trial, said: "It seems to me that the court erred in stating to the jury that the paper writing purporting to be an inquest of lunacy was not, and ought not to be, considered in the light of an inquest. I think it was too late to question it; it had been received by the county court as such; they had proceeded to appoint a guardian in consequence of it; and the proceedings show that that guardian had been, by the plaintiff himself, made a party to this suit. It is true, the writing or inquest was read to the jury; but its effects might have been weakened by stating to them that it was only the opinion of twelve honest men, but not such evidence as a lawful inquest would be. Although received as an inquest, it would not be conclusive evidence; yet it ought to have been given to them in that character."

*f. Incapacity to contract.*

*1. Conveyances.*

An adjudication of insanity is admissible upon the question of the lunatic's capacity to execute a deed. *Nichol v. Thomas* (1876) 53 Ind. 42; *Yauger v. Skinner* (1862) 14 N. J. Eq. 389; *Van Deusen v. Sweet* (1873) 51 N. Y. 378; *Hutchinson v. Sandt* (1833) 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *Rogers v. Walker* (1847) 6 Pa. 371, 47 Am. Dec. 470; *Davis v. Davis* (1910) 24 S. D. 474, 124 N. W. 715; *Giles v. Hodge* (1889) 74 Wis. 860, 43 N. W. 163.

There is a dictum to the same effect in *Osterhout v. Shoemaker* (1842) 3 Hill (N. Y.) 513.

In *Hall v. Warren* (1804) 9 Ves. Jr. (Eng.) 605, 32 Eng. Reprint, 738, 7 Revised Rep. 306, an inquisition of lunacy was held admissible on a bill for the specific performance of a land contract.

In *Mitchell v. Inman* (1913) — Tex. Civ. App. —, 156 S. W. 290, an action to cancel a deed on the ground of the grantor's insanity, an adjudication of lunacy was admitted to evidence over an objection limited to the validity of the adjudication.

A prior adjudication of lunacy is admissible to show the plaintiff's lunacy in an action by him for conversion of his property by his landlord, who bought in such property on a sale under a distress warrant, in satisfaction of rent. *M'Creight v. Aiken* (1838) 24 S. C. L. (Rice) 56.

In *Rider v. Miller* (1881) 86 N. Y. 507, an action to set aside a deed on the ground that the grantor was at the time non compos mentis, it was held that an inquisition of lunacy was competent evidence that at the time it was taken the grantor was not competent, and that to this extent and no more it was material, and whatever inference was to be derived therefrom prior to that time was a subject for consideration by the trial court.

In *Frederic v. Wilkins* (1913) 182 Ala. 343, 62 So. 518, the record of lunacy proceedings by which a grantor was committed to an insane asylum before he made the deed was held properly rejected as *res inter alios acta*.

And, for the same reason, the record of the appointment of a guardian was held in *Hovey v. Chase* (1863) 52 Me. 304, 83 Am. Dec. 514, inadmissible on the question of the ward's capacity to execute a deed.

In an action involving the validity of the deed made by a married woman, in which her husband joined, the alleged ground of its invalidity being that the husband was insane at the time, an order of the judge of probate committing the husband to the insane hospital is not admissible as evidence of his insanity, the question before the judge of probate being whether the husband was a proper subject for treatment or custody, while the issue before the jury was whether the husband was of sufficient mental capacity to give an intelligent consent to his wife's conveyance. *Leggate v. Clark* (1873) 111 Mass. 308.

And in *Dewey v. Allgire* (1893) 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276, the record of statutory proceedings to determine whether a person was a fit subject for treatment in a hospital for the insane was held inadmissible on the question of his insanity at the time of the prior execution of a deed.

An adjudication of lunacy was held, in an action to set aside a deed of the lunatic, to be inadmissible because rendered subsequently to the execution of the deed. *Uecker v. Zuercher* (1909) 54 Tex. Civ. App. 289, 118 S. W. 149; *Rowan v. Hodges* (1915) — Tex. Civ. App. —, 175 S. W. 847.

An inquisition, because void, was held, in *McCurry v. Hooper* (1848) 12 Ala. 823, 46 Am. Dec. 280, to have been improperly admitted in evidence on the question of the lunatic's capacity to execute a bill of sale.

And, in *Hunt v. Searcy* (1902) 167 Mo. 158, 67 S. W. 206, to be inadmissible for the same reason, on the question of the lunatic's competency to execute a deed.

In *Wait v. Maxwell* (1827) 5 Pick. (Mass.) 217, 16 Am. Dec. 391, the court held that the decree of a court of probate granting letters of guardianship of one non compos mentis was not admissible, because void, upon the question of her capacity to subsequently execute a deed.

### *B. Bills and notes.*

An inquisition is admissible in an action on a note executed by the maker within the period during which he was found to have been a lunatic. *Willis v. Willis* (1849) 12 Pa. 159.

In *Stitzel v. Farley* (1909) 148 Ill. App. 635, where the maker of a note, adjudged insane but a few years before the making of the note, was released from the insane asylum and had been without a conservator until shortly after the making of the note, when a new conservator was appointed, it was held, in an action on the note, that it was a question of fact to be found by the jury from all the evidence, whether the maker was or was not of sound mind at the time of the execution of the note.

In an action upon a note by the administrator of the payee, defended upon the ground of a settlement, a subsequent order for the appointment of a guardian of the payee was held admissible in evidence as to his mental condition at the time of the entry of such order, but not as to his condition at the time of the making of the settlement. *Burnham v. Mitchell* (1874) 34 Wis. 117.

An inquisition, because made after the alleged lunatic parted with the notes in question, was held inadmissible in an action of replevin by his guardian to recover them. *Small v. Champeny* (1899) 102 Wis. 61, 78 N. W. 407.

Since, on a trial of a scire facias to revive a judgment, the original judgment is not open to attack for any cause, an inquisition of lunacy is not admissible as evidence of the defendant's incapacity to execute the note on which the original judgment was rendered. *Henry v. Brothers* (1864) 48 Pa. 70.

### *C. Miscellaneous.*

An inquisition is admissible, in an action of debt on a bond, on the question of the obligor's incompetency to execute such bond. *Hart v. Deamer* (1831) 6 Wend. (N. Y.) 497; *Faulder v. Silk* (1811) 3 Campb. (Eng.) 126, 18 Revised Rep. 771.

An adjudication finding one who has made agreements for legal services to have been a lunatic before the agreements were made is admissible in an action upon such agreements. *Goodell v. Harrington* (1874) 3 Thomp. & C. (N. Y.) 345.

In *Pearl v. M'Dowell* (1830) 3 J. J. Marsh. (Ky.) 653, 20 Am. Dec. 199, an action of assumpsit for medical services to an alleged lunatic, it was held that the fact that the one to whom the services were rendered was a lunatic at the time of the supposed assumpsit, so found before that time by a regular inquisition, was admissible and a complete bar to the action.

And in *Portsmouth v. Portsmouth* (1828) 1 Hagg. Eccl. Rep. 355, 162 Eng. Reprint, 611, an inquisition was held admissible, in a suit to annul a

marriage solemnized within the period of the finding of insanity.

*g. Testamentary incapacity.*

An adjudication of insanity is competent evidence of the mental condition of the testator at the execution of a will. *Re Baker* (1917) 176 Cal. 430, 168 Pac. 881.

The record of an inquisition de lunatico inquirendo is admissible on the trial of an issue devisavit vel non, but such portion of the order of adjudication as instructed the committee appointed, as to the scope of his duties, is incompetent. *Kerr v. Lunsford* (1888) 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493.

In determining the question of capacity of a testator to make an alteration in his will, an inquisition of lunacy finding him to have been a lunatic, without lucid intervals, from a period of about seventeen months prior to his death, is admissible. *Hawkins v. Grimes* (1852) 13 B. Mon. (Ky.) 257.

In *Van Guysling v. Van Kuren* (1866) 35 N. Y. 70, upholding the probate of a will, an inquisition eight months after the date of the will, finding the testator to have been insane five months prior to the inquisition, was apparently admitted in evidence.

An adjudication of weakmindedness was held in *Mulholland's Estate* (1907) 217 Pa. 65, 66 Atl. 150, to be competent, because of its entry shortly after the making of the will.

The commitment of a person to an insane asylum is admissible in evidence as bearing on the question of his capacity to make a subsequent will. *Mileham v. Montagne* (1910) 148 Iowa, 476, 125 N. W. 664; *Re Barney* (1919) 185 App. Div. 782, 174 N. Y. Supp. 242.

In *Re Smith* (1913) 163 N. C. 464, 79 S. E. 977, the contest of a will on the ground of testamentary incapacity, the court held that it could not consider on appeal an exception to the refusal of the trial judge to receive in evidence a record in a proceeding said to have involved the sanity of the testator, because the appellate court was not informed as to its contents so that it could see its relevancy, and

give an intelligent opinion as to the validity of the exception.

The exclusion, in a suit to set aside the probate of a will on the ground of the testatrix's mental incapacity, of the record of an adjudication that the testatrix was of unsound mind and incapable of managing her estate, rendered five years after the making of the will, is not erroneous where there was direct evidence of the mental capacity of the testatrix when the will was executed. *Taylor v. Taylor* (1910) 174 Ind. 670, 93 N. E. 9.

In *Terry v. Buffington* (1852) 11 Ga. 337, 56 Am. Dec. 423, an inquisition of lunacy was held inadmissible because the propounders of the will were not parties or privies to the lunacy proceeding.

And in *Watson v. Watson* (1910) 137 Ky. 25, 121 S. W. 626, a judgment finding one mentally incompetent to manage his estate by reason of infirmity and age was held incompetent, on the issue of his testamentary capacity six months previously.

In *Re Preston* (1906) 113 App. Div. 782, 99 N. Y. Supp. 312, the portion of an inquisition finding prior insanity was held inadmissible on the issue of the capacity of the lunatic to execute a prior will, on the ground that the Code of Civil Procedure expressly limited the inquiry in lunacy proceedings to the mental condition of the alleged lunatic at the time of the hearing.

But in *Dominick v. Dominick* (1887) 20 Abb. N. C. (N. Y.) 286, where such Code provision was made the ground of objection to the admission of a subsequent inquisition, in an action involving the capacity of a testatrix to destroy her will, it was held that the submission of the inquisition to the jury without any remark as to its effect was not open to such objection, especially where no instructions were requested as to the effect of such evidence.

Proof of the appointment of a conservator for the testator about a month before the will was made, on the verdict of a jury finding him insane, is admissible as bearing on the question of his capacity to make a



will. *HOLLIDAY v. SHEPHERD* (reported herewith) ante, 558.

The subsequent appointment of a guardian of a testatrix is proper for the consideration of the jury, on the question of her mental condition at the time the will was made. *Spiers v. Hendershott* (1909) 142 Iowa, 446, 120 N. W. 1058.

Proof of the appointment of a guardian for a person, as incompetent to manage his own affairs, is admissible in evidence on the question of his testamentary capacity. *Rice v. Rice* (1883) 50 Mich. 448, 15 N. W. 545.

An adjudication of incompetency in guardianship proceedings, only a few days after the execution of a will by the alleged incompetent, while not fixing the status of the person affected as incompetent to make a will on a date prior to that of the adjudication, is evidence proper to be considered on the issue of want of testamentary capacity at the time of the appointment of the guardian; and where there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, the appointment, although later in time, is admissible on the issue of capacity when the act was done. *Re Loveland* (1912) 162 Cal. 595, 123 Pac. 801.

Whether a judgment in proceedings for the appointment of a guardian of an incompetent person, instituted after a will was made, which did not find the testator incompetent at such prior time, should be admitted on the question of his testamentary capacity, depends on its probative value as tending to prove the fact at issue. It stands on the same basis as would other evidence of the mental condition of the testator at a subsequent time. Whether it has probative value is largely for the trial court to determine. *McAllister v. Rowland* (1913) 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006.

But it was held in *Re Harvey* (1903) — Iowa, —, 94 N. W. 559, that proceedings for the appointment of a guardian over the testatrix, two years

after the date of the will, were properly excluded in a will contest.

The exclusion of the record of the subsequent appointment of a conservator was held not error in *Entwistle v. Meikle* (1899) 180 Ill. 9, 54 N. E. 217, on the ground that, conceding that the appointment was proper, it did not follow that the testator did not possess testamentary capacity.

The record of the appointment of a guardian for a testator because of the gradual decay of his mental faculties from great age was held to have been properly excluded in *Re Pinney* (1880) 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. This case was, however, overruled in *McAllister v. Rowland* (Minn.) supra.

In *Carter v. Gahagan* (1918) 102 Neb. 404, 167 N. W. 412, it was held that the record of guardianship proceedings should be excluded, where the evidence shows that the circumstances surrounding the appointment of the guardian for the testatrix afford no reasonable doubt for inferring an admission by her that she was in need of a guardian.

In *Roe v. Nix* L. R. [1898] P. (Eng.) 55, 68 L. T. N. S. 26, 62 L. J. Prob. N. S. 36, 1 Reports, 472, the reports of the chancellor's visitors to a testatrix in an insane asylum, which the court considered to be the best evidence extant as to her testamentary capacity, were rejected by him because of the refusal of the Lords Justices to permit their use in evidence, since by statute they were required to be kept secret, and to be destroyed upon the inmate's death.

#### *h. Criminal irresponsibility.*

A verdict upon a lunacy inquest is competent evidence upon a trial of the incompetent for the commission of a crime either before or after the inquest. *Davidson v. Com.* (1916) 171 Ky. 488, 188 S. W. 631.

The same holding is made in *McCully v. State* (1920) — Ark. —, 217 S. W. 453, as to the record of a probate court showing commitment to an insane asylum.

A prior adjudication of insanity and commitment to an insane asylum are admissible on the trial of the issue of

insanity in a prosecution for crime. — *State v. McMurry* (1899) 61 Kan. 87, 58 Pac. 961 (arson); *Wheeler v. State* (1878) 34 Ohio St. 394, 32 Am. Rep. 372 (burglary and larceny); *Hemp-ton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657 (homicide).

In *Bond v. State* (1913) 129 Tenn. 75, 165 S. W. 229, a prosecution for obtaining money by false pretenses, it was held that a subsequent inquisition whose finding of lunacy overreached the time of the commission of the crime was admissible, as was also the verdict of the jury, on the accused being put to trial on his plea of present insanity, that he was then insane and incapable of defending the charge against him.

An inquisition of lunacy, held at the same term of court at which the trial of a person on a criminal charge occurs, is admissible in support of his defense that he was of unsound mind at the time of committing the crime charged. *Smedley v. Com.* (1910) 139 Ky. 767, 127 S. W. 485.

A finding of insanity by a jury impaneled to try the question of sanity of one in custody on a criminal charge is competent evidence on his subsequent trial. *People v. Farrell* (1867) 31 Cal. 576.

In *Cooper v. State* (1913) 71 Tex. Crim. Rep. 489, 160 S. W. 382, a prosecution for bigamy, a prior adjudication of lunacy was admitted without objection, the court refusing, which was held proper, to permit the accused to introduce a certified copy of the evidence in the lunacy proceeding.

An inquisition of lunacy was received in evidence in *Rex v. Bowler* (1812; Eng.) 1 Starkie, Ev. 7th Am. ed. 309, vol. 2, p. 1277, note, on a prosecution for shooting at and wounding another, with a blunderbuss.

It was held in *State v. Glindemann* (1904) 34 Wash. 221, 101 Am. St. Rep. 1001, 75 Pac. 800, a prosecution for incest, that the exclusion of the appointment of a guardian for the accused was not reversible error, where the actual adjudication of his insanity preceding the guardianship proceeding was in evidence.

Proceedings in which one charged with homicide was adjudged insane, based on a statute providing that it shall not apply to persons charged with criminal offenses and who plead insanity, are properly excluded on his trial. *Davis v. State* (1902) 44 Fla. 32, 32 So. 822; *Johnson v. State* (1909) 57 Fla. 18, 49 So. 40.

In *Re Maas* (1900) 10 Okla. 302, 61 Pac. 1057, it was held that an order of a county board of insanity adjudging a murderer to be insane had no bearing upon his legal mental status, the effect of such an order being to admit one to the territorial asylum for treatment; and that such an order was not entitled to the faith and credit of a judgment of a court, as the members of such board did not act as judicial officers, but as a special board clothed with special powers only.

And in *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124, the certificates of the examining physicians in a proceeding for the commitment of a person to a state asylum were held inadmissible, because hearsay, to show the insanity of the defendant in a criminal prosecution.

#### *4. Mental unfitness for trial.*

The verdict of a jury which was called at a previous term of the court to inquire into the sanity of a prisoner, for the purpose of determining whether his trial ought to proceed at that term or be postponed, may be received in evidence at a subsequent term, for the purpose of showing that the defendant was still insane, and therefore that his trial ought to be further postponed. *People v. Farrell* (1867) 31 Cal. 576.

In *Reeves v. State* (1914) 186 Ala. 14, 65 So. 160, where it was suggested to the court that the defendant was insane and therefore ought not to be placed on trial, and the defendant, on this issue, seemed to rely solely on an order committing him to the state asylum for the insane, it was held that the court properly submitted the issue to the jury.

And in *Bond v. State* (1913) 129 Tenn. 75, 165 S. W. 229, it was held that the verdict of the jury, on the

accused being put to trial on his plea of present insanity, that he was then insane and incapable of defending the charge against him, was admissible on his subsequent trial.

*j. Disqualification as witness.*

An inquisition of lunacy is admissible on the issue of the lunatic's competency to testify. *Hoyt v. Adees* (1870) 3 Lans. (N. Y.) 173.

And in *Barker v. Washburn* (1911) 200 N. Y. 280, 34 L.R.A. (N.S.) 159, 140 Am. St. Rep. 640, 93 N. E. 958, an inquisition was admitted in evidence on such issue, apparently without objection, the holding being as to its effect.

But in *Hicks v. State* (1905) 165 Ind. 440, 75 N. E. 641, it was held that the proceedings in an examination by a commission as to a person's sanity, to determine whether he should be sent to a hospital for the insane, were inadmissible as affecting his credibility as a witness five years subsequently.

*k. Miscellaneous.*

An adjudication of insanity is admissible as tending to establish the extent of personal injuries sustained. *Donnelly v. Chicago City R. Co.* (1911) 163 Ill. App. 7.

An inquisition of lunacy is properly admitted in an action for divorce on the alleged ground of desertion, to show the insanity of the defendant during a part of the period of desertion. *Blandy v. Blandy* (1902) 20 App. D. C. 535.

An adjudication of lunacy is admissible in an action on a bond of the committee by his successor, to recover a balance of the lunatic's estate in the hands of the first committee. *Com. use of Beatty v. Patterson* (1900) 13 Pa. Super. Ct. 136.

*II. Probative force.*

*a. In general.*

An adjudication of insanity is conclusive evidence of the lunatic's mental condition at the time of such adjudication. *Avery v. Avery* (1919) — Cal. App. —, 183 Pac. 453; *Lucas v. Parsons* (1857) 28 Ga. 267; *Clark v. Trail* (1858) 1 Met. (Ky.) 35; *Andrews v. Andrews* (1905) 120 Ky. 718, 87 S. W.

1080, 90 S. W. 581; *Johnson v. Mitchell* (1912) 146 Ky. 382, 142 S. W. 675; *Wathens v. Skaggs* (1914) 161 Ky. 600, 171 S. W. 198; *Rahh v. Smith* (1918) 180 Ky. 326, 202 S. W. 501; *Southern Tier Masonic Relief Asso. v. Laudenbach* (1889) 5 N. Y. Supp. 901; *Johnston v. Given* (1884) 4 Walk. (Pa.) 341; *Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

But it was held in *Hill v. Day* (1881) 34 N. J. Eq. 150, and *Mott v. Mott* (1891) 49 N. J. Eq. 192, 22 Atl. 997, that a subsequent inquisition, finding the lunatic to have been insane from a time prior to the conveyance by him in question, was not, as to the other party thereto, conclusive even as to the point of time when taken.

And in *Rider v. Miller* (1881) 86 N. Y. 507, the court said: "The inquisition of lunacy was also competent and prima facie evidence that at the time it was taken the grantor was not competent. To this extent, and no more, it was material, and whatever inference is to be derived therefrom prior to that time was a subject for consideration by the trial court."

*1. Prior adjudication.*

There is a conflict of authority on the question whether an adjudication of insanity or incompetency resulting in the appointment of a guardian or committee is conclusive, or only prima facie, evidence of subsequent incapacity to contract. In some jurisdictions it is held that the adjudication is conclusive of the person's incapacity to make ordinary contracts subsequently thereto, and until the guardian or committee has been discharged, or the adjudication has in some other direct way been rendered no longer effectual.

*Indiana.*—*Musselman v. Cravens* (1874) 47 Ind. 1; *Pavey v. Wintrobe* (1882) 87 Ind. 379.

*Massachusetts.*—*Wait v. Maxwell* (1827) 5 Pick. 217, 16 Am. Dec. 391 (obiter); *Leonard v. Leonard* (1833) 14 Pick. 280; *Gibson v. Soper* (1856) 6 Gray, 279, 66 Am. Dec. 414 (obiter).

*Minnesota.*—*Thorpe v. Hanscom* (1896) 64 Minn. 201, 66 N. W. 1 (obiter).

**Missouri.**—*Rannells v. Gerner* (1883) 80 Mo. 474; *Kiehne v. Wessell* (1893) 53 Mo. App. 667; *Payne v. Burdette* (1900) 84 Mo. App. 332.

**New York.**—*Wadsworth v. Sharpsteen* (1853) 8 N. Y. 338, 59 Am. Dec. 499; *Banker v. Banker* (1875) 63 N. Y. 409 (obiter); *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446 (obiter); *Carter v. Beckwith* (1891) 128 N. Y. 312, 28 N. E. 582; *Fitzhugh v. Wilcox* (1851) 12 Barb. 235; *L'Amoureux v. Crosby* (1831) 2 Paige, 422, 22 Am. Dec. 655 (obiter); *Southern Tier Masonic Relief Asso. v. Laudendach* (1889) 5 N. Y. Supp. 901; *Wallace v. Frey* (1899) 27 Misc. 29, 56 N. Y. Supp. 1051; *R. A. Schoenberg & Co. v. Ulman* (1906) 51 Misc. 83, 99 N. Y. Supp. 650 (obiter); *O'Reilly v. Sweeney* (1907) 54 Misc. 408, 105 N. Y. Supp. 1033; *Schanck v. Hooper* (1916) 160 N. Y. Supp. 627 (obiter); *Mainzer v. Avril* (1919) 108 Misc. 230, 177 N. Y. Supp. 596.

**Ohio.**—*Jordan v. Dickson* (1888) 19 Ohio L. J. 64.

**Pennsylvania.**—*Imhoff v. Witmer* (1858) 31 Pa. 243; *Klohs v. Klohs* (1869) 61 Pa. 245 (obiter).

**Texas.**—*Elston v. Jasper* (1876) 45 Tex. 409 (obiter).

The reason given in *Leonard v. Leonard* (1833) 14 Pick. (Mass.) 280, for holding the adjudication conclusive of the disability of the lunatic in relation to all subjects on which his guardian can act is that otherwise the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust.

Marriage contracts, however, are held in these jurisdictions to be an exception to the rule, on the ground that marriage is a contract so peculiarly individual and personal as not to permit of anyone acting for the party concerned. *Payne v. Burdette* (1900) 84 Mo. App. 332; *Goodheart v. Ransley* (1892) 11 Ohio Dec. Reprint, 655.

But it was held in *O'Reilly v. Sweeney* (1907) 54 Misc. 408, 105 N. Y. Supp. 1033, that an inquisition of lunacy was conclusive evidence of the

subsequent incapacity of the lunatic to make a promise of marriage.

In *Kiehne v. Wessell* (1893) 53 Mo. App. 667, where the ward had no guardian at the time of the execution of the contract in question, the court said that the adjudication of lunacy was conclusive as to subsequent contracts, regardless of the fact whether the lunatic had a guardian or not.

But in *Gibson v. Soper* (1876) 6 Gray (Mass.) 279, 66 Am. Dec. 414, the court stated that an adjudication of insanity was not conclusive unless followed by the appointment of a guardian, and that then the party became incapable of contracting, not merely from the state of his mind, but because the power of present control over his property was taken from him.

And it was held in *Southern Tier Masonic Relief Asso. v. Laudendach* (1889) 5 N. Y. Supp. 901, that an inquisition of lunacy was not conclusive evidence of the subsequent incapacity of the lunatic to contract, where his committee never qualified or acted, but that in such case his subsequent recovery might be shown.

And in *Tozer v. Saturlee* (1855) 3 Grant, Cas. (Pa.) 162, the court said: "Where it is suspended or abandoned in mid-course, as seems to have been the case here, it may be doubted whether any stronger presumption is furnished by an inquisition as to contracts made after it was found, than as to such as were made previously, but within the ascertained period of incompetency. If no stronger, then it is not conclusive, and may be rebutted by such evidence as was offered here."

The nature of the cause of the insanity, whether old age, sickness, habitual drunkenness, or other cause, does not affect the conclusiveness of the adjudication. *Rannells v. Gerner* (1883) 80 Mo. 474.

In other jurisdictions, however, an adjudication of insanity or incompetency resulting in the appointment of a guardian or committee is held to be merely *prima facie*, and not conclusive, evidence of subsequent incapacity to contract. *EAGLE v. PETERSON* (reported herewith) ante, 553; *Barkheimer v. Lockhart* (1919) — Ark.

—, 213 S. W. 381; *Field v. Lucas* (1857) 21 Ga. 447, 68 Am. Dec. 465; *Chase v. Spencer* (1907) 150 Mich. 99, 118 N. W. 578 (letters of guardianship not issued); *Armstrong v. Short* (1820) 8 N. C. (1 Hawks) 11; *Arrington v. Short* (1824) 10 N. C. (3 Hawks) 71 (obiter); *Johnson v. Kincaide* (1843) 37 N. C. (2 Ired. Eq.) 470 (marriage contract); *Parker v. Davis* (1862) 53 N. C. (3 Jones, L.) 460; *Blaisdell v. Holmes* (1875) 48 Vt. 492 (practically not under guardianship); *Miller v. Rutledge* (1887) 82 Va. 863, 1 S. E. 202 (committee practically discharged before contract).

Whatever may be the true rule as regards subsequent incapacity to contract, the courts are substantially agreed that for other purposes the adjudication is at most *prima facie*, and not conclusive, evidence of mental incapacity, even when the inquiry relates to a time subsequent to the adjudication. Thus the adjudication is only *prima facie*, and not conclusive, evidence of testamentary incapacity (see *infra*, II. h), of criminal irresponsibility (see *infra*, II. i), and of incapacity to testify (see *infra*, II. k).

## 2. Subsequent adjudication.

The general rule as to the probative force of an adjudication of insanity, made after the transaction in question, is that such an adjudication is not conclusive, but at most presumptive, evidence of insanity, a few cases holding that it does not have even this force.

**Arkansas.**—*Shores-Mueller Co. v. Palmer* (1919) — Ark. —, 216 S. W. 295.

**California.**—*Avery v. Avery* (1919) — Cal. App. —, 183 Pac. 453.

**Indiana.**—*Taylor v. Taylor* (1910) 174 Ind. 670, 93 N. E. 9.

**Kentucky.**—*Hopson v. Boyd* (1845) 6 B. Mon. 296.

**Michigan.**—*Rice v. Rice* (1883) 50 Mich. 448, 15 N. W. 545; *Rice v. Rice* (1884) 53 Mich. 432, 19 N. W. 132.

**New Jersey.**—*Den ex dem Aber v. Clark* (1828) 10 N. J. L. 217, 18 Am. Dec. 417; *Whitenack v. Stryker* (1838) 2 N. J. Eq. 8; *Hunt v. Hunt* (1860) 13 N. J. Eq. 161; *Yauger v. Skinner* (1862) 14 N. J. Eq. 389; *Hill v. Day*

(1881) 34 N. J. Eq. 150; *Brady v. McBride* (1885) 39 N. J. Eq. 495; *Mott v. Mott* (1891) 49 N. J. Eq. 192, 22 Atl. 997; *Sbarbero v. Miller* (1906) 72 N. J. Eq. 248, 65 Atl. 472, affirmed without opinion in (1908) 74 N. J. Eq. 453, 77 Atl. 1088; *Re Coleman* (1917) 88 N. J. Eq. 578, 103 Atl. 78.

**New York.**—*Van Deusen v. Sweet* (1873) 51 N. Y. 378; *Banker v. Banker* (1875) 63 N. Y. 409; *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Fitzhugh v. Wilcox* (1851) 12 Barb. 235; *Griswold v. Miller* (1851) 15 Barb. 520; *Searles v. Harvey* (1876) 6 Hun, 658; *Hicks v. Marshall* (1876) 8 Hun, 327; *Hardy v. Berger* (1902) 76 App. Div. 393, 78 N. Y. Supp. 709; *Richie v. Shepard* (1913) 158 App. Div. 192, 143 N. Y. Supp. 19; *Hart v. Deamer* (1831) 6 Wend. 497; *L'Amoureux v. Crosby* (1831) 2 Paige, 422, 22 Am. Dec. 655; *Re Taylor* (1847) 1 Edm. Sel. Cas. 375; *Demelt v. Leonard* (1860) 19 How Pr. 140; *Goodell v. Harrington* (1874) 3 Thomp. & C. 345; *Hirsch v. Trainer* (1877) 3 Abb. N. C. 274.

**North Carolina.**—*Rippy v. Gant* (1847) 39 N. C. (4 Ired. Eq.) 443.

**Oregon.**—*Schindler v. Parzoo* (1908) 52 Or. 452, 97 Pac. 755.

**Pennsylvania.**—*Rogers v. Walker* (1847) 6 Pa. 371, 47 Am. Dec. 470; *Harden v. Hays* (1848) 9 Pa. 151; *Willis v. Willis* (1849) 12 Pa. 159; *Re Gangwere* (1850) 14 Pa. 417, 53 Am. Dec. 554; *Noel v. Karper* (1866) 53 Pa. 97; *Titlow v. Titlow* (1867) 54 Pa. 216, 93 Am. Dec. 691; *Klohs v. Klohs* (1869) 61 Pa. 245; *Lancaster County Nat. Bank v. Moore* (1875) 78 Pa. 407, 21 Am. Rep. 24; *Miskey's Appeal* (1883) 107 Pa. 611; *Hottle v. Weaver* (1903) 206 Pa. 87, 55 Atl. 838; *Hutchinson v. Sandt* (1833) 4 Rawle, 234, 26 Am. Dec. 127; *Koons v. Benscoter* (1873) 2 Kulp, 451; *Gresh v. Tamany* (1875) 2 Kulp, 453; *Draper's Estate* (1890) 26 W. N. C. 218.

**South Carolina.**—*Knox v. Knox* (1888) 30 S. C. 377, 9 S. E. 353; *Cathcart v. Matthews* (1916) 105 S. C. 329, 89 S. E. 1021.

**Texas.**—*Witty v. State* (1913) 69 Tex. Crim. Rep. 125, 153 S. W. 1146.

**England.**—*Rodd v. Lewis* (1755) 2

Lee, Eccl. Rep. 176, 161 Eng. Reprint, 304; *Faulder Spr. v. Silk* (1811) 8 Campb. 126; *Dane v. Kirkwall* (1836) 8 Car. & P. 679; *Frank v. Mainwaring* (1839) 2 Beav. 116, 48 Eng. Reprint, 1123; *Snook v. Watts* (1848) 11 Beav. 105, 50 Eng. Reprint, 757, 12 Jur. 444; *Bannatyne v. Bannatyne* (1852) 16 Jur. 864, 2 Rob. Eccl. Rep. 472.

*Ireland.—Hassard v. Smith* (1872) Ir. Rep. 6 Eq. 429.

It was held in *Andrews v. Andrews* (1905) 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581, that an adjudication of lunacy raised no presumption that its subject was a lunatic at any previous time.

A judgment of inquest finding a person to be mentally unsound has no retroactive effect. *Rath v. Smith* (1918) 180 Ky. 326, 202 S. W. 501.

In *Shirley v. Taylor* (1844) 5 B. Mon. (Ky.) 99, it was held that an inquest finding a person to be of unsound mind was no evidence that he was of unsound mind sixteen months previously.

It was held in *Wathens v. Skaggs* (1914) 161 Ky. 600, 171 S. W. 198, an action to cancel a deed on the ground of the grantor's insanity, that proof of an inquest held a few days after its execution, adjudging him incompetent to manage his estate, did not relieve the plaintiff of the burden of establishing the grantor's mental incapacity at the date of the conveyance.

It was held in *Whitenack v. Stryker* (1838) 2 N. J. Eq. 8, as to an inquisition of lunacy taken after the making of a codicil admitted to probate, that it was only entitled to the respect which was due to the opinion expressed in their verdict, of the jurors on the inquisition.

In New York, prior to 1875, a subsequent adjudication was presumptive evidence of insanity, but since the change in the law at that time, as is held in *Boschen v. Stockwell* (1918) 224 N. Y. 356, 120 N. E. 728; *Southern Tier Masonic Relief Asso. v. Laudenschach* (1889) 5 N. Y. Supp. 901; *Reals v. Weston* (1899) 28 Misc. 67, 59 N. Y. Supp. 807, and *Shanck v. Hooper* (1916) 160 N. Y. Supp. 627, it has no force as evidence of prior insanity.

In *Boschen v. Stockwell* (N. Y.) supra, the court, in reference to this change, said: "The inquiry is limited and confined to the question of incompetency at the time of the inquiry, and such has been the law ever since chapter 446 of the Laws of 1875, title 2, § 2. Prior to that time the practice had been to permit the jury to find how long the lunacy had continued (2 Barbour, Ch. Pr. 234; *Butler v. Jarvis* (1889) 51 Hun, 248, 4 N. Y. Supp. 137; *L'Amoureux v. Crosby* (1831) 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Hart v. Deamer* (1831) 6 Wend. (N. Y.) 497; *Griswold v. Miller* (1851) 15 Barb. (N. Y.) 520), and it had been held that a finding on an inquisition that the insanity existed at a date prior to the date of inquiry was presumptive evidence of the fact; that if the finding of the jury overreached the execution of a deed executed by the alleged incompetent, their inquisition was presumptive, but not conclusive, evidence of the grantor's incapacity. *Van Deusen v. Sweet* (1872) 51 N. Y. 378; *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446. Although this latter case was not decided in this court until 1889, examination will disclose that the lunacy proceedings were conducted under the old practice, the inquisition being returned on the 18th day of October, 1871. However, since the amendment above referred to there is no such presumption, and the finding by the jury that the lunacy existed at a time prior to the date of the inquiry is of no effect and without authority. Attention was directed to this change in the practice by the present chief of this court when sitting at special term. *Reals v. Weston* (1899) 28 Misc. 67, 59 N. Y. Supp. 807. See also *Re Preston* (1906) 113 App. Div. 732, 99 N. Y. Supp. 312. In *Dominick v. Dominick* (1887) 20 Abb. N. C. (N. Y.) 286, it was said of § 2335 of the Code of Civil Procedure: ' . . . By this section a change has been made in the practice to be pursued in this class of cases. Prior to its enactment the jury were at liberty to inquire into, and return a statement of, the antecedent period over which the lunacy had ex-

tended; and upon such a determination as to that period the inquisition was accepted by the court as *prima facie* or presumptive evidence that the unsoundness of mind had so far continued. *Van Deusen v. Sweet* (1872) 51 N. Y. 378; *Banker v. Banker* (1875) 63 N. Y. 409. And it had this effect as evidence against persons acquiring rights or interests under the lunatic prior to the inquisition, although they were not parties to, and had no notice whatever of, the proceedings. It was probably to abolish the injustice of this rule that in the enactment of the Code of Civil Procedure it was declared that "the inquiry . . . must be confined to the question whether he is so incompetent at the time of the inquiry." Such authorities to the contrary as *Richie v. Shepard* (1913) 158 App. Div. 192, 143 N. Y. Supp. 19; *Sander v. Savage* (1902) 75 App. Div. 333, 78 N. Y. Supp. 189; *Hardy v. Berger* (1902) 76 App. Div. 393, 78 N. Y. Supp. 709, do not correctly state the law, and failed to note that the *Van Deusen* and *Hughes* Cases, cited and relied upon, were determined according to the practice before the above statutory change in the law."

An inquisition of lunacy, whose finding overreaches the execution of a mortgage by the alleged lunatic, is not sufficient evidence of his incapacity to throw the burden of proof on the mortgagee to show the mortgagor's sanity, in an action to set aside the mortgage. *Jacobs v. Richards* (1854) 18 Beav. 300, 52 Eng. Reprint, 118.

*b. Presumption of continuance of insanity.*

A person adjudged to be insane is presumed to continue such until it is shown that sanity has returned. *People v. Farrell* (1867) 81 Cal. 576; *Lilly v. Waggoner* (1862) 27 Ill. 395; *Titcomb v. Vantyle* (1877) 84 Ill. 371; *Langdon v. People* (1890) 133 Ill. 382, 24 N. E. 874; *Mileham v. Montagne* (1910) 148 Iowa, 476, 125 N. W. 664; *State v. McMurtry* (1899) 61 Kan. 87, 58 Pac. 961; *Clark v. Trail* (1858) 1 Met. (Ky.) 35; *Herndon v. Vick* (1898) 18 Tex. Civ. App. 583, 45 S. W. 852.

In *Lucas v. Parsons* (1857) 23 Ga. 267, holding that a finding in an inquisition of lunacy is not conclusive of lunacy at a subsequent date, the court said: "The fact which the judgment finds is that the party is a lunatic at the time of the judgment. The law, from this fact, presumes, strongly presumes, that he will remain so."

And in *Small v. Champeny* (1899) 102 Wis. 61, 78 N. W. 407, the court said: "The general rule is that an adjudication as to mental unsoundness is direct evidence of the fact at the time of the adjudication, and presumptive evidence of the condition of the subject at a subsequent time, upon the theory that a condition of mind once shown to exist is presumed to continue."

Where the insanity of a testator has been legally established by an inquisition of lunacy before the will was made, its continuance will be presumed and the onus cast upon the propounders of the will to show that the disqualification had been removed. *Terry v. Buffington* (1852) 11 Ga. 337, 56 Am. Dec. 423.

In *Stitzel v. Farley* (1909) 148 Ill. App. 635, where it appeared that the maker of a note previously adjudged insane had been released from the asylum, and been without a conservator until shortly after the making of the note, it was held in an action on the note that, the maker having once been adjudged insane and not adjudged sane thereafter by a court, the presumption of insanity continued, and the burden was upon the holder to establish the maker's sanity at the time the note was executed.

In a proceeding to have the committee discharged and a decree vacated, the adjudication of lunacy is *prima facie* evidence of continuing incapacity. *Johnson v. Safe Deposit & T. Co.* (1906) 104 Md. 460, 65 Atl. 333.

It is held in *State v. Davis* (1887) 27 S. C. 609, 4 S. E. 567, in connection with the defense of insanity to a charge of murder, that where insanity has once been established by the fact that the person in question has been committed to a lunatic asylum, the presumption is that the same state of

mind continues to exist, until it has been overthrown by satisfactory evidence of restoration to sanity.

In *Haynes v. Swann* (1871) 6 Heisk. (Tenn.) 560, the court stated, upon the question of the validity of a deed signed by one previously adjudged a lunatic, that, the fact of insanity having been judicially ascertained, the law presumed its continuance until his restoration to sanity, or until a lucid interval was established by evidence.

In *State ex rel. Thompson v. Snell* (1907) 46 Wash. 327, 9 L.R.A. (N.S.) 1191, 89 Pac. 931, an application for a writ of mandamus requiring the court to make an examination as to the defendant's sanity after a trial for murder, and an acquittal on the ground of insanity, it was held that the presumption of insanity created by such acquittal continued until overcome by contrary proof.

While, where one is proved and adjudged to be of unsound mind arising from mania, the presumption of law is, in a controversy whether a writing executed by him was executed in a lucid interval, that his condition is unchanged, until the contrary is shown, that rule does not apply to one offered as a witness in the presence of the court unless the witness is still confined in an asylum, or the judgment of lunacy is so recent as to raise the presumption of fact that his condition has not materially changed since the verdict. *Covington v. O'Meara* (1909) 133 Ky. 763, 119 S. W. 187.

This presumption of continued incapacity is not conclusive. *Ibid.*

But in *Carter v. Beckwith* (1891) 128 N. Y. 312, 28 N. E. 582, an action by an attorney for services rendered on the request of an adjudged lunatic in the prosecution of proceedings to supersede the commission of lunacy, the court said that a lunatic whose lunacy had been judicially determined, and for whom a committee had been appointed, is incapable of entering into any contract, and that any contract which he may assume to make while in that situation is absolutely void; and that the court will not inquire whether the lunacy, in fact,

continued and existed when the contract was made, but that the presumption of its continuance is conclusive as to all dealings after the inquisition, until it has been superseded.

A decree appointing a conservator for an alleged incompetent, although it settles for the time being the status of the person whose property is to be held, raises no conclusive presumption of continued incapacity. *Chase v. Chase* (1914) 216 Mass. 394, 103 N. E. 857.

An adjudication of insanity, followed by the commitment of the patient to an asylum for the insane, does not create a conclusive presumption of continuance of insanity several years after the discharge of the patient from such asylum. *Mutual L. Ins. Co. v. Wiswell* (1896) 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996.

A person who had been adjudged insane and placed in an asylum for treatment, but who was not found by the jury to be incapable of managing her affairs, and for whom no guardian was ever appointed, will not, after she has been discharged from the asylum because of her improved condition, be conclusively presumed to continue insane until a formal adjudication shall be had finding that she has been restored to her reason. *Topeka Water-Supply Co. v. Root* (1895) 56 Kan. 187, 42 Pac. 715. See also to the same effect, *Lower v. Schumacher* (1900) 61 Kan. 625, 60 Pac. 538.

In *Davis v. Davis* (1910) 24 S. D. 474, 124 N. W. 715, an action to cancel a deed on the ground of the grantor's insanity, where a foreign judgment holding the grantor incompetent to execute a prior deed was admitted in evidence, it was held that the presumption that the mental condition of the grantor continued the same up to the time he executed the second deed was rebuttable.

This presumption may be repelled by oral testimony, and there is no rule of evidence which requires another request to be found in order that the presumption may be thereby rebutted. *Rodgers v. Rodgers* (1896) 56 Kan. 483, 43 Pac. 779; *Clark v. Trail* (1858) 1 Met. (Ky.) 35.



Where no guardian of the person and estate of a person who has been duly adjudged insane has been appointed, the discharge of such person from the insane asylum as restored to his right mind is sufficient to overcome the presumption that the insanity continued to exist after the person had been adjudged insane. *Walker v. Coates* (1896) 5 Kan. App. 209, 47 Pac. 158.

The presumption in favor of the legality of a marriage will prevail over the presumption that a person who has been adjudged insane by the proper tribunal continues insane until he has been duly declared sane. *Castor v. Davis* (1889) 120 Ind. 231, 22 N. E. 110.

*c. Effect of remoteness of adjudication.*

A qualification of the rule that the insanity of a party, when once established, will be presumed to continue until it is disproved, is that too long a period of time must not be shown to have elapsed between the proved insanity and the act of crime charged against the prisoner. *Langdon v. People* (1890) 133 Ill. 382, 24 N. E. 874.

And in *Wheeler v. State* (1877) 34 Ohio St. 394, 32 Am. Rep. 372, where the record of an adjudication of lunacy and of confinement in an asylum was admitted on a subsequent prosecution of the lunatic for crime, the court said: "The length of time between confinement in the asylum and the commission of the act charged, the nature of the crime, and other facts, may render such inquisition of little weight as evidence; but its weight is for the jury in each case."

*d. Effect of character of proceeding.*

*1. Commitment to insane asylum.*

The distinction between a proceeding to have a guardian appointed for a person of alleged unsound mind, and a proceeding to have one adjudged a fit subject for custody and treatment in a hospital for the insane, is discussed in *Dewey v. Allgire* (1893) 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276, holding inadmissible the record of a proceeding of the latter kind, where it is said: "At the common

law an inquisition founded upon a commission de lunatico inquirendo, resulting in an adjudication of insanity, was held to be in all cases prima facie evidence, and sometimes conclusive of the insanity of the person charged. This was upon the ground that such a proceeding was in the nature of one in rem to determine the status of the party, and was therefore binding upon the whole world. This proceeding bore a close analogy to the proceedings under our statute, whereby guardians are appointed for persons insane. It differs very materially, however, from a proceeding looking toward the custody and treatment of a person in the hospital. In the latter proceeding the examination is more or less ex parte, and its object, under the broad definition of insanity before referred to, presents an issue entirely different from that presented in this case, which is the competency of the party to manage his own affairs and enter into a valid contract."

Proof of commitment of a person to the hospital for the curable insane nine years previously raises no presumption that he is still insane. *Breedlove v. Bundy* (1884) 96 Ind. 319.

Proceedings for the commitment to the state hospital for the insane, of a person needing care and treatment, do not establish his incapacity to do business. *Knox v. Haug* (1892) 48 Minn. 58, 50 N. W. 934.

An inquest of lunacy by which one was adjudged to be a person of unsound mind and committed to an asylum for treatment, though conclusive evidence that such was his condition at the time of the inquest, is only prima facie evidence of his incapacity to contract at a subsequent period. *Johnson v. Mitchell* (1912) 146 Ky. 382, 142 S. W. 675; *Rath v. Smith* (1918) 180 Ky. 326, 202 S. W. 501.

Commitment to a state hospital for the insane is not proof of incapacity to contract, prior thereto. *Avery v. Avery* (1919) — Cal. App. —, 183 Pac. 453.

Proof that a person had been adjudged to be of unsound mind and a fit person to be committed to the in-

sane asylum, and of his commitment to the asylum in pursuance of such adjudication, is, where no guardian of his estate has been appointed, merely *prima facie* evidence of his incompetency to do business at a subsequent time. *Walker v. Coates* (1896) 5 Kan. App. 209, 47 Pac. 158.

An inquest of lunacy in which a person was adjudged to be of unsound mind and a fit subject for the lunatic asylum is only *prima facie* evidence of his condition at a subsequent period, and, being a mere presumption, may be repelled by oral testimony. *Logan v. Vanarsdall* (1905) 27 Ky. L. Rep. 322, 86 S. W. 981.

Statutory provisions for a commitment of an alleged insane person on the certificate of physicians, and an inquisition as to whether or not he is a public charge, make the certificate merely *prima facie* evidence of insanity, subject to be overthrown by countervailing evidence, and the statute does not therefore deprive the alleged insane person of his liberty without due process of law. *Re Allen* (1909) 82 Vt. 365, 26 L.R.A.(N.S.) 232, 73 Atl. 1078.

An order made in an *ex parte* proceeding committing a person to an insane asylum is not conclusive of his insanity in a criminal prosecution. *Reeves v. State* (1914) 186 Ala. 14, 65 So. 160.

In *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124, it was held that proof that the defendant in a prosecution for homicide had, on three different occasions, been committed to the state asylum for the insane, the last commitment having been made on the morning of the homicide, did not conclusively establish his irresponsibility. The court said: "There are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from such responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him of responsibility for his criminal acts."

The transfer of a convict from the

penitentiary to a lunatic asylum, under a statute authorizing the removal of an insane prisoner, is not conclusive upon the question of his insanity. *Langdon v. People* (1890) 133 Ill. 382, 24 N. E. 874.

Proof that one accused of assault had been confined in an insane asylum some years previously is not conclusive of his criminal irresponsibility. *Meyer v. People* (1895) 156 Ill. 126, 40 N. E. 490.

And in *Wheeler v. State* (1877) 34 Ohio St. 394, 32 Am. Rep. 372, the court said: "Ordinarily, such inquisitions are not conclusive, but only *prima facie*, evidence of incapacity, as will be seen from the authorities cited; but on a question like that in issue here, it is manifest they cannot be regarded as even *prima facie* evidence. A person who is a fit subject for confinement in an insane asylum does not necessarily have immunity from punishment for crime; and the length of time between confinement in the asylum and the commission of the act charged, the nature of the crime, and other facts, may render such inquisition of little weight as evidence; but its weight is for the jury in each case."

And it was held in *McCully v. State* (1920) — Ark. —, 217 S. W. 453, that the weight of a record of a probate court, showing commitment to an insane asylum, was for the jury in a criminal prosecution.

An adjudication that a person is a fit subject for treatment in the hospital for the insane is not conclusive of his want of responsibility for a crime subsequently committed. *Pflueger v. State* (1895) 46 Neb. 493, 64 N. W. 1094.

Proceedings for the commitment of a person to a hospital for the insane, under a statute which does not contemplate that such proceedings shall be a conclusive adjudication of insanity, but merely entitles the person pronounced insane to be placed in the hospital for treatment, is not conclusive of the insanity of such person in a prosecution for homicide. *Goodwin v. State* (1884) 96 Ind. 550.

Irresponsibility for a crime is not established by proof that, about

twenty-five years previously, the defendant had been confined for a few months in a hospital for the insane. *Blue v. Com.* (1916) 171 Ky. 165, 188 S. W. 329.

An adjudication of insanity and confinement in an insane asylum affords prima facie evidence that the alleged lunatic is a person of unsound mind, within a statutory provision disqualifying such persons as witnesses. *Pittsburgh & W. R. Co. v. Thompson* (1897) 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720.

That a person has been found unsound of mind by a court of competent jurisdiction, and is an inmate of an asylum for the insane, is prima facie evidence that he is of unsound mind, and imposes the burden on the party offering him as a witness to show his competency. *Covington v. O'Meara* (1909) 133 Ky. 763, 119 S. W. 187.

A record made nine years before by two justices of the peace, certifying that a certain person was then insane and was a suitable person to be admitted into the hospital for the curable insane, and that he was then so committed, is not sufficient to establish his incompetency as a witness. *Breedlove v. Bundy* (1884) 96 Ind. 319.

It was held in *Cathcart v. Matthews* (1916) 105 S. C. 329, 89 S. E. 1021, an action for rent or for the use and occupation of land, upon the question of the capacity of an alleged lunatic to direct a conveyance of the land by his trustee, that his prior confinement in a lunatic asylum, and subsequent adjudication of his lunacy, were not conclusive of the fact of his incapacity.

In *Schmidt's Succession* (1910) 125 La. 1065, 52 So. 160, it was held that proof of the interdiction of the testatrix and her commitment to an insane asylum some eighteen months after the making of the will, together with proof that within a period varying from five to ten months after the making of the will the testatrix had given signs of senile dementia, was insufficient to support an attack upon the validity of the will upon the ground of testamentary incapacity, where the proof failed to show that the testa-

trix was insane before or at the time of the execution of the will, and where there was nothing in the will itself sounding in folly.

It was held in *Newton v. Mutual Ben. L. Ins. Co.* (1879) 76 N. Y. 426, 32 Am. Rep. 335, where an action on a life insurance policy was defended on the ground that the insured falsely stated in his application that his father had not been afflicted with insanity, that the record of a probate court ordering the latter to be sent to a lunatic asylum, and the record of the asylum showing his admission thereto, were not conclusive evidence against the plaintiff of the insanity of the insured's father.

The order of commitment of a person to an insane asylum is not conclusive evidence against him, in an action for the malicious prosecution of him as an insane person. *Kellogg v. Cochran* (1890) 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677.

#### *2. Inquisition of habitual drunkenness.*

A prior adjudication of habitual drunkenness is conclusive evidence of the drunkard's incapacity to contract. *Wadsworth v. Sharpsteen* (1863) 8 N. Y. 388, 59 Am. Dec. 499; *Imhoff v. Witmer* (1856) 31 Pa. 243.

An adjudication of habitual drunkenness is not conclusive, but only prima facie, evidence of the subsequent incapacity of the drunkard to make a will. *Lewis v. Jones* (1860) 50 Barb. (N. Y.) 645; *Leckey v. Cunningham* (1867) 56 Pa. 370.

But in *Re Patterson* (1849) 4 How. Pr. (N. Y.) 34, it was held that an inquisition of habitual drunkenness was conclusive evidence of the invalidity of a subsequent will, made without permission of the court.

In *Griswold v. Miller* (1851) 15 Barb. (N. Y.) 520, setting aside a conveyance of realty taken by one with full knowledge that proceedings had been instituted against the grantor to have him declared an habitual drunkard, the court said that the rule seems to be well settled that, on a bill filed to set aside a conveyance on the ground of the lunacy of the party at the time he executed the conveyance,

the finding of a jury on an inquisition which overreached that period is *prima facie* evidence of his incapacity, even as against a stranger to the proceedings who had no opportunity to contest the issues therein.

An adjudication of incompetency because of habitual drunkenness is only *prima facie* evidence of the drunkard's incapacity to make a settlement during the prior period covered by the finding of incapacity, and such presumption may be rebutted by the other party to the settlement, although he had notice of the inquisition at the time of the making of the settlement. In this case the court said that such adjudication would be conclusive evidence of incapacity in all the future after the finding thereof, until the restoration of the subject of it, by order of the court and a discharge of his committee. *Klohs v. Klohs* (1869) 61 Pa. 245.

In *Miskey's Appeal* (1888) 107 Pa. 611, a suit to set aside a deed of trust on the ground that the maker was incompetent because of habitual drunkenness, holding that an inquisition finding him competent was only *prima facie* evidence of his competency, the court stated that the rule making an inquisition of lunacy or habitual drunkenness only *prima facie* evidence of mental infirmity, during the period found, applied likewise where the finding was negative.

In *Tozer v. Saturlee* (1865) 3 Grant, Cas. (Pa.) 162, holding reversible error the rejection of evidence offered in support of declarations of an alleged habitual drunkard against one claiming under him, the court said: "An inquisition is only persuasive evidence of incompetency as to contracts made before the inquest, but during the time the incompetency is found to have existed . . . where it is suspended or abandoned in mid-course, as seems to have been the case here, it may be doubted whether any stronger presumption is furnished by an inquisition as to contracts made after it was found, than as to such as were made previously, but within the ascertained period of incompetency. If no stronger, then it is not conclusive, and

may be rebutted by such evidence as was offered here."

### 3. Guardianship proceedings.

A decree of a court appointing a guardian for a lunatic is conclusive evidence of the ward's incapacity in relation to all subjects on which the guardian can act. *Pavey v. Wintrode* (1882) 87 Ind. 379; *Leonard v. Leonard* (1833) 14 Pick. (Mass.) 280; *Rannella v. Gerner* (1883) 80 Mo. 474; *Payne v. Burdette* (1900) 84 Mo. App. 332.

Where a finding that a person is insane is followed by the appointment of a guardian, the party becomes incapable of contracting, not merely from the state of his mind, but because the power of present control over his property is taken from him. *Gibson v. Soper* (1876) 6 Gray (Mass.) 279, 66 Am. Dec. 414.

So long as the guardianship continues, the decree of the court appointing the guardian may be regarded as conclusive on the question of the ward's sanity. *Willwerth v. Leonard* (1892) 156 Mass. 277, 31 N. E. 299.

But when the guardianship has terminated, and a controversy has arisen between third parties, one of whom claims under a contract made with the ward after the termination of the guardianship, the reason ceases for holding the decree conclusive. *Ibid.*

In *Griswold v. Butler* (1820) 3 Conn. 227, an adjudication of insanity and an appointment of a conservator were assumed, upon a question of adverse possession, to be conclusive evidence of the alleged lunatic's incapacity during the continuance of his guardianship.

In *Musselman v. Cravens* (1874) 47 Ind. 1, the court said: "An inquisition and appointment of a guardian is conclusive evidence that the ward is incapable of contracting, and is notice to all the world."

In *Redden v. Baker* (1882) 86 Ind. 191, it was held that the provisions of a statute providing for the appointment of a guardian for a person found by a jury to be of unsound mind, that such guardianship shall terminate

with the restoration to reason or death of the ward, that whenever it is alleged that such person of unsound mind has become of sound mind again the facts may be tried and determined in the same manner as the allegation of the unsoundness of mind, and that every contract, sale, or conveyance of any person, while of unsound mind, shall be void,—must be construed to mean that the incapacity or disability, once found and adjudged, must continue in full force until the restoration of mind shall have been tried and determined in the manner provided in the act.

In *Wait v. Maxwell* (1827) 5 Pick. (Mass.) 217, 16 Am. Dec. 391, holding a decree of a probate court granting letters of guardianship of an incompetent inadmissible, because void, the court said in effect that, had the decree and letters been valid, they would have been conclusive evidence of her incapacity.

In *Thorpe v. Hanscom* (1896) 64 Minn. 201, 66 N. W. 1, sustaining the foreclosure of a mortgage, where the defense was that the mortgagor was insane and under guardianship at the time of its execution, but it appeared that, although long prior thereto he had been adjudged incompetent and placed under guardianship, he was doing business at the time of the execution of the mortgage, and the control of the guardian over him had practically terminated, and he made no claim that the transaction in question was an improvident or an unfair one for him, but planted himself upon the technical proposition that the action of the probate court in placing his person and estate under guardianship was conclusive evidence of his mental incompetency to act for himself, and that, until the guardian was formally discharged and his estate restored to him by the judgment of the probate court, his contracts were under all circumstances absolutely void, the court said: "The deed of an insane person not under guardianship is not void, but only voidable, but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid

contract concerning his property, though in fact he is sane at the time of making the same. This rule is based upon convenience and necessity, for the protection of the guardian, and to enable him properly to discharge his duties as such. Without this rule it would be difficult, if not impossible, for the guardian to execute his trust, for in every action concerning the property of the ward he might be obliged to go before the jury upon the question of the ward's sanity, and one jury might find one way and another the other way. *Leonard v. Leonard* (1833) 14 Pick. (Mass.) 280; 2 Greenl. Ev. § 371. Now, when the reason for the rule does not exist, the rule does not apply. Hence, if there is in fact no actual and subsisting guardianship, but the same has been practically abandoned, and the person who had been under guardianship, after such abandonment, makes a deed at a time when he is in fact of sound mind, and the contract is fair, the deed will be enforced, though the guardian has not been discharged by any judicial action. *Elston v. Jasper* (1876) 45 Tex. 409."

In *Elston v. Jasper* (Tex.) *supra*, a suit to enforce specific performance of a title bond, the court, in passing upon, for the purpose of a new trial, the effect of the appointment of a guardian for the maker of the bond as an incompetent, said that an insane person, while actually under legal and subsisting guardianship, and in support of the guardian's authority, was conclusively presumed incompetent to contract, and that his deed as against his guardian was absolutely void, but the court held that this presumption could be overcome by proof of the lunatic's subsequent restoration to sanity and the termination of the guardianship, either by a judicial determination, or, as in this case, by the practical termination of the guardianship.

In *Jordan v. Dickson* (1888) 19 Ohio L. J. 64, the appointment of a guardian for a person as an imbecile was held to be conclusive evidence of his incapacity to ratify transfers by him

of his property, but the court said that, where the capacity of the ward to make a will, to marry, or to commit a crime was in question, the guardianship was, at the most, only *prima facie* evidence of incapacity.

In *Messenger v. Bliss* (1880) 35 Ohio St. 587, it was held that an alleged imbecile could, in an action by him to enjoin his guardian from interfering with the control and management of his property, rebut the presumption of imbecility arising from the appointment of a guardian, because such appointment was made under a statutory provision expressly declaring that the appointment by the probate court of a guardian for an imbecile should be regarded only as *prima facie* evidence of imbecility. This statutory provision was repealed before the determination of the preceding case.

An order declaring a person to be a lunatic and appointing a guardian for him is not conclusive upon third persons not parties to it, who may accordingly be permitted to show that, while the letters of guardianship remained unrevoked, the lunatic was capable of contracting. *Field v. Lucas* (1857) 21 Ga. 447, 68 Am. Dec. 465.

The appointment of a guardian for one as an insane person, under a statute providing that the term "insane person" shall include a distracted person, is not conclusive evidence of the ward's subsequent incapacity to enter into a contract of hiring, but it may be shown that the ward had recovered at the time of the taking of such contract. *Blaisdell v. Holmes* (1875) 48 Vt. 492.

The appointment of a guardian is not conclusive, but only *prima facie* evidence of want of testamentary capacity. *Harrison v. Bishop* (1891) 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Re Fenton* (1896) 97 Iowa, 192, 66 N. W. 99; *Re Chandler* (1906) 102 Me. 72, 66 Atl. 215; *Stone v. Damon* (1815) 12 Mass. 487; *Breed v. Pratt* (1836) 18 Pick. (Mass.) 115; *Crowninshield v. Crowninshield* (1854) 2 Gray (Mass.) 524; *Collins v. Long*

(1920) — Or. —, 186 Pac. 1088; *Hamilton v. Hamilton* (1873) 10 R. I. 538.

The presumption of unsoundness of mind arising from the appointment of a guardian may be overcome by evidence showing testamentary capacity. *Linkmeyer v. Brandt* (1898) 107 Iowa, 750, 77 N. W. 493.

In *Re Pendleton* (1889) 1 Connoly, 480, 5 N. Y. Supp. 849, holding a will valid, though made at a time when the testatrix was under the control of a committee in lunacy, the court said: "Were it not for the appointment of a committee in lunacy, there could have been very little ground for the claim that she was not competent to make a testamentary disposition of her estate. The force of such adjudication cannot be considered strong when we bear in mind that, ordinarily, the main object in appointing a committee is to deprive the party of managing his own estate, because he is incompetent to have the care of it, and would be likely to squander it."

In *Hamilton v. Hamilton* (R. I.) *supra*, it was held that a person under guardianship 'as non compos mentis' was *prima facie* incapable of making a will, even pending an appeal from the decree appointing the guardian.

It was held in *Williams v. Robinson* (1867) 39 Vt. 267, that the appointment of a guardian is not conclusive of the incompetency of the ward to make a will, where it does not appear but that the guardianship may have been imposed on the sole ground of weakness of capacity, and not for insanity, but the court intimated that it would hold the same even if the guardianship was imposed for insanity.

And in *Jenckes v. Probate Ct.* (1852) 2 R. I. 255, under an act providing that lunatics, and persons who, for want of discretion in managing their estates, may become charges upon the county, may be placed under guardianship, and that all conveyances made by any person under guardianship shall be void, it was held that the issuing of letters of guardianship for one as wanting discretion in the management of her estate did not avoid a will subsequently made by

her, upon the ground that a will was not a conveyance within the meaning of the act.

An adjudication that a person is mentally incapable of taking care of himself or his property, under a statute providing for the appointment of a guardian of such person, is not *prima facie* evidence of the ward's incapacity subsequently to make a will. *Re Cowdry* (1905) 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70.

In *Boston Safe Deposit & T. Co. v. Bacon* (1918) 229 Mass. 585, 118 N. E. 906, an appeal from the probate of the will of an alleged lunatic, holding inadmissible a decree of a probate court appointing a guardian for an uncle of the testatrix as an insane person, the court said that such a decree unreversed was *prima facie* evidence of the actual insanity of the person thereby placed under guardianship, and established a status of that individual which was notice of the incapacity of the ward to all the world.

The appointment of a guardian *ad litem* for a party to an action, on the ground of insanity, is *prima facie* evidence of the fact in any subsequent stage of the case. *Little v. Little* (1859) 13 Gray (Mass.) 264.

An appointment of a guardian for one as an insane person is but *prima facie* evidence of actual insanity, in a subsequent suit for divorce. *Garnett v. Garnett* (1874) 114 Mass. 379, 19 Am. Rep. 369.

The finding upon inquisition that one is an idiot and incompetent to manage his own affairs, and the appointment of a committee for him, are not conclusive that he is not a competent witness at a time several years later, but he may be permitted to testify if, upon questioning, he appears to be competent to do so. *Barker v. Washburn* (1911) 200 N. Y. 280, 34 L.R.A.(N.S.) 159, 140 Am. St. Rep. 640, 93 N. E. 958.

A judgment in proceedings for the appointment of a guardian of an incompetent person is not conclusive of his incompetency at a prior time. *McAllister v. Rowland* (1913) 124 Minn.

27, 144 N. W. 412, Ann. Cas. 1915B, 1006.

In *Ames's Will* (1902) 40 Or. 495, 67 Pac. 737, it was held that the appointment of a guardian for a person as an incompetent on the same day, but after the execution of a will by him, was presumptive, but not conclusive, evidence of his testamentary incapacity, and that such presumption could be overcome by evidence proving that he was at the time he executed the will, in fact, of sound and disposing mind and memory.

It was held in *Spiers v. Hendershott* (1909) 142 Iowa, 446, 120 N. W. 1058, and in *Re Clogston* (1919) — Vt. —, 106 Atl. 594, that the subsequent appointment of a guardian created no presumption of mental incapacity on the part of a testatrix.

*e. Effect of interest in lunacy proceedings.*

An adjudication that the grantor was of unsound mind at the time of the execution of a deed is not conclusive as against the grantee because he was the petitioner in the lunacy proceedings, but he may show that the grantor at the time of the conveyance was of sound mind. *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446.

An inquisition finding one to have been a lunatic at the time of the destruction by him, with the assent of his wife, of an inadequate marriage settlement, is only *prima facie*, and not conclusive, evidence of his incapacity at that time, even as against his wife, the petitioner in the lunacy proceedings, and she may show that he had a lucid interval at the time of the destruction of such settlement. *Re Gangwere* (1850) 14 Pa. 417, 53 Am. Dec. 554.

An inquisition finding prior lunacy with lucid intervals is *prima facie* evidence only of the lunatic's incapacity to make a will during such prior period, as against even the executor named in the will, who was the petitioner in the lunacy proceedings and was subsequently appointed the committee of the lunatic, and he may show that the will was executed by the

lunatic during a lucid interval. *Titlow v. Titlow* (1867) 54 Pa. 216, 93 Am. Dec. 691.

In *Mulholland's Estate* (1907) 217 Pa. 65, 66 Atl. 150, the court said, in relation to the force of an adjudication of weakmindedness, that apart from the fact that such weakmindedness as might lead to improvidence in the care of property was not necessarily inconsistent with testamentary capacity, the adjudication was entitled to very little weight in view of the fact that it was procured at the sole instance of the contestant of the will, who was the sole beneficiary in a prior will which was concealed from the court by such contestant.

*f. As against persons not parties or privies to, or without notice of, lunacy proceedings.*

The question of notice of the lunacy proceedings to those against whom the adjudication of insanity is received in evidence does not enter into the decision of most of the cases upon the weight of the adjudication, but want of notice is made a point in a few of the cases.

An adjudication of insanity is not conclusive, but only presumptive evidence, as against persons not parties or privies to the lunacy proceedings. *Blandy v. Blandy* (1902) 20 App. D. C. 535; *Field v. Lucas* (1857) 21 Ga. 447, 68 Am. Dec. 465; *HOLLIDAY v. SHEPHERD* (reported herewith) ante, 558; *Armstrong v. Short* (1820) 8 N. C. (1 Hawks) 11; *Rippy v. Gant* (1847) 39 N. C. (4 Ired. Eq.) 443; *Cathcart v. Matthews* (1916) 105 S. C. 329, 89 S. E. 1021.

An inquisition of lunacy is not, as against the mortgagee who was not a party to the inquisition, conclusive as to the incapacity of the lunatic to execute a mortgage during the period in which he has, by the inquisition, been found to have been of unsound mind, but the mortgagee may introduce proof that the alleged lunatic was of sound mind at the time of the execution of the mortgage. *Den ex dem. Aber v. Clark* (1828) 10 N. J. L. 217, 18 Am. Dec. 417.

Proceedings in lunacy, whether under the acts of assembly or in chan-

cery, are purely *ex parte*, and are conclusive only upon parties or privies, but as against strangers, where the inquiry is with regard to prior acts, a finding is *prima facie* only. *Drap-er's Estate* (1890) 26 W. N. C. (Pa.) 218.

In *Sprinkle v. Wellborn* (1905) 140 N. C. 163, 3 L.R.A. (N.S.) 174, 111 Am. St. Rep. 827, 52 S. E. 666, the court, in relation to the records of an *ex parte* inquisition of lunacy made after the date of the execution of the deed in question, said: "If made before that time, they might have been competent, but not conclusive, as to the insanity of Nancy Sprinkle. The presumption arising from them in such a case could be rebutted, and the very truth be made to appear, that is, that while they showed insanity, it did not in fact exist at the time the deed was executed. This is at least true as to all persons not parties or privies to the inquisition, as, for example, a grantee of the lunatic, who, being a stranger to the inquisition, could not traverse it, which was formerly done by *scire facias*."

In *Hall v. Warren* (1804) 9 Ves. Jr. 605, 32 Eng. Reprint, 738, directing an issue whether the defendant was a lunatic at the execution of a contract overreached by a commission of lunacy, upon a bill for specific performance, the court said: "The principal objection to the performance is, that the defendant was not competent, having been insane at the time the contract bears date. That is matter of fact. In support of that fact alleged, the inquisition is produced by which the defendant is found a lunatic from a period long antecedent, but with lucid intervals. That inquisition, having been taken in the absence of the plaintiff, is not conclusive upon him, but it is evidence *prima facie* of the lunacy. It is, however, competent to third parties to dispute the fact and to maintain that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers."

But in New York the question of notice of the lunacy proceedings to the party against whom the adjudication



is received in evidence is immaterial upon the weight of the adjudication which is notice to all the world. *Banker v. Banker* (1875) 63 N. Y. 409; *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 22 N. E. 446; *Fitzhugh v. Wilcox* (1851) 12 Barb. (N. Y.) 235; *Griswold v. Miller* (1851) 15 Barb. (N. Y.) 520; *Hoyt v. Adeo* (1870) 3 Lans. (N. Y.) 178.

It was held, however, in *Hirsch v. Trainer* (1877) 3 Abb. N. C. (N. Y.) 274, that a subsequent adjudication of the insanity of the mortgagor was not conclusive, but only presumptive evidence, as against the assignee of the mortgage who was not a party to the lunacy proceedings.

In *Musselman v. Cravens* (1874) 47 Ind. 1, the court stated that an inquisition and appointment of a guardian were conclusive evidence that the ward was incapable of contracting, and were notice to all the world.

And the court said, in *Boston Safe Deposit & T. Co. v. Bacon* (1918) 229 Mass. 585, 118 N. E. 906, that a decree of a probate court appointing a guardian for one as an insane person was *prima facie* evidence of the actual insanity of the person thereby placed under guardianship, and established a status of that individual which was notice of the incapacity of the ward to all the world.

#### *g. Incapacity to contract.*

The cases under this subdivision are simply given as illustrations of the probative force of an adjudication of insanity as applied to different kinds of contracts, and for the rule in the different jurisdictions, as to incapacity to contract, see *supra*, II. a.

#### *1. Conveyances.*

Capacity to dispose of property and to execute proper conveyances therefor is not necessarily disproved by the prior determination of the probate court that a person is, by reason of mental infirmity, incompetent to have the charge and management of his estate. *Chase v. Spencer* (1907) 150 Mich. 99, 113 N. W. 578.

An adjudication of insanity is not conclusive, but is *prima facie* determinative, of subsequent incapacity to

execute deeds. *Barkheimer v. Lockhart* (1919) — Ark. —, 213 S. W. 381.

A subsequent inquisition of lunacy is not conclusive, but only presumptive evidence of the lunatic's incapacity to execute a deed. *Hunt v. Hunt* (1860) 13 N. J. Eq. 161; *Van Deusen v. Sweet* (1873) 51 N. Y. 378; *Hughes v. Jones* (1889) 116 N. Y. 67, 5 L.R.A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Rogers v. Walker* (1847) 6 Pa. 371, 47 Am. Dec. 470; *Hutchinson v. Sandt* (1833) 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *Frank v. Mainwaring* (1839) 2 Beav. 116, 48 Eng. Reprint, 1123.

In *Mott v. Mott* (1891) 49 N. J. Eq. 192, 22 Atl. 997, it was held that an inquisition finding the grantor to have been of unsound mind, with lucid moments, from a time anterior to the conveyance attacked, simply made a *prima facie* case, and was not conclusive against the grantee even as to the point of time when it was taken.

It was held in *Wathens v. Skaggs* (1914) 161 Ky. 600, 171 S. W. 193, that an adjudication of incompetency, made a few days after the execution of a deed by the incompetent, did not relieve the plaintiff, in an action to cancel the deed, of the burden of establishing the grantor's incapacity at the date of the deed.

But in *Schindler v. Parzoo* (1908) 52 Or. 452, 97 Pac. 755, an action to avoid a deed on the ground of the grantor's mental incapacity where it appeared that the deed in question was executed when the grantor was confined to her bed suffering from a dangerous illness, that the subject-matter of the conveyance was her home and practically all of her worldly possessions, that the adjudication of her incompetency took place ten days after the execution of the deed and when she had so far recovered from her illness as to be around, and was in about the same condition of health that she had enjoyed for more than one year prior thereto, and that she was about seventy years of age, and there was abundant evidence that for some time prior to the execution of the deed she had been suffering mental and physical decline, it was held that an admission in the answer to the adjudica-

tion that the grantor was an incompetent person shifted the burden upon the grantee to show the grantor's competency at the execution of the deed.

An adjudication of lunacy is only *prima facie* evidence of the lunatic's incapacity to execute a deed pending an appeal, as against the grantee, in an action for the recovery of the land. *Grimes v. Shaw* (1893) 2 Tex. Civ. App. 20, 21 S. W. 718.

An inquisition of lunacy is not conclusive evidence of the lunacy against persons claiming title under the alleged lunatic. *Yauger v. Skinner* (1862) 14 N. J. Eq. 389.

It was held in *Cathcart v. Matthews* (1916) 105 S. C. 329, 89 S. E. 1021, that a subsequent adjudication of insanity was not conclusive evidence of the lunatic's incapacity to direct a conveyance of his land by his trustee.

In a note to *Frank v. Frank* (1840) 2 Moody & R. (Eng.) 314, the direction by the master of the rolls of an issue to ascertain whether the defendant was of sound mind at the time of the execution of the deed in question, it is stated that it had been shown in the proceedings in chancery, from which the issue had been directed, that the defendant had been adjudged to have been a lunatic from a time prior to the execution of the deed, and the master of the rolls, when the issue was directed, expressed his opinion that the inquisition raised a presumption against the sanity of the grantor at the time of the execution of the deed. It is further stated that there appears to be no doubt that the effect of an inquisition on a writ de lunatico inquirendo, when received in evidence on a trial between third parties touching the sanity of the supposed lunatic, is to raise a presumption that the party was a lunatic at the time stated by the inquisition, and that he continued to be a lunatic afterwards, but that the presumption of insanity, from the fact of the inquisition having found a party to be in that state, is, as stated by the master of the rolls in the principal case, a very slight presumption, though sufficient to shift the burden of proof to those who dispute the insanity.

Commitment to an insane asylum is not conclusive evidence of prior incapacity to execute a deed. *Avery v. Avery* (1919) — Cal. App. —, 183 Pac. 453.

The deed of an insane person, after being placed under guardianship, is absolutely void, and guardianship is conclusive respecting the disability of the ward. *Rannells v. Gerner* (1883) 80 Mo. 474.

The appointment of a guardian for one as an imbecile is conclusive evidence of his incapacity to ratify transfers by him of his property. *Jordan v. Dickson* (1888) 19 Ohio L. J. 64.

And in *Wait v. Maxwell* (1827) 22 Mass. 217, 16 Am. Dec. 391, holding a decree granting letters of guardianship of an incompetent inadmissible, because void, the court stated in effect that had the decree been valid it would have been conclusive evidence of the incompetent's incapacity to subsequently execute a deed.

In *Fitzhugh v. Wilcox* (1851) 12 Barb. (N. Y.) 235, a contract for the sale of realty by a person who had been found to be a lunatic was held void.

An adjudication that a person is a person of unsound mind is *prima facie* evidence of his subsequent incapacity to execute a trust deed. *Miller v. Rutledge* (1887) 82 Va. 863, 1 S. E. 202.

An inquisition of lunacy is only presumptive evidence of the incapacity of the lunatic to execute a mortgage during the previous time referred to in the finding. *Hardy v. Berger* (1902) 76 App. Div. 393, 78 N. Y. Supp. 709; *Hirsch v. Trainer* (1877) 3 Abb. N. C. (N. Y.) 274.

An inquisition has no force as evidence of the lunatic's incapacity at the time of his execution of a prior mortgage, as against one who has paid, in good faith, such mortgage, after his purchase of the mortgaged property from the lunatic's committee under a void deed, and who is entitled to be reimbursed for such payment. *Reals v. Weston* (1899) 28 Misc. 67, 59 N. Y. Supp. 807.

An inquisition, after a bill to foreclose, finding the mortgagor to have been a lunatic from a time prior to the

execution of the mortgage, casts the burden on the mortgagee of proving the mortgagor's sanity. *Snook v. Watts* (1848) 11 Beav. 105, 50 Eng. Reprint, 757.

In *Thorpe v. Hanscom* (1896) 64 Minn. 201, 66 N. W. 1, holding valid a mortgage made by one under guardianship, because executed after the practical abandonment of the guardianship and when the mortgagor was in fact of sound mind, the court said: "The deed of an insane person not under guardianship is not void, but only voidable, but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid contract concerning his property, though in fact he is sane at the time of making the same."

An adjudication of lunacy creates no presumption of incapacity to execute an assignment of a mortgage in the period overreached by the finding. *Schanck v. Hooper* (1916) 160 N. Y. Supp. 627.

In *Hill v. Day* (1881) 34 N. J. Eq. 150, a suit to set aside an assignment of a mortgage on the ground of the assignor's mental incapacity, it was held that an inquisition finding the assignor to have been of unsound mind antedating the assignment, but with lucid intervals, simply made a prima facie case, and that as to the assignee it was not conclusive even as to the point of time when taken, and that much less could it have that effect against him for the retrospective period of two years.

An inquisition is prima facie, but not conclusive, evidence of the incapacity of the lunatic to execute a lease within the period overreached by the finding of lunacy. *Hassard v. Smith* (1872) Ir. Rep. 6 Eq. 429.

In *Dane v. Kirkwall* (1838) 8 Car. & P. (Eng.) 679, an action for use and occupation, it was held that an inquisition of lunacy finding the alleged lunatic to have been so prior to the making of the lease in question was prima facie evidence of the lessee's incapacity.

In *Sbarbero v. Miller* (1907) 72 N. J. Eq. 248, 65 Atl. 472, affirmed without opinion in (1908) 74 N. J. Eq. 453,

77 Atl. 1088, an action to set aside an assignment of a lease because of the mental incapacity of the assignor, it was held that the finding of a commission in lunacy less than three months after the execution of the assignment was only prima facie evidence of his incapacity. The court in this case said: "I will not further discuss the weight of this finding because, while in a doubtful case I should give great weight to the determination of commissioners and a jury, I do not see that it is entitled to any more than prima facie effect in the face of a fully tried issue in this court. Particularly would I be inclined to treat it in the way indicated when, as in this case, the alleged lunatic was not served with notice of the commission, and was not present, and was not seen or examined by the commissioners or the jury."

In a suit for the reconveyance of personal property upon the ground of the vendor's mental incapacity, a subsequent inquisition is only prima facie proof of his incapacity. *Rippy v. Gant* (1847) 39 N. C. (4 Ired. Eq.) 443.

### 2. Bills and notes.

An adjudication of lunacy is conclusive as to the lunatic's incapacity to subsequently execute a promissory note, and such presumption, in the absence of a decree of restoration, cannot be overcome by proof that he has meanwhile become capable of managing his own affairs. *Kiehne v. Wessell* (1893) 53 Mo. App. 667.

An inquisition is conclusive evidence of the incapacity of one found to be an habitual drunkard to waive protest of a bill of exchange indorsed by him as against a bona fide holder of the bill without notice of the inquisition. *Wadsworth v. Sharpsteen* (1853) 8 N. Y. 388, 59 Am. Dec. 499.

It was held in *Stitzel v. Farley* (1909) 148 Ill. 635, that the burden was upon the holder, in an action on a note, to establish the maker's sanity at the time of its execution, where it appeared that the maker had been adjudged insane before the execution of the note, although he had been re-

leased from the insane asylum, and was without a conservator when he made the note.

An inquisition of lunacy is not conclusive, but is *prima facie*, evidence of the incompetency of the lunatic to make a promissory note during the retrospective period covered by the finding. *Hicks v. Marshall* (1876) 8 Hun (N. Y.) 327; *Richie v. Shepard* (1913) 153 App. Div. 192, 143 N. Y. Supp. 19; *Willis v. Willis* (1849) 12 Pa. 159; *Noel v. Karper* (1866) 53 Pa. 97; *Lancaster County Nat. Bank v. Moore* (1875) 78 Pa. 407, 21 Am. Rep. 24; *Hottle v. Weaver* (1903) 206 Pa. 87, 55 Atl. 838; *Knox v. Knox* (1888) 80 S. C. 377, 9 S. E. 353.

### 3. Marriage contracts.

An adjudication of lunacy is conclusive evidence of the lunatic's incapacity to subsequently make a promise of marriage. *O'Reilly v. Sweeney* (1907) 54 Misc. 408, 105 N. Y. Supp. 1033.

An inquisition of lunacy is only *prima facie* evidence of the subsequent incapacity of the lunatic to contract a marriage, and may be rebutted by the other party to the marriage. *Johnson v. Kincade* (1843) 37 N. C. (2 Ired. Eq.) 470; *Goodheart v. Ransley* (1892) 11 Ohio Dec. Reprint, 655.

The judgment of a probate court in adjudging a person insane and appointing a guardian is not conclusive of such person's incapacity to contract a valid marriage. *Payne v. Burdette* (1900) 84 Mo. App. 332.

In *Castor v. Davis* (1889) 120 Ind. 231, 22 N. E. 110, it is held that the presumption in favor of the legality of a marriage will prevail over the presumption that one who has been adjudged insane continues insane until duly adjudged sane.

An inquisition of lunacy is only presumptive evidence of the incapacity of the lunatic to contract a marriage solemnized within a period retrospectively included in the finding of insanity, and the fact that the other party to the marriage, the defendant in an action to annul it, had notice of the commencement of the lunacy proceedings before the marriage, does not

affect the question. *Banker v. Banker* (1875) 63 N. Y. 409.

In *Portsmouth v. Portsmouth* (1828) 1 Hagg. Eccl. Rep. 355, 162 Eng. Reprint, 611, an action to annul a marriage solemnized within the retrospective period of the finding of an inquisition of lunacy, the court said that the finding was no more than a circumstance, and a part of the evidence in support of unsoundness of mind at the time of the marriage.

An inquisition finding one to have been a lunatic at the time of the destruction by him of a marriage settlement is only *prima facie*, and not conclusive, evidence of his incapacity at that time. *Re Gangwere* (1850) 14 Pa. 417, 53 Am. Dec. 554.

An inquisition of habitual drunkenness is conclusive evidence of the subsequent incapacity of the drunkard to make a bond in the nature of an antenuptial settlement. *Imhoff v. Witmer* (1858) 31 Pa. 248.

### 4. Miscellaneous.

In an action of debt on a bond executed by one who had been adjudged a lunatic, the inquisition is only presumptive evidence of his incapacity, and may be rebutted by proof. *Armstrong v. Short* (1820) 8 N. C. (1 Hawks) 11.

And a subsequent inquisition is not conclusive, in such an action, as to the obligor's incapacity. *Hart v. Deamer* (1831) 6 Wend. (N. Y.) 497.

In an action of debt on a bond executed by one subsequently found to be insane, without lucid intervals, from a time antedating its execution, the inquisition is not conclusive evidence of his incapacity, and its weight is to be determined by the jury, after comparing it with the other facts of the case. *Faulder v. Silk* (1811) 3 Campb. (Eng.) 126, 13 Revised Rep. 771.

As to the execution of a judgment bond by a lunatic before the issuing of a commission, and which is overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. *L'Amoureux v. Crosby* (1831) 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

A finding of lunacy at an inquest is *prima facie* evidence of incapacity to confess judgment, where the judgment was confessed prior to the holding of the inquest (as digested in the *Century Digest*). *Koons v. Benscoter* (1873) 2 Kulp (Pa.) 451.

In *Parker v. Davis* (1862) 53 N. C. (8 Jones, L.) 460, an action to recover the price of goods sold and delivered to a lunatic, it was held that the inquisition of lunacy was not conclusive evidence of his insanity.

And in a similar action it was held that an adjudication of insanity, made subsequently to the execution of the contract of sale, did not establish insanity at the time of the making of the contract. *Shores-Mueller Co. v. Palmer* (1919) — Ark. —, 216 S. W. 295.

It was held in *Thomasson v. Kercheval* (1849) 10 Humph. (Tenn.) 322, an action on the case to recover moneys expended for the benefit of the defendant's intestate, in pursuance of a contract made with her, through her agent, that an adjudication of the insanity of the intestate was *prima facie* evidence of her incapacity to make the contract.

The presumption of insanity during the life of the inquisition is conclusive, and the actual sanity of the adjudged incompetent cannot be shown by the defendant, in an action by the incompetent's committee, in support of the defendant's settlement with the lunatic pending the action. *Wallace v. Frey* (1899) 27 Misc. 29, 56 N. Y. Supp. 1051.

An inquisition, so far as a finding of prior insanity is concerned, has no force as evidence of the incapacity of the lunatic to previously change the beneficiary in his benefit certificate, but it is conclusive evidence of his incapacity to subsequently change the beneficiary, except where no committee for the lunatic has qualified or acted, and the subsequently designated beneficiary may show his restoration to reason at the time of the subsequent designation of a new beneficiary. *Southern Tier Masonic Relief Asso. v. Laudenschach* (1889) 5 N. Y. Supp. 901.

#### *h. Testamentary incapacity.*

An adjudication of insanity is not conclusive, but only presumptive, evidence of testamentary incapacity, whether made before or after the execution of the will.

**Georgia.** — *Terry v. Buffington* (1852) 11 Ga. 337, 56 Am. Dec. 423 (prior adjudication).

**Indiana.** — *Harrison v. Bishop* (1891) 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069 (prior adjudication); *Taylor v. Taylor* (1910) 174 Ind. 670, 93 N. E. 9 (subsequent adjudication).

**Iowa.** — *Cahill v. Cahill* (1912) 155 Iowa, 340, 136 N. W. 214 (prior adjudication).

**Massachusetts.** — *Stone v. Damon* (1815) 12 Mass. 488 (prior adjudication).

**Missouri.** — *King v. Gilson* (1905) 191 Mo. 307, 90 S. W. 367 (prior adjudication).

**New Jersey.** — *Re Coleman* (1917) 88 N. J. Eq. 578, 103 Atl. 78 (subsequent adjudication).

**New York.** — *Searles v. Harvey* (1876) 6 Hun, 658 (subsequent adjudication); *Re Taylor* (1847) 1 Edmonds, Sel. Cas. 375 (prior adjudication).

**Pennsylvania.** — *Harden v. Hays* (1848) 9 Pa. 151 (subsequent adjudication); *Titlow v. Titlow* (1867) 54 Pa. 216, 93 Am. Dec. 691 (subsequent adjudication); *Hoopes's Estate* (1896) 174 Pa. 373, 34 Atl. 603 (prior adjudication).

**Vermont.** — *Re Wheelock* (1904) 76 Vt. 235, 56 Atl. 1013 (prior adjudication).

**England.** — *Bannatyne v. Bannatyne* (1852) 16 Jur. 864, 2 Rob. Eccl. Rep. 472, 14 Eng. L. & Eq. Rep. 581 (subsequent adjudication); *Prinsep v. Sombre* (1856) 10 Moore, P. C. C. 232, 14 Eng. Reprint, 480 (prior adjudication).

In *Wadsworth v. Sharpsteen* (1853) 8 N. Y. 388, 59 Am. Dec. 499, the court said: "It has been adjudged, however, that the inquisition is not conclusive evidence of the lunatic's incapacity to make a will. This is an exception to the general rule, and the reason given for it in the case of *Leonard v. Leon-*

ard (1832) 14 Pick. (Mass.) 284, is that this is an act which the guardian cannot do for him. And, in another case, that the making of a will is an act manifestly distinguishable from contracts and other acts done *inter vivos*, and involves no conflict of authority with the guardian, because the will cannot operate to any purpose till the death of the testator, and by that same event the authority of the guardian is determined. *Breed v. Pratt* (1836) 18 Pick. (Mass.) 116. To these may be added, as especially applicable to the case of an habitual drunkard, that the chief object of the proceeding by inquisition is the preservation of his property during his lifetime for the benefit of himself and his family, and that the motives which might induce him to make an improper disposition of it during his lifetime do not exist in relation to a disposition to take effect after his death."

Under a statute providing that, after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined, but if actually restored to capacity he may make a will, though his restoration is not thus determined, an adjudication of incompetency is, as to lack of testamentary capacity, *prima facie* evidence only. *Re Johnson* (1881) 57 Cal. 529.

A finding upon an inquest of lunacy that the subject thereof is a distracted or feeble-minded person, and by reason of this condition incapable of managing and caring for his estate, is not sufficient to establish want of testamentary capacity. *Re Weedman* (1912) 254 Ill. 504, 98 N. E. 956.

It was held in *Schmidt's Succession* (1910) 125 La. 1065, 52 So. 160, that the interdiction of a testatrix and her commitment to an insane asylum about a year and a half after the making of her will, and the fact that she had given signs of senile dementia within a period varying from five to ten months after the making of the will, were insufficient to support an attack upon the validity of the will, where

the evidence failed to show that she was insane before or at the time of the making of the will, and there was nothing unreasonable therein.

A finding by the probate court that a person is insane and incompetent to manage his property, although made a little later in the day on which his will was executed, is not conclusive of his want of testamentary capacity. *Rice v. Rice* (1884) 53 Mich. 432, 19 N. W. 132; *Rice v. Rice* (1883) 50 Mich. 448, 15 N. W. 545.

In *Whitenack v. Stryker* (1838) 2 N. J. Eq. 8, admitting two codicils to probate, where two inquisitions were admitted in evidence, one, dated between the dates of the codicils, finding the testator to be of unsound mind, but enjoying lucid intervals, and the other dated after the second codicil and finding the testator to be of unsound mind and mentally incapable of managing his affairs, it was held that these inquisitions were not conclusive as to the testator's capacity, but were only entitled to the respect which was due to the opinions expressed in their verdict of the jurors on the inquisitions.

In *Brady v. McBride* (1885) 39 N. J. Eq. 495, it was held that an inquisition, dated nearly three years after the will admitted to probate was made, finding that the lunacy had existed for three years, was not conclusive, but that any presumption which it raised was rebutted by the testimony of witnesses that the testatrix had testamentary capacity at the time of the making of the will.

A finding of insanity, confirmed after the execution of a will by the incompetent, is presumptive evidence of his testamentary incapacity and, unless overcome by satisfactory evidence, requires a denial of probate. *Re Widmayer* (1902) 74 App. Div. 336, 77 N. Y. Supp. 663.

In *Russell v. Lefrancois* (1883) 8 Can. S. C. 335, an action by the executor of the will of an alleged lunatic to compel the latter's curator to turn over the deceased's property to him as executor, the adjudication of the testator's insanity made about five weeks after the execution of the will,

being in evidence, was apparently given very slight weight in determining the incapacity of the testator.

In *Rodd v. Lewis* (1755) 2 Lee, Eccl. Rep. 176, 161 Eng. Reprint, 304, an inquisition finding insanity from a period prior to the execution of a will was held not strong enough to set aside the positive evidence of sanity of the testator at the time of making the will.

A decree of guardianship is not conclusive, but merely *prima facie*, evidence of testamentary incapacity. *Harrison v. Bishop* (1891) 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Re Fenton* (1896) 97 Iowa, 192, 66 N. W. 99; *Linkmeyer v. Brandt* (1898) 107 Iowa, 750, 77 N. W. 493; *Re Chandler* (1906) 102 Me. 72, 66 Atl. 215; *Stone v. Damon* (1815) 12 Mass. 488; *Breed v. Pratt* (1836) 18 Pick. (Mass.) 115; *Crowninshield v. Crowninshield* (1854) 2 Gray (Mass.) 524; *Boston Safe Deposit & T. Co. v. Bacon* (1918) 229 Mass. 585, 118 N. E. 906; *Collins v. Long* (1920) — Or. —, 186 Pac. 1038; *Hamilton v. Hamilton* (1873) 10 R. I. 538.

The court held in *Hamilton v. Hamilton* (R. I.) *supra*, that it made no difference that the will was executed pending an appeal which affirmed the decree establishing the guardianship.

In *Williams v. Robinson* (1867) 39 Vt. 267, holding that the appointment of a guardian is not conclusive evidence of testamentary incapacity, where it does not appear but that the guardianship may have been imposed on the sole ground of weakness of mind, and not for insanity, the court intimated that it would hold the same even if the guardianship was imposed for insanity.

Letters of guardianship issued upon the ground that the ward wanted discretion in the management of her estate, under an act providing that idiots, lunatics, or persons non compos mentis, and persons who for want of discretion in managing their estates would be likely to bring themselves and family to want and thereby render themselves chargeable upon the county, may be placed under guardianship, do not avoid a will subsequently

made by the ward, under another section of the same act declaring that all contracts, bargains, and conveyances made by any person under guardianship shall be utterly void, since a will is not a conveyance within the meaning of such section. The court further held that such letters did not have any effect because of the invalidity of the order of the probate court, but, in this connection, said that if a proper case had been stated and a valid order made, they did not think it should have any effect on the present case, because such a want of discretion did not imply that the party was not of a sane mind, but that if the appointment had been made because of idiocy, lunacy, or because the person was non compos mentis, the case would have been different. *Jenckes v. Probate Ct.* (1852) 2 R. I. 255.

In *Breed v. Pratt* (1836) 18 Pick. (Mass.) 115, it was said with reference to the making of a will by a person under guardianship: "It is an act manifestly distinguishable from contracts and other acts to be done inter vivos, and involves no conflict of authority with the guardian in this respect, because the will cannot operate to any purpose until the death of the testator, and by that same event the authority of the guardian is determined."

It was held in *Re Cowdry* (1905) 77 Vt. 359, 60 Atl. 141, 3 Ann. Cas. 70, that the appointment of a guardian for one, under a statute providing for the appointment of guardians for persons mentally incapable of taking care of themselves or their property, was not even *prima facie* evidence of testamentary incapacity.

The court said, in *Re Pendleton* (1889) 1 Connolly, 480, 5 N. Y. Supp. 849, in upholding a will made by one under the control of a committee in lunacy: "Were it not for the appointment of the committee in lunacy, there could have been very little ground for the claim that she [testatrix] was not competent to make a testamentary disposition of her estate. The force of such adjudication cannot be considered strong when we bear in mind

that, ordinarily, the main object in appointing a committee is to deprive the party of managing his own estate, because he is incompetent to have the care of it, and would be likely to squander it."

The subsequent appointment of a guardian creates no presumption of mental incapacity on the part of a testatrix at the time of the making of the will. *Spiers v. Hendershott* (1909) 142 Iowa, 446, 120 N. W. 1058; *Re Clogston* (1919) — Vt. —, 106 Atl. 594.

But it was held in *Ames's Will* (1902) 40 Or. 495, 67 Pac. 737, that the appointment of a guardian on the same day, but after the execution of a will by the ward, was presumptive, but not conclusive, evidence of his testamentary incapacity.

An inquisition of habitual drunkenness is only prima facie evidence of subsequent testamentary incapacity. *Lewis v. Jones* (1868) 50 Barb. (N. Y.) 645; *Leckey v. Cunningham* (1867) 56 Pa. 370.

But it was held in *Re Patterson* (1849) 4 How. Pr. (N. Y.) 34, that such an inquisition was conclusive evidence of the incapacity of the drunkard to make a valid will without permission of the court. The court said that the existence of the commission presented a technical objection which it was necessary to remove, and affirmed an order denying a motion to set aside an ex parte order, made at chambers, suspending the inquisition so far as to permit the drunkard to make a will.

#### *1. Criminal irresponsibility.*

An adjudication of insanity is only prima facie and not conclusive evidence, on a prosecution for murder, of the mental condition of the accused at the time of the commission of the crime within the period overreached by the finding of insanity. *Witty v. State* (1913) 69 Tex. Crim. Rep. 125, 153 S. W. 1146.

It was held in *Hempton v. State* (1901) 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657, on a prosecution for homicide, that a prior adjudication of insanity and commitment to an

insane asylum were not conclusive in favor of the accused, except that he was insane when it was made.

The weight of a record of a probate court showing commitment to an insane asylum is, in a criminal prosecution, for the jury. *McCully v. State* (1920) — Ark. —, 217 S. W. 453.

In *Wheeler v. State* (1878) 34 Ohio St. 394, 32 Am. Rep. 372, where a record of a probate court of an adjudication of lunacy and of confinement in an asylum was admitted on a subsequent prosecution of the lunatic for burglary and larceny, the court said: "Ordinarily, such inquisitions are not conclusive, but only prima facie evidence of incapacity, as will be seen from the authorities cited; but, on a question like that in issue here, it is manifest they cannot be regarded as even prima facie evidence. A person who is a fit subject for confinement in an insane asylum does not necessarily have immunity from punishment for crime; and the length of time between confinement in the asylum and the commission of the act charged, the nature of the crime, and other facts, may render such inquisition of little weight as evidence; but its weight is for the jury in each case."

The presumption of insanity created by an acquittal, on the ground of insanity of one tried for murder, continues until overthrown by proof of restoration to sanity. *State ex rel. Thompson v. Snell* (1907) 46 Wash. 327, 9 L.R.A. (N.S.) 1191, 89 Pac. 931.

It was held in *Reeves v. State* (1914) 186 Ala. 14, 65 So. 160, that an ex parte order committing one to an insane asylum was not conclusive evidence of his insanity, on his prosecution for murder.

The fact that he had been confined in a lunatic asylum is not conclusive on the question of the mental condition of one accused of assault a few years later. *Meyer v. People* (1895) 156 Ill. 126, 40 N. E. 490.

But it was held in *State v. Davis* (1887) 27 S. C. 609, 4 S. E. 567, on a prosecution for murder, that where insanity has been established by proof of commitment to an insane asylum, it



is presumed to continue until the contrary is shown.

It was held in *Langdon v. People* (1890) 133 Ill. 382, 24 N. E. 874, that the transfer from the penitentiary to an insane asylum of one convicted of forgery was not conclusive evidence of his insanity.

The fact that one on trial for homicide had been ordered committed to the state hospital for the insane immediately prior to the homicide does not conclusively establish that he was not responsible for the killing, since he might have been suffering from partial insanity such as would justify his detention in the asylum for care and treatment, and still not be insane to such an extent as to be deemed irresponsible in law for his conduct. *People v. Willard* (1907) 150 Cal. 543, 89 Pac. 124.

It was held in *Goodwin v. State* (1884) 96 Ind. 550, on a prosecution for homicide, that proceedings for the commitment of the accused to a hospital for the insane were not conclusive, where they were instituted under a statute which did not contemplate that such proceedings should be a conclusive adjudication of insanity, but merely an adjudication of propriety of treatment in the hospital.

It is not conclusive evidence of the irresponsibility of one accused of murder that he had previously been adjudged a fit subject for treatment in a hospital for the insane. *Pfueger v. State* (1895) 46 Neb. 493, 64 N. W. 1094.

Proof of confinement in a hospital for the insane for a few months is not conclusive evidence of the criminal irresponsibility of one accused of murder some twenty-five years afterwards. *Blue v. Com.* (1916) 171 Ky. 165, 188 S. W. 329.

#### *j. Mental unfitness for trial.*

Where a probate court, acting under its statutory authority to examine into the mental condition of persons and adjudge whether they are insane or not, has duly adjudged to be insane one in custody on a criminal charge, the examining magistrate, in the absence of any other showing or adjudi-

cation upon the question of the defendant's mental condition, cannot proceed with such examination or hold the defendant to bail to answer for such crime. *Re Wright* (1906) 74 Kan. 406, 86 Pac. 460, 89 Pac. 678.

In *Reeves v. State* (1914) 186 Ala. 14, 65 So. 160, where it was suggested to the court that the defendant was insane, and ought not to be placed on trial for that reason, and the defendant apparently relied solely upon an order, made while he was in jail, committing him to the state insane asylum, it was held that such an order was not conclusive as to the question of insanity.

A finding of insanity, on an inquiry instituted for the purpose of determining whether a person under confinement on a criminal charge should be brought to trial, is not conclusive on the question of his mental condition at the time of the offense. *State v. Grendahl* (1906) 181 Iowa, 602, 109 N. W. 121.

And in *Davidson v. Com.* (1916) 171 Ky. 488, 188 S. W. 631, where a lunacy inquiry into the mental condition of one under confinement on a criminal charge was held under a statute authorizing the jury to find when the insanity began, and providing that his trial should be postponed until the condition of his mind could be determined, and, if unsound, that he should be confined until he was restored, it was held that a verdict finding that his insanity began before the commission of the crime was not conclusive evidence of his insanity at that time, and was not a bar to his further prosecution, but that, as the verdict was conclusive of his mental condition only at the time of the inquest, and as there was no rule of law or statute requiring a second inquest to rebut the presumption of continuance of insanity, it might be rebutted by oral evidence upon his subsequent prosecution.

#### *k. Disqualification as witness.*

An adjudication of insanity is *prima facie* evidence of the lunatic's incompetency as a witness. *Hoyt v. Adeo* (1870) 3 Lans. (N. Y.) 173.

And in *Pittsburgh & W. R. Co. v.*

Thompson (1877) 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720, it was held that such an adjudication and confinement in a lunatic asylum were *prima facie* evidence of the lunatic's unsoundness of mind, under a statute disqualifying persons of unsound mind as witnesses.

But in *Covington v. O'Meara* (1909) 133 Ky. 763, 119 S. W. 187, it was held that the rule that one adjudged insane is presumed to continue so did not apply to one offered as a witness, unless he was still confined in the insane asylum, or the adjudication was so recent as to raise the presumption of fact that his mental condition had not materially changed.

And it was held in *Barker v. Washburn* (1911) 200 N. Y. 280, 84 L.R.A. (N.S.) 159, 140 Am. St. Rep. 640, 93 N. E. 958, that an inquisition of idiocy and the appointment of a committee for the idiot were not conclusive evidence of his incompetency to testify several years later, but that he might be allowed to testify, if an examination showed his competency to do so.

And in *Breedlove v. Bundy* (1884) 96 Ind. 319, it was held that a certificate by two justices of the peace that a person was insane and should be placed in a hospital for the curable insane, and his commitment thereto, was not sufficient to establish his incompetency as a witness nine years afterwards.

#### 1. *Miscellaneous.*

An inquisition of lunacy taken prior to an alleged adultery is only presumptive evidence, in an action for divorce, of the defendant's insanity at the time of the commission of the adultery. *Cook v. Cook* (1869) 53 Barb. (N. Y.) 180.

It was held in *Donnelly v. Chicago City R. Co.* (1911) 163 Ill. App. 7, that a subsequent adjudication of lunacy was not conclusive of the fact of insanity, in an action for personal injuries in which it was claimed that the insanity was due to the injuries received.

An adjudication of insanity, where no committee is appointed, is not conclusive evidence of the lunatic's in-

capacity to subsequently choose a new domicil. *Re Fidelity Trust Co.* (1899) 27 Misc. 118, 57 N. Y. Supp. 361.

The same holding was made in *Lucas v. Parsons* (1857) 23 Ga. 267, where a guardian had been appointed, and was acting.

In *Demelt v. Leonard* (1860) 19 How. Pr. (N. Y.) 140, an action by his committee to set aside a judgment previously rendered against a lunatic during the period overreached by the findings in the lunacy proceedings, it was held that the inquisition was presumptive evidence that the judgment debtor was insane at the time the judgment was obtained.

An inquisition of lunacy is only *prima facie* evidence upon the question whether the lunatic comes within the exception of the Statute of Limitations as to persons *non compos mentis*. *Christmas v. Mitchell* (1845) 38 N. C. (3 Ired. Eq.) 464.

An inquisition of lunacy is conclusive evidence of the insanity of the alleged lunatic at the time of the finding, in an action of trespass by the lunatic, against those who instituted the lunacy proceedings, for conspiracy in causing the plaintiff to be placed in an insane asylum. *Johnston v. Given* (1884) 4 Walk. (Pa.) 341.

A decree of the probate court upon an inquisition of lunacy must be considered, at least, as *prima facie* evidence that the assignment of the guardian was rightly made, and that the ward was a person *non compos mentis*. *White v. Palmer* (1808) 4 Mass. 147.

In *Chaloner v. New York Evening Post Co.* (1919) 260 Fed. 335, an action for libel in a Federal court for New York, by a resident of Virginia who had been adjudged insane by a New York court, and subsequently found sane by a Virginia court before the commencement of the action, it was held, upon the question of the plaintiff's capacity to sue under the section of the New York Code denying capacity to one who has been judicially declared to be incompetent, that the New York decree, in the absence of countervailing evidence of equal dignity, should be accepted as conclu-

sively establishing the plaintiff's present mental status, but that the later Virginia decree was competent evidence of the plaintiff's mental status, and neutralized the probative effect of the New York decree.

An adjudication of insanity of a referee, made on the date on which he signed his decision, is only prima facie or presumptive evidence of his insanity on such date, on a motion to set aside the judgment rendered upon his decision. *R. A. Schoenberg & Co. v. Ulman* (1906) 51 Misc. 83, 99 N. Y. Supp. 650.

In *Newton v. Mutual Ben. L. Ins. Co.* (1879) 76 N. Y. 426, 32 Am. Rep. 835, an action on a policy of life insurance by the administrator of the insured, where the defendant, in support of the defense that the insured falsely stated in his application for the policy that his father had not died of, or been afflicted with, insanity, intro-

duced in evidence the record of a probate court holding his father to be an insane person and ordering him to be sent to a lunatic asylum, and the record of the asylum showing his admission thereto, it was held that they were not conclusive evidence against the plaintiff of the insanity of the insured's father.

In *Re Linton* (1892) 29 W. N. C. (Pa.) 550, a committee was appointed for a person on proof of his lunacy by an adjudication of lunacy in another state.

In passing upon the question of the validity of the sale of a lunatic's real estate by his committee, the court, in *Mitchell v. Spaulding* (1902) 20 Pa. Super Ct. 296, said that the finding of the inquisition, after its return, was conclusive of the question of the capacity of the alleged lunatic until revoked. G. V. L.

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JOHN F. MALLEY, Collector, Plff. in Err.,

v.

CHARLES P. BOWDITCH et al., Trustees of the Pepperell Manufacturing Company.

*United States Circuit Court of Appeals, First Circuit—July 29, 1919.*

(259 Fed. 809.)

**Tax — stamp — share in trust.**

1. The provision of the Act of Congress of October 22, 1914, imposing a stamp tax upon the issues of shares of stock, applies to certificates of shares issued by a common-law trust which carry certain rights while the trust is a going concern and in its winding up.

[See note on this question beginning on page 612.]

**Definition — certificate of stock.**

2. A certificate evidencing a transferable share or shares in the share capital of a manufacturing company whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a "certificate of stock."

[See 7 R. C. L. 713.]

**Constitutional law — stamp tax — discrimination between companies.**

3. A statute imposing a stamp tax upon the issuance of certificates of stock does not unconstitutionally or unreasonably discriminate between associations which do and those which do not issue certificates of stock.

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ERROR to the District Court of the United States for the District of Massachusetts (Bingham, Dist. J.) to review a judgment in favor of plaintiffs in an action brought to recover the amount of a stamp tax on stock certificates paid by plaintiffs to defendant under protest. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Thomas J. Boynton and Francis G. Goodale, for plaintiff in error:

The Pepperell Manufacturing Company is an "association" within the meaning of the statute.

Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Crocker v. Malley, 163 C. C. A. 131, 250 Fed. 817.

The shareholders' certificates of Pepperell Manufacturing Company are "certificates of stock."

Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. ed. 558, 560; Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360; Crocker v. Malley, 163 C. C. A. 131, 250 Fed. 817; Roberts v. Anderson, 141 C. C. A. 121, 226 Fed. 9; Minot v. Burroughs, 223 Mass. 595, 112 N. E. 620; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; State ex rel. Batz v. Lewis, 118 Wis. 432, 95 N. W. 388; Dana v. Treasurer, 227 Mass. 562, 116 N. E. 941; Bartlett v. Gill, 221 Fed. 476, 140 C. C. A. 405, 224 Fed. 927; Com. v. Pennsylvania Coal Co. 197 Pa. 551, 47 Atl. 740.

Messrs. Tyler, Tucker, Eames, & Wright and William C. Rice, for defendants in error:

Certificates of beneficial interest in a trust are not "certificates of stock" within either the ordinary and recognized meaning, or the technical meaning, of that term.

1 Cook, Corp. § 8, p. 39; Neiler v. Kelley, 69 Pa. 403; 2 Machen, Corp. § 1313; Wells v. Green Bay & M. Canal Co. 90 Wis. 442, 64 N. W. 69; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; Bidwell v. Pittsburgh, O. & E. L. Pass. R. Co. 114 Pa. 535, 6 Atl. 729; Georgia R. & Bkg. Co. v. Wright, 132 Fed. 912; People ex rel. Winchester v. Coleman, 133 N. Y. 279, 16 L.R.A. 183, 31 N. E. 96; Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; Oliver v. Liverpool & L. Life & F. Ins. Co. 100 Mass. 531, 10 Wall. 566, 19 L. ed. 1029; Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919; Roberts v. Anderson, 141 C. C. A. 121, 226 Fed. 7.

Certificates of beneficial interest in a trust represent an interest or property fundamentally different in its nature from that represented by "certificates of stock."

Hutchins v. State Bank, 12 Met. 7 A.L.R.—39.

421; Peabody v. Treasurer, 215 Mass. 129, 102 N. E. 435; Kinney v. Treasurer (Kinney v. Stevens) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902; Howe v. Morse, 174 Mass. 491, 55 N. E. 213; Hyett v. Mekin, L. R. 25 Ch. Div. 735, 53 L. J. Ch. N. S. 241, 50 L. T. N. S. 54, 32 Week. Rep. 513; Atty. Gen. v. Mangles, 5 Mees. & W. 120, 151 Eng. Reprint, 52, 2 Horn & H. 74, 3 Jur. 281; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Hoadley v. Essex County, 105 Mass. 519; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Atty. Gen. v. New York, N. H. & H. R. Co. 198 Mass. 418, 84 N. E. 737; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Gleason v. McKay, 134 Mass. 419; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Opinion of Justices, 196 Mass. 603, 85 N. E. 545.

The ownership of certificates of beneficial interest in a trust involves very different rights and obligations from those involved in ownership of "certificates of stock."

Hoadley v. Essex County, 105 Mass. 519; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 208; Sanger v. Upton, 91 U. S. 60, 23 L. ed. 222; Phillips v. Blatchford, 137 Mass. 510; Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341.

Suits may be brought by or against a corporation in the corporate name, but a trust cannot sue or be sued as an entity.

Carey v. Brown, 92 U. S. 171, 172, 23 L. ed. 469, 470; Kerrison v. Stewart, 93 U. S. 155, 160, 23 L. ed. 843, 845; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; Ashton v. Atlantic Bank, 3 Allen, 217; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392; Coombs v. Harford, 99 Me. 426, 59 Atl. 529.

The construction of the statute under which these certificates of beneficial interest are clearly distinguished from "certificates of stock" is in accordance with the decisions under the Corporation Tax Law, and is the only construction which avoids the danger of unconstitutionality.

Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360; Crocker v. Malley, 163 C. C. A. 131, 250 Fed. 817; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 88 N. E. 512; Gleason v. McKay, 134 Mass. 419; Opinion of Justices, 196 Mass. 603, 85 N. E. 545.

Brown, District Judge, delivered the opinion of the court:

We are of the opinion that, on the original issue of the certificates of shares of the Pepperell Manufacturing Company, a manufacturing company organized in the form of a trust under the common law, and

**Tax—stamp—  
share in  
trust.**

deriving none of its rights, qualities, or benefits from any statute, there was required by the provisions of § 5, schedule A, of the War Tax Law, so-called, approved October 22, 1914 (38 Stat. at L. 745, 753, 759, chap. 331, Comp. Stat. §§ 2013, 2643, 4 Fed. Stat. Anno. 2d ed. pp. 185, 284, 296), a stamp tax of 5 cents on each \$100 of face value or fraction thereof.

By the agreement and declaration of trust it was provided: "The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars (\$7,668,000), divided for the purpose of issuing certificates into 76,680 shares, of the par value of one hundred dollars (\$100) each."

There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest therein and carrying with them certain rights while the company is a going concern and in its winding up.

The defendants in error, the trustees, contend that these certificates are not "certificates of stock."

The word "stock," however, is to be interpreted in connection with the accompanying words of the statute, "association, company, or corporation." It is a term not peculiar to corporations, but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company.

The contention of the trustees, that "legislative action is essential to the creation of 'capital stock,'" is erroneous. If there is a distinction between the "capital" and the "capital stock" of corporations, in that the capital stock is fixed by the

charter of a corporation, but that the capital used in its business may be either larger or smaller, there may be a like distinction between the joint stock or share capital of a partnership or association, as fixed by the agreement of the partners, and the full amount of its property. Lindley, Partn. 8th Eng. ed. 382 et seq.

In Bankruptcy Act August 19, 1841, chap. 9, § 14, 5 Stat. at L. 448, and Act March 2, 1867, chap. 176, § 36, 14 Stat. at L. 534, the term "joint stock" was used to describe partnership assets. Collier, Bankr. 11th ed. pp. 1550, 1535. In Berthold v. Goldsmith, 24 How. 541, 16 L. ed. 764, the term "capital stock" was used in the same sense.

An "association" or "company," equally with a corporation, may have a share capital distinct from its actual capital or property, irrespective of whether it is formed in a state without regulating statutes, or in a state where by statute it is regulated and given some of the characteristics of a corporation. The present statute, by the use of the terms "association" and "company," covers those formed under the common law as well as those formed under or regulated by statute.

It seems to us clear that the words, "certificates of stock," contain no implication of an intent to exclude common-law associations or companies.

A certificate evidencing a transferable share or shares in the share capital of a manufacturing company, whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a "certificate of stock."

**Definition—  
certificate of  
stock.**

By agreement the certificates in question were issued as evidence of shares of a fixed capital, divided into a fixed number of shares, of the par value of \$100 each.

We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may

be issued, not only by corporations, but by associations and companies. These may have this in common,—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial; for the tax is not a franchise tax or a corporation tax, but a stamp tax or document tax.

The differences between corporations and unincorporated associations being considered immaterial to the imposition of a stamp tax on documents, the different modes of realizing upon the shares of incorporated or unincorporated companies by the certificate holders must also be regarded as immaterial. Having that feature of resemblance which the statute fixes upon as the test of the imposition of a stamp tax, the difference between these different bodies which are named in the statute has become immaterial to the question before us.

The suggestion of constitutional difficulties in adopting the construction for which the collector contends, and which we think right, does not seem of weight. It involves "no distinction founded upon an immaterial difference between two kinds of partnerships," since the stamp tax is contingent upon the original issue of "certificates of stock," just as a stamp tax on checks is contingent upon the issuing of checks.

A stamp tax on documents discriminates between those who do and those who do not issue documents; and a distinction between unincorporated companies and associations which do and those which do not issue certificates of shares of stock is not unreasonable, nor founded upon an immaterial difference between two kinds of partnerships.

Thomas v. United States, 192 U. S. 363, 371, 48 L. ed. 481, 484, 24 Sup. Ct. Rep. 305; New York ex rel. Hatch v. Reardon, 204 U. S. 152,

158, 159, 51 L. ed. 415, 421, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

The Massachusetts cases cited (Gleason v. McKay, 134 Mass. 419; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Opinion of Justices, 196 Mass. 603, 85 N. E. 545) in our opinion do not give rise to any constitutional difficulty. The opinion of Chief Justice Rugg (196 Mass. 619, 620) tends to support the view that the words, "association" and "company," include organizations not regulated by statute, and that a statute including these in an excise tax does not involve a discrimination founded on an immaterial difference.

Nor do we regard it useful to consider whether the right of the certificate holder or shareholder is a chose in action or in the nature of a chose in action, or an equitable interest in property.

The certificate is but a muniment of title,—documentary evidence of ownership,—and not the share itself.

The thing taxed is not a chose in action, though it may be evidence of it. In a remote sense both a share of corporate stock and a certificate of a share in an unincorporated company may be said to represent an interest in property. It is equally true that both may represent an interest in a share of a capital fixed in amount, whether fixed by statute or by agreement.

In *Eliot v. Freeman*, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360, construing the Corporation Tax Law (Act Aug. 5, 1909, chap. 6, 36 Stat. at L. 11), it was held that the tax was imposed upon doing business in a corporate or quasi corporate capacity. But that case is clearly distinguishable from the present case, since the present statute does not impose a franchise tax, but imposes a stamp tax upon various kinds of documents, which may be issued by companies neither incorporated nor quasi incorporated, "or for or in respect of the vellum, parchment, or paper upon which

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between  
companies.

such instruments, matters, or things, or any of them are written or printed," etc. See § 5, 38 Stat. 753, chap. 331, 4 Fed. Stat. Anno. 2d ed. p. 284. In interpreting the statute we find no sufficient reason for limiting the terms, "association" and "company," to those which derive their powers from legislation.

We have examined, also, the opinion of the Supreme Court in *Crocker v. Malley*, March 17, 1919, 249 U. S. 223, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270, reversing the judgment of this court. In that case the Supreme Court found that "the declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash 'and meantime to income.'"

It was stated, however, in that case: "The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands," etc.

Under the present declaration of trust it is provided that the name of

the trust shall be *Pepperell Manufacturing Company*, and the trustees may be so designated, and in that name the trustees shall, so far as practicable, conduct the business of the trust; that the trustees shall employ and use the trust property and assets in the carrying on of the business of manufacturing textile or other fabrics, etc. This is essentially different from an ordinary real estate trust of the kind familiar in Massachusetts. If, under the decision of the Supreme Court, there may be doubt whether the term "association" is applicable, there seems no ground for serious doubt of the applicability of the term "company," used in the statute and made a part of the name and description of those persons who are to conduct the manufacturing business of the organization.

In applying this stamp tax we find no substantial reason for a distinction between this textile manufacturing company and other textile manufacturing companies.

The judgment of the District Court is reversed, and the case will be remanded to that court, with direction to enter judgment for the defendant, and the plaintiff in error recovers costs in both courts.

## ANNOTATION.

### "Massachusetts trusts."

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#### I. Scope.

The present annotation is confined to a treatment of cases involving vol-

#### III.—continued.

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untary common-law trusts formed for the purpose of carrying on a business for profit, and not deriving any pow-

ers or benefits from statutory regulation. This, of course, excludes cases involving strict partnerships, joint stock associations, or companies when there is no express trust, and all decisions determining questions as to any association, organization, company, or corporation formed under, or deriving any rights and powers from, either statutory or constitutional provisions, as well as all cases where the association was not formed for pecuniary profit, as distinguished from one whose object was pecuniary profit.

## II. *Validity.*

### a. *In general.*

It seems to be almost universally conceded, at least in the absence of prohibitory or controlling statute, that business trusts of the character known as "Massachusetts trusts," and which in the great majority of the cases are in fact nothing more than common-law partnerships, or joint stock companies or associations formed or organized in the nature of a trust, with the capital dividend into certificates or shares and usually represented by stock, to carry on a business for profit and in the interest and for the benefit of the certificate or share holders,—are, generally speaking, legal and valid. For instance, in a considerable number of cases the courts have either expressly or impliedly upheld the validity, fundamentally at least, of business trusts of the character under consideration. The following cases are illustrative of those which have involved apparently valid common-law business trusts:

**United States.**—*Eliot v. Freeman* (1911) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360; *Crocker v. Malley* (1919) 249 U. S. 228, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270, reversing on other grounds (1918) 163 C. C. A. 131, 250 Fed. 817; *Gregg v. Sanford* (1895) 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; *Bartlett v. Gill* (1915) 221 Fed. 476, affirmed in (1915) 140 C. C. A. 405, 224 Fed. 927; *MALLEY v. BOWDITCH* (reported herewith) ante, 608; *Hoey v. Coleman* (1891) 46 Fed. 221; *Re Associated Trust* (1914) 222 Fed. 1012.

**Idaho.**—*Spotswood v. Morris* (1906)

12 Idaho, 360, 6 L.R.A. (N.S.) 665, 85 Pac. 1094.

**Illinois.**—*Hart v. Seymour* (1893) 147 Ill. 598, 85 N. E. 246.

**Iowa.**—*Mallory v. Russell* (1887) 71 Iowa, 63, 6 Am. Rep. 776, 32 N. W. 102.

**Massachusetts.**—*Hoadley v. Essex County* (1870) 105 Mass. 519; *Whitman v. Porter* (1871) 107 Mass. 522; *Shoe & Leather Nat. Bank v. Dix* (1877) 123 Mass. 148, 25 Am. Rep. 49; *Smith v. Moore* (1880) 129 Mass. 222; *Gleason v. McKay* (1882) 134 Mass. 419; *Phillips v. Blatchford* (1884) 137 Mass. 510; *Ricker v. American Loan & T. Co.* (1885) 140 Mass. 346, 5 N. E. 284; *Mayo v. Moritz* (1890) 151 Mass. 481, 24 N. E. 1083; *Howe v. Morse* (1899) 174 Mass. 491, 55 N. E. 213; *Falardeau v. Boston Art Students' Asso.* (1903) 182 Mass. 405, 65 N. E. 797; *Hussey v. Arnold* (1904) 185 Mass. 202, 70 N. E. 87; *Re Opinion of Justices* (1908) 196 Mass. 603, 85 N. E. 545; *Kinney v. Treasurer (Kinney v. Stevens)* (1911) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902; *Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808; *Gardiner v. Gardiner* (1912) 212 Mass. 508, 99 N. E. 171; *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355; *Foster v. Boston* (1913) 215 Mass. 31, 102 N. E. 359; *Kennedy v. Hodges* (1913) 215 Mass. 112, 102 N. E. 432; *Peabody v. Treasurer* (1913) 215 Mass. 129, 102 N. E. 435; *Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009.

**New York.**—*Cross v. Jackson* (1843) 5 Hill, 478; *King v. Townshend* (1894) 141 N. Y. 358, 36 N. E. 513; *Ward v. Davis* (1850) 3 Sandf. 502.

**Ohio.**—*Merchants Nat. Bank v. Wehrmann* (1903) 69 Ohio St. 160, 68 N. E. 1004.

**Pennsylvania.**—*Pittsburg Wagon Works' Estate* (1903) 204 Pa. 432, 54 Atl. 316.

**Texas.**—*Connally v. Lyons* (1891) 82 Tex. 664, 21 Am. St. Rep. 935, 18 S. W. 799; *Willis v. Greiner* (1894) — Tex. Civ. App. —, 26 S. W. 858.

**England.**—*Walburn v. Ingilby* (1832) 1 Myl. & K. 61, 39 Eng. Reprint, 604, 3 L. J. Ch. N. S. 21, Coop. t. Brougham, 270; *Garrard v. Hardey*



(1843) 5 Mann. & G. 471, 134 Eng. Reprint, 648, 1 Dowl. & L. 51, 12 L. J. C. P. N. S. 205, 6 Scott, N. R. 450, 7 Jur. 200; *Harrison v. Heathorn* (1843) 6 Mann. & G. 81, 134 Eng. Reprint, 817, 12 L. J. C. P. N. S. 282, 6 Scott, N. R. 785; *Inderwick v. Snell* (1850) 2 Macn. & G. 216, 42 Eng. Reprint, 83, 2 Hall & Tw. 412, 19 L. J. Ch. N. S. 542, 14 Jur. 727; *Re Mexican & South American Co.* (1859) 27 Beav. 474, 54 Eng. Reprint, 188, 28 L. J. Ch. N. S. 631, 5 Jur. (N.S.) 615, 7 Week. Rep. 509, affirmed in (1859) 4 DeG. & J. 320, 45 Eng. Reprint, 124, 5 Jur. (N.S.) 779; *Smith v. Anderson* (1880) L. R. 15 Ch. Div. 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21; *Re Thomas* (1885) L. R. 14 Q. B. Div. 379, 54 L. J. Q. B. N. S. 336, 51 L. T. N. S. 602, 33 Week. Rep. 583.

In *Walburn v. Ingilby* (1832) 1 Myl. & K. 61, 39 Eng. Reprint, 604, where it was contended that a common-law joint stock association was illegal, Lord Chancellor Brougham said: "To hold such a company illegal would be to say that every joint stock company not incorporated by charter or act of Parliament is unlawful, and, indeed, indictable as a nuisance, and to decide this for the first time, no authority of a decided case being produced for such a doctrine."

*Cross v. Jackson* (1843) 5 Hill (N. Y.) 478, also seems to directly uphold the validity of a common-law joint stock association in the nature of a trust, it having been held that where, by the articles of agreement, all the property was to be vested in trustees thereafter to be elected and to whom the subscribers were to pay their subscriptions, an action to recover such subscriptions could be brought and maintained in the names of the trustees so elected. The validity of a business trust in the nature of an association or corporation also finds support in the case of *Clagett v. Kilbourne* (1861) 1 Black (U. S.) 346, 17 L. ed. 213. Here several persons formed an unincorporated association or joint stock company for the purpose of dealing in land which by the articles were to be conveyed to certain persons as trustee to hold as joint ten-

ants in trust for the members of the association, and the capital was divided into shares and distributed among the members in proportion to the sums contributed by them. Subsequently a creditor of one of the shareholders sought to sell his interest in the land which had been purchased and was held by the trustees, as the individual property of his debtor member of the trust; but the court, speaking through Mr. Justice Nelson, held that this could not be done, as the law was otherwise. Among other things he said: "The legal title is in the trustees, who are bound to account to the stockholders, the *cestuis que trust*, according to their respective shares, after all debts of the association have been discharged. The equity of the judgment creditor is the interest in the land, after a sufficient portion of it has been disposed of for this purpose." And, as further tending to show that the court regarded the trust as a valid one, it was said: "It is quite clear the plaintiff [debtor member of the association who had brought action to regain possession of the land from his creditor, to whom the sheriff had sold it on execution] has mistaken his remedy, as he obtained no title, legal or equitable, to the particular lots in question."

However, in Minnesota, it has been held that an unincorporated land association cannot hold property in trust, and that a deed to its trustees in trust for the association is void; at least where it does not state who the members are. *German Land Asso. v. Scholler* (1865) 10 Minn. 331, Gil. 260. This was an action to enforce a trust *inter vivos* by a conveyance of real estate to the plaintiff unincorporated "German Land Association," which had been formed for the purpose of securing to its members, homesteads upon public land in the Northwest. The deed in question was to named persons in trust for the "German Land Association," and "for the use and benefit of the several members thereof, according to their respective interests," as the same might thereafter be determined by division or otherwise. The court said that the association it-

self had no capacity to take or hold real estate, that a grant to such an association *eo nomine* would pass no legal title, and then held that, even though the deed was to trustees for the association, equity could not enforce the trust because, since the members of the association were not named, it was too uncertain as to the beneficiaries. Wilson, Ch. J., said: "Courts of equity carry trusts into effect only when they are of a certain and definite character. If, therefore, a trust is clearly created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either the objects or the persons who are to take them, the trust will be held entirely to fail. . . . The German Land Association was not by the law invested with any legal existence, and the trust deed gives no intimation as to who the persons were, associated under that name. The deed was, therefore, void." In connection with this decision it is worthy of note that the court applied reasoning usual in connection with deeds to associations themselves, where the question is the validity as affected by uncertainty of beneficiary; and that the association, perhaps, should be regarded as an association formed for other than pecuniary profit. It is also of interest that Sears, in his valuable book on "Trust Estates as Business Companies," points out, on page 15, that "this case, however, seems to confirm, by its very exception, claim for the legality of establishing a trust as to any number of persons in their own interest, if the proper indicia for identification of beneficiaries appear."

And in *Van Sandau v. Moore* (1826) 1 Russ. 441, 38 Eng. Reprint, 171, 4 L. J. Ch. 177, 25 Revised Rep. 101, reversing (1826) 2 Sim. & Stu. 509, 57 Eng. Reprint, 440, Lord Eldon, in the course of a review of the history of joint stock associations, seems to have been of the opinion that such associations were illegal in the absence of statutory creation or regulation giving effect to legal proceedings in which they were parties. For instance, he implied that when such an association

had a great many members, the jurisdiction of the court ought not to be employed because it could not give justice by attending to all the necessary parties, and consequently that the members of such an association could neither effectually demand what they had to demand, nor be effectually sued for that for which they were liable, one shareholder not being allowed to either sue or be sued so as to bind other shareholders not actually made parties. However, as elsewhere shown, Lord Eldon's opinion does not represent the true status of the law of England.

Of course if a company or association organized as a business trust conflicts with a statute regulating such enterprises, it is an illegal association. Such a statute was the English Companies Act of 1862 (25 & 26 Vict. chap. 89) which provided in § 4 that "no company, association, or partnership consisting of more than twenty persons shall be formed . . . for the purpose of carrying on any other business [than banking] that has for its object, the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered" under the act. An organization falling within a statute of this character is illustrated by the case of *Re Thomas* (1885) L. R. 14 Q. B. Div. (Eng.) 379, 54 L. J. Q. B. N. S. 336, 51 L. T. N. S. 602, 33 Week. Rep. 583, wherein it was held that an unincorporated and unregistered building and loan association was an illegal organization from the time it acquired more than twenty members, within § 4 of the Companies Act of 1862 (25 & 26 Vict. chap. 89), although in its conception it comprised less than twenty members. And again in *Smith v. Anderson* (1880) L. R. 15 Ch. Div. (Eng.) 247, 50 L. J. Ch. N. S. 247, 43 L. T. N. S. 329, 29 Week. Rep. 21, the Master of the Rolls held that the "Submarine Cables Trust," which had been formed by a deed providing for the purchase by trustees of shares of the stock of several submarine telegraph companies with money furnished by subscribers for the trust certificates, was a company or association formed

for the purpose of carrying on a business for gain within the meaning of the Companies Act and therefore illegal, since it had over twenty members. This judgment, however, was reversed by the court of appeal on the theory that, since the certificate holders retained no control over the trustees, they were not really associated in the business, and, therefore, that the association was a pure trust rather than a company, association, or partnership, so that it did not have to be registered under the act. (For a further treatment of the question of the difference between pure business trusts and trusts in the nature of a partnership or joint stock company, see *infra*, III. b, 1.)

*b. Capital stock or shares; effect of transferability.*

It has been in effect declared that the mere fact that an association or partnership in the form of a trust has shares and capital stock does not render it illegal at common law. *Phillips v. Blatchford* (1884) 137 Mass. 510; *Howe v. Morse* (1899) 174 Mass. 491, 55 N. E. 213; *Garrard v. Hardy* (1843) 5 Mann. & G. 471, 134 Eng. Reprint, 648, 1 Dowl. & L. 51, 12 L. J. C. P. N. S. 205, 6 Scott, N. R. 450, 7 Jur. 200; *Harrison v. Heathorn* (1843) 6 Mann. & G. 81, 134 Eng. Reprint, 817, 12 L. J. C. P. N. S. 282, 6 Scott, N. R. 735; *Re Mexican & South American Co.* (1859) 27 Beav. 474, 54 Eng. Reprint, 188, 28 L. J. Ch. N. S. 631, 5 Jur. (N. S.) 615, 7 Week. Rep. 509, affirmed in (1859) 4 DeG. & J. 320, 45 Eng. Reprint, 124, 5 Jur. (N. S.) 719. And it has been said that this is especially true if the organization does not attempt to act as a corporation. *Re Mexican & South American Co.* (Eng.) *supra*. And in fact it seems to be fairly well settled that joint stock companies not sanctioned by affirmative legislative action, but existing purely as common-law organizations and which are in character merely business trusts, are generally valid. The following cases support this rule: *Spotswood v. Morris* (1906) 12 Idaho, 360, 6 L.R.A.(N.S.) 665, 85 Pac. 1094 (holding that the joint stock association under consideration was "clearly

legal under the common law"); *Phillips v. Blatchford* (1884) 137 Mass. 510 (holding that the Act of 6 Geo. I. chap. 18, known as "The Bubble Act," and restraining the formation of common-law joint stock companies, has not been adopted in this country); *Walburn v. Ingilby* (1832) 1 Myl. & K. 61, 39 Eng. Reprint, 604, 3 L. J. Ch. N. S. 21, Coop. t. Brougham, 270 (holding joint stock companies valid at common law). In *Spotswood v. Morris* (Idaho) *supra*, it was held that a joint stock company voluntarily organized to deal in real estate, and which derived no rights or powers from any statute, was not violative of a constitutional provision that joint stock companies shall not exercise any of the powers or privileges of corporations not possessed by individuals or partnerships, since "to possess or exercise powers or privileges of corporations requires a sovereign grant, — a franchise which said association has not and does not profess to possess."

And it has been expressly held that Massachusetts business trusts are not rendered illegal because intended to avoid having a paid-up capital, which would be necessary if a corporation were formed, and to escape taxation. *Phillips v. Blatchford* (Mass.) *supra*. *Holmes, J.*, said that "an association does not become illegal simply because another very like it is taxed. We perceive no wrong to the public, and as to the shareholders, if they choose to purchase stock in a partnership with unlimited personal liability, it is their own lookout."

Nor, it has been held, is the trust character of a so-called "Massachusetts real estate trust" affected by the fact that the parties to the agreement were to acquire a beneficial interest in proportion to the amount contributed by each, and that no provision was made for muniments of title. *Mallory v. Russell* (1887) 71 Iowa, 63, 60 Am. Rep. 776, 32 N. W. 102.

And the fact that a joint stock company in the nature of a trust association raises and has "transferable" stock has been held not to render the association a nuisance at common law.

Garrard v. Hardey (1843) 5 Mann. & G. 471, 134 Eng. Reprint, 648, 1 Dowl. & L. 51, 12 L. J. C. P. N. S. 205, 6 Scott, N. R. 450, 7 Jur. 200; Harrison v. Heathorn (1843) 6 Mann. & G. 81, 134 Eng. Reprint, 817, 12 L. J. C. P. N. S. 282, 6 Scott, N. R. 735; Re Mexican & South American Co. (1859) 27 Beav. 474, 54 Eng. Reprint, 188, 28 L. J. Ch. N. S. 631, 5 Jur. (N. S.) 615, 7 Week. Rep. 509, affirmed in (1859) 4 DeG. & J. 320, 45 Eng. Reprint, 124, 5 Jur. (N. S.) 779. In Garrard v. Hardey (Eng.) supra, it was held that the formation of a joint stock company or partnership in the nature of a trust, and the raising and transferring of stock therein, did not render the company an illegal one. In this case it was alleged that the defendant and others did illegally associate themselves together in an illegal undertaking tending to the common nuisance, prejudice, and inconvenience of the Queen's subjects in trade and commerce, in that they did act as a corporate body and pretend to be a trading corporation and did pretend to raise and transfer stock in such company without legal authority by act of Parliament, charter from the Crown, or letters patent under the great seal or by any legal authority whatever; but Tindal, Ch. J., held otherwise. He said: "The raising and transferring of stock in a company cannot be held, in itself, an offense at common law; such species of property was altogether unknown to the law in ancient times; . . . we find no authority for holding that an allegation that the parties raised and transferred stock is simply, and per se, without any statement of the mode by which it injures or defrauds the public, an indictable offense at common law. And, laying that allegation out of the way, the plea really states no more, in substance, than that the plaintiff and the defendant 'and other persons' (which allegation would be satisfied if there were two only in addition to themselves), pretended to act as a trading corporation, under the name and style of 'The Limerick Marble & Stone Company.' The plea states no illegal mode or means by which they pretended to

act as a company, as, by usurping a common seal, or the like; nothing more is stated than their assuming the style and firm of a company."

So, it has been held that partnerships organized in the form of business trusts are not rendered illegal by the fact that their capital is divided into "transferable" shares. Phillips v. Blatchford (1884) 137 Mass. 510; Howe v. Morse (1899) 174 Mass. 491, 55 N. E. 213; Re Mexican & South American Co. (1859) 27 Beav. 474, 54 Eng. Reprint, 188, 28 L. J. Ch. N. S. 631, 5 Jur. N. S. 615, 7 Week. Rep. 509, affirmed in (1859) 4 DeG. & J. 320, 45 Eng. Reprint, 124, 5 Jur. N. S. 779. And see Hoadley v. Essex County (1870) 105 Mass. 519; Whitman v. Porter (1871) 107 Mass. 522; Ricker v. American Loan & T. Co. (1885) 140 Mass. 346, 5 N. E. 284; Williams v. Boston (1911) 208 Mass. 497, 94 N. E. 808; Williams v. Milton (1913) 215 Mass. 1, 102 N. E. 355, followed and relied upon in Foster v. Boston (1913) 215 Mass. 31, 102 N. E. 359; and Frost v. Thompson (1914) 219 Mass. 360, 106 N. E. 1009. In Re Mexican & South American Co. 27 Beav. 474, 54 Eng. Reprint, 188, 28 L. J. Ch. N. S. 631, 5 Jur. N. S. 615, 7 Week. Rep. 509, affirmed in (1859) 4 DeG. & J. 320, 45 Eng. Reprint, 124, 5 Jur. N. S. 779, supra, the Master of the Rolls said: "The other ground [of alleged illegality] is, that there is an indefinite assignment of shares. I have listened in vain for any case, or, indeed for the statement of any principle, whereby at common law, and independent of any statute, a partnership between persons who agree among themselves that their shares shall be legally assignable in perpetuum, or indefinitely assignable, is absolutely void and illegal. I find no case which determines it, and no principle on which it can rest, nor am I able to conjecture why such an association should be void at common law. It does not appear to me to offend against society, or to injure any class of individuals."

#### *c. Provisions limiting liability.*

Under an unincorporated business trust of the character under consid-

eration it has been held that the trustees may lawfully be so limited by the agreement as to incurring indebtedness as not to bind the beneficiaries personally. Thus, in *Bank of Topeka v. Eaton* (1901) 100 Fed. 8, affirmed without opinion in (1901) 47 C. C. A. 140, 107 Fed. 1003, where the articles of association provided that any debt incurred by the trustees for the association should be a lien upon the trust property, but that they had no power to bind the shareholders personally, it was held that one who took a note from the trustees containing an express statement that it was given under the articles of association, and not otherwise, would be limited to a proceeding against the trust property so that he could not maintain an action against the shareholders individually. And that a provision exempting the stock or certificate holders from personal liability for debts does not prevent the trust being classified as a partnership, see *Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808.

And the fact that the liability of each member is expressly limited to his share has been held not enough to make a joint stock company in its nature a business trust, illegal. *Walburn v. Ingilby* (1832) 1 Myl. & K. 61, 39 Eng. Reprint, 604. In this connection Lord Chancellor Brougham said: "The clause intimating that each subscriber is only to be liable to the extent of his share is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice. In that light it is not to be viewed as criminal or as a means of deception; for the publicity of it may tend to inform such as deal with the company, and a proof of that publicity in the neighborhood of parties so dealing might go to fix them with notice. For any other purpose, for the purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, would

have himself to blame, and be the victim of his ignorance of the known law of the land."

And the trustees may themselves avoid personal liability on any contract entered into by them by express provision to that effect. For instance, in *Shoe & Leather Nat. Bank v. Dix* (1877) 123 Mass. 148, the trustees of a common-law land association were held to have avoided personal liability on a note given for a trust purpose by virtue of the provision, "We as trustees, but not individually, promise to pay," etc. Again, in *Hussey v. Arnold* (1904) 185 Mass. 202, 70 N. E. 87, where the trustees of a business trust made a contract which by its terms was enforceable only against the trust property, it was held that the trustees incurred no personal liability on the contract and, therefore, that an attachment in an action on the contract brought against the trustees personally created no enforceable lien.

*d. As affected by rule against perpetuities.*

It has been held that the rule against perpetuities is not violated by a business trust organized for an indefinite term, at least where the trust real estate was to be conveyed to the trustees to be held by them until they exercised their discretion to sell the same. *Hart v. Seymour* (1893) 147 Ill. 598, 35 N. E. 246. This was upon the theory that such a conveyance to the trustees to be disposed of at any time they saw fit did not cause any suspension of the power of alienation, without which there can, of course, be no violation of the rule against perpetuities.

And in *Howe v. Morse* (1899) 174 Mass. 491, 55 N. E. 213, in holding that a common-law building association trust was not illegal merely because no termination of the trust or sale of the corpus thereof would necessarily occur within the period of a life or lives in being at the time of the creation of the trust and twenty-one years, or because the certificate holders could not have partition of the land or compel its sale except by a three-fourths vote, so that there was an illegal restraint upon alienation,

the court said: "The substance of the situation is that the shareholders for the time being have the whole equitable estate in the corpus of the trust, and can at all times sell and transfer their equitable estates at their own pleasure; and the trustees hold the legal title in fee in trust to do with the land whatever may be required by the owners of the equitable estate, which owners have full capacity, at all times and at their own option, to require a sale of the land discharged of the trust, or the immediate termination of the trust after a period of five years and a few days, the owners of the equitable estate being a voluntary association, the beneficial interests in which are represented by shares, and the association acting by vote of the shareholders. That the directions of the association to the trustees are to be given by three-fourths votes, rather than by majority votes, is immaterial, since it cannot be said that one is more improbable than the other; either is a reasonable way of declaring the will of the association, and there is no provision that a vote to sell or to end the trust must be passed within any stated period, or at all. Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose, and where the income is not accumulated but is distributed as it accrues, and where the land is to be sold free of trusts at the will of the association, and where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders, and never can become vested in any other person save by act of the absolute owners or by operation of law upon their property, and not by force of any limitation contained in the deed of trust, the equitable interests so vested being also constantly vendible by their several owners without let or hindrance, as well as subject to their debts and passing like other property upon death by virtue, not of the deed of trust, but of the general laws governing the disposition of the property of decedents,—withdraws no property from com-

merce, and is not within the reason or the terms of what is called 'the rule against perpetuities.' The trust involves no future limitations, no restraint upon alienation; and no accumulation either of income or of principal."

### *III. Purpose and legal nature.*

#### *a. Purposes for which business trust may be formed.*

There seems to be no doubt that in jurisdictions where common-law business trusts may be formed at all, there is no limitation upon the purpose or object for which such a trust may be created, provided, of course, that the same is ordinarily legitimate and lawful. In fact such trusts have been formed to deal in various ways with both real and personal property.

Illustrative of the purposes for which common-law real estate trusts have been formed may be mentioned business trusts formed for the purpose of buying and selling land (*Clagett v. Kilbourne* (1861) 1 Black (U. S.) 346, 17 L. ed. 213; *Bank of Topeka v. Eaton* (1901) 100 Fed. 8, affirmed without opinion in (1901) 47 C. C. A. 140, 107 Fed. 1003; *Spotswood v. Morris* (1906) 12 Idaho, 360, 6 L.R.A. (N.S.) 665, 85 Pac. 1094; *Mallory v. Russell* (1887) 71 Iowa, 63, 60 Am. St. Rep. 776, 32 N. W. 103; *Peabody v. Treasurer* (1913) 215 Mass. 129, 102 N. E. 435); purchasing, improving, holding, and selling lands and buildings (*Eliot v. Freeman* (1911) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360); purchasing, improving, and managing real estate for gain (*Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808; *Ward v. Davis* (1860) 3 Sandf. (N. Y.) 502); holding, managing, improving, selling, and leasing real estate (*Bartlett v. Gill* (1915) 221 Fed. 476, affirmed in (1915) 140 C. C. A. 405, 224 Fed. 927); purchasing, selling, managing, and care, etc., of fruit-bearing lands (*Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009); holding, maintaining, and acquiring lands, water power, paper manufacturing plants, tenements, etc., operating such plants, etc., with the power of owners, and finally converting the same into money

and distributing the proceeds among the beneficiaries (*Crocker v. Malley* (1919) 249 U. S. 223, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270); purchasing a certain real estate mortgage, etc. (*Pittsburg Wagon Works' Estate* (1903) 204 Pa. 432, 54 Atl. 316); formed to conduct a land or building association (*Hart v. Seymour* (1893) 147 Ill. 598, 35 N. E. 246; *Shoe & Leather Nat. Bank v. Dix* (1877) 123 Mass. 148, 25 Am. Rep. 49; *Howe v. Morse* (1899) 174 Mass. 491, 55 N. E. 213; *King v. Townshend* (1894) 141 N. Y. 358, 36 N. E. 513; *Ward v. Davis* (1850) 3 Sandf. (N. Y.) 502; *Willis v. Greiner* (1894) — Tex. Civ. App. —, 26 S. W. 858); although a national bank cannot legally become a member of such a trust association (*Merchants' Nat. Bank v. Wehrmann* (1903) 69 Ohio St. 160, 68 N. E. 1004); to conduct a department store trust for the purpose of purchasing and holding certain land and erecting a building thereon suitable for a department store (*Eliot v. Freeman* (1911) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360); as well as for general investment, management, and use of real estate and to deal in stocks, bonds, and other similar securities (*Hussey v. Arnold* (1904) 185 Mass. 202, 70 N. E. 87). In *Re Associated Trust* (1914) 222 Fed. 1012, the organization in question was merely designated as a "Massachusetts real estate trust," without setting out the specific purpose of the association. And in *Kinney v. Treasurer* (*Kinney v. Stevens*) (1911) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902, and *Kennedy v. Hodges* (1913) 215 Mass. 112, 102 N. E. 432, Massachusetts real estate trusts formed for unspecified purposes were also under consideration.

And business trusts other than the ordinary common-law real estate trusts have been formed and seemingly are regarded by the courts as valid. Illustrative of this class are the manufacturing companies organized in the form of common-law trusts which were under consideration in *MALLEY v. BOWDITCH* (reported herewith) ante, 608; *Hoadley v. Essex County* (1870)

105 Mass. 519; *Gleason v. McKay* (1883) 134 Mass. 419; and *Phillips v. Blatchford* (1884) 187 Mass. 510; the trust organized for the purpose of disposing of certain patent rights which was involved in *Smith v. Moore* (1880) 129 Mass. 222; the trust formed in *Mayo v. Moritz* (1890) 151 Mass. 481, 24 N. E. 1083, for the purpose of procuring patents on a certain invention, disposal thereof and distribution of the proceeds among the script holders; a collective body voluntarily associated and not of statutory origin for the purpose of carrying on an express business and known as the "Adams Express Company," which was treated in *Hoey v. Coleman* (1891) 46 Fed. 221, and *Gregg v. Sanford* (1895) 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; the voluntary trust association dealt with in *Whitman v. Porter* (1871) 107 Mass. 522, which had been formed for the purpose of purchasing and running a ferryboat; the "Williamsburgh & New York Union Ferry Association," which was before the court in *Cross v. Jackson* (1843) 5 Hill (N. Y.) 478; the voluntary trust association formed for the purpose of buying, selling, and leasing railroad rolling stock, sometimes familiarly called the "Car Trust," which was construed in *Ricker v. American Loan & T. Co.* (1885) 140 Mass. 346, 5 N. E. 284; the trust to deal in stocks, bonds, securities, etc., and known as the "Boston Personal Property Trust," considered in *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355; a similar trust known as the "General Investment Trust," which was under consideration in *Foster v. Boston* (1913) 215 Mass. 31, 102 N. E. 359; a voluntary common-law trust to acquire and hold shares of the capital stock and securities of street railway and other companies for the benefit of the members, as in *Gardiner v. Gardiner* (1912) 212 Mass. 508, 99 N. E. 171 (but that in New York and Ohio there can be no partnership of separate and independent corporations, whether directly or indirectly, through the medium of a trust, see *People v. North River Sugar Ref. Co.* (1890) 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, which

involved what is known as the original "Sugar Trust," and *State ex rel. Watson v. Standard Oil Co.* (1892) 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279, which had the original "Standard Oil Trust" under consideration, and in both of which the decision was upon the theory that participation in such a combination was inconsistent with the characters of the participants as incorporations); a trust to carry on a general mercantile business as is illustrated by *Connally v. Lyons* (1891) 82 Tex. 664, 27 Am. St. Rep. 935, 18 S. W. 799; a trust to hold, manage, and control a business building under a certain lease thereof, as in *Falardeau v. Boston Art Students' Asso.* (1903) 182 Mass. 405, 65 N. E. 797; a joint stock company in the nature of a trust to work mines of gold, silver, and other metals, as in *Walburn v. Ingilby* (1882) 1 Myl. & K. 61, 39 Eng. Reprint, 604, 3 L. J. Ch. N. S. 21, Coop. t. Brougham, 270; a partnership or joint stock company to work gold mines under the title "Anglo-American Gold Company Mining Association," as in *Harrison v. Heathorn* (1843) 6 Mann. & G. 81, 134 Eng. Reprint, 817, 12 L. J. C. P. N. S. 282, 6 Scott, N. R. 735; the trading company known as "The Limerick Marble & Stone Company," involved in *Garrard v. Hardey* (1843) 5 Mann. & G. 471, 134 Eng. Reprint, 648, 1 Dowl. & L. 51, 12 L. J. C. P. N. S. 205, 6 Scott, N. R. 450, 7 Jur. 200; and the trading company or partnership known as "The London Conveyance Company," which was considered in *Inderwick v. Snell* (1850) 2 Macn. & G. 216, 42 Eng. Reprint, 83, 2 Hall & Tw. 412, 19 L. J. Ch. N. S. 542, 14 Jur. 727.

#### *b. Legal nature of organization.*

##### *1. In general.*

With reference to the legal character of trusts in the nature of voluntary unincorporated business organizations, various designations have been made.

For example, a business trust of the general character under consideration has as between members been referred to as a quasi corporation. *Hoey v. Coleman* (1891) 46 Fed. 221.

And in a number of instances joint stock companies or associations have been the designation made by the courts. See *Clagett v. Kilbourne* (1861) 1 Black (U. S.) 346, 17 L. ed. 218; *Gregg v. Sanford* (1895) 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; *Bank of Topeka v. Eaton* (1901) 100 Fed. 8, affirmed without opinion in (1901) 47 C. C. A. 140, 107 Fed. 1003; *Spotswood v. Morris* (1906) 12 Idaho, 360, 6 L.R.A.(N.S.) 665, 85 Pac. 1094; *Hart v. Seymour* (1893) 147 Ill. 598, 35 N. E. 246; and *Walburn v. Ingilby* (1882) 1 Myl. & K. 61, 39 Eng. Reprint, 604, 3 L. J. Ch. N. S. 21, Coop. t. Brougham, 270. -

And business trusts have been referred to as partnerships where the certificate or shareholders retained control over the trustees and have had some authority as to the conducting of the business. See *Clagett v. Kilbourne* (U. S.) *supra*; *Spotswood v. Morris* (1906) 12 Idaho, 360, 6 L.R.A.(N.S.) 665, 85 Pac. 1094; *Hoadley v. Essex County* (1870) 105 Mass. 519 (holding that the fact that each member might sell and transfer his interest and thus introduce a new partner, though unusual, was not inconsistent with a contract of copartnership); *Whitman v. Porter* (1871) 107 Mass. 522 (holding same as preceding case); *Smith v. Moore* (1880) 129 Mass. 222; *Gleason v. McKay* (1883) 134 Mass. 419; *Phillips v. Blatchford* (1884) 137 Mass. 510; *Ricker v. American Loan & T. Co.* (1885) 140 Mass. 346, 5 N. E. 284; *Howe v. Morse* (1899) 174 Mass. 491, 55 N. E. 213; *Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808 (holding same as *Hoadley v. Essex County* (1870) 105 Mass. 519, *supra*); *Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009 (same); *King v. Townshend* (1894) 141 N. Y. 358, 36 N. E. 513; *Inderwick v. Snell* (1850) 2 Macn. & G. 216, 42 Eng. Reprint, 83, 2 Hall & Tw. 412, 19 L. J. Ch. N. S. 542, 14 Jur. 727. This is especially true with respect to third persons. *Hoey v. Coleman* (1891) 46 Fed. 221.

So, business trusts have been regarded as both joint stock companies and partnerships, the holders of the stock in joint stock companies gener-



ally being regarded as partners in fact. *Clagett v. Kilbourne* (1861) 1 Black (U. S.) 346, 17 L. ed. 213; *Spotswood v. Morris* (1906) 12 Idaho, 360, 6 L.R.A. (N.S.) 665, 85 Pac. 1094. This rule is perhaps subject to the limitation that, strictly speaking, any member of a partnership may generally bind the firm by acts in the course of the business, whereas in joint stock companies the management of the affairs of the companies may be intrusted to officers or trustees. For a case which discusses this particular phase of the question under annotation, see *Willis v. Greiner* (1894) — Tex. Civ. App. —, 26 S. W. 858.

And where the beneficiaries retain no control over the trustee, and are not in fact associated in the actual carrying on of the business, but are limited in interest to having the trust administered in their interest, it has been held that it should be regarded as a strict or pure trust. *Crocker v. Malley* (1919) 249 U. S. 223, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270; *Mayo v. Moritz* (1890) 151 Mass. 481, 24 N. E. 1083; *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355; *Foster v. Boston* (1913) 215 Mass. 31, 102 N. E. 359; *Connally v. Lyons* (1891) 82 Tex. 664, 21 Am. St. Rep. 935, 18 S. W. 799; *Smith v. Anderson* (1880) L. R. 15 Ch. Div. (Eng.) 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21.

However, for many purposes, perhaps, it is not technically accurate to describe trusts such as are under consideration in this annotation either as partnerships, joint stock companies, or strict trusts. This is illustrated by some of the cases hereinafter set out and quoted, among which might be specifically mentioned, *Re Associated Trust* (1914) 222 Fed. 1012 (infra, III. b, 2). In fact as aptly stated by *Wrightington* in § 13 of his book on *Unincorporated Associations*, some of the associations organized under trust deeds "combine the elements of both partnership and trust, while others are essentially trusts, and not partnerships." Consequently it is frequently a difficult problem to determine whether a common-law business trust for

legal purposes is of partnership character or is to be regarded as a pure trust. Then, of course, arises the practical question as to what distinguishes a business trust in the nature of a partnership from a strict trust formed to carry on a business enterprise.

Upon the latter phase of the general question it has been said that the distinction between business trusts which are regarded as partnerships and those which are regarded as ordinary trusts turns upon the provisions of the trust agreement or declaration, those trusts where the shareholders are given substantial control of the management of the trust property being regarded as partnerships, and those where the shareholders have no such control being regarded as an ordinary trust the same as the usual testamentary trust. *Re Associated Trust* (Fed.) supra. To the same effect is *Mayo v. Moritz* (1890) 151 Mass. 481, 24 N. E. 1083.

And in *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355, the court expressly pointed out the distinction between the two classes of cases by contrasting *Hoadley v. Essex County* (1870) 105 Mass. 519, supra, and similar cases with *Mayo v. Moritz* (Mass.) supra, saying that "in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals, whose instructions are to be obeyed by their agent [trustee], who, for their convenience, hold the legal title to their property; the property is their property, they are the masters; while in *Mayo v. Moritz*, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves, nor to instruct the trustees how to manage it for them." Applying this rule it was further said: "In the *Boston Personal Property Trust* the property is the property of the trustees, to be managed for the benefit of the certificate

holders. There is no association of or among the certificate holders. The rights of the certificate holders are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus when the trust comes to an end. It is in every respect an investment trust, and nothing more.”

Again in *Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009, the court said: “A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership. . . . Tested by the principles there [referring to *Williams v. Milton* (Mass.) supra] laid down, the Buena Vista Fruit Company is a voluntary association organized under two instruments, one called a ‘declaration of trust’ and the other ‘by-laws.’ These two instruments provide that the shareholders representing two thirds in value of outstanding shares have power to remove either or all of the trustees at any time, without assigning any cause, and to appoint others to fill the vacancy; to terminate the trust at any time earlier than that limited for its duration in the declaration of trust, and to terminate it by requiring conveyance of the property to other trustees upon new trusts, or to a corporation. A majority of the shareholders at any time by vote may amend the declaration of trust. The by-laws may be ‘altered, amended, or repealed’ by vote of the majority of the shareholders. . . . These provisions demonstrate that this association is a partnership, and not a trust.”

So, in *Smith v. Anderson* (1880) L. R. 15 Ch. Div. (Eng.) 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week.

Rep. 21, the distinction between pure trusts and business trusts in the nature of partnerships or joint stock companies where the members are associated in business and retain and exercise control of the trustees, and either directly or indirectly over the business, is pointed out with some clearness by Lord Justices James, Brett, and Cotton.

In connection with the preceding cases it is of interest that *Wrightington* in “Unincorporated Associations,” § 14, in answering the question, How much control by the beneficiaries over the trustee is needed to change a trust into a partnership? arrived at the seemingly logical conclusion that the power to change trustees at stated intervals or to fill vacancies as they occur should not be deemed sufficient to transfer such proprietorship to the shareholders as would make the trust a partnership, but that the power to remove at any time without cause and to fill vacancies as was the case in *Frost v. Thompson* (Mass.) supra, was totally different, since in such a case the trustee would not be independent. And in fact in *Illinois* it has been held that the fact that the shareholders in a real estate trust are empowered to remove and appoint trustees and direct the action of the existing trustees does not affect its character as a trust or the legal title of the trustees to the trust real estate, especially when no attempt has been made to exercise such reserve powers, the mere existence of unexercised power not affecting the trustees’ legal title. *Hart v. Seymour* (1893) 147 Ill. 598, 35 N. E. 246.

But the fact that the trustees of a real estate trust are limited to the contracting of debts to the value of the trust property, and that the trust agreement exempts the certificate holders from personal liability for debts, does not prevent the relation of such holders from being that of partners. *Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808 (it was further held in this case that the certificate holders were not taxable as cestuis que trust—see case as set out infra, III. b, 3). And see *Hussey v. Arnold*

(1904) 185 Mass. 202, 70 N. E. 87. In the Williams Case the court said that "the limitations upon the power and liability of individual members and the attempt to avail themselves of many of the privileges of stockholders in corporations relate more to details and to the machinery of management than to the substantive purposes of the enterprise."

Of course it is what the parties do, and not what they say, that is decisive in determining the character of the trust. See *Williams v. Boston* (Mass.) *supra*, as set out *infra*, III. b, 3; and *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355 (holding that a declaration in the trust agreement was not conclusive. The latter case was followed and relied upon in *Foster v. Boston* (1913) 215 Mass. 31, 102 N. E. 359). In *Williams v. Milton* (Mass.) *supra*, the court in this connection said: "We have not alluded to the declaration in the indenture of trust here in question, that it was the intention of the parties to it to create a [strict] trust, and not a partnership [in the form of a business trust]. It is what the parties did that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did."

## 2. Under Bankruptcy Act.

In *Re Associated Trust* (1914) 222 Fed. 1012, a "Massachusetts real estate trust" created by an instrument giving the shareholders power to elect the trustee and amend the declaration and terminate the trust by a three-fourths vote was held to be an "unincorporated company" within the meaning of the provisions of the Federal Bankruptcy Act of 1898, which declare who may be declared bankrupt. In this connection the court said: "The character of the organization is to be gauged rather by the powers of the certificate holders, than by the extent to which those powers have as yet been exercised. The analogy between the respondent organization and a corporation is apparent. The certificate holders clearly possess

many of the most characteristic powers of stockholders. If the expression 'unincorporated company' in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words. To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate holders obligations which neither they nor the creditors of the trust supposed existed. It would be a very unjust result. To hold that the respondent is not an organization, and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. These certificate holders voluntarily united into a business organization, in which they invested their money under a contract by which they acquired certain individual rights against the trustee, and certain other rights to be exercised by joint action of all the certificate holders. 'Unincorporated company' seems to me exactly to describe what the respondent is."

## 3. For purposes of taxation.

It has been held that the collective body known as the "Adams Express Company," which was constituted by written articles of association without reference to any statute or franchise, and whereby its capital was divided into transferable shares, its business was conducted by a board of managers, and all its property was vested in the exclusive possession of trustees, was not taxable under a New York statute subjecting to taxation the corporate stock of "all moneyed or stock corporations deriving an income or profit from their capital or otherwise." *Hoey v. Coleman* (1891) 46 Fed. 221. In this case the court first held that the association under consideration was not a corporation in legal definition, and then decided that the term "corporation" as used in the statute could not be interpreted to embrace "partnerships which masquerade as corporations." In reaching the conclusion that the association was not a legal corporation, the court said: "It is a quasi corporation as between the

members by their voluntary contract. But the responsibility of the members for the obligations of the company is not limited, and each is liable for the whole. As to third persons, it is a partnership, having many of the characteristics of a corporation, but none of those immunities which are conferred by the state exclusively upon corporations, either by special charter or general laws. Inasmuch as a corporation is always created by a franchise, while this company is self-constituted, and a corporation is only known to the law as a legal entity, in which the members have lost their individuality, while this company is known to the law only as an aggregation of individuals, whose identity and personal responsibility are unchanged, the proposition that the Adams Express Company is not a corporation in legal definition is too self-evident for discussion."

Nor is the stock of a voluntary manufacturing association organized as a common-law trust, taxable as "stocks in a moneyed corporation" under Massachusetts Gen. Stat. chap. 11, § 4, it being impossible for an association not organized under statutory law to be regarded as a corporation. *Hoadley v. Essex County* (1870) 105 Mass. 519.

And upon similar reasoning it has also been held that the Adams Express Company, a New York common-law association, was not subject to taxation under Pennsylvania statutes imposing an annual tax upon the corporate stock of all companies "incorporated" by or under any law of the state of Pennsylvania and of every company "incorporated" by any other state and doing business in the state of Pennsylvania. *Gregg v. Sanford* (1895) 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151. In *State v. Adams Exp. Co.* (1895) 3 Ohio S. & C. P. Dec. 326, the *Gregg* Case was said to have been "not half considered" and to be "entitled to no consideration as a guide."

Likewise a common-law real estate trust is not a corporation, joint stock company, or association within the meaning of the Federal Corporation Tax Act of 1909. Thus, in *Eliot v.*

*Freeman* (1911) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360, real estate trusts created by deed for the buying, holding, and selling of lands and buildings for the benefit of the shareholders, which did not derive any benefit from and were not organized under any statute, were held not subject to the tax imposed by the Federal Excise Act of 1909 upon the doing of business by corporations, joint stock companies, or associations "now or hereafter organized under the laws of the United States or of any state or territory," Mr. Justice Day maintaining for the court that the tax in question was imposed upon doing business in a corporate or quasi corporate capacity, i. e., with the facility or advantage of corporate organization under statutes giving them certain powers and qualifications, and that trusts of the character under consideration could "hardly be said to be organized within the ordinary meaning of that term," and that "it [one of the two trusts under consideration] certainly is not organized under statutory laws as corporations are." He summarized as follows: "Entertaining the view that it was the intention of Congress to embrace within the Corporation Tax Statute only such corporations and joint stock companies as are organized under some statute, or derive from that source some quality or benefit not existing at common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act." And as a matter of fact it has been held that a statute which attempts to impose a strict excise tax, i. e., a tax on some franchise permitting the doing of business, is unconstitutional so far as it is made to apply to a common-law business trust in which the interest of each member may be transferred without the special assent of the other members. *Gleason v. McKay* (1883) 134 Mass. 419.

Nor is a real estate trust an "association" under the terms of the Federal Income Tax Act of 1913. Thus, in *Crocker v. Malley* (1919) 249 U. S. 223, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270, reversing (1918)

163 C. C. A. 131, 250 Fed. 817, it was held that the trustees of a common-law realty trust under which they were to collect the rents and income of the trust property, and to pay the same over to the holders of trust certificates in proportion to the amount of such certificates held by them, with the right to apply any funds for the repair or development of the property held by them, or the acquisition of more property, the certificate holders, by the terms of the trust, having no partnership interest in or control over the fund, were not an "association" within the meaning of § II. G (a) of the Federal Income Tax Act of October 3, 1913, which imposed a tax upon the income of every corporation, joint stock company, or association "no matter how created or organized," so that the income received by the trustees was not taxable in their hands without any deductions with respect to dividends received from a corporation that itself paid an income tax. In reaching this conclusion Mr. Justice Holmes, in delivering the opinion of the court, said that the declaration of trust on its face was an ordinary real estate trust of the kind familiar in Massachusetts, that in that state it undoubtedly would be held to create a trust, and nothing more, and that the trust in question would not fall under any familiar conception of a joint stock association, whether formed under a statute or not; and continued as follows: "If we assume that the words, 'no matter how created or organized,' apply to 'association' . . . still it would be a wide departure from normal usage to call the beneficiaries here a joint stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint stock association within the meaning of the act, unless all trustees with discretionary powers are such, and the special provision for trustees in D [provides that trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxa-

tion upon dividends of a corporation that itself pays an income tax] is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law." In the circuit court of appeals (163 C. C. A. 131) the decision was upon the theory that, since the powers of the trustees resembled those of the directors of a corporation, and as the income could not be regarded as the individual property of the beneficiaries until received by them, it must be regarded as income accruing to a group or body of individuals collectively, so as to render them in effect an association within the meaning of the act; but the Supreme Court in reversing that decision declared that it was immaterial whether the individual receipt holders were entitled to the income of the fund subject to an unexercised power in the trustees, in their reasonable discretion, to divert it to the improvement of the capital, or whether they are not entitled to the income as such until they receive it.

On the other hand some tax statutes have been held broad enough to include common-law business trusts under terms ordinarily applicable to companies or associations formed under statutes. Thus, in the reported case (*MALLEY v. BOWDITCH*, ante, 608) it was held that certificates of shares issued by a manufacturing company organized in the form of a common-law trust and which derived none of its rights, benefits, or qualifications from any statute, were within the meaning of and taxable under § 5, schedule A, of the War Tax Law of October 22, 1914, which imposed a stamp tax on each \$100 of "certificates of stock" issued by any "association," "company," or "corporation." This was upon the theory that the phrase "certificates of stock," as used in the act, disclosed no intention to exclude common-law associations, but rather evidenced a legislative purpose to im-

pose the tax on certificates of stock as muniments of title; and that while the court regarded the term "association" as broad enough to include the trust in question, if there was any doubt, there was "no ground for serious doubt of the applicability of the term 'company' used in the statute and made a part of the name and description of those persons who are to conduct the manufacturing business of the organization." It was further held in this case that the statute was not invalid in its application on the theory that it was inapplicable to other associations which did not issue certificates of stock, since as the tax was merely on muniments of title, the statute would only apply to associations which had issued muniments of title. It should also be remembered that the court expressly distinguished the case from *Eliot v. Freeman* (1911) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360, *supra*, on the ground that the decision in that case turned upon the point that the tax was imposed upon doing business in a corporate or quasi corporate capacity, whereas in the present case it was merely a stamp tax on certificates of stock.

And in *Opinion of Justices* (1908) 196 Mass. 603, 85 N. E. 545, it was held by a court divided four to three that it was within the power of the Massachusetts legislature under a constitutional provision giving it power and authority to impose and levy reasonable duties and excises upon any "product, goods, wares, merchandise, and commodities whatsoever . . . within the commonwealth," to enact an excise tax upon sales of shares or certificates of stock in a voluntary trust association, the majority of the court maintaining that such a sale was within the meaning of the term "commodity" as used in the provision. However, it was also held in this case that a constitutional provision authorizing the legislature to impose proportional assessments and taxes did not grant power to impose a tax on sales of shares or certificates of stock in a business trust.

In Massachusetts it has been held

that the holders of transferable certificates in a common-law real estate business trust, although not personally liable for debts, were partners within the meaning of Massachusetts Rev. Laws, chap. 12, § 27 (Stat. 1909, chap. 490, pt. 1, § 27), relating to the joint taxation of partners under the partnership name in the place where the partnership business is carried on, and were not to be treated merely as *cestuis que trust*, taxable in the different places where they resided, under § 23, chap. 5, of the act which provided that personal property held in trust for the payment of income to the beneficiary shall be assessed to the trustee in the place where such beneficiary lives, etc. *Williams v. Boston* (1911) 208 Mass. 497, 94 N. E. 808. The court said that "there are reasons of policy why the members should be held to be partners within the meaning of this section (27), for as such trusts are not regulated by statute, and no returns are required of them, interests in them held by nonresidents of the city or town where their business is conducted would be liable to escape taxation unless the property is taxed in the firm name. However, the contrary has been held where the business trust in question is a pure trust, as, for example, where the trust property is the property of the trustees, to be managed by them, and not by or under the direction of the certificate holders, whose rights are limited to each receiving his share of the income during continuation of the trust and of the corpus upon termination of the trust. *Williams v. Milton* (1913) 215 Mass. 1, 102 N. E. 355; *Foster v. Boston* (1913) 215 Mass. 31, 102 N. E. 359.

In *Bartlett v. Gill* (1915) 221 Fed. 476, affirmed in (1915) 140 C. C. A. 405, 224 Fed. 927, it was held that shares in real estate and personal property trusts were taxable under War Rev. Act June 13, 1898, chap. 448, § 29 (30 Stat. at L. 464), which provided that any person having any trust as administrator, executor, or trustee in "legacies or distributive shares arising from personal property," only so far as such shares actually represented personal property, and

that money which had been ordered converted into real property was not reached by the Tax Act.

In *Kinney v. Treasurer (Kinney v. Stevens)* (1911) 207 Mass. 368, 35 L.R.A.(N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902, it was held that a note held by a nonresident but secured by a certificate for shares in a Massachusetts real estate trust was subject to a succession tax under Mass. Stat. 1907, chap. 563, § 1, as amended by Stat. 1909, chap. 268, and chap. 527, § 1, as property within the jurisdiction of the commonwealth, although the testator held only an equitable interest in the real estate, an interest in which was represented by the certificate. So, in *Peabody v. Treasurer* (1913) 215 Mass. 129, 102 N. E. 435, it was held that shares of stock in Massachusetts real estate trusts were interests in property within the jurisdiction of the commonwealth and subject to an inheritance tax under the statute involved in the *Kinney Case*. Rugg, Ch. J., said: "It is not necessary to analyze with greater nicety the precise character of the property interest of a shareholder under each of the trusts. It is true of all of them that their rights are equitable interests in tangible property within the commonwealth. While the legal title is in the trustees their ownership is fiduciary, and the certificate holders are the ultimate proprietors of the property, which is held and managed for their ultimate benefit, and which must be divided among them at the termination of the trust. Their rights constitute not choses in action, but a substantial property right. In this respect the case is indistinguishable in principle from shareholders in a domestic corporation."

*c. Legal characteristics of capital stock.*

In *Kennedy v. Hodges* (1913) 215 Mass. 112, 102 N. E. 432, shares in a real estate trust, the home office of which was in Massachusetts, where alone the shares were transferable, were held to constitute property found within the commonwealth under a statute (Mass. Rev. Laws, chap. 143, § 1) providing that when administra-

tion is taken in the commonwealth on the estate of a nonresident, "his estate found here" should be administered here.

Where the trust agreement provides that the legal title to the trust real estate shall vest in the trustee, who has power to sell and convey the same and divide the proceeds among the members, and there is no provision for division at any time of the land itself among the members, it has been held that the real property held by the trustees must, for the purposes of the trust, be regarded as personal property so that the wife of a deceased member could not claim dower therein. *Mallory v. Russell* (1887) 71 Iowa, 63, 60 Am. Rep. 776, 32 N. W. 102.

So, it has been held that where a common-law association is formed for the purchase of certain real estate, the title to be in a trustee and the interest of each member to be determined according to the number of shares which he holds and which can change hands only by transfer on the books of the association, the real estate of the association must be regarded as personal property so that the interest of a member cannot be sold under execution as real estate. *Pittsburg Wagon Works' Estate* (1903) 204 Pa. 432, 54 Atl. 316.

In *Gardiner v. Gardiner* (1912) 212 Mass. 508, 99 N. E. 171, where a common-law business trust had outstanding both preferred and common stock, and was in arrears of dividends, and additional shares of preferred stock were issued to cover the arrears, and such stock recited that it was in purchase of such arrears, it was held that the substance rather than the technical form must be given consideration, and, therefore, since there was no fund which could be designated either as profits, undivided earnings, or accumulated surplus sufficient to cover the arrearage, the new issue must be regarded as an additional capital of the trust association rather than income, so that a life beneficiary of a stockholder was only entitled to the income therefrom.

*IV. Rights of trust creditors.*

In the absence of provision express-

ly limiting the personal liability of the members of a business trust, it seems that their liability to bona fide trust creditors is unlimited. For instance, in *Phillips v. Blatchford* (1884) 137 Mass. 510, Holmes, J., in discussing the legality of a so-called "Massachusetts trust" said that as to shareholders, if they choose to purchase stock in such an enterprise "with unlimited personal liability," it is their own lookout. And see also *Hoev v. Coleman* (1891) 46 Fed. 221, as quoted supra, III. b, 3.

As to provisions in trust agreements and contracts with trustees expressly limiting liability, see supra, II. c.

Of course where a trustee of a common-law business trust has incurred an obligation in conducting the trust, the obligee may reach the trust estate. *Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009. However, to do this the creditor must bring himself within the rule. *Ibid.* In this case it was held that the alleged creditor of the trust did not bring himself within the rule, for the reason that it plainly appeared that the note upon which the claim was founded was not executed in accordance with the authority conferred upon the trustees by the declaration of the trust.

And see *Willis v. Greiner* (1894) — Tex. Civ. App. —, 26 S. W. 858, as set out in the following subdivision.

#### V. Power of officers or shareholders to sell trust lands.

As regards the rights and powers of the certificate or shareholders or the officers of an unincorporated trust association owning real estate, it has been held that where the trust is in the form of a joint stock association they have no power to bind the association by a contract to sell such property at a stipulated price unless such power has been granted them, especially where the association agreement vests the title in the association trustees, who are empowered to make conveyance of the same under the direction of the stockholders. *Willis v. Greiner* (1894) — Tex. Civ. App. —, 26 S. W. 858. In this case the president and secretary of the association attempted to make a contract to deliver deeds to certain lands owned by the association to a third person at a stipulated price, and it was held that such an agreement would not support an action by such person for commissions for the sale of such lots.

#### VI. Liability of trustees for negligence.

In accordance with the general rule of negligence it has been held that the trustees of a business trust association are civilly liable to one injured by their negligent management of the trust property. *Falardeau v. Boston Art Students' Asso.* (1903) 182 Mass. 405, 65 N. E. 797. G. J. C.

WILLIAM W. APPLETON et al., Trustees, etc., of James E. Cooley,  
Deceased, et al., Appts.,

v.

CITY OF NEW YORK, Respt.

*New York Court of Appeals — October 3, 1916.*

(219 N. Y. 150, 114 N. E. 73.)

#### Highway — right to require license for vault beneath.

1. A municipal corporation has authority in the regulation and supervision of its streets to require a license and exact a fee from the owner of the fee of the street as a condition to the construction by him of vaults beneath the surface of the highway.

[See note on this question beginning on page 646.]



**Appeal — review of facts.**

2. The New York court of appeals cannot review a finding of fact by the appellate division of the supreme court which is supported by the evidence, although it reverses the findings of the special term.

[See 2 R. C. L. 208.]

**Highway — title — Dutch grant — effect.**

3. The rule of the Dutch law, under which a grant was made of land on Manhattan island by representatives of the Dutch government, that all lands used for streets shall revert in the government, does not operate if the streets were opened after the island had passed to the English.

**— dedication — date.**

4. A dedication of land for a highway in 1733 was valid under the common law.

[See 8 R. C. L. 881.]

**— title to fee.**

5. The fee of land dedicated for a highway remains under the common law in the ones making the dedication.

[See 8 R. C. L. 906.]

**Eminent domain — title to fee.**

6. When the language and intent of a statute do not otherwise require, the fee to land appropriated for the use of a public highway will remain in the owner.

[See 13 R. C. L. 116, 120.]

**Highway — proportioning fee to square feet occupied — tax.**

7. That the amount of a fee to be paid for a license to construct a vault beneath a highway is calculated upon the number of square feet occupied by the vault does not make the payment a tax or assessment for revenue.

**APPEAL** by plaintiffs from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County, Part IV. (Greenbaum, J.), in their favor, and dismissing the complaint on the merits in an action brought to restrain defendant from claiming any estate in, or interfering with vaults or vault spaces under, the surface of the street connected with the premises of plaintiffs. *Affirmed.*

The material facts are stated in the opinion of the court.

Mr. J. Hampden Dougherty, for appellants:

The findings of the appellate division so far as they conflict with those of the special term are without any evidence whatever to sustain them, and are unwarranted in law.

Lauderdale Peerage Claim, 17 Abb. N. C. 462, note; Johnson v. M'Intosh, 8 Wheat. 543, 573, 576, 5 L. ed. 681, 688, 689; Martin v. Waddell, 16 Pet. 407, 10 L. ed. 1011; Canal Comrs. & Appraisers v. People, 5 Wend. 446; Canal Appraisers v. People, 17 Wend. 571; People ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461; Mortimer v. New York Elev. R. Co. 25 Jones & S. 244, 6 N. Y. Supp. 898; Hine v. New York Elev. R. Co. 54 Hun, 425, 7 N. Y. Supp. 464; Paige v. Schenectady R. Co. 178 N. Y. 102, 70 N. E. 213; Hinckel v. Stevens, 165 N. Y. 171, 58 N. E. 879.

Assuming that during Dutch occupancy streets or roads might have been opened without compensation through certain lands, the right of government to open streets without compensation terminated upon the surrender to the

English, or, in any event, upon the final treaty of cession in 1674, and became altogether nonexistent. No such right was ever transferred to the English Crown or now inheres in the city of New York.

Re John Street, 19 Wend. 659; Dill Mun. Corp. 5th ed. § 1194; 11 Herman, Estoppel & Res Judicata, pp. 1363, 1364; 20 Am. & Eng. Enc. Law, 1182; Peck v. Burr, 10 N. Y. 294; Moore v. New York, 73 N. Y. 248, 29 Am. Rep. 134; Curnen v. New York, 79 N. Y. 511.

The findings of the appellate division that dedication was neither recognized by statute nor developed at common law as early as 1733 is without evidence to sustain it, nor is it in accord with fact.

Gowen v. Philadelphia Exch. Co. 5 Watts & S. 741, 40 Am. Dec. 489; Reg. v. Hornsey, 10 Mod. 150, 88 Eng. Reprint, 670; 1 Hargraves, Law Tracts (1787) p. 9; Grogan v. Hayward, 6 Sawy. 498, 4 Fed. 161; Jersey City v. Morris Canal & Bkg. Co. 12 N. J. Eq. 547; State ex rel. Sims v. Otoe County, 6 Neb. 129; Hunter v. Sandy Hill, 6

Hill, 407, 23 Am. Dec. 222; McKinney v. Griggs, 5 Bush, 405, 96 Am. Dec. 360; Bessemer Land & Improv. Co. v. Jenkins, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. 565; Elyton Land Co. v. South & North Ala. R. Co. 95 Ala. 631, 10 So. 270; 9 Am. & Eng. Enc. Law, 2d ed. 15; Wood v. Veal, 5 Barn. & Ald. 454, 106 Eng. Reprint, 1257, 1 Dowl. & R. 20, 24 Revised Rep. 454.

The finding that Cortlandt street must be presumed to have been opened under the Colonial Statute of October 1, 1691, is without any evidence to support it, and not in accordance with law.

10 Am. & Eng. Enc. Law, 2d ed. 73; 13 Cyc. 486; Elliott, Roads & Streets, §§ 115, 125, 137; Gerard, Streets, Wharves (N. Y.) p. 156; Williams v. New York C. R. Co. 16 N. Y. 97, 69 Am. Dec. 651; Kelsey v. King, 33 How. Pr. 39, 1 N. Y. Trans. App. 138; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; Mott v. Eno, 181 N. Y. 346, 74 N. E. 229; Bradley v. Crane, 201 N. Y. 14, 94 N. E. 359.

The "presumption" in which the appellate division erroneously indulged, that the original street had been opened under the Act of 1691, has obviously no application to the 5-foot strip.

Mott v. Eno and Bradley v. Crane, *supra*.

In providing that before a permit for the use of vault space shall be issued, the same kind and rate of charge shall be made irrespective of where the fee is, the ordinances not only deprive the fee owner of his property in the street without due process of law, but also deny to him the equal protection of the laws.

Re Gilbert Elev. R. Co. 38 Hun, 488; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159; Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; McCarthy v. Syracuse, 46 N. Y. 194; Mairs v. Manhattan Real Estate Asso. 89 N. Y. 498; Williams v. Kenney, 14 Barb. 629; Cortelyou v. Van Brundt, 2 Johns. 357, 3 Am. Dec. 439; Jackson ex dem. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Galen v. Clyde & R. Pl. Road Co. 27 Barb. 543; Babbage v. Powers, 130 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132; Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373.

The city has no right to demand compensation from the owner of the fee of the street for the use of the vault space.

Tacoma Safety Deposit Co. v. Chicago, 247 Ill. 192, 31 L.R.A.(N.S.) 868, 93 N. E. 153, 20 Ann. Cas. 564; Sears v. Chicago, 247 Ill. 204, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 589; Tacoma Safety Deposit Co. v. Chicago, 247 Ill. 192, 31 L.R.A.(N.S.) 868, 93 N. E. 153, 20 Ann. Cas. 564; State, Benson, Prosecutor, v. Hoboken, 33 N. J. L. 280.

If the plaintiffs are correct in their contention and the city, in defiance of their rights, is threatening to cut them off from vault space owned by them in fee, they would be entitled to invoke equitable relief.

High, Inj. § 363; Varick v. New York, 4 Johns. 53; Manchester Cotton Mills v. Manchester, 25 Gratt. 825; Kerr, Inj. § 125; Oakley v. Williamsburg, 6 Paige, 262; Clark v. Syracuse, 13 Barb. 33; Manko v. Chambersburgh, 25 N. J. Eq. 168; State, Benson, Prosecutor, v. Hoboken, 33 N. J. L. 280.

Plaintiffs have all the rights in the original street and in the additional 5-foot strip which belonged to the persons owning the land when the street was originally dedicated and when it was widened. The title was conveyed to the street center.

Bissell v. New York C. R. Co. 23 N. Y. 61; Gerard, Streets, p. 149; Hammond v. McLachlan, 1 Sandf. 323; Perrin v. New York C. R. Co. 36 N. Y. 120; Re Ladue, 118 N. Y. 213, 23 N. E. 465; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Mott v. Mott, 68 N. Y. 246; Kings County F. Ins. Co. v. Stevens, 87 N. Y. 287, 41 Am. Rep. 361; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; Miner v. New York, 5 Jones & S. 171; Sizer v. Devereux, 16 Barb. 160; Dovaston v. Paine, 2 Smith, Lead. Cas. 6th Am. ed. 228; Banks v. Ogden, 2 Wall. 57, 17 L. ed. 818; Bliss v. Johnson, 73 N. Y. 529; Devlin, Real Estate, 3d ed. § 1024.

Messrs. Terence Farley and Leon N. Futter, with Mr. Lamar Hardy, for respondent:

If the city owns the bed of Cortlandt street, then unquestionably it has the right to charge anything it sees fit for the privilege of constructing vaults.

3 Dill. Mun. Corp. 5th ed. §§ 1178, 1180.

If the abutting proprietor owns the fee he cannot construct a vault without the permission of the municipal authorities and subject to such terms and conditions as they may impose. And such a permit is subject to revocation

at any time when the public necessities require it.

*Patten v. New York Elev. R. Co.* 3 Abb. N. C. 306; *Deshong v. New York*, 74 App. Div. 234, 77 N. Y. Supp. 563, affirmed in 176 N. Y. 475, 68 N. E. 880; *Lincoln Safe Deposit Co. v. New York*, 96 App. Div. 624, 88 N. Y. Supp. 912, affirmed in 210 N. Y. 34, L.R.A.1915F, 1009, 103 N. E. 768; *New York v. DePeyster*, 120 App. Div. 762, 105 N. Y. Supp. 612, affirmed in 190 N. Y. 547, 83 N. E. 1123; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 432, 105 N. Y. Supp. 1071, affirmed in 124 App. Div. 920, 108 N. Y. Supp. 1145; *New York Steam Co. v. Foundation Co.* 195 N. Y. 43, 21 L.R.A. (N.S.) 470, 87 N. E. 765; *Tiernan v. Thorp*, 88 Neb. 662, 32 L.R.A. (N.S.) 1034, 130 N. W. 280; *Sears v. Chicago*, 247 Ill. 204, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 543; *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192, 31 L.R.A. (N.S.) 868, 93 N. E. 153, 20 Ann. Cas. 564; *People ex rel. Mather v. Marshall Field & Co.* 266 Ill. 609, L.R.A.1915F, 937, 107 N. E. 864, Ann. Cas. 1916B, 743; *Peabody v. Boston*, 220 Mass. 376, L.R.A.1915F, 1005, 107 N. E. 952.

Irrespective of the question whether the city may charge for vault privileges, plaintiffs, who have been guilty of a confessed wrong, cannot come into a court of equity and ask it to protect them from any interference on the part of the city.

*Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; *Weeghman v. Killifer*, L.R.A.1915A, 820, 131 C. C. A. 558, 215 Fed. 289; *Moore v. Tarlton*, 3 Ala. 444, 37 Am. Dec. 701; *Sioux City v. Chicago & N. W. R. Co.* 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183; *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987; *Ryan v. Miller*, 236 Mo. 496, 139 S. W. 128, Ann. Cas. 1912D, 540; *Powers's Appeal*, 125 Pa. 175, 11 Am. St. Rep. 882, 17 Atl. 254; *McVey v. Brendel*, 144 Pa. 235, 13 L.R.A. 377, 27 Am. St. Rep. 625, 22 Atl. 912; *Larscheid v. Kittell*, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576; *Rock v. Mathews*, 35 W. Va. 531, 14 L.R.A. 508, 14 S. E. 137.

Plaintiffs' first point that "the findings of the appellate division, so far as they conflict with those of the special term, are without any evidence whatever to sustain them, and are unwarranted in law," cannot be sustained.

3 Kent, Com. 12th ed. p. 392; *Campbell v. Hall*, Cowp. pt. 1, p. 204, 98 Eng. Reprint, 1045; *Constantine v. Van Win-*

*kle*, 6 Hill, 177; *Overbagh v. Patrie*, 8 Barb. 28; *People v. Livingston*, 8 Barb. 253; *Bartow v. Draper*, 5 Duer, 130; *Wetmore v. Story*, 22 Barb. 414; *Dunham v. Williams*, 37 N. Y. 251; *Dunham v. Williams*, 36 Barb. 136; *Levy v. Levy*, 33 N. Y. 97; *Story v. New York Elev. R. Co.* 3 Abb. N. C. 478, reversed in 90 N. Y. 122, 43 Am. Rep. 146; *Van Giesen v. Bridgeford*, 18 Hun, 73, 83 N. Y. 348; *Smith v. Rentz*, 131 N. Y. 169, 15 L.R.A. 138, 30 N. E. 54.

The findings of the appellate division that dedication was neither recognized by statute nor developed at common law as early as 1733 is in accord with fact and sustained by evidence.

*Angell, Highways*, 3d ed. § 133; *Jones, Easements*, § 422; 1 *Reeves, Real Prop.* p. 221, note 3; *Washb. Easements*, p. 207; *Morris v. Vanderen*, 1 Dall. 64, 1 L. ed. 38; *De Ruyter v. St. Peter's Church*, 3 Barb. 119; *Morgan v. King*, 30 Barb. 9, reversed in 35 N. Y. 458, 91 Am. Dec. 58; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Williams v. Williams*, 8 N. Y. 525; *Hill v. Livingston County*, 12 N. Y. 52; *Madison Ave. Baptist Church v. Baptist Church*, 46 N. Y. 131; *Cutting v. Cutting*, 86 N. Y. 522; *Brookhaven v. Smith*, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, 80 N. E. 665, 11 Ann. Cas. 1; *Barnes v. Midland R. Terminal Co.* 193 N. Y. 378, 127 Am. St. Rep. 962, 85 N. E. 1093; *Fulton Light, Heat & P. Co. v. State*, 200 N. Y. 400, 37 L.R.A. (N.S.) 307, 94 N. E. 199; *Re Carnegie Trust Co.* 206 N. Y. 390, 46 L.R.A. (N.S.) 260, 99 N. E. 1096; *Gerard, Titles to Real Estate*, 5th ed. p. 22.

The widening of Cortlandt street in 1784 must be deemed to have been accomplished pursuant to the then-existing laws.

*Bartow v. Draper*, 5 Duer, 130; *Sherman v. McKeon*, 8 Bosw. 103; *Williams v. New York C. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *People v. Kerr*, 27 N. Y. 188; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

Assuming that Thomas Salter and his wife were vested with the title to half the bed of Cortlandt street, that title was not transferred by the conveyance to James E. Cooley.

*Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Tyler v. Hammond*, 11 Pick. 193; *English v. Brennan*, 60 N. Y. 609; *Watson v. New York*, 67 App. Div. 573, 73 N. Y. Supp. 1027, affirmed in 175 N. Y. 475, 67 N. E. 1091; *Bartow v. Draper*, 5 Duer, 130; *Higinbotham v. Stoddard*,

72 N. Y. 94; Hall v. Whitehall Water Power Co. 103 N. Y. 129, 8 N. E. 509; People ex rel. Burnham v. Jones, 112 N. Y. 597, 20 N. E. 577; Clark v. Rochester City & B. R. Co. 2 N. Y. Supp. 563; Harris v. Oakley, 17 N. Y. S. R. 198, 2 N. Y. Supp. 305; Union Burial Ground Soc. v. Robinson, 5 Whart. 18.

The city owns the fee of the land occupied by the streets, whether such streets were laid out under the Dutch régime, or during the colonial period, or subsequently, after the organization of the state government.

Kane v. New York Elev. R. Co. 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278; People v. Kerr, 27 N. Y. 188; Kellinger v. Forty-second Street & G. Street Ferry R. Co. 50 N. Y. 206; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268, 10 N. E. 528; Knickerbocker Ice Co. v. Forty-second & G. Street Ferry R. Co. 176 N. Y. 408, 68 N. E. 864.

Collin, J., delivered the opinion of the court:

The plaintiffs seek in this action in equity a judgment perpetually restraining the defendant from claiming any estate in, or interfering with vaults or vault spaces under, the surface of the northerly half of Cortlandt street in the city of New York connected with the premises of the plaintiffs at the northwest corner of Broadway and Cortlandt street. The special term awarded the judgment sought by the plaintiffs, which the appellate division reversed, and dismissed the complaint on the merits.

The immediate inducement of the action was the threat of the defendant that unless the plaintiffs procured from and paid the defendant for a permit for the vault spaces, it would deprive the plaintiffs and their tenants of the use of them. The plaintiffs assert that the threatened action is unlawful because they own in fee simple the bed of the part of Cortlandt street in which the vault spaces are.

The appellate division and the special term are in disagreement in regard to certain of the cardinal facts. There are, however, facts found by the special term which the

appellate division did not reverse. Of them are the following: The source of the title of the plaintiffs to their premises and of the claimed fee in the land of the street was a grant, of April 25, 1644, by a ground brief of Director General Kieft in behalf of the States General of the United Netherlands, to Jan Jansen Damen. Cortlandt street did not then exist. On or about May 25, 1733, the then owners of the land in question, and the owners of other lands, filed with the common council of the city of New York their declaration and petition, which recited that they were possessed of certain parcels of land on the west side of Broadway and running from thence to Hudson river, and for the improvement of them they and "others concerned in the said lands by mutual consent and agreement have laid and staked out a certain new street through the said lands from the Broadway aforesaid to Hudson river of 40 foot in breadth and called the name thereof Cortlandt street," and stated that they "therefore hereby declare and make known that the said new street so laid out of 40 foot English measure in breadth through the lands aforesaid and called Cortlandt street shall forever remain, continue, and be a Publick Street and Highway in like manner as the other Publick Streets of this City now are or lawfully ought to be," and prayed that "their Declaration and Petition may be recorded in the Record of the Common Council of this Corporation." The common council granted the petition. In 1788 Cortlandt street was widened, under the Laws of 1784, chapter 56, 10 feet, by the addition of 5 feet on each side. The plaintiffs or their predecessors in title about the year 1859 constructed, and there have since then existed, vaults under the beds of Cortlandt street and Broadway contiguous to the said premises at the corner of those streets. Municipal ordinances in force at the time of the construction forbade, under a penalty, the construction of a vault in any of the

streets of the city without the written municipal permission and the payment of a sum for each square foot of vault space occupied. No permission or payment for the vaults has at any time existed. Ordinances of a cognate nature have existed at all times since 1859. In 1912 the defendant first learned of the extent of the vaults, and the proper municipal authority demanded of the plaintiffs that they obtain a permit and make the required payment, and threatened, in case of their default, to wall up the vaults. Other findings will be referred to as they become relevant.

The plaintiffs assert that Jan Jansen Damen was, through the ground brief, vested by the Dutch sovereignty with the fee of the 40 feet of the lands which subsequently were occupied by the street, which, transmitted to his successors in title by mesne grants, did not pass from them in 1733 by virtue of the Roman-Dutch law, because the Roman-Dutch law had ceased to exist as to it, or by virtue of the declaration and petition of 1733, and by mesne conveyances such fee is now in the plaintiffs; and that the defendant acquired in 1788 in the proceeding under the Statute of 1784 an easement only in the 10 feet added to the width of the street. The defendant asserts that the sovereign grant to Damen, in its effect and extent, was defined by the Roman-Dutch law, under which sovereignty was revested with the fee of lands granted by it in private ownership and subsequently appropriated for a public street or highway; that such sovereign right of revestment was property and was transferred, under the capitulation articles of 1664, the Treaty of Breda of 1667 and the Treaty of Westminster of 1674, to the British Crown and thence, through royal grant and charters, passed to the defendant, vesting in it the fee of the original 40 feet; and further, that the action of the owners, assuming that the fee was in them, and the common council in 1733,

was not a dedication of a street, and was the instituting of a proceeding under a colonial act of 1691 through which the defendant obtained the fee to the 40 feet; that the city became vested with the fee of the 5 feet appropriated in widening the street upon its northerly side by virtue of the Authorizing Statute of 1784.

The special term by its findings of fact and conclusions of law sustained the assertions of the plaintiffs. The appellate division, by the findings of fact as determined by it, and legal conclusions based upon them, sustained the assertions of the defendant, and reversed any finding of fact made by the special term inconsistent with the findings made by it. In case the new findings of fact made by the appellate division have support

*Appeal—review of facts.*

in the evidence, we must, inasmuch as its legal conclusions are upheld by the facts as found, affirm its decision. *Union Trust Co. v. Oliver*, 214 N. Y. 517, 522, 108 N. E. 809.

We take up first the question, Did the executory right in the Dutch sovereignty of being revested with the fee of lands as and when devoted to a street pass to the British sovereignty? It is neither necessary nor useful to attempt to determine or discuss whether the title of the British Crown to the territory of New Netherlands arose from discovery or conquest, or the cognate question whether the civil law was in force in the province de jure or merely de facto: "The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword." *Johnson v. M'Intosh*, 8 Wheat. 543, 576, 5 L. ed. 681, 689. Historical research has not weakened the accuracy of the statement of Chief Justice Marshall. We assume, for the purposes of this case, that at the time of the execution and delivery

of the ground brief to Damen in 1644 the Roman-Dutch law was in force in New Netherlands, that the grant by the ground brief was with reference to it, and the correlative rights of the Dutch government and the grantee in relation to the grant were controlled by it, and that the grantee was vested with the fee, subject to such limitations or servitudes as it and the ground brief affixed.

The Roman-Dutch law prevailed in the New Netherlands at the time of the sovereign grant to Damen. The Roman or civil law was its basis, but the government of the United Netherlands had through their enactments and customs incorporated in it provisions of their own. A rule of it was that every sovereign grant was subject to the reversion in the sovereignty of the absolute title to any part of the granted lands which became a public highway. *Dunham v. Williams*, 37 N. Y. 251. By virtue of it, the Dutch sovereignty, from the time of the grant to the time it withdrew from and surrendered to Great Britain the New Netherlands, would have become, as the representative of the people within its jurisdiction, the owner of the land of Cortlandt street, if appropriated for the street within that time. Throughout that period the title of Damen and of his successors was subject to such regal prerogative. It was a prerogative, however, which the Roman-Dutch law affixed to the Dutch sovereignty, which depended upon, and which was enforceable only through, that law. The common law of England knew naught of it, had no recognition for it, or no remedy through which it might be grasped or enforced. The common law of England ruled, generally speaking, that, apart from any statutory provisions, the owner of the land adjoining a highway, or the lord of the manor, is owner also of the soil of one half of the highway, and the owner of the soil of a highway "has right to all above and underground, except only the right of passage

for the King and his people," and may exercise all rights of ownership not inconsistent with the public right of passage. *Goodtitle ex dem. Chester v. Alker*, 1 Burr. 138, 97 Eng. Reprint, 231, 17 Eng. Rul. Cas. 549, 1 *Ld. Kenyon*, 427; *St. Mary, Newington, v. Jacobs*, L. R. 7 Q. B. Div. 47. The executory prerogatives, privileges, and rights, which by virtue of the Roman-Dutch law inhered in the Dutch sovereignty and which were foreign to the British sovereignty and its common law, did not pass, under the capitulation articles and treaties, to the British Crown or its representative, the Duke of York. The sovereignty of the Dutch was not merged in that of Great Britain. It withdrew from and became extinct in the territory of New Netherlands. It surrendered to the British Crown the public territorial possessions and estate. It did not transfer to the British Crown the Roman-Dutch law or the rights incorporate in the government of the Dutch by virtue of that law to seize, sequester, or escheat any part of or interest in the lands granted by it. The reign of the Roman-Dutch law expired in New Netherlands (except as left applicable by the capitulation articles and treaties to the private rights of the Dutch inhabitants), and with it expired the servitude, dependent upon and enforceable only through it, in the lands granted to Damen. Executory sovereign rights springing from that law and enforceable only through it ceased to exist as to the surrendered territory, and the British Crown had such prerogatives or rights in relation to it as the common law of England, modified, perhaps, by the stipulations of the surrender, gave it. The property right in the Dutch government to a reversion of the title to so much of the lands granted to Damen as became a public street or highway was not a property right in the realm of the common law of England. The common law did not recognize nor grasp nor uphold

Highway-title  
—Dutch grant—  
effect.

it. The British Crown had not the right to assert a title to Cortlandt street, even as it obviously would not have had the right to assert title to the lands granted to Damen through sequestration or escheat for a cause justifying under the Roman-Dutch law, but unknown to the English law. *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 546, 29 L. ed. 270, 271, 5 Sup. Ct. Rep. 1005. Such conclusion is not inconsistent with our decision in *Dunham v. Williams*, 37 N. Y. 251, 253, or our views in other cases harmonizing with that decision. In *Dunham v. Williams*, and in those other cases, the street or highway under consideration was laid out prior to 1664, as we have in each case expressly and carefully stated. The executory sovereign right had, therefore, through the rule of the Roman-Dutch law, become executed and ripened into an absolute title and property. That law had exhausted its office and had created that which the common law recognized as property. The Dutch government owned the land of the street or highway as it owned the vacant or ungranted lands of the province,—an ownership and a property cognizable and regulated by the common law of England. The ownership of the Dutch government in the land of a street or highway was the same as it would have been had its grantee or a successor in his title conveyed to it those lands. Thus, in *Dunham v. Williams* we said: "The highway having been laid out long prior to the capitulation, the title of the government to the roadbed was absolute." In *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L.R.A. 640, 26 N. E. 278, the fact was the same. In *Paige v. Schenectady R. Co.* 178 N. Y. 102, 110, 70 N. E. 213, the defendant claimed that Washington avenue was a Dutch street and the title to it, therefore, in the public. We denied the claim, and said: "Obviously, when Washington avenue became a public highway, the colony of New York was governed

by the English law, under which the sovereign did not own the fee to the streets or highways, but only an easement upon the land over which they extended. Under the common law of England, the title to the land in a street or highway was not in the King, but in the lord of the manor, subject only to the easement of the public to a way over it." We conclude that the fee of the lands as and when devoted to the street did not pass to the British Crown.

We take up next the finding of the appellate division that under the declaration and petition of 1733 the predecessors of the defendant here took the necessary proceedings, under the Colonial Act of 1691, to lay out Cortlandt street as a public highway, and that thereunder it acquired the fee of the 40 feet.

The finding is, and must be, based, under the record, exclusively upon the contents of the declaration and petition and the language of the act. The contents of the declaration and petition and the granting of the petition have already been stated. The Colonial Act (Laws 1691, chap. 18) in effect recited that it was necessary for traffic and commerce "that buildings streets lanes wharfs docks and alleys" be regulated with uniformity for public accommodation, and "that all impediments and obstructions that may retard so necessary a work may be removed," and enacted that the municipal authorities might at their pleasure appoint supervisors of those public conveniences to act according to such rules as they should establish, and might obstruct any building that would narrow a street, and if in the laying out for the future of any such convenience "they doe take any persons Grounds they are to give notice to the Owners or Partyes interested in the ground to be so taken," and may treat and agree with the owners or parties "to the end that reasonable satisfaction may be given for all such ground as shall be taken and employed for the uses aforesaid," or in default of agreeing may cause the impaneling

of a jury to assess "such Damages and recompense as they shall judge fit to be awarded to the owners and others interested according to their severall and respective Interests and Estates Of any such ground or any part thereof for their respective interests and Estates in the same as by the said Mayor Aldermen and Common Council shall be adjudged fitt to be converted to the purposes aforesaid." The language of the act does not indicate or suggest that the declaration and petition had any relation to it. It clearly contemplates a proceeding in invitum in which the land to be appropriated for the public use was to be taken, not accepted as petitioned by its owners, and was to be paid for pursuant to an amicable agreement between them and the municipality, or in default of such agreement, to an assessment by the jury. The contents of the declaration and petition do not indicate or suggest that it has any relation to the act. The land described by it is, in form, dedicated to the public for the purposes of a street through the declaration and petition and the order or resolution of the common council. In form, a street is created by dedication. In contravention of such conclusion, it is asserted that the common law with respect to dedication had not in 1733 been developed. The assertion is unsupported by and is <sup>-dedication-</sup><sub>date.</sub> contrary to judicial authority and the natural conclusions authorized by the history of the common law. The easement of a private right of way was frequently created under the common law as early as the fourteenth century. "The most elaborate and carefully worded of the private documents which have come down to us are those which create or regulate pasture rights and rights of way." 2 Pollock & M. History of English Law, p. 144. It is a clear and near step from a right of way to an individual to a right of way to the public. In *Post v. Pearsall*, 22 Wend. 425, 433, Chancellor Wal-

worth stated: "Although at the time of the publication of the laws of William, the Conqueror, there were but four great roads in England called the King's highways, yet no one can doubt that there were, even at that time, innumerable thoroughfares, and many squares and open spaces, which had been dedicated to the use of the people at large, for passages and promenades; and the number since that time has probably increased an hundred fold. The law of dedication, therefore, which was applicable to thoroughfares, was properly applicable to market places and promenades, although they were not highways in the ordinary sense of the term." This general statement has a strong support in the authoritative statement: "Most highways have, or are deemed to have, originated from the owner's dedication of his land to the public for the purposes of passage and acceptance by the public of his gift, evidenced by their user of the way." 16 Laws of England (Halsbury) p. 12. Judicial authority upon the question is not lacking. In *New Orleans v. United States*, 10 Pet. 662, 9 L. ed. 573, it was held that land was dedicated to the public use in 1724, and the court said: "That property may be dedicated to public use is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. The original dedication is proved by the maps in evidence, and by a public use of more than a century. These facts are conclusive." pp. 712-717. In 1713 an English court recognized the principle of dedication in the following opinion: "If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material quo animo it was laid out, it shall be deemed a public way." *Reg. v. Hornsey*, 10 Mod. 150, 88 Eng. Reprint, 670. In 1732 it was likewise recognized in the two decisions in *Rex v. Hudson*, 2 Strange, 909, 93 Eng. Reprint, 935, and *Lade v. Shepherd*, 2



Strange, 1004, 93 Eng. Reprint, 997, in each of which the alleged dedication was many years prior to the rendering of the decision. We think the declaration and petition and the resolution or order of the common council conclusively established the dedication of the 40 feet to the public for the purposes of a public street. By the common law,

in the act of dedication, the fee of the soil remained in the owners, but the use of the street was vested in the public. The owners parted with the use involved in the purposes of a street only. *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. Our conclusion is that the defendant has not at any time held the fee to the original 40 feet of the street, and that the finding of the appellate division in relation thereto is not supported by the evidence.

We take up next the finding of the appellate division "that when the common council determined to lower the grade of Cortlandt street and to extend its width 5 feet on either side," pursuant to chapter 56 of the Laws of 1784, "the fee to the widened part of the street vested in the city of New York." This finding has not any support in the evidence. The Statute of 1784 recited, in effect, the destruction by fires "during the war" of a considerable part of the city, and that streets in such destroyed parts might be beneficially altered, and authorized, in effect, the city to appoint commissioners for the purpose of laying out the streets in such parts of the city under prescribed restrictions with the provision that where any owner deemed his lot injured he might apply to the city "to have the injury or damage so supposed to have been suffered, ascertained by appraisement," and appraisers "shall determine upon a full and equitable consideration and estimate of all the circumstances attending the alteration in the streets, as aforesaid, whether such lot or lots has or have been decreased or

advanced in value by such alterations and to what amount," and contemplated payment to the owner of his damage or by him for the increased value. A proceeding under this statute effected the widening of the street. It does not appear from any finding or the proceeding as described that a fee was taken or sought. The statute, obviously, did not prescribe or require the taking of the fee to the land appropriated for the widening. An easement fulfilled its intentment and purposes and constituted the interest taken, because when

the language and intent of a statute do not otherwise require, the fee to land appropriated for a public use will remain in the owner. *Mott v. Eno*, 181 N. Y. 346, 74 N. E. 229; *Bradley v. Crane*, 201 N. Y. 14, 94 N. E. 359. Our conclusion is that the defendant has not at any time held the fee to the land used in widening the street.

We take up now a question to which we have not as yet referred. The special term found, as facts, the extent of the occupied vault space; the demand of the defendant that the plaintiffs pay for the use of such space and take out a permit for its use; that the ordinances of the defendant, adopted in 1906 and existing at the time of the demand, forbade, under a penalty, the construction of a vault in a street without the written permission of the borough president having jurisdiction, and payment to him, after obtaining the permission, of "such sum as he shall certify in the said permission to be a just compensation to the city for such privilege, calculated at the rate of not less than 30 cents, nor more than \$2 per foot, for each square foot of ground mentioned (in the application) as required for such vault," and that no permit to use any portion of said space was ever applied for by the plaintiffs or their predecessors in title. It held as conclusions of law that the plaintiffs had not the right to construct or maintain the vaults

Eminent domain  
—title to fee.

without obtaining the permit from the defendant, and the defendant had not the right to require the plaintiffs as a condition precedent to the use of any part of the said vault space to pay to it compensation fixed in the ordinance for the privilege of using said space. The judgment enjoined the defendant "from exacting from the plaintiffs the compensation fixed in the ordinance passed in the year 1906, and from interfering in any manner with plaintiffs' use of said vaults by reason of plaintiffs' failure or refusal to pay such compensation." The reasoning of the special term as expressed in the opinion was: The ordinance imposed a compensation based upon the number of square feet contained in the vault space and hence imposed not a mere license fee incident to the power to investigate the application and regulate the use of the street, but a tax measured in amount by the rental value of the vault; the charter of the defendant conferred upon the board of aldermen power to regulate merely, which does not include the power to tax. The appellate division made the finding of fact (Ryan v. Franklin, 199 N. Y. 347, 92 N. E. 673) "that no proof was adduced by the plaintiffs which tended to show that the rate of compensation which was prescribed by the ordinances for a vault permit was either excessive or unreasonable or in the nature of a tax or an assessment or a rental for the use of the land," and the conclusion of law "that, even assuming that the plaintiffs are the owners of the bed of Cortlandt street, still they have not the right to construct vaults thereunder without the permission of the municipal authorities. And as a condition of granting such permission, the municipal authorities are entitled to impose such terms and conditions as they may see fit to indemnify the city against the expenses which it would be subjected to in performing its duty of supervision and inspection and maintenance and repair."

There is not in the record any evidence supporting the finding of the special term that the defendant demanded of the plaintiffs that they pay for and take out a permit for the use of the space of land occupied by the vaults, or the conclusion that the ordinances provided or intended that plaintiffs should pay a tax upon or for such space. The language of the ordinances, upon which ultimately the finding is based, does not support the finding or conclusion. It expresses that the privilege applied and to be compensated for is that of constructing a vault in the street. That privilege has not any relation to the ownership or a renting of the land of the street or the use of the fee. It is a requisite preliminary to the construction of the vault, because the land constituting the street is subject to all the public uses, servitudes, and appropriations essential to or consistent with its status as a street, and, in the interest of public safety, convenience, security, and comfort, is, within all legitimate street uses, by statutory grant, under the control, regulation, and disposition of the public authorities, whose right to exact a payment or fee, in the process of regulation, for a permission or privilege of exercising in it a private possession or advantage, consistent with the public uses, is undoubted. Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373; Buffalo v. Stevenson, 207 N. Y. 258, 100 N. E. 798; Deshong v. New York, 176 N. Y. 475, 68 N. E. 880; Lincoln Safe Deposit Co. v. New York, 210 N. Y. 34, L.R.A.1915F, 1009, 103 N. E. 768; New York v. Rice, 198 N. Y. 124, 28 L.R.A.(N.S.) 375, 91 N. E. 283. This right exists as to the owner of the land contiguous to the land of the street, irrespective of the ownership of the fee of the latter, because it is an element in the authorized regulation and supervision of the street.

The provisions of the ordinances do not contain any evidence that the

Highway—right to require license for vault beneath.

payment required from the applicant for the permission to construct a vault is a tax, and not a fee or the permission. They require him to state in his written application "the number of square feet of ground which is required for the same, and the intended length and width of the same," and to pay as a just compensation for the privilege a sum "calculated at the rate of not less than 30 cents, nor more than \$2, per foot for each square foot of ground mentioned as required for such vault." We cannot discern in the fact that the licensing officer is required, in exercising his discretion as to the amount, to make the basis of his computation the number of square feet of the space to be occupied, support for the legal conclusion that the pay-

—proportioning  
fee to square  
feet occupied—  
tax.

ment is a tax or assessment for revenue. It does not tend to prove that a computation so based would produce an unreasonable charge or fee for the expenses of the defendant resulting from the ascertainment as to whether or not the permission should be granted as requested and the regulation, supervision, and inspection incident to

the construction and maintenance of the vault. The language carries no evidence that the ordinances apply only to vaults constructed in streets, the fee of which is in the defendant, or that the compensation is a rental.

The appellants take before us the further ground that the ordinances are unauthorized and unlawful because they apply alike to all streets irrespective of ownership and therein refuse to recognize the superior rights of the individuals owning the fee of a street. Inasmuch as this ground assumes that the compensation required by them is a rental, what we have already said makes further consideration of it unnecessary.

For the reasons stated, the judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Hiscock, Chase, Hogan, and Cardozo, JJ., concur.

#### NOTE.

For right of abutting owner to permanent use of subsurface of street or highway, see the annotation to *KRESS v. MIAMI*, post, 646.

S. H. KRESS & COMPANY et al., Appts.,

v.

CITY OF MIAMI.

*Florida Supreme Court—July 10, 1919.*

(— Fla. —, 82 So. 775.)

#### Highway — use by abutting owner.

1. The owner of the fee in a street has the right to use the subsurface in front of his property, so long as he does not interfere with the rights of the municipality below the surface for sewers, and pipes for water, gas, or other proper purposes.

[See note on this question beginning on page 646.]

#### Municipal corporation — ordinance — deprivation of property.

2. A municipality cannot deprive a person of his property or property rights, by declaring by ordinance or

otherwise that to be a nuisance, which in fact is not a nuisance.

[See 19 R. C. L. 817.]

#### Highway — openings in sidewalk.

3. The owner of the fee in a street

has the right, subject to reasonable municipal regulation, to make openings in the sidewalk to give access to the area beneath; but he is bound so to construct and cover the opening that it shall at all times be as safe for the use of the public as if it did not exist, and public travel over the same be not unreasonably interfered with.

[See 13 R. C. L. 133.]

**Municipal corporation — requiring permit for opening in sidewalk.**

4. A city has the right to require the owner of the fee in a street to procure a permit before making an opening in the sidewalk, and it has the right to see that proper safeguards are thrown about the work, and that in its progress

the right of the public to use the sidewalk is not unreasonably interfered with.

[See 13 R. C. L. 192.]

— **power to regulate openings in street.**

5. A city may regulate how excavations in the subsurface of a street shall be made by the owner of the fee, and may regulate how trapdoors or other appliances for closing the opening shall be constructed; but it may not arbitrarily refuse to grant a permit, nor, under the guise of regulation, place an additional burden upon the abutting owner, or make regulations that would in effect deprive him from exercising his rights in the subsurface.

[See 19 R. C. L. 851.]

**APPEAL** by defendants from a decree of the Circuit Court for Dade County (Branning, J.) enjoining them from completing the construction of a vault or subway under a sidewalk in the plaintiff city, and requiring them to remove the portion already constructed and restore the sidewalk to its previous condition. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Lilburn R. Railey, for appellants:

An injunction is an extraordinary remedy, and should not be granted except in extraordinary cases, and especially should it not be granted without the court being clearly advised on the matter and the other party having an opportunity to be heard before the granting of a temporary injunction.

*Savage v. Parker*, 53 Fla. 1002, 43 So. 507; *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597; *Richardson v. Kittlewell*, 45 Fla. 551, 33 So. 984; *Thebaut v. Canova*, 11 Fla. 143; *Garnett v. Jacksonville, St. A. & H. River R. Co.* 20 Fla. 889; *Builders Supply Co. v. Acton*, 56 Fla. 756, 47 So. 822; *Bowes v. Hoeg*, 15 Fla. 403; *Peck v. Spencer*, 26 Fla. 23, 7 So. 642.

It is incumbent upon the complainant coming into a court of equity asking for an injunction to clearly show that he has no other adequate remedy.

*Florida Packing & Ice Co. v. Carney*, 49 Fla. 293, 111 Am. St. Rep. 95, 38 So. 602; *Louisville & N. R. Co. v. Railroad Comrs.* (Louisville & N. R. Co. v. Burr) 63 Fla. 491, 44 L.R.A. (N.S.) 189, 58 So. 543; 22 Cyc. 769, 880; *Randall v. Jacksonville Street R. Co.* 19 Fla. 409.

It was the duty of the court, when application was made, to dissolve the injunction previously granted.

7 A.L.R.—41.

*Hall v. Horne*, 52 Fla. 510, 42 So. 383; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525.

In the absence of anything to show the contrary, the title and legal possession of the owner or occupants of lands abutting on the street presumably extend to the middle of the street.

*Rawls v. Tallahassee Hotel Co.* 43 Fla. 288, 31 So. 237; *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Elliott, Roads & Streets*, p. 110; *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497; *Western U. Teleg. Co. v. Williams*, 86 Va. 696, 8 L.R.A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2; *Hodges v. Seaboard & R. R. Co.* 88 Va. 653, 14 S. E. 380; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

The easement of the public in a street is confined to a right of way.

*Lutterloh v. Cedar Keys*, 15 Fla. 306; *Rawls v. Tallahassee Hotel Co.* 43 Fla. 288, 31 So. 237; *Hodges v. Seaboard & R. R. Co.* 88 Va. 653, 14 S. E. 380.

The city cannot by ordinance prevent and absolutely prohibit the abutting owner from constructing a vault or subway under the street or sidewalk so long as it does not interfere with the

easement of the public, and any ordinance prohibiting the owner from so constructing a vault or subway, or attempting to make same a nuisance, is invalid.

*Temperance Hall Asso. v. Giles*, 33 N. J. L. 260; *Ray v. Mt. Pleasant*, 70 Iowa, 193, 30 N. W. 853; *Dunn & L. Bros. v. Gunn*, 149 Ala. 583, 42 So. 686; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Gordon v. Paltzer*, 56 Mo. App. 599; *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 898, 4 Am. Neg. Rep. 459; *McCarthy v. Syracuse*, 46 N. Y. 194; *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192, 31 L.R.A.(N.S.) 368, 93 N. E. 153, 20 Ann. Cas. 564; *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; *Chicago v. Norton Mill Co.* 196 Ill. 580, 63 N. E. 1043; *Weller v. McCormick*, 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101.

The owner of the fee has a right to use the subsurface of a public street, provided he does not materially interfere with the travel on the surface.

*Lynch v. North View*, 73 W. Va. 609, 52 L.R.A.(N.S.) 1038, 81 S. E. 833; *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 13 L.R.A.(N.S.) 904, 80 Pac. 1053.

Neither the city nor the legislature can enact an ordinance which will disturb rights already vested or obtained, neither can a prospective ordinance affect such rights.

*Ledwith v. Jacksonville*, 32 Fla. 1, 13 So. 454; *Tyson v. Mattair*, 8 Fla. 107.

Where the owner owns to the center of the street, the construction of a vault or alleyway underneath the street or sidewalk is not a nuisance.

*Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Gordon v. Peltzer*, 56 Mo. App. 599; *McCarthy v. Syracuse*, 46 N. Y. 194; *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 893, 4 Am. Neg. Rep. 459; *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431; *Lynch v. North View*, 73 W. Va. 609, 52 L.R.A.(N.S.) 1038, 81 S. E. 833; *Colegrove Water Co.*

*v. Hollywood*, 151 Cal. 425, 13 L.R.A.(N.S.) 904, 80 Pac. 1053.

Neither can the city, even under its police power, make that a nuisance which does not materially interfere with the rights of the public or of others to the use of their property.

*Karasek v. Peier*, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33; *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192, 31 L.R.A.(N.S.) 368, 93 N. E. 153, 20 Ann. Cas. 564.

*Messrs. Hudson, Wolfe, & Cason*, for appellee:

A municipality may maintain injunction to prevent the excavation or obstruction of streets.

*Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475, 53 N. W. 675; *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; *Mt. Clemens v. Mt. Clemens Sanitarium Co.* 127 Mich. 115, 86 N. W. 537; *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255; *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161; *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. Rep. 900, 56 N. W. 874; *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 489, 27 N. E. 232; *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 4 Pac. 433; *Newark v. Delaware, L. & W. R. Co.* 42 N. J. Eq. 196, 7 Atl. 123; *Demopolis v. Webb*, 87 Ala. 659, 6 So. 408; *Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Wauwatosa v. Dreutzer*, 116 Wis. 117, 92 N. W. 551.

There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land is in a municipality or in the abutting owner.

*Palatine v. Krueger*, 121 Ill. 72, 12 N. E. 75; *Babbage v. Powers*, 130 N. Y. 281, 14 L.R.A. 398, 39 N. E. 132.

The easement in the street is not confined to the surface, but includes the land below the surface.

*Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427; *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 827.

Every excavation in the street or sidewalk, made without municipal authority, is a nuisance per se.

*Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114; *Babbage v. Powers*, 130 N. Y. 281, 14 L.R.A. 398, 39 N. E. 132; *Jorgensen v. Squires*, 144 N. Y. 280, 89 N. E. 373; *Clifford v. Dam*, 81 N. Y. 52; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartmann*, 29 N. Y. 591, 86

Am. Dec. 341; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Donnelly v. Rochester*, 166 N. Y. 315, 59 N. E. 989, 9 Am. Neg. Rep. 550; *Perry v. Castner*, 124 Iowa, 386, 66 L.R.A. 160, 100 N. W. 84, 2 Ann. Cas. 363.

Excavations under a sidewalk are lawful so long as they are not forbidden by ordinances or regulations of the city, but no longer.

*Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; *Weller v. McCormick*, 52 N. J. L. 470, 8 L.R.A. 793, 19 Atl. 1101; *Pickrell v. Carlisle*, 185 Ky. 126, 24 L.R.A. (N.S.) 193, 121 S. W. 1029.

The city can take and appropriate the necessary space, even after an underground structure has been completed and used.

*Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 898, 4 Am. Neg. Rep. 459; *United States v. Boston Elev. R. Co.* 176 Fed. 963; *Scribner v. Grand Rapids*, 119 Mich. 188, 77 N. W. 699.

The owner of an abutting lot is not presumed to be the owner of the fee of the street.

*Gainesville v. Thomas*, 61 Fla. 538, 54 So. 780.

An obstruction is not justified by the fact that all of the street is not required for present uses.

*State v. Kean*, 69 N. H. 122, 48 L.R.A. 102, 45 Atl. 256; *Costello v. State*, 108 Ala. 45, 85 L.R.A. 303, 18 So. 820.

*Browne*, Ch. J., delivered the opinion of the court:

This is an appeal from the decree of the chancellor permanently enjoining S. H. Kress & Co., its agents, servants, and employees, from constructing a vault or subway under a sidewalk in the city of Miami, and requiring them to place the sidewalk in the condition in which it was prior to the time any excavation was made thereunder.

We have considered, but will not discuss, all the assignments of error, but confine ourselves to such as relate to the vital issue,—the right of a person owning land abutting on a street in which he has the fee, to excavate and construct a subway or cellar beneath the surface of the

sidewalk, and have access thereto by properly constructed and safeguarded trapdoors or other equipment.

The authorities are not in harmony, but they may be grouped into three classes: Those that hold that the owner of the fee to the street is also the owner of the subsurface and may make excavations therein if he does not unreasonably interfere with the public easement; those that hold that excavations may be made as long as they are not forbidden by ordinance or other regulation of the city; those that hold that every excavation in the street or sidewalk made without municipal consent is a nuisance per se.

Those in the first group follow the older, and we think the better, rule, as laid down by so eminent an authority as Lord Mansfield, who said: "1 Rolle, Abr. 392, Letter B, pl. 1, 2, is express—'that the King has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil.' So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it." *Goodtitle ex dem. Chester v. Alker*, 1 Burr. 183, 97 Eng. Reprint, 231.

This doctrine has been modified by some of the later decisions of the courts of this country, but we cannot follow those that seek to extinguish all rights of the owner of the fee to the subsoil, or give to municipalities the power to take from such owner his unsundered right in the subsurface. The distinction between the doctrine of those courts that hold every excavation under the street or sidewalk made without municipal authority is a nuisance per se, and those that hold they are lawful so long as not forbidden by the ordinances of the city, more in name than in substance. A right that may be taken from a person at the will of the city is not a right, but a privilege, and, when we sustain the right of the city to grant or withhold from the owner of the fee the privilege of making excavations in the subsoil of a street adjacent to

his property, his right vanishes. Neither can a municipality deprive the owner of his property or property rights, by declaring by ordinance or otherwise that to be a nuisance, which, in fact, is not a nuisance.

When the excavation for the area-way beneath the sidewalk was commenced by the appellant, there was no ordinance prohibiting it; but subsequently one was enacted that did, and it is contended that the abutting owner thereby lost his right to proceed with the work of constructing the cellar and trapdoors. We call attention to this as illustrative of the proposition, stated supra, that a recognition of the right of the city to enforce such an ordinance denies the right of the abutting owner to the subsoil of a street, because where property rights exist they cannot be taken away by an ordinance except when the property or the use to which it is put is a nuisance.

Any attempt to discuss the cases holding the various doctrines on this subject would extend this opinion to too great length, without any beneficial result; and we shall content ourselves with citations from some of those that hold as we do.

In *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 74 Am. St. Rep. 788, 75 N. W. 898, 4 Am. Neg. Rep. 459, the court said:

"Assuming that Cooley owned the soil to the center of the street, he was at liberty to use it, subject to the public easement, the same as other parts of his property, and the construction of the areas was not in itself unlawful."

"The excavation by the plaintiffs of the area under the sidewalk was not unlawful; they owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way, the plaintiffs would have been responsible. But, so long as they did no injury to the street, they were at liberty to use

the space under it as they might any other part of their property." *McCarthy v. Syracuse*, 46 N. Y. 194.

"A gift of a right of way is not a gift of the earth and other materials which may exist within the boundary lines of the way, the right of which is given." *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298, 7 Mor. Min. Rep. 306.

"But it is conceded there was no such ordinance of the city of Detroit, applicable to the construction of this work (and that no license or permission was obtained from the common council for its construction), and we are satisfied that, at common law, the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed; though it would afterwards become a nuisance if not kept in repair.

"Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been, in England, for a long period, as general as we know it has been in this country. And, though we find many decided cases in English books, for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal in themselves, when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all the cases, to have been assumed by the courts without any showing of such special authority or any authority. They have been treated as nuisances when allowed to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but

we find no intimation of their original illegality, when safely and properly constructed. This will appear from the cases cited below upon the question whether the tenant or the landlord is bound to keep them in repair. And the same view seems to have been quite generally taken in this country, outside of the state of New York." *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

In *McQuillin on Mun. Corp.* vol. 3, § 1343, the subject is thus treated:

"Excavations may be considered from three viewpoints: First, as merely temporary ones to accomplish a lawful purpose, but interfering to some extent with public travel for a short time; second, permanent excavations in sidewalks, such as those which lead to basements by stairs inclosed by a railing on two sides, the question not relating so much to the right to use the space under the surface of the street as to the right to deprive permanently the public of the right to pass over a certain part of the sidewalk; third, the right to use the subsurface where it in no way conflicts with the public use of the surface.

"As to the first class, they are largely regulated by municipal provisions, and where for a lawful purpose are not interfered with further than to require a permit to be obtained from the municipality.

"As to the second class, it has been said that in the congested portions of large cities the use of basements are of great value, and the construction of areaways seems to be a necessity. So coalholes consisting of an iron rim into which a solid metal covering is adjusted, resting on a flange made for the purpose, are common in nearly all cities. . . . As to the third class, the first question to be decided is who owns the fee of the street. If the abutting owner has title thereto, he may use the space under the street, to the center thereof, the same as his other property, so long as he does not interfere with the superior rights of the municipality below the surface

for sewers, etc. On the contrary, if the fee of the street is in the municipality, it may require abutting owners to obtain a permit before excavating under a street for room for a vault, cellar, engine room, or the like, and may require the payment of reasonable rent for the use thereof."

Other cases in point are *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263; *Gordon v. Peltzer*, 56 Mo. App. 599; *Day v. Mt. Pleasant*, 70 Iowa, 193, 30 N. W. 853; *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431; *Tacoma Safety Deposit Co. v. Chicago*, 31 L.R.A.(N.S.) 868, and note (247 Ill. 192, 93 N. E. 153, 20 Ann. Cas. 564).

Upholding, as we do, the right of the owner of the fee in a street to use the subsurface the same

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as his other property, so long as he does not interfere with the rights of the municipality below the surface for sewers and pipes for water, gas, and other proper purposes, it follows that the owner has the right, subject to reasonable municipal regulation, to make openings in the sidewalk to give access to the area beneath; but he is bound so to construct and cover the opening that it shall at all times be as safe for the use of the public as if it did not exist, and public travel over the same be not unreasonably interfered with.

The city has the right to require the appellant to procure a permit before

making an opening in the sidewalk, and it has the right to see that proper safeguards are thrown about the work, and that in its progress the right of the public to use the sidewalk is not unreasonably interfered with. It may also regulate how the excavation shall be made, and the trap-

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—power to regulate openings in street.

doors or other appliances for closing



the opening constructed; but it may not arbitrarily refuse to grant a permit, nor, under the guise of regulation, place an additional burden upon the abutting owner, or make such regulations as would in effect

deprive him from exercising the rights recognized in this decision.

The decree of the chancellor granting the injunction is reversed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

## ANNOTATION.

### Right of abutting owner to permanent use of subsurface of street or highway.

- I. Introductory, 646.
- II. Laying pipes, 646.
- III. Passage beneath:
  - a. In general, 647.
  - b. Raceways, etc., 647.
  - c. Cattle ways, 648.
- IV. Vaults, coalholes, etc.:
  - a. In general, 648.
  - b. Street uses paramount, 649.
  - c. Flooding, 650.
  - d. New York cases:
    - 1. In general, 650.
    - 2. Street uses paramount, 651.
- V. Miscellaneous, 652.

#### *I. Introductory.*

This is a perplexing subject. The street purposes of the highway are paramount. The abutting owner owning the fee of the highway may use it in any manner not interfering with the street purposes. The authorities are not agreed upon what are street purposes,—a subway railway is a street purpose in Massachusetts, but not in New York. Travel on a sidewalk being a street purpose, may the city forbid all vaults under the walk as impairing its safety? The examination of the various questions, particularly as to the rights, if any, of abutters where the city owns the fee of the street, is frequently blocked by the omission from the report of any statement as to where the ownership of the fee of the highway lies. Cases as to uncovered "areas" are not included.

The owner of the land of a highway subject to the right of the public "may take trees growing upon the land, occupy mines, sink watercourses under it, and, generally, has a right to every use and profit which can be derived from it consistent with the easement." *Woodruff v. Neal* (1859) 28 Conn. 165.

It was stated in *Weller v. McCormick* (1890) 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101, where a pedestrian on the sidewalk was injured by the falling of a limb from a tree in front of the defendant's premises, that an abutting owner may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel.

In *Fisher v. Thirkell* (1870) 21 Mich. 1, 4 Am. Rep. 422, where the fee of the street apparently was in the abutting owner, it was held that, under the common law, excavations under public streets, where properly constructed and maintained, were not to be treated as nuisances per se, or in any respect illegal.

#### *II. Laying pipes.*

The abutting owner of the fee of a city street has the right to lay a water pipe for his own use beneath the surface so far as he can do so without impeding the public use, and, for that purpose, may excavate the soil, subject to such restrictions by the municipality as will insure the least interruption to the public easement. *Colegrove Water Co. v. Hollywood* (1907) 151 Cal. 425, 13 L.R.A. (N.S.) 904, 90 Pac. 1053.

In the absence of a municipal ordinance prescribing any rules or regulations governing the conduct of citizens in making excavations in the street, it is not unlawful for the assignee of the lot owners owning the fee of the street to dig a ditch and lay a gas-pipe line thereunder, pro-

vided he leaves the surface in as good condition as he found it, and does not materially interrupt travel thereon. *Lynch v. North View* (1914) 78 W. Va. 609, 52 L.R.A.(N.S.) 1038, 81 S. E. 833.

The fee owner at common law may lay pipes in the highway, and where the original owner of the fee has laid water pipes along a highway, which have been used by him and his successors for sixty years, such pipes not interfering with the public right, they cannot be torn up by the municipality unless through condemnation proceedings. *Wells v. Croton-on-Hudson* (1910) 69 Misc. 97, 124 N. Y. Supp. 1058.

It was held in *Cloverdale Homes v. Cloverdale* (1913) 182 Ala. 419, 47 L.R.A.(N.S.) 607, 62 So. 712, that an abutting fee owner may make an excavation which amounts to an inconvenience to no one, in the street, necessary to enable him to attach a service pipe to the gas pipe at a point opposite his residence in the street. The court said: "The mere fact that an abutting landowner owns the ultimate fee to the middle of the street does not confer upon him the right to put that part of the street in which he owns such ultimate fee to even a temporary use which is inconsistent with all of the rights of the public in such street, unless there is some necessity therefor. 'The fee is entirely and completely subordinate to the dominant easement,' and an invasion of the rights of the public in the street 'can be justified only on the ground of necessity.' . . . As the abutter owns the fee to the middle of the street, he may, however, out of respect to the fact of his ownership, use that part of the street for any lawful purpose of his own when such use in no way interferes with any of the dominant rights of the public."

In speaking of the duty under contract of an abutting owner to connect his house with the service water pipe, the court said: "The abutting owner has a right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the street to

lay his pipe for conveyance of water a right of access constituting a property right in the street, which he may use and of which he cannot be divested or denied?" *McClagherty v. Bluefield Waterworks & Improv. Co.* (1910) 67 W. Va. 285, 32 L.R.A.(N.S.) 229, 68 S. E. 28, the ownership of the fee of the street not being stated.

In *Bayonne v. North Arlington* (1910) 78 N. J. Eq. 283, 79 Atl. 357, it was held that the abutting owner owning the fee of the street may not lay water pipes therein to convey water out of the state.

But in *Kansas Natural Gas Co. v. Haskell* (1909) 172 Fed. 545, it was held that the state cannot prevent the abutting owners owning the fee of highways from laying therein pipes for the purpose of conveying natural gas out of the state.

### III. Passage beneath.

#### a. In general.

In holding that the dedicator, whose deed under the statute conveys the fee of the land, has no right to mine thereunder, the court in *Matthiessen & H. Zinc Co. v. La Salle* (1886) 117 Ill. 411, 2 N. E. 406, 8 N. E. 81, stated that owners of city lots had not the right of subterranean passage from one side of the street to the other.

#### b. Raceways, etc.

The owner of land crossed by a public highway may open a mill race under the highway, keeping a proper bridge, and not impairing the right of the public to use the highway as such. *Perley v. Chandler* (1810) 6 Mass. 454, 4 Am. Dec. 159; *Dygart v. Schenck* (1840) 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Clay v. Hart* (1898) 25 Misc. 110, 55 N. Y. Supp. 43, affirmed in (1899) 41 App. Div. 625, 58 N. Y. Supp. 1150; *Woodring v. Forks Twp.* (1857) 28 Pa. 355, 70 Am. Dec. 134; *Phoenixville v. Phoenixville Iron Co.* (1863) 45 Pa. 135; *West Bend v. Mann* (1883) 59 Wis. 69, 17 N. W. 972.

So in case of a drain. *Baring v. Heyward* (1844) 29 S. C. L. (2 Speers) 553.

It was held in *Groton v. Haines* (1858) 36 N. H. 388, that the town,

upon the laying out of a highway, had no right to interfere with a watercourse over which the highway ran, and which was used by the fee owner for carrying water to his house; and, if the town, after constructing the highway and erecting a bridge over the watercourse, neglected to repair the bridge, in consequence of which neglect the watercourse was obstructed, the owner had the privilege of entering upon the highway and opening the culvert, doing no unnecessary damage to the highway.

In *Chase v. Middleton* (1900) 123 Mich. 647, 82 N. W. 612, it was held that a landowner acquired a prescriptive right to the use of a ditch constructed by him across a highway, where he used it as a drain for more than twenty years without objection from the township authorities.

In *Ellsworth v. Lord* (1889) 40 Minn. 337, 42 N. W. 389, it was held that the dedication of a highway laid out and opened by the plaintiff over his dam and flume and by his mill did not appear to be inconsistent with his private right to use and maintain thereafter the dam and water power, or with the full enjoyment of his property, further than was reasonably implied by the nature of such dedication, and necessary for the public easement of travel and passage.

#### *c. Cattle ways.*

The fee owner's right of passage-ways for cattle seems somewhat uncertain.

In *Pemberton v. Dooley* (1890) 43 Mo. App. 176, it was held that the owner of the fee had the right to a pass way for his cattle through a ravine crossed by a highway on a bridge, provided he did not disturb the public use.

Where an owner of land abutting on a public highway intersected by a stream, which was spanned by a bridge, permitted her cattle to go under the bridge, and they frightened the horses of a traveler on the highway, it was for the jury to say whether the owner's use of the highway was an unreasonable interference with public rights. *Mean v. Callison* (1911) 28 Okla. 737, 116 Pac. 195.

But in *Snively v. Washington Twp.* (1907) 218 Pa. 249, 12 L.R.A.(N.S.) 918, 67 Atl. 465, it was held that a township which, in opening a public road, leaves a pass way for cattle beneath it for the accommodation of owners of abutting land, which it maintains for a period of fifty years, is not liable in damages in an action of trespass when, for public convenience, it decides to close the pass way, although the owner had built the walls of the pass way.

In *Davis v. Pickerell* (1908) 139 Iowa, 186, 117 N. W. 276, it was held that an abutting owner is not entitled to a cattle way unless by leave of the board of supervisors when the statute so requires.

#### *IV. Vaults, coalholes, etc.*

##### *a. In general.*

It is held in *KRESS v. MIAMI* (reported herewith) ante, 640, that an abutting owner having the fee of the street has the right to have a vault or subway under the sidewalk, provided that he complies with the reasonable regulations of the municipality and does not interfere with its rights for sewers and pipes for water, gas, and other proper purposes.

An abutting owner owning the fee of the street may make a vault under the sidewalk, properly covered, which does not interfere with the public's use of the street and sidewalks. *Westliche Post Asso. v. Allen* (1887) 26 Mo. App. 181.

A municipal corporation cannot, under its power to control its streets, require abutting owners to secure a permit to place vaults or areas beneath the sidewalks, and pay rent to the city for the space so occupied, where the fee is in them; but it may do so where it owns the fee of the street. *Tacoma Safety Deposit Co. v. Chicago* (1910) 247 Ill. 192, 31 L.R.A.(N.S.) 868, 93 N. E. 153, 20 Ann. Cas. 564. Followed as to the first proposition in *Farwell v. Chicago* (1910) 247 Ill. 235, 93 N. E. 168; *Sears v. Chicago* (1910) 247 Ill. 204, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 539; *Illinois Trust & Sav. Bank v. Chicago* (1910) 247 Ill. 264, 93 N. E. 167.

In *Dubuque v. Maloney* (1859) 9 Iowa, 450, 74 Am. Dec. 358, where the city had built a cistern under the street and sidewalk, it was held that the abutting owner owning to the center of the street was not liable for an injury to the cistern caused by his excavations for a foundation and cellar. The court said: "Neither the city, nor any individual, had the right, against the will or without the consent of the owner of the adjoining lot, to construct a cistern under the street or sidewalk, and if the defendant for his own convenience, or to suit his own purpose, excavated the earth from the sidewalk opposite his lot, and in so doing injured or destroyed the cistern, there is no principle on which he can be made liable, in an action by the city, to recover damages for the injury."

The abutting owner owning to the center of the street has the right to a coalhole under the sidewalk, if made in a proper manner and so as not to interfere with or endanger public travel. *Papworth v. Milwaukee* (1885) 64 Wis. 389, 25 N. W. 431.

In *State, Benson, Prosecutor, v. Hoboken* (1869) 33 N. J. L. 280, it was held that a city having statutory authority to regulate the building of vaults is not authorized to require an abutter owning to the center of the street to pay a license fee based upon the size of the vault and the nature of the property, as this would be taxation.

A municipality owning the fee of the street may prevent an abutter from building a vault without its permission. *Davis v. Clinton* (1879) 50 Iowa, 585.

In the following cases it does not appear who owned the fee of the street: A coalhole is not inherently unlawful. *Kirkpatrick v. George Knapp & Co.* (1888) 28 Mo. App. 427. A coalhole under the sidewalk, constructed before any legislation, state or municipal, on the subject, is not a nuisance. *Adams v. Fletcher* (1890) 17 R. I. 187, 33 Am. St. Rep. 859, 20 Atl. 263. Where there are no municipal regulations on the subject, the abutter may build a vault under the

sidewalk. *Gordon v. Peltzer* (1894) 56 Mo. App. 599. A city, having authorized a vault, cannot, fifteen years after its construction at great expense, summarily destroy it as a nuisance. *Tiernan v. Thorp* (1911) 88 Neb. 662, 32 L.R.A.(N.S.) 1034, 130 N. W. 280. The construction and maintenance of a cellarway in an alley, with a cover projecting above the surface, will not be enjoined at the suit of an adjoining owner in the absence of evidence that it interferes with the safe and convenient use of the alley. *Reynolds v. Union Sav. Bank* (1912) 155 Iowa, 519, 49 L.R.A.(N.S.) 194, 136 N. W. 529.

In a case where the ownership of the fee of the street is not stated, and the other facts are not clear, but the city apparently had reduced the size of the plaintiff's vault by a change of grade, the court said: "If the vault or excavated area under the sidewalk was in the street, plaintiff cannot recover such damages as if it were his private property, but the vault is to be treated as any other convenience of a temporary character which he was rightfully enjoying and had the right to enjoy until such time as the city, representing the state in its paramount right to the use of the street, should, by proper ordinance or resolution terminate his right of enjoyment. Such right is not terminated by an unlawful change of grade." *Burnham v. Milwaukee* (1913) 155 Wis. 90, 143 N. W. 1067.

#### *b. Street uses paramount.*

Of course, the proper street uses dominate the situation.

Thus, an abutter owning to the center of the street, having built with the city's permission a vault under the sidewalk, must submit to having a wall of the vault pierced by telephone poles thereafter authorized by the city. *Julia Bldg. Asso. v. Bell Teleph. Co.* (1885) 88 Mo. 267, 57 Am. Rep. 398.

A property owner may be enjoined from excavating under the sidewalk adjoining his property in such a way as to interfere with electric conduits rightfully there. *Allegheny County Light Co. v. Booth* (1907) 216 Pa. 564,

9 L.R.A. (N.S.) 404, 66 Atl. 72, where it does not appear who owned the fee of the street.

The legislature may authorize the construction of a subway for a street railway in the street, and if such construction interferes with a vault built by an adjoining owner, and extending into the street, the municipality may require the closing or abandoning of it. *United States v. Boston Elev. R. Co.* (1910) 176 Fed. 963, where it seems probable that the fee was in the adjoining owner.

So, in *Sears v. Crocker* (1904) 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327, a case brought by abutters owning the fee of the street, the court remarked that the mere fact that a subway "deprives abutters of the use of vaults or other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets, above or below the surface, whenever the public needs the occupied space for travel."

A municipal corporation having only an easement in a street may construct therein a subway necessary to accommodate public travel without liability to abutting owners for interference with vaults constructed by them beneath the street, or for the expense of removing fixtures therefrom, even under a statute requiring compensation for injuries sustained by reason of property taken or injured, except public ways or lands, and authorizing the removal or relocation of conduits or other property without expense to the city. *Peabody v. Boston* (1915) 220 Mass. 376, L.R.A. 1915F, 1005, 107 N. E. 952. But see the New York cases *infra*, d, 2.

#### c. Flooding.

A lessee of one who, as abutting owner, having the fee to the center of the street, made a cellar under the sidewalk in compliance with the city's permission and regulations, may recover from it for damages for leakage from a defective sewer into such cellar. *Allen v. Boston* (1893) 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519.

In *Bloom v. Orange* (1918) 91 N. J.

L. 376, 103 Atl. 395, it was held that an abutting owner has a right to have a vault under the sidewalk, and that if the city, after it has been there for forty years, negligently causes it to be flooded, he may recover therefor. We are probably to understand that the owner owned to the center of the street.

A city permitting an owner to use cellar stairways from the street to his basement is liable for negligence in the flooding of the basement by water from the street. *Wendt v. Akron* (1913) 161 Iowa, 338, 142 N. W. 1024, where the ownership of the street does not appear.

In *Dell Rapids Mercantile Co. v. Dell Rapids* (1898) 11 S. D. 116, 74 Am. St. Rep. 783, 75 N. W. 898, 4 Am. Neg. Rep. 459, it was held that a fee owner was at liberty to use the soil to the center of the street, subject to the public easement, the same as he might use any other part of his property; and therefore he had a right to construct beneath the surface of the sidewalk an area for his own use. If his goods stored in his basement were injured because of an overflow in the area due to the negligent construction of a public sewer, through a portion of the subsoil occupied by the city, the municipality would be liable for such injuries. See also *McCarthy v. Syracuse* (1871) 46 N. Y. 194, *infra*, d, 1.

It was held otherwise in substance where the city owned the fee of the street. *Guthrie v. Nix* (1897) 5 Okla. 555, 49 Pac. 917.

#### d. New York cases.

##### 1. In general.

(It will be noted that some of the cases arising in the city of New York, hereinafter cited, are referred to as not stating whether or not the fee of the street was owned by the city. It is not unusual to meet the statement that under the city's charter it has the fee of the streets, and it may well be that some of such cases were decided upon the tacit understanding that the city had the fee of the particular street. But in view of the decision in *APPLETON v. NEW YORK*

(reported herewith) ante, 629, it seems that without a further study of the rights of such city than the scope of this note affords, it is safer not to take for granted that the fee of a particular street is in such city.)

It has been held in a number of cases where the ownership of the street is not stated that an abutter who, without authority, makes an excavation under the sidewalk, is liable to one injured, irrespective of negligence. *Congreve v. Smith* (1858) 18 N. Y. 79; *Congreve v. Morgan* (1858) 18 N. Y. 84, 72 Am. Dec. 495; *Anderson v. Dickie* (1863) 26 How. Pr. (N. Y.) 105; *Clifford v. Dam* (1879) 12 Jones & S. 391, affirmed in 81 N. Y. 52.

(But the city's consent may be by implication. *Babbage v. Powers* (1891) 180 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132.)

Similarly, it has been held that a space in a vault greater than allowed under permit is a nuisance per se. *New York v. Gerry* (1917) 100 Misc. 297, 165 N. Y. Supp. 659, where the ownership of the fee of the street is not reported.

But where the plaintiffs sued the city for neglect of duty as to a sewer causing a flood in the plaintiff's basement under the sidewalk, the court said: "The excavation by the plaintiffs of the area under the sidewalk was not unlawful; they owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way, the plaintiffs would have been responsible. But, so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property. They were not bound to leave the earth there, as a protection against a possible overflow of the sewer." *McCarthy v. Syracuse* (1871) 46 N. Y. 194.

It seems to be held in *Title Guarantee & T. Co. v. New York* (1912) 205 N. Y. 496, 99 N. E. 160, that the city in its discretion may charge what it sees fit for an extension of an old vault, the report not showing who owned the fee of the street.

In *APPLETON v. NEW YORK* (reported herewith) ante, 629, it was held that after fifty years of use (without permit and in violation of ordinances) of vaults under the half of the street by the owner of the fee of such half, the city may require payment for a permit for continued use of the vaults.

The court seems to have been of a similar opinion in *Mahoney v. New York* (1911) 145 App. Div. 884, 180 N. Y. Supp. 602.

Attention is called to the statement of the court in the *APPLETON CASE* that the permission of the city "is a requisite preliminary to the construction of the vault, because the land constituting the street is subject to all the public uses, servitudes, and appropriations essential to or consistent with its status as a street, and, in the interest of public safety, convenience, security, and comfort, is, within all legitimate street uses, by statutory grant, under the control, regulation, and disposition of the public authorities, whose right to exact a payment or fee, in the process of regulation, for a permission or privilege of exercising in it a private possession or advantage, consistent with the public uses, is undoubted. . . . This right [of the city] exists as to the owner of the land contiguous to the land of the street, irrespective of the ownership of the fee of the latter, because it is an element in the authorized regulation and supervision of the street."

In *New York v. Madison Ave. Real Estate Co.* (1904) 42 Misc. 535, 85 N. Y. Supp. 1118, where the report does not show the ownership of the street, it was held that a vault may not be built without the city's permit.

An abutter not owing the fee of the street may not complain if his vault, in use for forty years with the city's acquiescence, is taken away without compensation. *Patten v. New York Elev. R. Co.* (1878) 3 Abb. N. C. 806.

#### *2. Street uses paramount.*

A city owning the fee of the street and having given permission for vaults therein may revoke it when a public purpose requires. *Lincoln Safe*

Deposit Co. v. New York (1904) 96 App. Div. 624, 88 N. Y. Supp. 912.

A municipal corporation which has granted a public service corporation a right to lay a pipe in a street, the fee of which belongs to itself, cannot confer authority upon an abutting owner to injure such pipe in the construction of a vault which it permits him to place under the sidewalk. *New York Steam Co. v. Foundation Co.* (1909) 195 N. Y. 43, 21 L.R.A.(N.S.) 470, 87 N. E. 765.

In New York a subway railroad is not a street purpose, although the city owns the fee. *Re Opening & Extending of New Street* (1915) 215 N. Y. 109, L.R.A.1916A, 1290, 109 N. E. 104, Ann. Cas. 1917A, 119. If the city owns the fee the abutter is entitled to compensation for deprivation of lateral support and if the city does not own the fee the abutter owning it is entitled to substantial damages. *Re Rapid Transit R. Comrs.* (1909) 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366.

But where the city owns the fee, a subway railroad seems to be held to be a public purpose sufficient to enable the city to abrogate vaults. Thus it was held that an abutting owner's right to maintain, under a license from a city, a vault in the public street, does not constitute a property right attached to the fee, and a dominant easement under the surface of the street, but it amounts to no more than a revocable permit, or license revocable whenever the city or public uses require. *Potter v. Interborough Rapid Transit Co.* (1907) 54 Misc. 423, 105 N. Y. Supp. 1071, affirmed in (1908) 124 App. Div. 920, 108 N. Y. Supp. 1145, where the use was for a subway railway.

So a municipal corporation which owns the fee of its street was held not liable to an abutting owner for permitting the construction of a subway beneath its surface, though he is entitled to lateral support, and a permit by such municipal corporation to an abutting owner for the construction of a vault under the surface of a street is subject to abrogation for public convenience or necessity. *Lincoln*

*Safe Deposit Co. v. New York* (1913) 210 N. Y. 34, L.R.A.1915F, 1009, 103 N. E. 768.

In a similar situation it was said in *March v. New York* (1901) 69 App. Div. 3, note, 74 N. Y. Supp. 1151, that no trespass is disclosed in the destruction, under municipal authority, of a vault maintained in the street by an adjoining owner, presumptively by authority of a license from the city, which owns the fee of the street; that, as a matter of law, the plaintiff had no right to the possession of this portion of the street, as against the city.

#### *V. Miscellaneous.*

One building a vault by leave of the city may recover from a stranger who injures the sidewalk over it by negligence. *Parrish v. Baird* (1899) 160 N. Y. 302, 54 N. E. 724, 6 Am. Neg. Rep. 666.

Where an abutting property owner is required by statute to erect and maintain a vault or covered area way under the sidewalk adjoining his premises, the city authorities are without power to exact from him compensation for a permit to construct such a vault or covered area way. *Buek v. Collis* (1897) 17 App. Div. 465, 45 N. Y. Supp. 291.

It was held in *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* (1909) 81 Kan. 430, 28 L.R.A.(N.S.) 1082, 105 Pac. 704, that where the proper public authorities authorize a subway in a public street for the use of the street railway, an abutting property owner cannot prevent the construction thereof although seriously injured thereby, his remedy being that afforded by the recovery of consequential damages. It does not appear who owned the fee of the street.

"Where the fee to a street is in the abutting lot owners, and excavations are made in the street and a bridge erected thereover, the surface of the street underneath the bridge may be used by the owners of the fee in any manner not inconsistent with the right of the public." *Adair v. Atlanta* (1905) 124 Ga. 288, 52 S. E. 739.

It is not intended to go into the

vexed question as to what will create a presumption of a permit by the city to build a vault, or the value of such presumption. See, for example, *Gridley v. Bloomington* (1873) 68 Ill. 47; *Gregsten v. Chicago* (1898) 145 Ill. 451, 86 Am. St. Rep. 496, 84 N. E. 426; *Deshong v. New York* (1902) 74

App. Div. 234, 77 N. Y. Supp. 563, affirmed in (1903) 176 N. Y. 475, 68 N. E. 880; *Jorgensen v. Squires* (1895) 144 N. Y. 280, 39 N. E. 873; *People ex rel. Ziegler v. Collis* (1897) 17 App. Div. 448, 45 N. Y. Supp. 282, appeal dismissed in (1899) 158 N. Y. 704, 53 N. E. 1130. B. B. B.

PETER ANDERSON, Respt.,

v.

COLUMBIA CONTRACT COMPANY, Appt.

*Oregon Supreme Court (Dept. No. 1)—September 28, 1919.*

(— Or. —, 184 Pac. 240.)

#### **Water — destruction of licensed fish trap.**

1. A navigator cannot negligently destroy a licensed fish trap in a public navigable water.

[See note on this question beginning on page 667.]

#### **Trial — jury — controverted question.**

2. Controverted questions on both sides of which there is evidence must be submitted to the jury.

#### **Water — navigable stream — Columbia river.**

3. Columbia river is a navigable stream, and as such is a common highway.

#### **—conflict between navigation rights and fishery rights.**

4. The right of navigation in a navigable stream is paramount to that of fishery, but the navigator cannot with impunity do unnecessary injury to the fisherman or his property.

[See 11 R. C. L. 1036.]

#### **—restriction on navigation.**

5. One navigating a public navigable river is not bound to keep within the channel or usual course in which vessels navigating said river should be operated and navigated.

#### **Appeal — consideration of charge as a whole.**

6. The charge to the jury should be considered as a whole with a view to ascertaining, if possible, whether the rights of the complaining party were so prejudiced as to prevent a fair trial.

[See 14 R. C. L. 817.]

#### **Water — obstruction of stream — fish trap.**

7. A fish trap licensed by the state

and Federal governments in a public navigable river, which is not located within the usual course followed by vessels navigating the stream, is not an unlawful obstruction.

[See 11 R. C. L. 1037, 1038.]

#### **Property — personalty — fish trap.**

8. A fish trap placed in position during the fishing season by driving piling into the soil, and removed when the season is over, is personal property.

#### **Venue — injury to personal property — transitory action.**

9. The right of action for injury to a fish trap, which is personal property, is transitory.

#### **Damages — lost profits.**

10. Damages may include an allowance for lost profits which it is reasonably certain would have been made if the wrong complained of had not been done.

[See 8 R. C. L. 501.]

#### **— value of use.**

11. The damages for injury to a fish trap should include the cost of repairs and the value of the use during the time the trap is necessarily out of commission.

[See 8 R. C. L. 490.]

#### **Evidence — damages — value of fish trap.**

12. In determining the value of the



use of a fish trap injured by another's negligence, which has no rental value, evidence is admissible as to the number of fish which the trap took immediately before and immediately after the injury, as well as the number taken by other traps similarly located during the time the injured trap was out of commission.

#### On Petition for Rehearing.

**Appeal — Inconsistent instructions — effect.**

13. The giving of a correct instruction does not make nonprejudicial the giving of an inconsistent incorrect one.

[See 2 R. C. L. 260; 14 R. C. L. 777.]

**APPEAL** by defendant from a judgment of the Circuit Court for Multnomah County (Gantenbein, J.) in favor of plaintiff in an action brought to recover damages for injury to his fish trap, alleged to have been caused by defendant's negligence. *Reversed.*

**Statement by Harris, J.:**

The Columbia Contract Company, an Oregon corporation having its principal office in Portland, appealed from a judgment for \$1,050 which Peter Anderson obtained against it for damages done to his fish trap by the company's towboat and barges. Anderson owned a pound net fish trap on the Washington side of the Columbia river. The waters of the river are affected by the ebb and flow of the ocean tides at the place where the trap is located. The fish trap was constructed by driving piling into the bed of the river and attaching web or nets to the piling in the manner described in *Monroe v. Withycombe*, 84 Or. 328, 331, 165 Pac. 227. The extreme width of the heart of the Anderson trap was approximately 50 feet; the lead was about 350 feet long, with the piling in it set from 8 to 10 feet apart; and hence the trap was about 400 feet over all.

About 300 feet above the Anderson trap, and on the Washington shore of the river, was a light, and back further "up in the woods" was a second light. These two lights are known in the record as the range lights. On the Oregon side of the river, and above the Anderson trap, is a place called "Bugby hole," where another light is kept; and between Bugby hole and the Anderson trap is a bar in the river, called "Puget bar." Upon leaving Bugby hole, masters of vessels navigate Puget bar by getting in line with the two range lights, and steer on that course until the bar is crossed.

Along the entire length of the Anderson trap the water is about 17 feet in depth, except at the "inner end," where it is "about 8 or 10 feet." About 1,800 feet above the Anderson trap, on the Washington side of the river, is another trap, known as the "Brandt trap." There is no obstruction between these two traps. Referring to the towboat and barges operated by the defendant, one witness stated that there "was water enough" between the two traps "so that you could go pretty close by the shore."

We cannot speak any more definitely of the width of the river at the place where the Anderson trap is located than to say that it is between 2,000 feet and 1 mile. Puget bar ends at a point above the Anderson trap. According to the testimony of one witness for the plaintiff, "after you get across the bar, and down the river, the whole river is deep, and you can go anywhere." Another witness for Anderson stated that "it is deep water clear across" opposite the Anderson trap. J. O. Church, who was employed by the defendant as master of the towboat Samson, and was thoroughly familiar with the presence and location of the Anderson trap, explained that, if it be assumed that the river is 2,000 feet wide at the Anderson trap, "you will probably have 500 feet there" beyond the outside end of the trap to "navigate in." The plaintiff contended that there "is 3,000 or 4,000 feet of channel there, — deep water across the channel."

The witnesses differed in their

opinions as to how far vessels usually ran outside the Anderson trap when passing up or down the river. The estimates given by the witnesses for the plaintiff range from 800 to 1,000 feet. Captain Church, a witness for the defendant, testified: "I should judge the steamships ran in within 250 feet. J. E. Copeland, a master of steamboats, with many years of experience, stated that the course usually followed by him before the trap was put in ran about 20 feet from it; but after the trap was installed he made a change in his course, by changing one eighth of a point in the distance from Puget bar to the range light, and this changed course passed the end of the trap at a distance of about 200 feet.

The Columbia Contract Company was engaged in transporting rock down the river to the jetty at the mouth of the river, and for that purpose the company used three barges and a towboat called the Samson. Each barge, when loaded, carried about 800 tons of rock and drew about 10 feet of water. The Samson drew between 14 and 14½ feet of water. Each of the barges was about 140 feet long and approximately 40 feet wide. The Samson was about 125 feet long, with a 25-foot beam. At some time in 1911, probably September 28th, the defendant was taking the Samson and three barges loaded with rock down the river. One barge was lashed to the bow of the Samson, while a second barge was lashed on one side, and the third barge was lashed on the other side of the first barge and towboat, making of the towboat and barges what counsel have termed in their briefs a "spike formation." The flotilla was approximately 120 feet wide. The Samson, with its barges, passed Bugby hole about 3 A. M., and at that time it was so foggy that the range lights above the Anderson trap could not be seen. The fog made its appearance on the river about midnight, and in a short time became so thick that the range lights were completely ob-

scured from view and could not be seen by fishermen on the river. One fisherman, Christian Tholo, was operating a gill net in the channel of the river a short distance above the Anderson trap, and upon hearing the fog signal of the Samson he took in his net. He could not see the range lights, nor could he see either the Oregon or Washington shore; and after changing the course of his gasoline boat several times, he finally found himself at the end of the Brandt trap, where he tied his boat. Another fisherman, Olaf Vog, was likewise operating a gill net in the channel of the river near to and a short distance above the Anderson trap. When he reached what he supposed was the end of his drift, or the place where he "should start to pick up," he took up his gill net, and although he "wanted to get over to the Oregon shore," he found himself on the Washington side at the Anderson trap, where he tied up "and laid down in the boat."

Not being able to see the range lights, upon leaving Bugby hole the master of the Samson navigated his vessel by clock and compass, by noting the time shown by the clock and by observing the course recorded in his course book. He explained that fourteen minutes of running would have brought the flotilla to the Anderson trap; that at the end of eleven minutes he slowed down, and at the end of twelve or thirteen minutes he stopped the engines and drifted. After Puget bar is crossed, and while passing the Brandt and Anderson traps, vessels, when following the usual course, are not navigated on a tangent, but are steered along the line of a slight curve. The two traps are on the outer side of this curve. The usual course taken by vessels is farther out from the Brandt trap than from the Anderson trap, and yet Tholo, the fisherman who had tied up his boat at the Brandt trap, says that the Samson and the barges passed within 20 feet of the Brandt trap. According to this witness the Samson, with its barges, proceeded down

the river through the waters between the Brandt and Anderson traps, and then ran on through the latter trap. The flotilla ran through the lead of the Anderson trap at a point between the heart and inner end of the lead, taking out 24 piling, and ran so close to the heart of the trap that only one or two piling next to the heart and in the lead remained standing.

Anderson repaired the trap, and at the end of two weeks from the date of the accident was able again to operate it. He sued the Columbia Contract Company for the total sum of \$1,618.60. This total sum embraced two items—one for \$818.60, the cost of repairing the trap, and the other \$800, the amount of the "money and profits" which Anderson alleges he could and would have earned if the trap had not been injured.

The complaint contains six specifications of negligence. The plaintiff alleges: (1) That, although there was a fixed channel and course in which vessels navigating the river should be operated, the defendant negligently failed to keep the tugboat within the limits of "said channel, and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel, and into and against said fish trap;" (2) that the defendant negligently failed to maintain sufficient lights upon the vessel, so that objects lying in the stream could be seen and avoided; (3) that the defendant negligently failed to maintain a lookout, and neglected to keep a sufficient watch ahead; (4) that the defendant negligently failed to see and avoid striking the trap; (5) that the defendant negligently operated the vessel at a dangerous and unsafe rate of speed; and (6) that the defendant negligently failed to stop the vessel and to run aside, so as to avoid the fish trap, after the trap was or should have been seen by the defendant.

In its answer the defendant denies that it was guilty of negligence in any particular. As a further an-

swer to the complaint the defendant avers that the fish trap was unlawfully built and maintained, and in such a manner that it obstructed the navigable channel of the river and was a menace to navigation; that the trap was unlawfully maintained in two particulars: (1) That it extended from the shore to a point in the navigable channel in the river; and (2) "that the signals and lights were not maintained thereon as required by law." The defendant alleges that at a time when it was lawfully navigating the river on a dark and foggy night, and while moving slowly down the stream "in the channel thereof," and "solely because the said fish trap was so located that it obstructed the navigable channel of the said river, the said steamboat, with its tow, ran into said fish trap."

The plaintiff replied by traversing the affirmative allegations of the answer.

Messrs. Teal, Minor, & Winfree for appellant.

Messrs. Malarkey, Seabrook, & Dible, for respondent:

Although the right of navigation is paramount to the right of fishery, due care must be used by vessels to avoid injury to fish traps.

Farnham, Waters, 149; Horst v. Columbia Contract Co. 89 Or. 344, 174 Pac. 161; Wright v. Mulvaney, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045.

A party cannot be heard to complain of an instruction where it appears that he requested and there was given, at his behest, an instruction of the same legal effect.

Wesco v. Kern, 36 Or. 433, 59 Pac. 548, 60 Pac. 563; Anderson v. Oregon R. Co. 45 Or. 211, 77 Pac. 119.

The laws of sister states must be pleaded and proved.

Scott v. Ford, 52 Or. 294, 97 Pac. 99; Ellis v. Abbott, 69 Or. 234, 138 Pac. 488.

That a person is innocent of crime or wrong, and that the law has been obeyed, are disputable presumptions of law.

Bernard v. Willamette Box & Lumber Co. 64 Or. 232, 129 Pac. 1039; Crane v. Oregon R. & Nav. Co. 66 Or. 317, 133 Pac. 810.

A presumption of law is evidence, and a jury may find in accordance with such presumption.

*Dorn v. Clarke-Woodward Drug Co.* 65 Or. 516, 133 Pac. 351; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121, 12 L.R.A. 823, 26 Pac. 1053.

The presence of a disputable presumption of law shifts the burden of proof.

*Consor v. Andrew*, 61 Or. 491, 123 Pac. 46.

Where, in a contract, plans and specifications are referred to, for the specific purpose only, they become a part of the contract for such purpose only.

*Myers v. Strowbridge Estate Co.* 82 Or. 43, 160 Pac. 135; *Wallace v. Oregon Engineering Co.* 90 Or. 31, 174 Pac. 156, 176 Pac. 445.

Official duty is presumed by law to have been duly and regularly performed.

*McLeod v. Lloyd*, 43 Or. 260, 71 Pac. 795, 74 Pac. 491; *State ex rel. Fleck v. Dalles City*, 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855.

Where a writing is ambiguous, the practical interpretation of it and the meaning ascribed to it by the parties may be shown.

*Harlow v. Oregonian Pub. Co.* 53 Or. 276, 100 Pac. 7; *Spande v. Western Life Indemnity Co.* 68 Or. 188, 186 Pac. 1189.

A jury is not bound to accept as conclusive the uncontradicted statement of a witness.

*White v. East Side Mill & Lumber Co.* 84 Or. 233, 161 Pac. 969, 164 Pac. 736, 15 N. C. C. A. 848.

Questions as to the proximate cause of an injury are questions of fact for the jury to decide.

*Manning v. Portland Ship Bldg. Co.* 52 Or. 101, 96 Pac. 545; *Buchanan v. Lewis A. Hicks Co.* 66 Or. 503, 133 Pac. 780, 134 Pac. 1191.

Vessels must be operated with greater care in fogs.

6 Thomp. Neg. 6890, 6924, 6930.

The trap was personal property, and the action to recover damages thereto could be maintained wherever appellant could be found. The court had jurisdiction.

*Doscher v. Blackiston*, 7 Or. 146; *Helm v. Gilroy*, 20 Or. 522, 26 Pac. 851; *Hershberger v. Johnson*, 87 Or. 110, 60 Pac. 838; *Blanchard v. Eureka Planing Mill Co.* 58 Or. 40, 87 L.R.A. (N.S.) 133, 113 Pac. 55.

Where a fish trap has been damaged,  
7 A.L.R.—42.

the owner is entitled to recover the value of the use of the trap during such time as it is necessarily idle for repairs.

6 Thomp. Neg. § 7253; *Wright v. Mulvaney*, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045; *Shelbyville Lateral Branch R. Co. v. Newark*, 4 Ind. 471; *New-Haven S. B. Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 13 How. 101, 14 L. ed. 68.

Evidence which tends to throw light upon the value of such use is admissible.

*Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570; *Jacobs v. Cromwell*, 216 Mass. 182, 103 N. E. 883; *Horace F. Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N. E. 718.

*Harris, J.*, delivered the opinion of the court:

The foregoing statement may be summarized by saying that the defendant attempted to navigate the river at a time when it was so foggy that one could not see ahead and the range lights ceased to be an aid to navigation; that the defendant left Bugby hole with the intention of following the usual course taken by vessels across Puget bar and past the Anderson trap; that the towboat and barges were successfully navigated across Puget bar; that the river is between 2,000 feet and a mile wide at the point where the Anderson trap is located; that between 500 and 4,000 feet of that width opposite the Anderson trap is sufficiently deep for the navigation of vessels; that the usual course followed by vessels is between 200 and 1,000 feet from the outer end of the Anderson trap; that, instead of following the usual course, as the master of the *Samson* says he intended, the flotilla, because of some controverted reason, got out of the usual course of vessels at a point at least 1,800 feet, and probably more, above the Anderson trap, and proceeded on down the river outside of the usual course, but in waters deep enough for the navigation of the towboat and barges, to and through the Anderson trap.

It is appropriate here to add to what already has been said that the

master of the Samson testified that he did not see the Brandt trap at all, and that it was so foggy that he did not see the Anderson trap until he was about 100 feet from it. On the other hand, Christian Tholo testified that the fog lifted before the Samson reached the Anderson trap, and that when the boat was "in front of the lower range light" (300 feet above the Anderson trap) it was "swinging," and that at that time he saw the light on the end of the Anderson trap. The witness Vog corroborated the testimony of Tholo by saying that after the flotilla went through the trap, "I was looking around, and I could see the shore, the house ashore, and the woods back of the house." Anderson explained that his house was 600 feet below the front range light; and hence, if his testimony is taken as true, the trap, which was 300 feet below the range light, was 300 feet above the house. The Samson was displaying a red light on the port side and a green light on the starboard side, as well as two white lights on the masthead, as required by the regulations. There was a white light on the outside of each barge. These lights, however, served to enable others to see the Samson rather than to enable the Samson to see other objects. In addition to the lights already mentioned, the Samson was equipped with both an arc and a search light. The master of the vessel stated that the search light is not used in foggy weather, for the reason that such a light hinders rather than aids navigation. Besides the master, who was at the time of the accident at the Samson's wheel, there was a sailor on duty on the Samson as a lookout. There was a man on each barge, but each of these three men was asleep.

As already stated, Captain Church testified that at the end of eleven minutes he slowed down, and at the end of twelve or thirteen minutes after leaving Bugby hole he stopped the engines and drifted; but opposed to this evidence there was

the testimony of Christian Tholo, who told the jury that "when she passed me she had the speed that she usually had," and that after he saw the Samson she was going, so far as he could observe, "as she usually goes when it is clear." There was testimony for the plaintiff to the effect that vessels either anchored or tied up in heavy fogs; but there was also evidence for the defendant to the effect that only loaded ocean-going vessels, whether with or without a tug, anchored, and that towboats with barges never anchored or tied up on account of the fog. The master of the Samson testified that, if the towboat had been equipped with a stern wheel, he could have backed out after seeing the trap and thus avoided it; but since the boat was equipped with a propeller, an attempt to back out at any time after he saw the Anderson trap would have resulted in the flotilla swinging around and striking the trap broadside, and thus causing greater damage to the trap. He also stated that when he discovered his predicament he started the engines and went through the lead of the trap as straight as he could, and by so doing did the least possible damage, and that if he had not done this the flotilla would have taken out the heart of the trap. It is apparent, from this brief account of the evidence, that the questions of whether or not the defendant negligently failed to maintain sufficient lights, or negligently failed to keep a lookout, or negligently failed to see and avoid the fish trap, or negligently operated the flotilla at a dangerous rate of speed, or negligently failed to stop the Samson and her tow and avoid the fish trap, were all properly submitted to the jury. There was evidence upon both sides of these controverted questions, and it was therefore the province of the jury to determine the facts. The trial court did not commit error, as contended by the defendant, in asking the jury to decide whether the cor-

**Trial-jury—  
controverted  
question.**

poration was negligent in respect to any of those five specifications of negligence.

Much of the discussion in the briefs relates to the allegation that the defendant "negligently failed to keep and maintain said tugboat within the limits" of the fixed channel and course in which vessels were usually operated. The defendant has urged numerous objections to the instructions given by the court, contending that some of them were erroneous and that several of them were inconsistent with each other. The position taken by the defendant is rested largely upon the application which it contends should be made of the rule which gives paramountcy to the right of navigation.

The Columbia river is a navigable stream, and as such is a common highway "and forever free." This right is a public one, and it is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union. *Johnson v. Jeldness*, 85 Or. 657, 661, L.R.A. 1918A, 1074, 167 Pac. 798. The right of fishery is likewise a common right. The right of navigation is paramount, for the reason that it is of the most importance to the public weal. *Davis v. Jerkins*, 50 N. C. (5 Jones, L.) 290, 293; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570; *Flanagan v. Philadelphia*, 42 Pa. 219, 228. Stated in general terms, the right of fishery must give way to the right of navigation. Expressed in more accurate language, the paramountcy of the right of navigation does not extinguish the right of fishery, although the former does, whenever there is a necessary conflict, limit the latter, and compel it to yield so far as the right of fishery interferes with the fair, useful, and legitimate exercise of the right of navigation. Speaking of the abstract right of the public, it may be said, as expressed in 1 *Farnham on Waters*, § 27: "The public is en-

titled to the free, uninterrupted, and unobstructed use of every part of the stream, from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats . . . either up and down or across, or from the main stream onto any particular part in question, or thence onto the body of the stream; and this whether such part has ever been so used, and whether there is any present or anticipated necessity for so using it."

Continuing to employ general terms when referring to the right of navigation, in the abstract, a boat has a right to "take her course," and to go when and where it is necessary to go, and is not obliged to stop or go out of her way, or wait upon the movements of those who are managing a fishing seine or net; and yet this right of navigation, which entitles the public to the unobstructed use of every part of the stream which is capable of navigation by boats, and authorizes a boat to "take her course," cannot be exercised without regard to the rights of others. The navigator of a public stream must manage his craft with ordinary care and with due regard to the rights, property, and lives of others. 1 *Farnham, Waters*, §§ 27, 31, 33; *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320, 332, 43 N. W. 576. While a boat may "take her course,"

nevertheless a navigator cannot with impunity do unnecessary damage to a fisherman or his property; but, upon the contrary, the paramount right of navigation must be exercised fairly, and not arbitrarily, and with due regard to the subordinate right of fishery, and a boat must be so navigated as not to do unnecessary damage. 1 *Farnham, Waters*, § 33a; *Gould, Waters*, 2d ed. § 87; *Porter v. Allen*, 8 Ind. 1, 65 Am. Dec. 750; *Lewis v. Keeling*, 46 N. C.

—conflict  
between  
navigation  
rights and  
fishery rights.

(1 Jones, L.) 299, 307, 62 Am. Dec. 168; *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570. For example, if nets are placed across the channel of a river, so as to be a bar to navigation, a vessel may, if reasonably necessary to do so, run over the nets; but, if a navigator is warned or ought to have known of his approach toward the net of a fisherman, he is liable for damage resulting from his negligent failure to avoid doing damage, if he can do so without prejudice to the reasonable prosecution of his voyage. *Horst v. Columbia Contract Co.* 89 Or. 344, 350, 352, 174 Pac. 161; *Hopkins v. Norfolk & S. R. Co.* 131 N. C. 463, 42 S. E. 902; *Cobb v. Bennett*, 75 Pa. 326, 329, 15 Am. Rep. 752; *Wright v. Mulvaney*, 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045. The ruling in *Wright v. Mulvaney* is of peculiar interest, for the reason that there, as here, a pound net fish trap was injured by a boat with a tow, and some of the other material particulars were like the facts presented here. The court says: "But it does not necessarily result from this [the paramount right of navigation] that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict, the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right."

When it is said that the public is entitled to navigate upon any part of the navigable waters of a stream without obstruction, it must always be understood that reference is made to unlawful, and not lawful, obstructions. An obstruction placed in a stream may be authorized by

competent authority, and consequently the right of navigation is limited by that kind of an obstruction. *Gould, Waters*, 2d ed. § 87; *Davis v. Jerkins*, 50 N. C. (5 Jones, L.) 290, 293; *Flanagan v. Philadelphia*, 42 Pa. 219, 232; *Lewis v. Keeling*, 46 N. C. (1 Jones, L.) 299, 306, 62 Am. Dec. 168; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525. If authority is granted for the erection of an obstruction in a navigable stream, and the obstruction is so placed as to be partly beyond the limits of the authorization, then in that event the obstruction is unlawful, and a nuisance only to the extent that the authority has been exceeded. *Knox v. Chaloner*, 42 Me. 150, 156; *Renwick v. Morris*, 3 Hill, 621, affirmed in 7 Hill, 575. Even though an obstruction is wholly or partially unauthorized, nevertheless this lack of authority for the erection or maintenance of the obstruction does not necessarily operate as authority to a navigator negligently to destroy the obstruction. 1 *Farnham, Waters*, § 33; *Dimes v. Petley*, 15 Q. B. 276, 117 Eng. Reprint, 462, 19 L. J. Q. B. N. S. 449, 14 Jur. 1132; *The Brinton*, 13 C. C. A. 331, 26 U. S. App. 486, 66 Fed. 71.

We may now direct attention to some of the instructions which the court gave to the jury. After defining negligence, and explaining that the plaintiff could recover if the defendant was, and he himself was not, guilty of negligence, the court told the jury, in instruction No. 3, that "it is charged" in the complaint "that at said time the said boat was being operated outside of and beyond the channel or course in which such vessels should be operated;" and then follows an enumeration of the remaining five specifications of negligence. Having referred to the first specification of negligence in the language already quoted, and having enumerated the other five specifications, the court, in instruction No. 4, then said: If you find the defendant was "guilty of

—Destruction of  
licensed  
fish trap.

any one or more of said charges, and if you so find that any one or more of said charges which you may so find defendant guilty of constituted negligence or lack of due care," and that such acts caused the injury, then "plaintiff is entitled to a verdict," unless his own negligence contributed to the injury.

The jury was properly told, in instruction No. 5, "that in operating its said vessel the duty rests upon defendant to operate the same in a reasonably careful manner, so as to avoid colliding with or injuring structures along the shore."

The next instruction related to the right and duty of the defendant when navigating in the fog, and the succeeding instruction referred to the duty of maintaining a lookout. The next instruction, No. 8, reads as follows: "It was also the duty of defendant to operate and navigate said vessel in the channel or usual course in which vessels navigating said river should be operated and navigated."

In instruction No. 9 the jurors were told: "If you find from a preponderance of the evidence, therefore, that defendant failed to perform any one or more of these duties, then defendant was negligent, and not in the exercise of due care."

Instruction No. 26 is important, because it was given at the request of the defendant. This instruction begins by saying that if the jury found that the plaintiff had obtained permits from the state of Washington and the United States, and had erected and maintained the trap in the place and manner provided by such permits, and if the jury further found "that the defendant was careless and negligent in piloting, operating, and navigating its towboat Samson, and in thereby causing the same to run into and against the said fish trap of plaintiff, and that the fish trap was thereby damaged and injured, the plaintiff is entitled in such case, and in such case only, to recover from the defendant the amount of his

damages: Provided that the negligence of the defendant which occasioned the injury consisted in the failure of the defendant to keep and maintain its towboat within the limits of the navigable channel of the Columbia river and outside and beyond the fixed course and navigable channel of said river, or that the defendant failed to keep and maintain adequate and sufficient lights upon its towboat, so that objects lying in the Columbia river could be seen and avoided, or that the defendant failed to keep and maintain a lookout upon its towboat, and failed to keep and maintain a sufficient watch ahead, or that the defendant, through negligence in looking ahead, failed to see the fish trap; or that, having seen the fish trap, the defendant failed to use such means as were available to avoid striking and injuring the same, or that the defendant operated and propelled its towboat at a dangerous rate of speed, or at an unsafe rate of speed with regard to the condition of the weather, the atmosphere, and the circumstances and conditions surrounding the locality where the accident complained of is alleged to have occurred, or that the defendant, having means to stop its towboat, or to turn aside and thus avoid the fish trap after the same was seen, failed to employ said means efficiently, or to take proper and timely steps to stop its towboat, or to turn aside and thus avoid the said fish trap."

Instruction No. 8 was clearly erroneous. Instruc-

tion No. 3, standing alone, is not strictly accurate, for the reason that it states that the complaint charges that "the boat was being operated outside," instead of including the element of negligence, and saying that the boat was being "negligently" operated outside, of the channel. However, when this instruction is construed in connection with instruction No. 4, then the two, when taken together, harmonize with the complaint. The plaintiff

—restriction on navigation.



does not rely in his complaint upon the bald fact that the defendant got outside of the channel usually followed by vessels; but he relies upon the charge that the "defendant carelessly and negligently failed to keep and maintain said tugboat within the limits of said channel, and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel."

The position of the plaintiff with respect to instructions 3 and 4 is made plain by the following excerpt taken from his printed brief:

"By said instructions, 3 and 4, the court charged the jury that it was alleged in the complaint that appellant carelessly and negligently operated its boat outside of and beyond the channel or course in which vessels should be operated, and that if the jury found, not only that appellant did this, but that its action in so doing resulted from negligence or a lack of due care, and they also found that such negligence caused the damages to the trap, respondent was entitled to recover, unless he was himself guilty of contributory negligence.

"In other words, the court instructed the jury that before they could find against appellant for navigating outside the channel or usual course of vessels they must find that it did so unnecessarily and because of negligence and a want of due care. It was properly left to the jury to say from all the circumstances, taking into consideration the location of the trap and the width of the channel, whether appellant's action in going outside of the usual channel and course of vessels was the result of an unfair or negligent exercise of its right of navigation."

Instruction No. 26 is entirely consistent with instructions 3 and 4, and is in harmony with the construction which the plaintiff places upon these two instructions. Instruction No. 8, however, told the jury that it was the duty of the defendant to navigate its vessel in the

channel and the usual course taken by boats. When this instruction is considered in the light of all the instructions which had been previously given, and in connection with instruction No. 9, it was equivalent to charging the jury that, if the defendant got outside of the channel or usual course taken by vessels, that fact alone and of itself convicted the defendant of negligence; for, after saying in instruction No. 8 that it was the duty of the defendant to operate its boat in the usual course taken by other vessels, the court said in instruction No. 9 that, if "defendant failed to perform any one or more of these duties," then the defendant was negligent. It was not negligent *per se* for the defendant to navigate the flotilla outside of and beyond the course usually followed by vessels. It was a question of fact for the jury to say whether the defendant failed to exercise ordinary care in the navigation of its flotilla. It may fairly be assumed that the defendant conceded that when its flotilla left Bugby hole its captain intended to follow the usual course taken by vessels, and did not intend to go between the Brandt and Anderson traps; the defendant does not contend that the business in which it was engaged required it to go outside of the usual course, or to navigate the waters between the Brandt and Anderson traps; and consequently the ultimate question of fact is whether the defendant failed to use due care when transporting the rock down the river; and although a failure to keep within the usual course taken by vessels is not negligence as a matter of law, nevertheless, as stated in *Porter v. Allen*, 8 Ind. 1, 4, 65 Am. Dec. 750, "though it was proper for the jury to consider the fact" that the boat was not in the usual and ordinary channel where boats are usually run, "in connection with the other facts proved in the case, still it was alone insufficient to control the verdict."

**Appeal—**  
**consideration**  
**of charge as a**  
**whole.**

The charge to the jury should, of course, in this as in all cases, be considered as a whole, with the view of ascertaining, if possible, whether the rights of the appealing litigant were so prejudiced as to prevent a fair trial. Instruction No. 8 was not a mere parenthetical statement made during the course of the charge, but it stands out as prominently as any other single instruction appearing in the charge, and it contains plain language which the jury could not have misunderstood; and hence a reversal of the judgment becomes necessary.

The defendant insists that the Anderson trap was an unlawful obstruction. The plaintiff was authorized by both the state of Washington and the United States to erect and maintain the trap. All the evidence shows that the trap was neither above nor below the place indicated in the permits, although there is a controversy as to whether or not the trap extended farther out into the river than allowed by the permit given by the United States. The defendant argues that all that part of the trap which was taken out when the flotilla went through the lead was beyond the limits fixed by the permit. The evidence shows conclusively that the 24 piling taken out were either in whole or in part within the limits of the Federal permit. The defendant argues that the trap exceeded the length allowed by the permit by 180 feet. Even though it be assumed that the trap was 180 feet too long, still it must be remembered that the heart was 50 feet wide, and if to this width is added the distance covered by the 1 or 2 piling left standing next to the heart, and also the distance covered by the 24 piling taken out, it will be seen that only a part of the obstruction was unlawful, in the sense that it exceeded the authority given to the plaintiff. If, on the other hand, the trap did not extend beyond the point allowed by the per-

mit, then all of it was authorized, and no part of it was an illegal obstruction. No part of the trap was within the usual course followed by vessels going up or down the river.

The defendant has urged with much vigor that this is a local action, and therefore triable only in the state of Washington. The plaintiff first obtained a permit from the United States in 1901, and he operated under that permit until 1912, when he received a new permit. In each year of that period, except possibly four or five years, when he did not put in the trap, the plaintiff drove the piling for his trap and completed its construction a short time before the fish began to run, and then, when the fishing season ended for that year, he pulled out the piling and removed the trap. No part of the trap was driven into the earth, except the piling; and all the piling were driven by the owner with the intention on his part of removing them at the end of the season; and hence the trap was only personal property. **Water—**  
**obstruction of**  
**stream—**  
**fish trap.**

**Property—**  
**personal—**  
**fish trap.**

Johnson v. Pacific Land Co. 84 Or. 356, 164 Pac. 564; Roseburg Nat. Bank v. Camp, 89 Or. 67, 173 Pac. 313. The trap was only an appliance used by the plaintiff in the exercise of his right to fish. The action is not one for trespass upon real property; nor is it prosecuted on account of any assault upon the right of fishery. The trap was personal property, and was used as an appliance by the plaintiff, a salmon fisherman; and when that appliance was damaged, the result was not different in principle from the situation presented by some person negligently breaking an ordinary trout rod, which the owner was using for casting from the bank into a stream, and even though the trout fisherman owned the bank upon which he stood while casting. The injury com-

**Venue—Injury**  
**to personal**  
**property—**  
**transitory**  
**action.**

plained of was damage to the trap, and the action is transitory.

The next question relates to the measure of damages. The court said to the jury that if the plaintiff was entitled to recover at all, he was entitled "to such damages as you may find from a preponderance of the evidence will fairly compensate him for the loss he has suffered;" and that "there are two elements of damage to be considered by you: First, you will consider and determine from the evidence the reasonable amount that it would be necessary to expend to repair plaintiff's trap and restore it to the same or as good condition as it was before the injury; second, you will determine from the evidence the value of the use of plaintiff's trap during such time as it was necessarily delayed by the injury to it. The sum of these two elements so determined by you would be the amount plaintiff is entitled to, if entitled to any sum."

Besides evidence relating to the cost of repairing the trap there was testimony concerning the number of fish caught by the Anderson trap before the accident, and also after the trap was repaired, as well as testimony about the catch made by other traps in that locality and on the same side of the river. The Anderson trap had been in operation from September 10, 1911. There was evidence to the effect that the catch made by the Anderson trap averaged 1,500 or 1,600 pounds a day for a few days before the accident; that the fish "generally run steady on that place there, right along; when we have a run, we have one at about the same time as the other places." The plaintiff testified that the "run of silver side salmon" continued during the period of two weeks while his trap was out of repair, "because the rest of the traps above me and below me had lots of fish at the time when she was broke off;" that during those two weeks the traps above and below his trap "were catching up to a couple of tons a day;" that after the

trap was repaired the average catch was "about 1,600 or 1,700 pounds per day." Charles Brandt, who was an experienced trap fisherman and thoroughly familiar with the Anderson trap, testified that he knew the reasonable value of the use of the Anderson trap, and that its value was "between \$50 and \$60 a day" during "the time she was broke down;" however, he also stated that he never knew of a trap having been rented for a money rental, but that all the leases coming to his knowledge had been "on the shares." This witness further explained that the Anderson trap "was a trap that caught the fish, and she is the best trap there is in" that locality; that he "would be willing to pay the man \$50 a day for the use of that trap," and that "I go on the basis of what catch she is making" when estimating the value of the trap. The weather conditions, according to all the evidence, were favorable. The foregoing is substantially all the evidence relating to the value of the use of the trap.

The defendant contends that it was error to receive evidence of the average catch of the Anderson trap before and after the accident; that the testimony about the catch made by other traps, located above and below the Anderson trap, was erroneous. The defendant took the position that the occupation of a fisherman is uncertain and precarious, and that his profits are necessarily speculative, and for that reason the defendant requested, but the court refused to give, the following instructions: "The value of the fish trap of the plaintiff, if you should find that the plaintiff is entitled to recover, is a matter of easy determination, and inasmuch as the trap is put in for one season only, I charge you that the measure of damages for the use of the trap is interest upon such value as you may find the trap to have had at the time of this injury for such period as you may deem reasonable, but not over the period of one year at the rate of 6 per centum (6%)."

The law aims to allow full and complete compensation to an innocent party who has been damaged by the breach of a contract or the commission of a tort. In practice, the law does not prove false to its theory by banning profits merely because of their nature as profits; but, upon the contrary, the law endeavors faithfully to realize its aim by allowing compensation for profits which it is reasonably certain would have been made, if the wrong complained of had not been done. Allison v. Chandler, 11 Mich. 542; 8 R. C. L. 501; Bredemeier v. Pacific Supply Co. 64 Or. 576, 131 Pac. 312; Fields v. Western Union Teleg. Co. 68 Or. 209, 217, 137 Pac. 200; McGinnis v. Studebaker, 75 Or. 519, L.R.A. 1916B, 868, 146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917B, 1190; Feeney & B. Co. v. Stone, 89 Or. 360, 171 Pac. 569, 174 Pac. 152; Fletcher v. Fischer, — Or. —, 182 Pac. 823. In the absence of malice the law endeavors to compel reparation rather than punishment. When attempting to compel reparation, the difficulties encountered by the administrators of the law consist in the application rather than in the interpretation of the rules prescribed for the measurement of damages. There is no single rule applicable alike to all cases, involving profits which may be taken into account, when fixing the amount of compensation for the breach of a contract or the commission of a tort. In some cases profits constitute either the sole or one of the elements of damages, and therefore are to be taken as the measure of the amount of compensation; and in other cases profits constitute only an item of evidence to be taken into consideration, together with other evidence, by the jury when fixing the amount of compensation.

Damages—  
lost profits.

profits as an element of damages, and hence, if entitled to recover on his theory of the case, he would be entitled to have this element of damage measured by the amount of the profits. The instruction of the court, however, is based on the theory that the plaintiff is entitled to recover the value of the use of the trap, and we think that the theory of the trial court is —value of use. correct and in harmony with the principle which supports the holding in Williams v. Island City Mercantile & Mill. Co. 25 Or. 573, 37 Pac. 49. One witness testified that he never knew of a trap having been rented for a money rental, and hence it may be that the trap does not have a rental value, in the same sense that the words "rental value" are used when referring to a storeroom or a dwelling house in a city; and yet the trap did have a usable value. The trap was usable for only one purpose, and it was valuable for that, and no other purpose, and the damages must, in order to award compensation, be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Past results ought to be of some aid in fixing the usable value, and in the very nature of things one of the first inquiries that one would naturally make when estimating the usable value of the trap would be: How many fish did the trap catch? Admission of evidence concerning the catches made by the trap before the injury is fully supported by the doctrine stated in Williams v. Island City Mercantile & Mill. Co. See also the luminous opinion in Standard Supply Co. v. Carter, 81 S. C. 181, 19 L.R.A. (N.S.) 155, 62 S. E. 150. While the past success of the trap is not controlling, it is nevertheless one of the factors which may be taken into consideration, not as the measure of damages, but to aid the jury in estimating damages. Post v. Munn, 4 N. J. L. 61, 63, 7 Am. Dec. 570;

If the complaint is strictly construed, it must be interpreted to mean that the plaintiff is suing for

profits as an element of damages, and hence, if entitled to recover on his theory of the case, he would be entitled to have this element of damage measured by the amount of the profits. The instruction of the court, however, is based on the theory that the plaintiff is entitled to recover the value of the use of the trap, and we think that the theory of the trial court is —value of use. correct and in harmony with the principle which supports the holding in Williams v. Island City Mercantile & Mill. Co. 25 Or. 573, 37 Pac. 49. One witness testified that he never knew of a trap having been rented for a money rental, and hence it may be that the trap does not have a rental value, in the same sense that the words "rental value" are used when referring to a storeroom or a dwelling house in a city; and yet the trap did have a usable value. The trap was usable for only one purpose, and it was valuable for that, and no other purpose, and the damages must, in order to award compensation, be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Past results ought to be of some aid in fixing the usable value, and in the very nature of things one of the first inquiries that one would naturally make when estimating the usable value of the trap would be: How many fish did the trap catch? Admission of evidence concerning the catches made by the trap before the injury is fully supported by the doctrine stated in Williams v. Island City Mercantile & Mill. Co. See also the luminous opinion in Standard Supply Co. v. Carter, 81 S. C. 181, 19 L.R.A. (N.S.) 155, 62 S. E. 150. While the past success of the trap is not controlling, it is nevertheless one of the factors which may be taken into consideration, not as the measure of damages, but to aid the jury in estimating damages. Post v. Munn, 4 N. J. L. 61, 63, 7 Am. Dec. 570;

Horace F. Wood Transfer Co. v. Shelton, 180 Ind. 273, 101 N. E. 718. See also *Jacobs v. Cromwell*, 216 Mass. 182, 103 N. E. 383.

That there was a good run of fish during the two weeks is evidenced, the plaintiff says, by the fact that the weather conditions were good, by the significant circumstances that other traps in the same locality, but less favorably situated than the Anderson trap, caught each day "up to a couple of tons a day," and by the important fact that, when the Anderson trap was repaired, it caught each day from 1,600 to 1,700 pounds of fish. Does not this evi-

**Evidence—**  
**damages—value**  
**of fish trap.**

dence of the catches made during the two weeks, as well as the catches made immediately afterwards, serve to make more certain any inference of usable value that may be drawn from prior results? Obviously the testimony about the run and catch of fish during the two weeks when the trap was out of repair and the catches made by the Anderson trap when again put in repair constituted data which would be very helpful in fixing the usable value of the trap for those two weeks. The fishing season is of comparatively short duration, and consequently the usable value of the trap might be negligible at one time of the year and considerable at another. In brief, the evidence under discussion was competent, not for the purpose of measuring the compensation to be paid to the plaintiff, but for the purpose of aiding the jury in estimating the usable or rental value of the trap.

There are other exceptions presented by the record, but, since the questions arising out of them are not likely to recur upon a retrial, we deem further discussion unnecessary.

The judgment is reversed, and the cause is remanded for a new trial.

McBride, Ch. J., and Burnett and Benson, JJ., concur.

A petition for rehearing having been filed, *Harris, J.*, on November 25, 1919, handed down the following additional opinion (— Or. —, 185 Pac. 231):

In the original opinion we ruled that instruction No. 8 made it necessary to reverse the judgment. The plaintiff earnestly insists in the petition for a rehearing that instruction No. 8, which was given at the request of plaintiff, "is merely a statement with which everyone will agree, namely, that it was the duty of appellant to operate and navigate its vessel where vessels should be operated and navigated."

The petition for a rehearing contains no new argument, for at the hearing, as well as in his printed brief, the plaintiff vigorously contended that instruction No. 8 was devoid of error, and the reasons given for that contention were the same as those now assigned by him. However, we have again examined and considered the record with the same result as before. As stated in the original opinion, this instruction was not a parenthetical statement, but, upon the contrary, it stood out as boldly and prominently as any other instruction. When instruction No. 8 is viewed in the light of the allegation that, "although there was at said time and place a fixed channel and course in which vessels navigating said river should be operated, said defendant carelessly and negligently failed to keep and to maintain said tugboat within the limits of said channel and carelessly and negligently navigated said vessel outside and beyond said fixed course and channel," and when this instruction is viewed in the light of the evidence concerning the location of the course usually followed by vessels, it appears manifest to us that the instruction in effect stated to the jurors that it was the duty of the defendant to navigate its flotilla in the channel and course usually taken by boats.

Among other instructions, the court gave, at the request of the defendant, instruction No. 29, which

reads as follows: "Vessels navigating the Columbia river are not required to keep in the dredged channel, where there is a dredged channel, nor in the center of the navigable channel. For instance, you may legally and without negligence navigate any part of the navigable channel of said river where the depth of water is sufficient therefor."

The plaintiff now argues, just as he contended in his printed brief, that instruction No. 8 is not prejudicial when considered in connec-

tion with instruction No. 29. The answer to this argument is that one instruction is inconsistent with the other. Construing instruction No. 8 as we do, then the inevitable conclusion is that this instruction was prejudicial error. We adhere to the original opinion and the conclusion there reached.

Appeal—  
inconsistent  
instructions—  
effect.

The petition for a rehearing is denied.

### ANNOTATION.

#### Liability for damage by vessel to nets or other articles used in fishing.

##### General rule.

The right of navigation is superior to the right of fishing, and no liability attaches for injury to fishing apparatus by a vessel engaged in the bona fide exercise of the right of navigation, in the absence of proof of wantonness, maliciousness, or unnecessary damage. *The City of Baltimore* (1872) 5 Ben. 474, Fed. Cas. No. 2,744; *Lewis v. Keeling* (1854) 46 N. C. (1 Jones, L.) 299, 62 Am. Dec. 168; *ANDERSON v. COLUMBIA CONTRACT Co.* (reported herewith) ante, 653. See also *Anonymous* (1808) 1 Campb. (Eng.) 517.

Thus, in *Lewis v. Keeling* (1854) 46 N. C. (1 Jones, L.) 299, 62 Am. Dec. 168, it appeared that the defendant's steamboat, in approaching the shore of a navigable river to take on a passenger, ran on and destroyed a seine used by the plaintiffs in their fishery. The court held that the right of navigation was paramount to the right of fishing, and therefore the defendant had a right to bring his steamboat to the river bank for the purposes of his vocation, and he was not liable for the destruction of a fishing net in so operating the boat, in the absence of proof of wanton or malicious destruction. The court said: "A boat on a navigable stream has a right to 'take her course,' and to go to the bank, when and where it is necessary to do so, doing no unnecessary damage, and acting without wantonness or malice; and is not obliged to stop or go out

of her way, or wait upon the movements of those who are managing a seine or net, which they are permitted to use by the sufferance of the sovereign, and not as a right conferred by grant. This is the only line that can be established, plain enough for practical purposes. There must be no wantonness or malice,—no unnecessary damage,—but a bona fide exercise of the paramount right of navigation."

In *The City of Baltimore* (1872) 5 Ben. 474, Fed. Cas. No. 2,744, wherein it appeared that a steamship, while entering the harbor of New York, on her usual course, ran over a seine containing a quantity of fish, tearing the net and liberating the fish, the court held that a libel against the vessel must be dismissed, for, it appearing that the ship was traveling in her regular course, and that a deviation therefrom would have incurred danger of grounding, there was no negligence on her part.

See also *Anonymous* (Eng.) supra, an early English case brought for disturbing the plaintiff's fishery by the moving of a vessel in such a manner that the plaintiff was prevented from taking as many fish as he would otherwise have done, wherein the court said: "A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse

that right so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right? The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. . . . The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet, if he acted wantonly and maliciously for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, but not otherwise."

**Limitation of rule.**

The rule that there is no liability for injury to fishing paraphernalia necessarily damaged by a vessel in the fair and reasonable exercise of the right of navigation is strictly limited, however, to those cases wherein it does not appear that the injury was caused wantonly, maliciously, or negligently; and where these circumstances appear, the courts hold the wrongdoer liable.

**New Jersey.**—*Post v. Munn* (1818) 4 N. J. L. 61, 7 Am. Dec. 570.

**North Carolina.**—*Hopkins v. Norfolk & S. R. Co.* (1902) 131 N. C. 463, 42 S. E. 902.

**Oregon.**—*Horst v. Columbia Contract Co.* (1918) 89 Or. 344, 174 Pac. 161.

**Pennsylvania.**—*Cobb v. Bennett* (1874) 75 Pa. 326, 15 Am. Rep. 752.

**Washington.**—*Fowler v. Harrison* (1905) 39 Wash. 617, 81 Pac. 1055.

**Wisconsin.**—*Wright v. Mulvaney* (1890) 78 Wis. 89, 9 L.R.A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045.

**Canada.**—*Snowball v. Donovan* (1895) 33 N. B. 182; *Hubbard v. Dickie* (1906) 39 N. S. 506; *Smith v. Northern Constr. Co.* (1914) 30 Ont. L. Rep. 494, 5 Ont. Week. N. 789, 19 D. L. R. 380.

Thus, in *Post v. Munn* (N. J.) supra, an action in trespass, it appeared that the plaintiff was the owner of a fishery on a navigable river, and the defendant, who was the master of a boat on the same river, in sailing his boat, ran on a net thrown out by the

plaintiff, tearing and injuring the same. The court held that while the right of fishery was subordinate to the right of navigation, nevertheless, the master of a vessel was liable for a wilful destruction of a net in the exercise of the superior right.

And in *Cobb v. Bennett* (1874) 75 Pa. 326, 15 Am. Rep. 752, wherein the plaintiff contended that the defendant wantonly ran his vessel into the former's fishing net, greatly injuring it, it appeared that the defendant, on being warned of the presence of the net, could have changed his course without prejudice to the reasonable prosecution of his voyage. The court held that the defendant was liable for the damage complained of, saying: "A vessel is entitled to take her course in the navigation of the river, and to hold it without regard to the fisherman's net, provided the master act without wantonness or malice, and do no unnecessary damage. This is an obvious consequence of the superior right of navigation. But this, we think, was the very doctrine of the charge, and the exception contained in the qualification in view of the facts in evidence. If the mariner, warned of the position of the net and requested to change his tack, may do so 'without prejudice to the reasonable prosecution of his voyage,' can we say he is exercising his superior right of navigation justly, and in the spirit of the maxim, "*sic utere tuo ut alienum non lædas*," if, indifferent to the inferior right, he recklessly holds on his way and fouls and injures the fisherman's net? Certainly we cannot say this, for in effect it would be to say a fisherman has no rights whatever; that being no right which another may disregard under all circumstances."

In *Wright v. Mulvaney* (Wis.) supra, wherein it appeared that the defendant's steam tug ran through a fish net of the plaintiff, and it appeared, further, that at the time of the occurrence it was broad daylight, and those in charge of the tug could have easily seen the net and changed the boat's course so as to avoid it, the court held that the defendant was liable for the negligence of his serv-

ants, although the injury was not caused wantonly or maliciously.

Where it appeared that a steamboat had a clear and wide channel in which it could have been so operated as not to interfere with the plaintiff, the court held that the owners of the boat were liable for the unnecessary damage caused the plaintiff's fishing boat and nets, saying: "The steamboat should exercise her paramount right of navigation in a bona fide manner, so as to do no unnecessary damage." *Horst v. Columbia Contract Co.* (1918) 89 Or. 344, 174 Pac. 161.

See, to the same effect, *Hopkins v. Norfolk & S. R. Co.* (1902) 131 N. C. 463, 42 S. E. 902.

In *Hubbard v. Dickie* (1906) 39 N. S. 506, wherein it appeared that the plaintiff's fish net was carried away and destroyed by the negligent navigation of the defendant's towboat, the court held that the defendant was liable for the damage caused by his negligence, it appearing that the course of the boat could have been altered without danger, so as to avoid hitting the nets.

In *Fowler v. Harrison* (1905) 39 Wash. 617, 81 Pac. 1055, wherein it appeared that the appellants wilfully, deliberately, and wantonly ran their steamboat into and destroyed the fish traps and nets of the respondent, the court held that they were liable for the damage caused thereby, for, conceding that the traps and nets were not lawfully in the stream, nevertheless, the appellants would not be justified in maliciously and wilfully destroying the same.

In *Smith v. Northern Constr. Co.* (1914) 30 Ont. L. Rep. 494, 19 D. L. R. 380, wherein the respondent sought to recover damages for the loss sustained by him owing to the destruction of his fish nets by the appellant, it appeared that the appellant was engaged in towing "a large boom of logs or saw timber and ties" on the waters of the bay, and was using for that purpose "a tug or steam vessel known as an alligator," and in the process of towing and warping, "in addition to the usual methods of propulsion," a large steel cable and anchor were attached to a

tree or other solid object upon the land, and the cable was wound up by steam power on a drum on the alligator, and in that way the alligator and her tow were hauled along. It appeared further that, in so operating the tug and tow, an anchor was put out in the water in front of the alligator; and, upon an attempt being made to wind the cable to which the anchor was attached, it was found that the anchor did not hold. The cable was then let go, and either then, or in taking it to the shore of the island to attach it to a tree, it caught the nets and destroyed them. The court held that the appellant was liable for the damage caused by the negligence of its servants, for it was not justified in wilfully impinging upon or destroying the nets, and was bound to use due care and skill in the navigation of the vessel, saying: "The man in charge of the tow knew or ought to have known that there were or were likely to be nets set out in the eastern channel; he had been instructed to be careful to avoid injuring nets, and yet no precaution whatever to that end was taken. There was, as I have said, no reason why the cable which caught the nets and destroyed them should have been let go and permitted to ground. The channel which was taken was not the one used in such an operation as that in which the appellant was engaged, and there was no necessity for taking the eastern channel. If the wind was such that the alligator could not take the western channel, there was nothing to prevent it being anchored or fastened to a tree on the shore; but, in spite of the fact that the wind would not permit of the westerly channel being taken, and was so strong that the alligator was unable to keep to its course, those navigating it deliberately proceeded by the easterly channel, with which they were little acquainted, and that, too, upon a dark night."

In the reported case (*ANDERSON v. COLUMBIA CONTRACT Co.* ante, 653) the court holds that it was proper to submit to the jury the question whether the defendant negligently operated



its towboat in such a manner as to cause the injury to the plaintiff's fish traps, holding that while the right of fishery must give way to the paramount right of navigation, the latter right must be exercised in a bona fide and fair manner, and with due regard to the subordinate right of fishery, and the boat must be so navigated as not to do unnecessary damage.

In *Snowball v. Donovan* (1895) 33 N. B. 182, wherein it appeared that a warp holding a raft at anchor broke, and the raft crashed into the plaintiff's nets, seriously damaging them, the court held that the evidence was sufficient to justify the jury in finding the defendant guilty of negligence, and liable for the damage sustained.

W. J. K.

## METROPOLITAN DISCOUNT COMPANY, Plff. in Err.,

v.

F. D. DAVIS.

*Oklahoma Supreme Court—January 29, 1918.*

(— Okla. —, 170 Pac. 707.)

### Bills and notes — indorsement by stamp.

1. An indorsement of the name of the payee on a bill of acceptance by means of a rubber stamp is sufficient, if such indorsement was made by authority of the payee, and there is no presumption of want of such authority when the indorsee in a suit on the instrument alleges due indorsement, such allegation being taken as true, unless the denial thereof is duly verified.

[See note on this question beginning on page 672.]

### Pleading — denial of transfer of note.

2. An allegation by the plaintiff of indorsement of bills of exchange is not put in issue by a verified allegation in the answer that defendant "denies that the bills of exchange were transferred and indorsed to said plaintiff for a valuable consideration before maturity."

### Bills and notes — indorsement — effect.

3. An indorsement of a negotiable

instrument by the payee of itself imports a valuable consideration.

[See 3 R. C. L. 1052.]

### — time of indorsement.

4. When the indorsement of a negotiable instrument is not dated, the indorsement and negotiation are presumed to have been made before maturity.

[See 3 R. C. L. 1181.]

Headnotes by STEWART, C.

ERROR to the District Court for Cotton County (Jones, J.) to review a judgment in favor of defendant in an action brought to recover amounts alleged to be due on five certain negotiable bills of acceptance. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. L. K. Revelle, for plaintiff in error:

The defenses and counterclaim set up in the answers are wholly insufficient on their face to constitute a defense or counterclaim to the action brought, and are wholly without merit on the identical question sought to be raised by said answers.

Citizens' Sav. Bank v. Landis, 37 Okla. 530, 132 Pac. 1101; Western Exch. Bank v. Coleman, 38 Okla. 178, 132 Pac. 488; Showalter v. Webb, 42 Okla. 297, 141 Pac. 439; Norman v. Lambert, — Okla. —, 153 Pac. 1097; Howard v. Kincaid, 54 Okla. 271, 156 Pac. 628.

When a person executes a negotia-

ble instrument fair upon its face, which passes in the regular course of business, before maturity, for value, into the hands of a person who takes it in good faith, without knowledge of defects or imperfections or possible defenses that may be urged against its payment, the maker is liable to such innocent holder, no matter what defenses he might have as between himself and the original payee.

Showalter v. Webb, 42 Okla. 297, 141 Pac. 439; Mangold & G. Bank v. Utterback, 54 Okla. 655, L.R.A.1917B, 364, 160 Pac. 713; Howard v. Kincaid, 54 Okla. 271, 156 Pac. 628; 10 Cyc. 1116; Topeka Capital Co. v. Remington Paper Co. 61 Kan. 1, 57 Pac. 504.

The indorsement on the acceptances was sufficient.

14 Enc. Pl. & Pr. 676; Randolph v. Harris, 28 Cal. 561, 87 Am. Dec. 139.

Messrs. Dudley B. Madden and W. A. Ruggles for defendant in error.

Stewart, C., filed the following opinion:

This case involves liability of the defendant to the plaintiff on five negotiable bills of acceptance, each for \$59.20 and bearing date January 20, 1914, payable to the order of National Novelty Import Company, due respectively four months, six months, eight months, ten months, and twelve months after date. The plaintiff corporation alleged that it was the owner and holder of such bills in due course for valuable consideration and by due indorsement before maturity; that the defendant had paid on the first due the sum of \$25 on July 2, 1914, and the further sum of \$25 on July 21, 1914, as shown by indorsement thereon. The defendant filed answer, admitting the execution of the bills, but denying that the plaintiff was the owner or holder of the same in due course, and denying that the same were transferred and indorsed to said plaintiff for valuable consideration before maturity. The answer was not verified, but afterwards defendant filed what was called "Amendment to Answer," which was signed and verified, reading as follows: "I, F. D. Davis, being first duly sworn, on my oath say that I am defendant in the above-entitled action, and that

the certain denial contained in the above and foregoing answer in said action, in words as follows, to wit: 'especially denies that said bills of exchange mentioned in said bill of particulars were transferred and indorsed to said plaintiff for a valuable consideration before maturity,' is true."

The defendant alleged that said bills of acceptance were signed in pursuance of a contract made with the National Novelty Import Company by its agent and representative T. K. Smith for the purchase of certain articles of jewelry, and that defendant had sustained damages in the sum of \$500 because of breach of an alleged warranty of such goods. The evidence shows that the payee indorsed the bills of acceptance before maturity to the plaintiff, and received valuable consideration therefor; that plaintiff had no knowledge of any defense to the same, there being no evidence tending to disprove such facts. The trial court, however, submitted the cause to the jury on the issue of damages, and, the jury returning a verdict for the defendant, the trial court rendered judgment accordingly, from which judgment the plaintiff duly appeals.

The trial court refused, on request of the plaintiff, to instruct the jury on the question of the plaintiff being an innocent purchaser for value and a holder in due course. Such failure of the court is assigned by the plaintiff as error, and it is also contended that the plaintiff was entitled to judgment on the pleadings and under the undisputed evidence. The defendant urges that his amendment to the answer, in which he says that he "denies that said bills of acceptance mentioned in the bill of particulars were transferred and indorsed to plaintiff for valuable consideration before maturity is true," was sufficient to put in issue the indorsement of the bills of acceptance under § 4759, Rev. Laws 1910, providing, among other things, that "allegations of the execution of written instruments and indorse-

ments thereon, . . . shall be taken as true unless the denial . . . be verified by the affidavit of the party, his agent or attorney."

We cannot agree with learned counsel for defendant; the affidavit does not deny the indorsement, but denies that the bills were indorsed to plaintiff for a valuable consideration before maturity. The averment is not sufficient to put in issue the allegation of plaintiff as to the indorsements, which indorsements

**Pleading—  
denial of  
transfer of  
note.**

of themselves import valuable consideration, and it is provided in § 4095, Rev. Laws 1910, as follows: "Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue."

The indorsements in the instant case bearing no date, it must therefore be presumed that they were

**—time of  
indorsement.**

made before maturity. Even if the answer were sufficient to put in issue the question of indorsements, there was evidence introduced showing that the indorsements were duly made, and there is no evidence to the contrary.

It is contended, however, by the defendant that the evidence shows

that the indorsements were made by the use of a rubber stamp, and therefore are not sufficient. The means by which an indorsement is made are not so important as is the intention of the purported indorsee. An indorsement of the name of the payee on a bill of acceptance by means of a rubber stamp is sufficient, —indorsement by stamp. if such indorsement

was made by authority of the payee, and there is no presumption of want of such authority when the indorsee in a suit on the instrument indorsed alleges due indorsement. The maker of the bills of acceptance in the case at bar is, therefore, in no position to complain as to the manner of indorsement. *Cadillac State Bank v. Cadillac Stave & Heading Co.* 129 Mich. 15, 88 N. W. 67; *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675; *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849. Under both the pleadings and evidence in this case the plaintiff is entitled to recover.

The judgment is reversed, with instructions to render judgment for the plaintiff for the face of the bills of acceptance, with interest at the rate of 6 per cent from their respective dates of maturity, less the amounts paid, to be credited as of the dates same were paid, and costs.

**Per Curiam:**

Adopted in whole.

## ANNOTATION.

### Sufficiency of signing or indorsing a bill or note by printing or stamping.

The sufficiency of a printed or stamped signature or indorsement to a bill or note has generally been sustained. *Pennington v. Baehr* (1874) 48 Cal. 565 (facsimile of signature of public official printed on interest coupons attached to bonds); *Lexington v. Union Nat. Bank* (1897) 75 Miss. 1, 22 So. 291 (lithographed signature of public official to interest coupons attached to bonds); *Mayers v. McRimmon* (1906) 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447 (rubber stamp indorsement); *Rosenberg v. Germania*

*Bank* (1904) 44 Misc. 233, 88 N. Y. Supp. 952 (obiter); *METROPOLITAN DISCOUNT Co. v. DAVIS* (reported herewith) ante, 670; *Carroll v. Mitchell-Park Mfg. Co.* (1910) 60 Tex. Civ. App. 263, 128 S. W. 446 (note signed with rubber stamp); *Midkiff v. Johnson County Sav. Bank* (1912) — Tex. Civ. App. —, 144 S. W. 705 ("transfers upon the back of . . . acceptances . . . by printed signatures, presumably with rubber stamp").

A stamped indorsement has been sustained under the requirement of

the Negotiable Instruments Act that an indorsement must be "written" on the instrument itself, or on a paper attached thereto. *American Union Trust Co. v. Never Break Range Co.* (1916) 196 Mo. App. 206, 190 S. W. 1045; *Flanders v. Snare* (1908) 37 Pa. Super. Ct. 28. In *American Union Trust Co. v. Never Break Range Co.* (Mo.) *supra*, the court states that the question is placed beyond debate by the further provision of the Negotiable Instruments Law that, unless the context otherwise requires, "written" includes printed, and "writing" includes print. The corporation whose indorsement was in question in this case had several times recognized the rubber stamp indorsement as its own, and had ratified it and agreed to have an official sign under it if that was desired. Upon the general question of whether a signature by a rubber stamp is sufficient, the court states that the fact "that this indorsement was not 'in writing,' in the literal sense of the word 'writing,' is entirely immaterial. It has been many times held that affixing a rubber stamp to an instrument is sufficient in law to fulfill the requirement that the indorsement of the name must be written, or in writing, if the stamp is affixed with the intent of using it as an indorsement." Practically the same reasoning with reference to the Negotiable Instruments Act appears in *Flanders v. Snare* (Pa.) *supra*.

It is stated in *Weston v. Myers* (1864) 33 Ill. 424, that a person whose name was printed on a due bill, by issuing the bill for value, adopted the printed signature thereon as his own, and became thereby bound in the same manner as if he had written it himself. The court further states: "We think it makes no difference, so far as the defendant's liability is concerned, whether he wrote his name in script or Roman letters, or whether such letters were made with a pen or with type, or whether he printed, engraved, photographed, or lithographed them, so long as he adopted and issued the signature as his own. It is true that a written signature in script may be a safer mode of subscribing one's

name, but where a party has adopted a signature made in any other mode and has issued an instrument with such adopted signature for value, he is estopped from denying its validity."

There is no opinion in *Pennington v. Baehr* (1874) 48 Cal. 565, *supra*. The action in that case was an application for writ of mandamus to require the state treasurer to pay interest on bonds, as evidenced by the coupons attached thereto. The refusal to make the payment was based on the ground that the name of the president of the fund commissioners had been printed upon the coupons and not written with his own hand. It was contended for the treasurer that a facsimile could not be adopted as a signature without express authority of law, and that, since no express authority of law appeared in this case, the signature was invalid. The court ordered the mandamus to issue as prayed for without writing any opinion.

Printed or stamped indorsements and signatures have been treated as valid in some cases, without any question being raised. *First Nat. Bank v. Smith* (1882) 132 Mass. 227 (stamped indorsement); *Cadillac State Bank v. Cadillac State & Heading Co.* (1901) 129 Mich. 15, 83 N. W. 67 (corporate notes on which the corporate name was impressed with a rubber stamp, "per . . . manager," held valid); *McKee v. Vernon County* (1874) 3 Dill. 210, Fed. Cas. No. 8,851 (interest coupons to county bonds on which coupons the signatures of the proper officials were lithographed held valid obligations); *Thompson v. Big Cities Realty & Agency Co.* (1910) 21 Ont. L. Rep. 394 (rubber stamp corporate signature to note, as a part of which the names of the president and treasurer appeared in writing, sustained).

There are certain conditions prerequisite to the sufficiency of a stamped signature or indorsement. These have been variously stated. A condition quite generally announced is that the signature or indorsement must be made by the authority of the person whose signature or indorsement it purports to be. *Mayers v. McRimmon*

(1906) 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447; **METROPOLITAN DISCOUNT CO. v. DAVIS** (reported herewith) ante, 670. It has been stated that the person whose signature is printed or stamped must adopt it as his signature. *Pennington v. Baehr* (1874) 48 Cal. 565; *Weston v. Myers* (1864) 38 Ill. 424; *Midkiff v. Johnson County Sav. Bank* (1912) — Tex. Civ.

App. —, 144 S. W. 705. In case of an indorsement it has been stated that the stamp must be affixed with the intent to use it as an indorsement. *American Union Trust Co. v. Never Break Range Co.* (1916) 196 Mo. App. 206, 190 S. W. 1045, see supra; *Mayers v. McRimmon* (1906) 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447.

W. A. E.

### W. P. FULLER & COMPANY, Resp.,

v.

ARTHUR J. ADAMS, Doing Business as the Crystal Mirror & Beveling Company,  
and

ROBERT LONGMIRE, Garnishee, Appt.

*Washington Supreme Court (Dept. No. 2) — July 16, 1917.*

(Fuller & Co. v. Longmire, 97 Wash. 254, 166 Pac. 623.)

#### Estoppel — leaving property in possession of relative.

A mother who permits her minor son to have possession of machinery belonging to her, for use in a business conducted by him, knowing that he held himself out as the owner of the machinery, is estopped to assert title to it against one who gives him credit for goods furnished for use in the business without knowledge of the true ownership of the property.

[See note on this question beginning on page 676.]

**APPEAL** by garnishee defendant from a judgment of the Superior Court for Pierce County (Card, J.) in favor of plaintiff in an action brought to recover the purchase price of goods sold by plaintiff to defendant Adams. *Affirmed.*

The facts are stated in the opinion of the court, except that appellant's brief states that the property involved consisted of beveling machines used in the manufacturing processes of the son's business.

Mr. H. W. Lueders, for appellant:

Defendant's mother is not estopped from claiming the property in question, and cannot be held for the obligations incurred by her minor son.

*Robinson v. Chapline*, 9 Iowa, 91; *Greenwood v. Corbin*, 48 Wash. 357, 93 Pac. 433; *Bennet v. Strait*, 63 Iowa, 620, 19 N. W. 806; *Hoag v. Martin*, 80 Iowa, 714, 45 N. W. 1058; *Marston v. Dreson*, 85 Wis. 530, 55 N. W. 896; *Re Garner*, 110 Fed. 123; *Van Horn v. Overman*, 75 Iowa, 421, 39 N. W. 679; *Giannone v. Fleetwood & Co.* 93 Ga. 491, 21 S. E. 76; *Diebolt v. The Chester Hair*, 4 Fed. 571; *Le Count v. Greenley*, 42 Hun, 655, 6 N. Y. S. R. 91; *Staples v. Bradbury*, 8 Me. 181, 23 Am. Dec. 494.

Messrs. Raymond J. McMillan and Ernest K. Murray for respondent.

Parker, J., delivered the opinion of the court:

This action was commenced in the superior court for Pierce county by the plaintiff, W. P. Fuller & Company, seeking recovery of the purchase price of goods sold by it to the defendant Arthur J. Adams. Thereafter a writ of garnishment was issued in the action at the instance of the plaintiff, directed to Robert Longmire, sheriff of Pierce county, requiring him to answer as to property in his possession belonging to the defendant. He answered the

writ, admitting that he had in his possession certain personal property, describing it, claimed by the plaintiff to be the property of the defendant, but alleged that it was in fact the property of Carrie Adams, the mother of the defendant. This allegation of ownership of Carrie Adams was controverted by the plaintiff. Thereafter the issue so raised was tried by the court together with the issues raised by the pleadings in the original action, resulting in findings and judgments in favor of the plaintiff as against both the original and garnishee defendants. The court directed the sale of the property in the hands of Longmire as garnishee defendant, and the proceeds thereof applied to the payment of the judgment rendered against the original defendant. From this disposition of the cause the garnishee defendant Longmire has appealed to this court. The original defendant Adams has not appealed, so the controversy here is only between the plaintiff and Longmire as garnishee defendant.

It appears that the defendant Adams was, at the time of purchasing the goods for the purchase price of which judgment was rendered against him in respondent's favor, a minor about twenty years old. At the time of purchasing the goods he was carrying on the business indicated by the name Crystal Mirror & Beveling Company. The goods were sold to him by respondent for use in that business. The business was being carried on by him as his own, he having entire control thereof with knowledge and consent of his mother, who was then his natural guardian, his father having died some time previous. This property is in the hands of appellant as garnishee was property used in the business, and had been seized by appellant as sheriff in proceedings looking to the foreclosure of a chattel mortgage thereon, which had been executed by defendant Adams, which property remained in appellant's possession at the conclusion of the foreclosure proceedings. It

was claimed by Mrs. Adams as her property, she claiming that it had been loaned by her to her son for use in the business, and it was because of this claim made by Mrs. Adams that appellant resists the claim of the plaintiff that it be sold to satisfy the judgment against defendant Arthur J. Adams. Mrs. Adams was not a party to the original action, nor to this garnishment proceeding. The trial court found that "Carrie Adams is and was the mother of the defendant Arthur J. Adams, and at all times was informed and knew that said Arthur J. Adams was holding himself out as the owner of the personal property above described, and that he was conducting the business of said Crystal Mirror & Beveling Company as his own and obtaining credit therein, and said Carrie Adams by her conduct is estopped to assert as against the plaintiff that said Arthur J. Adams is not the owner of said personal property."

This finding, we think, is amply supported by the evidence. Plainly, we think, whatever right to this property Carrie Adams may have as against her son Arthur J. Adams, it must be held to be his property so far as the rights of the plaintiff in this cause are concerned.

Estoppel—leaving property in possession of relative.

Some other contentions are made by counsel for appellant. We think they are wholly without merit so far as the present controversy is concerned. We may observe that they relate for the most part to questions arising in the original action, and not to questions arising between respondent and appellant. We are not here concerned with alleged errors occurring in the rendering of the judgment against the defendant Arthur J. Adams, since no appeal is taken therefrom.

The judgment against appellant Longmire as garnishee is affirmed.

Ellis, Ch. J., and Fullerton, Mount, and Holcomb, JJ., concur.

Petition for rehearing denied.

## ANNOTATION.

### Estoppel to assert title to personal chattel by permitting another to use it in his business.

- I. Scope, 676.
- II. General principles, 676.
- III. The rule:
  - a. In general, 678.
  - b. Kinds of property:
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- IV. Illustrations, 681.
- V. Contra and border-line cases, 683.
- VI. Miscellaneous, 684.

#### I. Scope.

This note is limited to the question whether the owner of a personal chattel who permits another to use it in his business is thereby estopped to assert title to it as against a creditor or purchaser of the possessor. It is not intended, in general, to cover the question of the effect of such permission and consequent possession coupled with other indicia of title or accompanied by other acts or conduct, which, together with said permission and possession, would amount to an estoppel, though the cases are rarely without some evidence of other acts or conduct besides the permission. The note excludes cases of securities, or of slaves, or of property in the hands of agents, or sold, or conditionally sold. It also excludes questions between the bailor and the bailee's assignees for creditors, or his trustee in bankruptcy. In some states there are statutes governing the question of verbal loans, at least, to some extent.

#### II. General principles.

"It is said to be a fundamental principle of our law of personal property that no man can be divested of it without his own consent; and consequently even an honest purchaser, under a defective title, cannot resist the claim of the true proprietor. The maxim that 'no one can transfer to another a better title than he has himself' obtains in the civil as well as the common law (Pothier, *Traite du Contract du Vente*, 1, n. 7; *Erk. In.* 418): and

hence it is now recognized everywhere in civilized Europe, for 'a sale ex vi termini imports nothing more than that a bona fide purchaser succeeds only to the rights of the vendor.' 2 Kent, Com. 324; *Saltus v. Everett* (1838) 20 Wend. (N. Y.) 275, 32 Am. Dec. 541. In England, an exception is acknowledged in favor of sales effected in market overt; but, as in this country we have not adopted their notion of market overt, every transfer of chattels is, with us, to be considered in reference to the general law I have stated. . . . In the words of Lord Loughborough: 'Mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery must take the hazard of the title of its author.' Bell, J., in *McMahon v. Sloan* (1849) 12 Pa. 229, 51 Am. Dec. 601. See also Kent, Ch. J., in *Wheelwright v. De Peyster* (1806) 1 Johns. (N. Y.) 471, 3 Am. Dec. 345.

A note to *Wilbraham v. Snow* (1671) 2 Wms. Saund. 47, 85 Eng. Reprint. 624, has this passage: "But it is said that if the bailee, or other person who has only a special property, sells and delivers the goods to another as his own, bona fide and without notice, the general owner cannot maintain this or any other action against the vendee, because by such a sale by a person who has a special property in, and possession in fact of, the goods, the property of the general owner is altered. Bro. Trespass, 216, 295." As to which Holmes, J., in *Robinson v. Bird* (1893) 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391, says: "The mere fact that the plaintiffs made a bailment to Mrs. Bryant, and that she mortgaged the goods to Stetson, who took without notice and for value, and directed the present sale, is not such a justification. The passage to the contrary in the note to *Wilbraham v. Snow* (Eng.) supra, cited in *Vincent v. Cornell* (1833) 13 Pick. (Mass.)

296, 23 Am. Dec. 683, is a misunderstanding of the Yearbooks, on a matter as to which their doctrine no longer is the law, as everyone knows, and as may be seen from the later additional note."

"A purchaser from a lessee or bailee for hire, in possession by virtue of an ordinary lease, cannot withhold the property from the lessor or true owner, although he purchased for value and without notice." *Guest Piano Co. v. Ricker* (1916) 274 Ill. 448, 113 N. E. 717.

"In the absence of conduct amounting to fraud or deceit, the owner of the property will not be precluded from asserting his title against the creditors of one having the custody and manual possession thereof." *Nisbet v. Federal Title & T. Co.* (1916) 144 C. C. A. 54, 229 Fed. 644, writ of certiorari denied in (1916) 241 U. S. 669, 60 L. ed. 1229, 36 Sup. Ct. Rep. 553.

In sustaining against the creditors of the bailee the ownership of one who lent farming implements to his brother to use on his farm, where they remained four years, the court said: "Large quantities of material are constantly being placed in the hands of artificers and manufacturers, for the purposes of being converted into goods, wares, and merchandise, and yet it is permitted to the owner to prove and hold his property, unless the transaction is tainted with fraud in fact. And it is believed that, so far as it relates to trade and commerce, the rule has always obtained that the character of the transaction may be shown. . . . No reason is perceived why a farmer may not hire or borrow stock and implements to carry on his business, or why the wealthy may not, of their abundance, leave their property to a poor neighbor or relative, to enable him to obtain a livelihood, without forfeiting the ownership. To so hold would cut off all the aid that may be kindly extended by the affluent to the industrious poor, who are willing, but unable, to contribute to the production, so essentially necessary to the support and

well-being of society." *Peters v. Smith* (1867) 42 Ill. 417.

The doctrine of two innocent persons requires more than the bare possession of property loaned. *William J. Lemp Brewing Co. v. Mantz* (1918) 120 Md. 176, 87 Atl. 814.

Where the owner of a horse lent it to his brother, a sewing machine agent, who used it for a time and then pledged it to a third party, the court, in sustaining the owner's right, said: "We are also referred to the effect upon the owner's rights of his clothing another with the indicia of ownership, and to the rule by which it is determined which of two innocent parties must suffer. If the law referred to applied to cases like this it would soon put an end to lending and all other forms of bailment." *Cox v. McGuire* (1887) 26 Ill. App. 319.

Where the owner delivered a horse to another person to be kept for him on certain terms, with a certain division of the emoluments, in holding that the owner might recover the horse of one who innocently purchased it from such possessor, the court said: "The maxim that 'he who trusts most shall lose most' is said to apply in favor of the purchaser. But does not he who parts with a limited, qualified property, or use of a specific thing, capable of identification and recaption, trust less than he who pays his money, in its kind undistinguishable, to the vendor, upon his affirmation or assurance that the thing sold is his own?" *Chism v. Woods* (1808) *Hardin* (Ky.) 531, 3 Am. Dec. 740.

But compare, in this connection, *Neale v. Sears* (1868) 31 Tex. 105, *infra*, V.

In *Larkin v. Parmelee* (1897) 69 Conn. 79, 36 Atl. 1009, in holding that the owner of property which she permitted her brother to use in his business did not intend to represent an actual ownership in the bailee, the court said: "The doctrine of estoppel in pais especially concerns conscience and equity. Where one of two innocent persons must suffer, it is frequently—perhaps generally—equitable that the loss should fall upon the one who has been the cause of



the injury, rather than upon the other, who is not only innocent, but without fault in the matter. And so, in applying the principle stated by Lord Denman in *Pickard v. Sears* (1837) 6 Ad. & El. 469, 112 Eng. Reprint, 179, 11 Eng. Rul. Cas. 78, we have held that 'whatever the motive may be, if one so acts or speaks that the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a wilful design, to induce the other to believe him, and to act upon that belief, if such proves to be the actual result.' And for the same reason, i. e., that the doctrine of estoppel in pais 'is so purely a doctrine of practical equity,' we have also held the imputing in each particular case, to a person whose course of action is unaccompanied by fraud or any culpability, knowledge of consequences that may follow his conduct, is not wholly subject to abstract formulas, but depends somewhat on the actual equities of the case. . . . As stated by Baldwin, J., in a recent case; 'An equitable estoppel does not so much shut out the truth as let in the truth, and the whole truth. Its office is not to support some strict rule of law, but to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties.' *Canfield v. Gregory* (1895) 66 Conn. 17, 33 Atl. 536."

### III. The rule.

#### a. In general.

The owner of a chattel is not estopped to assert title to it by permitting another to use it in his business.

**United States.**—*Nisbet v. Federal Title & T. Co.* (1916) 144 C. C. A. 54, 229 Fed. 644, writ of certiorari denied in (1916) 241 U. S. 669, 60 L. ed. 1229, 36 Sup. Ct. Rep. 553.

**Alabama.**—*McCall v. Powell* (1879) 64 Ala. 254; *Medlin v. Wilkerson* (1886) 81 Ala. 147, 1 So. 37; *Boozer v. Jones* (1910) 169 Ala. 481, 53 So. 1018.

**California.**—*Paden v. Goldbaum* (1894) 4 Cal. Unrep. 767, 37 Pac. 759.

**Connecticut.**—*Hart v. Carpenter* (1855) 24 Conn. 427; *Larkin v. Parmelee* (1897) 69 Conn. 79, 36 Atl. 1009; *Lester v. Ladrigan* (1916) 90 Conn. 570, L.R.A. 1916F, 939, 98 Atl. 124.

**Georgia.**—*Giannone v. Fleetwood & Co.* (1893) 98 Ga. 491, 21 S. E. 76.

**Illinois.**—*Peters v. Smith* (1867) 42 Ill. 417; *Guest Piano Co. v. Ricker* (1916) 274 Ill. 448, 113 N. E. 717 (case lost on another ground); *Cox v. McGuire* (1887) 26 Ill. App. 319; *Charles Moe Co. v. J. H. Logue Co.* (1903) 108 Ill. App. 128.

**Indian Territory.**—*Davis v. First Nat. Bank* (1905) 6 Ind. Terr. 124, 25 L.R.A. (N.S.) 760, 89 S. W. 1015.

**Kentucky.**—*Chism v. Woods* (1808) Hardin, 531, 3 Am. Dec. 740; *Anderson v. Heile* (1901) 23 Ky. L. Rep. 1115, 64 S. W. 849.

**Louisiana.**—*Reid v. Mayo* (1893) 45 La. Ann. 1091, 13 So. 799.

**Maine.**—*Staples v. Bradbury* (1831) 8 Me. 181, 23 Am. Dec. 494; *Sibley v. Brown* (1838) 15 Me. 185.

**Maryland.**—*William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814.

**Massachusetts.**—*Oliver Ditson Co. v. Bates* (1902) 181 Mass. 455, 57 L.R.A. 239, 92 Am. St. Rep. 424, 63 N. E. 908.

**Minnesota.**—*Wright v. Tanner* (1904) 92 Minn. 94, 99 N. W. 422; *Kiewel v. Tanner* (1908) 105 Minn. 50, 25 L.R.A. (N.S.) 772, 117 N. W. 231.

**Missouri.**—*Moore v. Simms* (1891) 47 Mo. App. 182; *Oyler v. Renfro* (1900) 86 Mo. App. 321.

**Montana.**—*Miles v. Edsall* (1887) 7 Mont. 185, 14 Pac. 701.

**Nebraska.**—*McClelland v. Scroggin* (1892) 35 Neb. 536, 53 N. W. 469.

**New Hampshire.**—*Bellows v. Denison* (1838) 9 N. H. 293; *Johnson v. Willey* (1865) 46 N. H. 75.

**New York.**—*M'Instry v. Tanner* (1812) 9 Johns. 135; *Smith v. Clews* (1889) 114 N. Y. 190, 4 L.R.A. 392, 11 Am. St. Rep. 627, 21 N. E. 160; *Roberts v. Dillon* (1869) 3 Daly, 50; *Hodge v. Ade* (1870) 2 Lans. 314.

**Pennsylvania.**—*McMahon v. Sloan* (1849) 12 Pa. 229, 51 Am. Dec. 601; *Agnew v. Johnson* (1854) 22 Pa. 471,

62 Am. Dec. 803; *Chamberlain v. Smith* (1863) 44 Pa. 431; *Heisley v. Economy Tool Mfg. Co.* (1907) 33 Pa. Super. Ct. 218; *Mack v. Holsopple* (1917) 67 Pa. Super. Ct. 291.

**South Carolina.**—*Adams v. Fellers* (1911) 88 S. C. 212, 35 L.R.A. (N.S.) 385, 70 S. E. 722.

**Utah.**—*Turnbow v. Beckstead* (1908) 25 Utah, 468, 71 Pac. 1062.

**Wisconsin.**—*Neubauer v. Gabriel* (1898) 86 Wis. 200, 56 N. W. 738.

It will be seen that the fact that the bailee puts his own name on the property with the knowledge of the bailor does not necessarily create an estoppel (*Nisbet v. Federal Title & T. Co.* (1916) 144 C. C. A. 54, 229 Fed. 644, writ of certiorari denied in (1916) 241 U. S. 669, 60 L. ed. 1229, 36 Sup. Ct. Rep. 553 *infra*, IV.; *Larkin v. Parmelee* (1897) 69 Conn. 79, 36 Atl. 1006, *infra*, IV.); even in the case of branding sheep (*Turnbow v. Beckstead* (Utah) *supra*). But see, as to cattle kept at a distance from the owner, *First Nat. Bank v. Kissare* (1908) 22 Okla. 545, 132 Am. St. Rep. 644, 98 Pac. 433, *infra*, V.

The rule has illustration in cases where the property is leased.

**United States.**—*Nisbet v. Federal Title & T. Co.* (Fed.) *supra*.

**Alabama.**—*Boozar v. Jones* (1910) 169 Ala. 481, 53 So. 1018.

**Connecticut.**—*Hart v. Carpenter* (1855) 24 Conn. 427; *Lester v. Lad-rigan* (1916) 90 Conn. 570, L.R.A. 1916F, 939, 98 Atl. 124.

**Illinois.**—*Guest Piano Co. v. Ricker* (1916) 274 Ill. 448, 113 N. E. 717 (case lost on another ground).

**Louisiana.**—*Reid v. Mayo* (1893) 45 La. 1091, 13 So. 799.

**Massachusetts.**—*Oliver Ditson Co. v. Bates* (1902) 181 Mass. 455, 57 L.R.A. 289, 92 Am. St. Rep. 424, 63 N. E. 908.

**Minnesota.**—*Kiewel v. Tanner* (1908) 105 Minn. 50, 25 L.R.A. (N.S.) 772, 117 N. W. 281.

**Missouri.**—*Moore v. Simms* (1891). 47 Mo. App. 182.

**Montana.**—*Miles v. Edsall* (1887) 7 Mont. 185, 14 Pac. 701.

**New Hampshire.**—*Johnson v. Willey* (1865) 46 N. H. 75.

**New York.**—*Roberts v. Dillon* (1869) 3 Daly, 50; *Hodge v. Adee* (1870) 2 Lans. 314.

**Pennsylvania.**—*Chamberlain v. Smith* (1868) 44 Pa. 431; *Heisley v. Economy Tool Mfg. Co.* (1907) 33 Pa. Super. Ct. 218.

**South Carolina.**—*Adams v. Fellers* (1911) 88 S. C. 212, 35 L.R.A. (N.S.) 385, 70 S. E. 722.

**Utah.**—*Turnbow v. Beckstead* (1903) 25 Utah, 468, 71 Pac. 1062.

**Wisconsin.**—*Neubauer v. Gabriel* (1898) 86 Wis. 200.

So, where the property is loaned.

**Alabama.**—*Medlin v. Wilkerson* (1886) 81 Ala. 147, 1 So. 37.

**Illinois.**—*Peters v. Smith* (1887) 42 Ill. 417; *Cox v. McGuire* (1887) 26 Ill. App. 319.

**Maryland.**—*William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814.

**Minnesota.**—*Wright v. Tanner*, 92 Minn. 94, 99 N. W. 422.

**Missouri.**—*Oyler v. Renfro* (1900) 86 Mo. App. 321.

**New York.**—*M'Instry v. Tanner* (1812) 9 Johns. 135.

**Pennsylvania.**—*McMahon v. Sloan* (1849) 12 Pa. 229, 51 Am. Dec. 601; *Mack v. Holsopple* (1917) 67 Pa. Super. Ct. 291.

So, where it is delivered under other contract of bailment. *McCall v. Powell* (1879) 64 Ala. 254; *Paden v. Goldbaum* (1894) 4 Cal. Unrep. 767, 37 Pac. 759; *Chism v. Woods* (1808) *Hardin* (Ky.) 581, 3 Am. Dec. 740; *Anderson v. Heile* (1901) 23 Ky. L. Rep. 1115, 64 S. W. 849; *Agnew v. Johnson* (1854) 22 Pa. 471, 62 Am. Dec. 308.

(That a lease has a privilege of purchase does not alter the rule. *Miles v. Edsall* (1887) 7 Mont. 185, 14 Pac. 701).

#### *b. Kinds of property.*

##### *1. Property for use on farms.*

Perhaps the rule has most frequent illustration in cases of property bailed for use on a farm.

**Alabama.**—*McCall v. Powell* (1879) 64 Ala. 254 (mules).

**California.**—*Paden v. Goldbaum*

(1894) 4 Cal. Unrep. 767, 37 Pac. 759 (stock).

Connecticut.—Hart v. Carpenter (1856) 24 Conn. 427 (cow).

Illinois.—Peters v. Smith (1867) 42 Ill. 417 (farming implements).

Maine.—Staples v. Bradbury (1832) 8 Me. 181, 23 Am. Dec. 494 (stock).

Minnesota.—Wright v. Tanner (1904) 92 Minn. 94, 99 N. W. 422 (horses).

Missouri.—Moore v. Simms (1891) 47 Mo. App. 182 (cows); Oyler v. Renfro (1900) 86 Mo. App. 321 (horses).

Nebraska.—McClelland v. Scroggin (1892) 35 Neb. 536, 53 N. W. 469 (stock, implements, and machinery); McGinley v. Brechtel (1908) 4 Neb. (Unof.) 552, 95 N. W. 82 (stock).

New Hampshire.—Johnson v. Willey (1865) 46 N. H. 75 (heifer).

Pennsylvania.—McMahon v. Sloan (1849) 12 Pa. 229, 51 Am. Dec. 601; Chamberlain v. Smith (1863) 44 Pa. 431 (oxen).

Wisconsin.—Morgan v. Pierron (1885) 64 Wis. 523, 25 N. W. 543 (sheep).

## 2. *Diamonds, etc.*

Some of the cases of diamonds and the like are beyond the strict scope of this note, but they present features of a peculiar character.

In *Charles Moe Co. v. J. H. Logue Co.* (1908) 108 Ill. App. 128, it was held that a bona fide pledgee of a diamond from one to whom it had been loaned to show to a customer, and who was to return it the same day, as another had the refusal of it, could not retain it as against the owner.

If a dealer is intrusted with diamonds to show to a customer, but is not authorized to sell, a purchaser in good faith, and without notice of the facts as to the ownership, can acquire no title as against the owner, since mere possession does not confer the power to sell. *Smith v. Clews* (1889) 114 N. Y. 190, 4 L.R.A. 392, 11 Am. St. Rep. 627, 21 N. E. 160.

The owner of a diamond, by knowingly intrusting it to a dealer in jewelry for the purpose of obtaining a match for it, or, failing in that, to get an offer for it, does not thereby so put it in the power of the bailee to act

as apparent owner as to estop the bailor from setting up title as against a subsequent purchaser without notice. *Levi v. Booth* (1882) 58 Md. 305, 42 Am. Rep. 332.

A bona fide purchaser of diamonds from one who obtained them from their owner, under the fraudulent representation that he had a customer for them, and would return them or their price in an hour, with the intention of appropriating them to his own use, acquires no title as against the bailor. *Baehr v. Clark* (1891) 83 Iowa, 813, 13 L.R.A. 717, 49 N. W. 840.

Where a person intrusts to another an article of diamond jewelry "upon the representation that it is to be exhibited to a third person with a view of selling it, and authorizes the sale to be made at a certain price, the person receiving the article to retain as his compensation any amount paid by the purchaser in excess of the price fixed by the owner, such person receiving does not thereby acquire the right to pawn the property for his own benefit, and the party to whom it may be delivered in pawn acquires no right thereby to hold it as against the owner." *Frantz v. Winehill* (1909) 124 La. 680, 50 So. 650; *Frantz v. Fink* (1909) 125 La. 1018, 28 L.R.A. (N.S.) 539, 52 So. 131.

## 3. *Various.*

The rule has been applied in case of a cash register (*Kiewel v. Tanner* (1908) 105 Minn. 50, 25 L.R.A. (N.S.) 772, 117 N. W. 231); a chronometer (*Roberts v. Dillon* (1869) 3 Daly (N. Y.) 50); stereotype plates (*Agnew v. Johnson* (1854) 22 Pa. 471, 62 Am. Dec. 303); a newspaper plant (*Reid v. Mayo* (1893) 45 La. 1091, 13 So. 799); tools (*McInstry v. Tanner* (1812) 9 Johns. (N. Y.) 135); a planing machine and lathe (*Heisley v. Economy Tool Mfg. Co.* (1907) 33 Pa. Super. Ct. 218); a moving picture machine (*Adams v. Fellers* (1911) 88 S. C. 212, 35 L.R.A. (N.S.) 385, 70 S. E. 722); a horse for use by a traveling man (*Cox v. McGuire* (1887) 26 Ill. App. 315); a race horse (*Anderson v. Heile* (1901) 23 Ky. L. Rep. 1115, 64 S. W. 849); mules for use in ped-

ding (*Medlin v. Wilkerson* (1886) 81 Ala. 147, 1 So. 37) and in hauling (*Boozer v. Jones* (1910) 169 Ala. 481, 53 So. 1018); sheep (*Turnbow v. Beckstead* (1908) 25 Utah, 468, 71 Pac. 1062; *Bellows v. Denison* (1888) 9 N. H. 293); wagons and harness (*William J. Lemp Brewing Co. v. Mantz* (1913) 120 Md. 176, 87 Atl. 814); an automobile (*Mack v. Holsopple* (1917) 67 Pa. Super. Ct. 291); a truck (*Lester v. Ladrigan* (1916) 90 Conn. 570, L.R.A.1916F, 939, 98 Atl. 124); furniture for use in a barber shop (*Giannone v. Fleetwood & Co.* (1898) 93 Ga. 491, 21 S. E. 76), or in a hotel (*Neubauer v. Gabriel* (1893) 86 Wis. 200, 56 N. W. 783); pianos (*Guest Piano Co. v. Ricker* (1916) 274 Ill. 448, 118 N. E. 717 (case lost on another ground); *Oliver Ditson Co. v. Bates* (1902) 181 Mass. 455, 57 L.R.A. 289, 92 Am. St. Rep. 424, 63 N. E. 908); and circus properties (*Nisbet v. Federal Title & T. Co.* (1916) 144 C. C. A. 54, 229 Fed. 644, writ of certiorari denied in (1916) 241 U. S. 669, 60 L. ed. 1229, 36 Sup. Ct. Rep. 553).

#### IV. Illustrations.

The owners of circus property who leased it to a circus corporation for use in their business retained their property as against creditors of the lessee. *Nisbet v. Federal Title & T. Co.* (1916; C. C. A. Colo.) 144 C. C. A. 54, 229 Fed. 644, writ of certiorari denied in (1916) 241 U. S. 669, 60 L. ed. 1229, 36 Sup. Ct. Rep. 553, where the court said: "It is true that that corporation exercised dominion over the property, and the same was appropriately labeled to indicate its connection with the circus exhibition. The uncontroverted proofs are that this was entirely in accord with the custom of the business in which the property was used. In such cases, the sale statute . . . has no application."

In *Larkin v. Parmelee* (1897) 69 Conn. 79, 36 Atl. 1009, upon the assumption that it is an essential element of estoppel that the owner must have put the property in the possession of another with an intention to represent an actual ownership in the possessor, and to induce others to act upon that

representation as true, it was held that evidence that the owner of a horse and wagon and harness allowed her brother to use the property in his meat-market business, and permitted it to continue in the latter's possession after seeing a sign upon the wagon, "George W. Larkin, Meats," did not establish conclusively the existence of such an intention, where it appeared that she had no interest in her brother's business, her conduct being in entire good faith, without any anticipation that the property would be liable to attachment for her brother's debts, or that her action would in any manner tend to deceive his creditors, or to give him any false credit.

An owner of horses, by allowing a trainer to have possession of them and to race them in his own name, under a certain contract, is not estopped from maintaining his ownership as against a creditor of the trainer, furnishing feed, but not asserting an agister's lien. *Anderson v. Heile* (1901) 23 Ky. L. Rep. 1115, 64 S. W. 849.

The use of stock by a husband under a contract with his wife by which he was to pasture the stock for the use of the cattle, and she was to have the increase, cannot of itself create an estoppel against the wife in favor of her husband's creditors. *Paden v. Goldbaum* (1894) 4 Cal. Unrep. 767, 37 Pac. 759.

In *McGinley v. Brechtel* (1908) 4 Neb. (Unof.) 552, 95 N. W. 32, where the owner of stock loaned it to his daughter for use on the farm of her husband, and the latter, after keeping it until he and his wife separated, sold the property, it was held that the owner was not estopped from recovering the same, there being nothing in his acts or conduct to mislead the purchaser, or cause him to believe the husband was the owner, and nothing to show that the owner knew that his son-in-law claimed to own the property.

In *Staples v. Bradbury* (1832) 8 Me. 181, 28 Am. Dec. 494, after holding that the fact that a father who has conveyed his farm to his son, reserving a life interest in it, places

cattle thereon in such a situation as ostensibly to be the property of the son, so that a vendee of the son may fairly presume the animals to be his, will not prevent the father, or his representatives, from asserting title thereto, the court says that "surely, because the owner of cattle or any other personal property leases it to his neighbor, who goes into possession, that neighbor has no right to dispose of it; we are not to allow property to be thus changed. The question is not, Did the cattle appear to be the property of . . . [the son] when he gave the bill of sale? but, Were they then his property?"

In *Turnbow v. Beckstead* (1903) 25 Utah, 468, in holding that the lessor of sheep may recover them of the lessee's mortgagee, the court did not attach much significance to the fact that the lessee had put his brand on them.

The owner of furniture does not, by letting the occupants of a barber shop use it, thereby hold it out as their property, or as a basis for giving them credit; nor does he thereby grant them any leave so to hold it out. *Giannone v. Fleetwood & Co.* (1893) 93 Ga. 491, 21 S. E. 76.

A father who leases furniture to his son to start him in the hotel business is not estopped from asserting title thereto as against the son's mortgagee, who had furnished him with meat and groceries for the hotel. *Neubauer v. Gabriel* (1893) 86 Wis. 200, 56 N. W. 733.

It is no defense to the demand of pianos by their owner that they were purchased in good faith by an innocent purchaser from a hotel company, which had leased them of the owner. *Guest Piano Co. v. Ricker* (1916) 274 Ill. 448, 113 N. E. 717, where, however, the owner lost its case on another ground.

That the lessee of a piano had a retail store and kept musical instruments for sale, and that this was known to the lessors, was held not to enlarge the authority of the lessee, and give him a right to sell the piano to a bona fide purchaser for value without notice, to whom he had formerly hired it. *Oliver Ditson Co. v.*

*Bates* (1902) 181 Mass. 455, 57 L.R.A. 289, 92 Am. St. Rep. 424, 63 N. E. 908.

The owner of a piano who lets it to the husband of a musical teacher may recover the value of it from an auctioneer to whom the lessee has sent it for sale, and who refuses to deliver it without the payment of expenses incurred. *Loeschman v. Machin* (1818) 2 Starkie (Eng.) 311, 20 Revised Rep. 687.

In holding that the owner of a cash register, safe, and pool table, who had leased them to a saloon keeper for use in his business, was not estopped to claim title as against an attachment creditor of the lessee, the court laid down the rule that, "in order that the real owner of personal property may be estopped from asserting his title against a person who has dealt with the one in possession on the faith of his apparent ownership, something more than mere possession and control is necessary to be shown. To work an estoppel in such a case, the possession of the third person must be of such a character, or he be so clothed with the indicia of title, as to deceive those dealing with him in the belief of his ownership." *Kiewel v. Tanner* (1908) 105 Minn. 50, 25 L.R.A. (N.S.) 772, 117 N. W. 231.

Lessors of a chronometer to a ship-owner may retain it when it has been delivered to them for repair, after the term of the lease, by one who had purchased it in good faith from a dealer. *Roberts v. Dillon* (1869) 3 Daly (N. Y.) 50.

A lessee of a newspaper plant, etc., who went into possession as editor and publisher, and so printed his name on the paper, cannot place himself in position to give title to the property by later changing the printed statement so as to read that he was editor and proprietor, the change being without the consent of the lessors. *Reid v. Mayo* (1893) 45 La. Ann. 1091, 13 So. 799.

One renting a moving picture machine to another for use in the state, whose laws do not require the contract to be recorded, does not, where he reclaims the property as

soon as he learns the facts, lose his title in favor of a bona fide purchaser in another state, to which the lessee removes the property without authority, although the laws of such state require the recording of such contracts to give them validity against bona fide purchasers. *Adams v. Fellers* (1911) 88 S. C. 212, 85 L.R.A. (N.S.) 385, 70 S. E. 722.

The owner of an automobile, who was the officer of a company which he permitted from time to time to use the car in its business, recovered in replevin against a vendee of such company in *Mack v. Holsopple* (1917) 67 Pa. Super. Ct. 291, where the court approved the refusal of the trial court to charge the jury that the plaintiff was estopped.

In *Cleveland v. Rand* (1916) 90 Vt. 223, 97 Atl. 989, it was held that a woman owning a farm and the personal property thereon was entitled to recover live stock levied on and sold under an execution against her husband, upon a judgment on a contract which did not relate to the management of the farm or the personal property. She had permitted her husband to treat the personal property as his own in dealing with third persons, so that, for example, he had made a mortgage on some of the personal property with her consent, and had purchased stock for which he gave his personal lien notes,—the mortgage and the notes being duly recorded,—and he had for several years inventoried the personal property for taxation as his own. It was held that the case was not altered by the facts that the husband's judgment creditor, before entering into his contract with the husband, inquired of the town clerk whether the husband was good for six or seven hundred dollars, and that the town clerk answered by letter, in substance, that he considered him good for that amount; that he owned a small place in the village, and the personal property on the farm where he resided. The clerk got this information from what then appeared in the town clerk's office. The court said: "The findings do not show that the town clerk, when he wrote the

letter to Wright, had any knowledge or information touching any of the facts found pertaining to the conduct of the plaintiff; nor do they show that, through the town clerk, Wright had any such knowledge or information before his contract with Cleveland was consummated. It follows that, so far as showing such facts against the plaintiff as constitute an estoppel is concerned, the defendant's case stands no better with the evidence of his information from the town clerk than it does without that evidence; the same essential elements of estoppel are lacking."

#### V. *Contra and border-line cases.*

The *Davis Case* (Ind.) and the *Neale Case* (Tex.) *infra*, probably go further against the general rule than any others.

In *Davis v. First Nat. Bank* (1905) 6 Ind. Terr. 124, 25 L.R.A. (N.S.) 760, 89 S. W. 1015, it was held that an intending tenant who, pending a negotiation for a lease, places a wagon which is to be the consideration for the lease in possession of the other party, and permits him to use it as his own for a year, is estopped to assert title against one who, without notice, has taken a mortgage on the property from the party in possession.

In *Neale v. Sears* (1868) 31 Tex. 105, one of two partners in a saloon business, who owned the billiard tables, withdrew, but permitted the continued use thereof to his former partner, who, in advertising the attractions of his place, included the tables. It was held that Sears, the owner of the tables, could not recover them from the bailee's mortgagee. The court said: "We do not attribute fraud to Sears; on the contrary, as far as we can judge from the record, his motives were influenced by kindness toward White, and the case might more properly come into the class where one of the two innocent persons must suffer; and it is a well-established rule that he who trusts most must suffer most. . . . Because Sears tacitly assented to the assumed ownership of the property by White, and thereby induced Neal to loan money to White upon the security fur-

nished by this property, he is legally and equitably precluded from asserting his ownership to the detriment of Neale, who appears an innocent purchaser." This case, of course, had something of the element of leaving property in the hands of the vendor.

There are, however, a few other cases which, while not in terms denying the rule, indicate a tendency against it.

It will be seen that it is held in the reported case (*W. P. FULLER & Co. v. ADAMS*, ante, 674) that a mother who permits her minor son to have possession of machinery belonging to her, for use in a business conducted by him, knowing that he holds himself out as the owner of the machinery, is estopped to assert title to it against one who gives him credit for goods furnished for use in the business without knowledge of the true ownership of the property. The court states that the theory of estoppel is amply supported by the evidence. It is to be regretted that the evidence is not reported. The facts, so far as reported, do not indicate that the holding of estoppel would be in accord with the great weight of opinion.

In a case where the testimony is not reported, the court reversed a judgment for a wife who claimed furniture in a hotel against an attaching creditor of her husband, and said: "Where a party by his course of dealing, or particular conduct, though not actually designed to entrap or defraud another, but which induces another to believe, as in this case, that the husband is the owner of the property upon which he obtains credit, she will be estopped from asserting the contrary when the creditor demands that the property shall answer for his debt.

. . . The husband obtained this credit for supplies which went into the hotel where this furniture was employed; and a careful reading of the testimony in this record has persuaded us that there are such strong circumstances of an equitable estoppel in favor of this defendant as should entitle him to the most explicit submission of that issue to the jury." *Cottrell v. Spiess* (1886) 28 Mo. App. 35.

In *Dunlap v. Gooding* (1885) 22 S. C. 548, it was held that where a mother let her son have a mare, and hold himself out as its owner, an innocent purchaser was so affected by the mother's conduct as to estop her from asserting title to the property.

There is an especially strong circumstance in *First Nat. Bank v. Kissare* (1908) 22 Okla. 545, 132 Am. St. Rep. 644, 98 Pac. 433, where the owner of cattle living in Arkansas branded them with his son-in-law's brand and shipped them to him in the Indian Territory, to be by him pastured for hire, and it was held that the owner could not recover the cattle from his son-in-law's mortgagee. The court said: "That Kissare by branding his cattle in Butler's brand and sending them from Conway, Arkansas, to Holdenville, Indian Territory, many miles from where they were known as his property, and by placing them in Butler's possession, thereby clothed Butler with the highest indicia of title thereto, there can be no doubt. It is a well-known fact that cattle bearing a brand are, by the business world, taken to be the property of the owner of the brand. By thus branding them, Kissare not only proclaimed to the world Butler's ownership in the cattle as effectually as he could have done by any other means, but just as effectually disclaimed ownership in them himself."

#### VI. Miscellaneous.

In *Albright v. Albright* (1913) 151 Wis. 610, 139 N. W. 413, it appeared that a couple conveyed their farm and the personal property thereon to their eldest son, in consideration of some money and an agreement to support them, and that, after the father's death, the son conveyed the farm to his mother and lived on it with her and his two brothers for many years, his mother being in charge and he at times absent. It was held, on the mother's death, that he was not estopped from claiming the personalty, it not being shown that the brothers who received real property from their mother and who claimed the personalty, she having once stated that she had given it to them, had changed

their position to their prejudice, relying on their mother's apparent ownership of the personalty.

That a druggist who owned a printing press and other materials allowed another to set up a printing shop in the rear of his store, in his own name, and to use such press and materials, will not estop the owner from holding the property as against a creditor who did not give credit to the printer on the faith of the supposed ownership. *Angell v. Hopkins* (1889) 79 Cal. 181, 21 Pac. 729.

So, allowing a press to be used by the owner's successors in business does not prevent the owner from as-

serting title as against a creditor who had not extended credit to the possessor because of the press. *Orcutt v. Gast* (1918) 231 Mass. 305, 120 N. E. 855.

In *Morgan v. Pierron* (1885) 64 Wis. 523, 25 N. W. 543, where a father stocked a farm, and put his son upon it to make a living, and some of the property was taken in an attachment against the son, it was held that the father could recover, it appearing that he was unaware of the debt of the son, and it not appearing that the creditor knew anything about the ownership of the property, or the circumstances of his debtor. B. B. B.

## RE ESTATE OF DANIEL C. CORBIN, Deceased.

STATE OF WASHINGTON, Appt.,

v.

AUSTIN CORBIN et al., Exrs., etc., of Daniel C. Corbin, Deceased, Respts.

*Washington Supreme Court (Dept. No. 1)—June 18, 1919.*

(— Wash. —, 181 Pac. 910.)

### Tax — computation — individual estate.

1. Under an inheritance tax law which imposes the tax upon the right to receive, the graduated rates of taxation should be determined by the amount going to the individual taxed, and not upon the whole estate, as composed of the aggregate of the separate devises and legacies.

[See note on this question beginning on page 688.]

### — inheritance — what affected by.

2. A tax upon the right to receive property under a will, rather than upon the property itself or the right to transmit it, is imposed by a statute providing that all property which

shall pass to any person shall be subject to a tax at certain rates, depending upon the degree of relationship of the recipient to the testator.

[See 26 R. C. L. 195.]

APPEAL by the State from a judgment of the Superior Court for Spokane County (Blake, J.) in favor of the executors in a proceeding to determine inheritance taxes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. R. Jackson and George G. Hannan for the state.

Messrs. Allen, Winston, & Allen, for respondents:

The tax is not one upon the right of devolution, but one on the privilege of succession by will, law, or gift, the word "inheritance" being used in its

broad sense. Were it otherwise, it would be unconstitutional, as not being within its title.

Re *Clark*, 37 Wash. 671, 80 Pac. 267; *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *Re Stixrud*, 58 Wash. 339, 33 L.R.A.(N.S.) 632, 109 Pac. 348, Ann. Cas. 1912A, 850; *Re White*, 42 Wash.



360, 84 Pac. 831; *Re Lotzgesell*, 62 Wash. 352, 113 Pac. 1105; *Ops. Atty. Gen.* 1915, 1916, p. 289.

The inheritance tax statutes being special and arbitrary in their nature, and it being within the power of the legislature to make its intent clear, they are strictly construed against the state. Their terms will not be extended by implication or construction, and all doubts will be resolved in favor of the taxpayer.

*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *State ex rel. Pettit v. Probate Ct.* 137 Minn. 238, L.R.A.1917F, 436, 163 N. W. 285; *English v. Crenshaw*, 120 Tenn. 531, 17 L.R.A.(N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165; *McDaniel v. Byrket*, 120 Ark. 295, 179 S. W. 491; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140; *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 114; *Lynch v. Union Trust Co.* 90 C. C. A. 147, 164 Fed. 161; *Bailey v. Henry*, 125 Tenn. 390, 143 S. W. 1124.

When construing statutes, that construction should, if possible, be given which will render the statute fair, and not absurd or oppressive.

*Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Dennis v. Moses*, 18 Wash. 537, 40 L.R.A. 802, 52 Pac. 333.

Where two constructions are possible, one rendering the law valid, the other rendering it unconstitutional, the first, though not the most obvious, should be adopted.

*Armour & Co. v. Western Constr. Co.* 36 Wash. 529, 78 Pac. 1106; *Townsend Gas & E. L. Co. v. Hill*, 24 Wash. 469, 64 Pac. 778.

The tax being on the privilege of inheriting, one who inherits the same sum of money as another can only be compelled to pay the same amount for the privilege of receiving such sum from the same class of deceased relatives, even though in the one case the estate was worth only \$10,000 in all, and in the other a million dollars.

*State v. Alston*, 94 Tenn. 674, 23 L.R.A. 178, 30 S. W. 750; *State ex rel. Slabaugh v. Vinsonhale*, 74 Neb. 675, 105 N. W. 472; *Re Timken*, 158 Cal. 51, 109 Pac. 608; *Posey v. Com.* 123 Va.

551, 96 S. E. 771; *Re McKennan*, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; *Morrow v. Durant*, 140 Iowa, 437, 23 L.R.A.(N.S.) 474, 118 N. W. 781, 17 Ann. Cas. 850; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Alderman v. Wells*, 85 S. C. 507, 27 L.R.A.(N.S.) 864, 67 S. E. 781, 21 Ann. Cas. 193; *Re Fox*, 154 Mich. 5, 117 N. W. 558.

*Tolman, J.*, delivered the opinion of the court:

*Daniel C. Corbin*, a resident of Spokane county, there died on June 29, 1918, leaving an estate which, after deducting debts and expenses properly allowable under the Inheritance Tax Law, amounted in value to \$743,425.52. Deceased by his will devised this estate to his widow, a son, and a daughter in unequal proportions. The executors and the tax commissioner were unable to agree upon the method of computing the inheritance tax and applying the graduated rates provided by § 9183, Rem. Code, as amended by the Laws of 1917, chap. 43, p. 196. The tax commissioner contended that all of the legatees and devisees were within the first class, as defined by the statute, and that, after deducting the exemption, the graduated rates should be applied to the estate passing to them as a whole; while the executors contended that the graduated rates should be applied to each bequest or legacy as a separate entity. By the first-mentioned method of computation the inheritance tax would, by reason of the graduated rates, amount to considerably more than by the second. The matter was submitted to the trial court upon an agreed statement of facts, and that court adopted the method of computing the tax contended for by the executors, and entered judgment accordingly, from which judgment the state has appealed.

The act which we are called upon to consider is entitled, "An Act Relating to the Taxation of Inheritances and Providing for the Disposition of the Same." In the first section (Rem. Code, § 9182), it is

provided that "all property within the jurisdiction of this state, and any interest therein, . . . which shall pass by will or by the statutes of inheritance . . . to any person in trust or otherwise, shall, for the use of the state, be subject to a tax as provided for in § 9183, . . . and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, . . . shall be respectively liable for all such taxes to be paid by them. . . . The inheritance tax shall be and remain a lien on such estate from the death of the decedent until paid."

In the second section as now amended, chapter 43, p. 196, Session Laws of 1917, it is provided:

"The inheritance tax shall be imposed on all estates subject to the operation of this act at the following rate:

"If passing to or for the use of a father, mother, husband, wife, lineal descendant, adopted child or lineal descendant of an adopted child, the tax shall be 1 per centum of any value not exceeding \$50,000; 2 per centum of any value in excess of \$50,000 and not exceeding \$100,000; 3 per centum of any value in excess of \$100,000 and not exceeding \$250,000; 5 per centum of any value in excess of \$250,000. . . ."

Following are other classifications based upon relationship or want of it, each taking a different rate.

Bearing upon the question to be here determined, we must inquire whether this act imposes a tax upon the right to receive property by inheritance as distinguished from a tax upon the property itself thus passing, or a tax upon the right to transmit property by will or under statutes of succession. A reading of the statute at once suggests that in assessing the tax the relationship or classification of each legatee or devisee must be considered in order to determine the rate of taxation; and the language of the act and its title, fairly construed, seem to point

toward the conclusion that the legislative intent was to impose a tax upon <sup>Tax—inheritance</sup> ~~the right to receive,~~ <sup>—what affected by.</sup> rather than a tax upon the property itself or upon the right to transmit it. This court has been called upon in a number of cases to consider this legislation, though in none of them was the question now in issue raised; yet some light may be shed upon the present subject by a study of what has been heretofore said.

In *State v. Clark*, 30 Wash. 439, 71 Pac. 20, the constitutionality of the law was attacked, and the opinion deals mainly with constitutional questions. Among other expressions which might be quoted, it is there said: "The rule of equality in taxation is invoked against this exemption. It may be observed that the rule invoked does not forbid a liberal classification for purposes of taxation. The classification made here is manifestly reasonable. There is no inequality among the members of the same class. This objection is discussed in many of the authorities heretofore cited. It is so completely met and disposed of in the case of *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, that it must be convincing here."

The writer of that opinion quoted from and repeatedly referred to the *Magoun Case*, and so clearly followed and adopted its reasoning as to make it binding upon us, practically to the same extent as though it were a decision by this court. It is said in the *Magoun Case*: "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance."

This court again considered the act in the case of *Re Clark*, 37 Wash. 671, 80 Pac. 267. It was there said: "We do not think that the claim of the state treasurer can be upheld. The inheritance tax is payable out of the legacies, and is chargeable to the individual legatees.

The court cannot compel one legatee to pay the inheritance tax due from another, and yet such is the effect of the order appealed from."

In *Re White*, 42 Wash. 360, 84 Pac. 831, there was involved the question of whether the title of the act was sufficiently broad to cover a tax on the right of succession by will as well as by operation of law, and it was there held that the act imposes a tax on the right of succession, whether the property passed by will, by operation of law, or by grant or gift, to take effect upon the death of the grantor or donor.

In *Re Stixrud*, 58 Wash. 339, 33 L.R.A.(N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850, it was squarely held that this act imposes a tax, not upon property, but upon the right or privilege of receiving it.

In *Re Lotzgesell*, 62 Wash. 352, 113 Pac. 1105, it was held that the inheritance tax was not a debt of the testator, but was properly chargeable to the legatees.

If, then, as we have already held, the tax is one upon the right to receive, to be paid, in the last analysis, by the legatee, and if one legatee cannot be held to pay the tax of another, does it not likewise follow that the amount of the tax to be

paid by any one legatee must be determined from the amount of the legacy received by him, and not either in whole or in part from the <sup>—computation</sup> ~~—individual~~ amount which may <sup>estate.</sup>

be received by others? We are convinced that a fair reading of the statute itself leads to that conclusion, and every expression of this court during the eighteen years that it has been the law lends support to that position. Not only so, but the reasoning of other courts in construing similar laws, while not wholly harmonious, abundantly supports our conclusions. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Re Macky*, 46 Colo. 79, 23 L.R.A.(N.S.) 1207, 102 Pac. 1075; *Re McKennan*, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611; *Re Fox*, 154 Mich. 5, 117 N. W. 558; *McGannon v. State*, 33 Okla. 145, 124 Pac. 1063, Ann. Cas. 1914B, 620.

We conclude, therefore, that the legislative intent was that each legacy should be considered as a separate entity and taxed as such at the statutory rate, and therefore the judgment appealed from was right and is affirmed.

Holcomb, Ch. J., and Mitchell, Main, and Mackintosh, JJ., concur.

## ANNOTATION.

### Whole estate or individual shares as basis of computation of inheritance tax.

- I. Introduction, 688.
- II. Rule as to exemptions:
  - a. In general, 689.
  - b. Rule that legacy or distributive share is determinative, 689.
  - c. Rule that amount of the entire estate is determinative, 691.
- III. Rule as to graduated rate, 695.

#### I. Introduction.

The ordinary form of inheritance tax statute declares that all property that shall, upon the death of the owner, pass to another, shall be subject to a tax, but excepts therefrom property or estate below a certain amount.

There is also a provision in some statutes for an increased rate as the property or estate increases in amount. The various statutes are set out below. The contemporary statute should always be consulted in any investigation of this subject. Under such statutes there arises the question annotated herein, as to whether the "property" or "estate" that is exempted or that measures the rate under the graduated taxing statutes is the property or estate of the decedent or the property or estate that passes to the separate beneficiaries.

*II. Rule as to exemptions.*

*a. In general.*

Although this matter as it relates to exemptions is governed to some extent by the form of statute, the differences in statutes do not account altogether for the difference in judicial opinion. There are two theories upon the question.

*b. Rule that legacy or distributive share is determinative.*

According to one theory the exemption is governed by the amount of the legacy or distributive share.

**United States.**—*Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, see statute set out *infra*.

**Colorado.**—*People v. Koenig* (1906) 37 Colo. 283, 85 Pac. 1129, 11 Ann. Cas. 140.

**Kentucky.**—*Booth v. Com.* (Rodman v. Com.) (1908) 130 Ky. 88, 33 L.R.A. (N.S.) 592, 113 S. W. 61.

**Maine.**—*State v. Hamlin* (1894) 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76.

**Minnesota.**—*State ex rel. Basting v. Probate Ct.* (1907) 101 Minn. 485, 112 N. W. 878.

**New York.**—*Re Cager* (1888) 111 N. Y. 343, 18 N. E. 866 (decided under chap. 483, Laws of 1885); *Re Howe* (1889) 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513 (decided under chap. 483, Laws of 1885); *McVean v. Sheldon* (1888) 48 Hun, 163 (decided under chap. 483, Laws of 1885); *Re Smith* (1886) 5 Dem. 90 (Statute of 1885); *Re Hopkins* (1887) 6 Dem. 1 (Statute of 1885); *Re McCready* (1887) 6 Dem. 292, 10 N. Y. S. R. 696 (Statute of 1885); *Re Sterling* (1894) 9 Misc. 224, 30 N. Y. Supp. 385 (Acts of 1885, 1887, and 1891, all substantially similar; see Act of 1885, set out *infra*); *Re Hunt* (1916) 96 Misc. 399, 160 N. Y. Supp. 383 (Statute of 1885); this rule was applied in *Re Peck* (1890) 2 Connolly, 201, 24 Abb. N. C. 365, 9 N. Y. Supp. 465; *Re Swift* (1890) 2 Connolly, 644, 16 N. Y. Supp. 193, but no question arose thereon; *contra*, *Re Miller* (1887) 5 Dem. 132 (Statute of 1885).

The statute involved in *People v.*  
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*Koenig* (Colo.) *supra*, provided that "all property . . . which shall pass by will or by the intestate laws of this state from any person . . . to any person or persons . . . shall be and is subject to a tax at the rate hereinafter specified . . . and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, etc., . . . in every such case the rate of tax shall be \$2 on every \$100 of the clear market value of such property received by each person . . . provided that the sum of \$10,000 of any such estate shall not be subject to any such duty or taxes and that only the amount in excess of \$10,000 shall be subject to the above duty or tax." The court argues that "the term 'such estate,' to which the exemption applies, presupposes that that estate or property has been described or mentioned in some previous part of the section or statute. The word 'property,' but not 'estate,' is earlier employed several times in the same section. Naturally 'such estate' in the proviso relates to the next antecedent similar expression. Observing this usual rule of construction, the term 'such estate' we think refers to 'such property received by each person,' because that is the first preceding similar term found in the same sentence and in the same grammatical connection. As the tax is laid upon the receipt of 'such property by each person,' naturally the exemption should, and we hold does, apply to the separate distributive shares and legacies, and not to the aggregate value of the property of the decedent. 'Property' and 'estate' are often used synonymously, and are so used in this section."

The statute involved in *Booth v. Com.* (Ky.) *supra*, provided that "all property which shall pass by will, or by the intestate laws of this state from any person, . . . to any person . . . shall be and is subject to a

tax of \$5 on every \$100 of the fair cash value of such property. . . . Provided that the first \$500 of every estate shall not be subject to such duty or tax." In holding that this last sentence referred to the estate passing to the legatee, the court says that "the tax is upon the individual, and can be imposed only when the particular interest in the decedent's estate passing to him exceeds \$500. The tax is not, therefore, imposed on the estate of the decedent, but upon the beneficiaries' right of succession to his property. Nor does the fact that the executor or administrator is required by the act to pay the tax make it a tax against the estate of the testator or decedent, for it also requires him to deduct it from the estate passing to the legatee or collateral heir."

The statute involved in *State v. Hamlin (Me.) supra*, provided that "all property within the jurisdiction of this state, and any interest therein, . . . which shall pass by will or by the intestate laws of this state . . . to any person . . . shall be liable to a tax of 2½ per cent of its value above the sum of \$500 . . . and all administrators, executors and trustees, and any such grantee . . . shall be liable for all such taxes." The court argues: "It is difficult to construe this language to mean other than that such taker, subject to the tax, shall be liable upon the amount received above \$500. A grantee is made liable to 'such taxes.' What taxes? Plainly, 2½ per cent upon the amount received in excess of \$500. This construction is greatly aided by the 2d section, which, in dealing with limited estates to the excepted classes (whether including all or part of decedent's estate) and remainder to the taxable class, provides for an appraisal of the value of the limited estate, and when that is ascertained, that value, 'together with the sum of \$500,' is to be deducted from the value of such property, and the remainder become subject to the tax or duty. This provision is plainly inconsistent with the claim that the \$500 exemption is to be taken once for all from the corpus of decedent's entire estate."

The statute under which *State ex rel. Basting v. Probate Ct.* (1907) 101 Minn. 485, 112 N. W. 878, was decided, is not set out in that opinion. A statute of this state which was involved in the earlier case of *State ex rel. Foot v. Bazille* (1905) 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056, provided: "Section 1. A tax shall be and is, hereby imposed upon all inheritances, devises, bequests, legacies and gifts of every kind, . . . the value of which exceeds \$10,000, and upon such excess only. Section 2. Such tax shall be computed upon the full and true value of such inheritance, devise, bequest, legacy, or gift, above such excess." This statute apparently is the same as that involved in *State ex rel. Basting v. Probate Ct.*

Section 1 of chapter 483, of the New York Laws of 1885, under which *Re Cager* (1888) 111 N. Y. 348, 18 N. E. 866, and *Re Howe* (1889) 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 518, and other of the New York cases set out above, were decided, provided that "after the passage of this act all property which shall pass by will," etc., to any person, etc., other than the father or certain other excepted persons, "shall be subject to a tax of \$5 on every \$100 of the clear market value of such property, provided that an estate which may be valued at a less sum than \$500 shall not be subject to such duty or tax." In holding that the exemption applied to each separate legacy, the court, in *Re Howe* (N. Y.) *supra*, states that "the tax is not imposed upon the estate of which she [the testatrix] was seised or possessed, but only upon so much of it as passes to certain persons,—not all persons, or any person; and, although the executor is required to pay the tax, he is to deduct it from the particular legacy, and cannot 'deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon.'"

The New York statute was changed by the Statute of 1892, under which the entire amount of the decedent's estate was made the determinative

amount (see *infra*, II. c). The New York act was again changed in 1910 (Laws of New York, § 243, chap. 706), and the words "estate" and "property," as used in the article, were defined to mean "the property or interest therein, passing or transferred to individual or corporate legatees, devisees, heirs, next of kin," etc., and "not the property or interest therein of the decedent, grantor, donor or vendor, passing or transferred." Under this act, the courts have, in accord with the clear language thereof, held the exemption to be governed by the amount passing to the beneficiaries. *Re Mason* (1910) 69 Misc. 280, 126 N. Y. Supp. 998; *Re Title Guarantee & T. Co.* (1913) 81 Misc. 106, 142 N. Y. Supp. 1070, affirmed in (1913) 159 App. Div. 803, 144 N. Y. Supp. 889, which is affirmed in (1914) 212 N. Y. 551, 106 N. E. 1043; *Re Eaton* (1913) 79 Misc. 69, 140 N. Y. Supp. 601.

Under a statute providing that an inheritance tax shall not be imposed upon any inheritance, legacy, or other donation to or in favor of any ascendant or descendant of the decedent below \$10,000 in amount of value, the question is seemingly settled in accord with the theory of the above decisions. It has been held, however, that if the legacy is over \$10,000 in value, it is taxable on its full amount under this statute. *Fallon's Succession* (1919) 144 La. 299, 80 So. 544.

*c. Rule that amount of the entire estate is determinative.*

Other courts hold the exemptions to be determined by the amount of the estate, and not the amount of the separate legacies.

**Iowa.**—*McGhee v. State* (1898) 105 Iowa, 9, 74 N. W. 695.

**Michigan.**—*Stellwagen v. Wayne Probate Judge* (1902) 130 Mich. 166, 89 N. W. 728.

**Montana.**—*State ex rel. Gilmore v. District Ct.* (1912) 45 Mont. 335, 122 Pac. 922, Ann. Cas. 1914A, 469.

**Ohio.**—*Re Inheritance Tax* (1897) 5 Ohio S. & C. P. Dec. 555.

**Pennsylvania.**—*Howell's Estate* (1892) 147 Pa. 164, 23 Atl. 403; *Com. v. Boyle* (1885) 2 Del. Co. Rep. 335; *Mixter's Estate* (1891) 10 Pa. Co. Ct.

409. But see *Com. v. Kerchner* (1889) 24 W. N. C. 260, and explanation thereof in *Howell's Estate*, *supra*.

**Utah.**—*Dixon v. Ricketts* (1903) 26 Utah, 215, 72 Pac. 947.

**Wisconsin.**—*Black v. State* (1902) 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522.

**England.**—*Atty.-Gen. v. Aberdare* [1892] 2 Q. B. 684, 61 L. J. Q. B. N. S. 615, 67 L. T. N. S. 588, 56 J. P. 806. See *Re Hamlin* (1919; N. Y.) post, 701.

By some statutes it is the amount of the estate passing or transferred to those not specifically exempted from the provisions of the act. *Re Hoffman* (1894) 143 N. Y. 327, 38 N. E. 311 (decided under Act of 1892); *Re Corbett* (1902) 171 N. Y. 516, 64 N. E. 209 (decided under Act of 1896, which was substantially the same as Act of 1892); *Re Costello* (1907) 189 N. Y. 288, 82 N. E. 139 (decided under statute similar to statute under which *Re Corbett* was decided); *Re Hall* (1895) 88 Hun, 68, 34 N. Y. Supp. 616, (decided under Act of 1892); *Taylor's Estate* (1893) 6 Misc. 277, 27 N. Y. Supp. 232; *Re Birdsall* (1897) 22 Misc. 180, 49 N. Y. Supp. 450, affirmed in (1899) 43 App. Div. 624, 60 N. Y. Supp. 1133; *Re De Graaf* (1898) 24 Misc. 147, 53 N. Y. Supp. 591; *Re Curtis* (1900) 31 Misc. 83, 64 N. Y. Supp. 574; *Re Flynn* (1893) 30 N. Y. Supp. 88 (Statute of 1892); *Re Hart* (1917) 98 Misc. 515, 162 N. Y. Supp. 716 (decided under Statute of 1892), reversed on other grounds in (1917) 179 App. Div. 39, 166 N. Y. Supp. 188, where the court expressed no opinion on the question herein annotated; *Re Goldberg* (1919) 187 App. Div. 692, 176 N. Y. Supp. 201 (Statute of 1892 and amendment of 1896). *Contra*, *Re Skillman* (1894) 10 Misc. 642, 32 N. Y. Supp. 780 (this decision by a surrogate refuses to follow *Re Hoffman* (1894) 143 N. Y. 327, 38 N. E. 311, *supra*).

See *Re Title Guarantee & T. Co.* (1913) 81 Misc. 106, 142 N. Y. Supp. 1070, *supra*.

A bishop or a religious corporation is specifically exempted from taxation under the New York statute, and it is

the theory of the decisions that if such a gift reduces the estate below the exemption amount, the estate is not taxable. *Re Corbett* (1902) 171 N. Y. 516, 64 N. E. 209 (obiter). Certain relatives of the decedent are also exempted unless the property passing to them is over \$10,000, while the general exemption amount is only \$500. In *Re Corbett* (N. Y.) *supra*, a tax was assessed upon the legacies to favored relatives although aggregating less than \$10,000, where this aggregate with the legacies passing to others made a total so passing in excess of \$10,000.

Where the entire estate is less than \$10,000, a legacy to a favored relative has been held not taxable; but if the estate, including such legacy, is over \$500, the shares of the other legatees are held taxable although the aggregate of the shares passing to them is less than \$500. *Re Costello* (1907) 189 N. Y. 288, 82 N. E. 139; *Re Garland* (1903) 88 App. Div. 380, 84 N. Y. Supp. 630; *Re McMurray* (1904) 96 App. Div. 128, 89 N. Y. Supp. 71; *Re Mock* (1906) 113 App. Div. 913, 100 N. Y. Supp. 1130, reversing (1906) 49 Misc. 283, 99 N. Y. Supp. 236; *Re Rosendahl* (1903) 40 Misc. 542, 82 N. Y. Supp. 992.

On the other hand, it has been held in this state that where property less than \$10,000, which is bequeathed to one of the favored relatives, reduces the amount of the estate below \$500, the estate is not taxable. *Re Bliss* (1896) 6 App. Div. 192, 39 N. Y. Supp. 875; *Re Conklin* (1903) 39 Misc. 771, 80 N. Y. Supp. 1124. The reasoning by which the court in *Re Bliss* (N. Y.) *supra*, arrived at its conclusion, is as follows: After citing the statutory definition of the words "estate" and "property," to the effect that such words shall be taken to mean the property or interest therein of the testator or intestate, etc., passing or transferred "to those not herein specifically exempted" from the provisions of the act, the court states: "It thus appears that under the statute, while the distributive shares passing to the nephew do not exceed in the aggregate the sum of \$500 [the general exemp-

tion amount], still those shares will be subject to taxation in case the whole property of the intestate passing to persons not by the act specifically exempted exceeds the sum of \$500. The only question presented is, therefore, whether the sister [one of the favored relatives] of the intestate is 'specifically exempted' by the statute. We think it clear that she is. The counsel for the appellant concedes that bishops and religious corporations are exempted from the provisions of the tax, and that if any part of the estate had passed to them under the distribution, such part would not be considered in determining whether the property exceeded \$500 or not. The exemption from taxation of devises or bequests to bishops and religious corporations is found in the same section as the exemption of the father, mother, or sister, in case the personal property is less than \$10,000 [the exemption amount to favored relatives]. We think the father, mother, or sister is as truly exempted as the bishop or religious corporation. There is this, and only this, difference between these two classes: The bishop or religious corporation is specifically exempted in all cases; the father, mother, or sister, etc., are exempted only in case the estate does not exceed \$10,000. But as to both these classes the exemption is specific. As the distributive share passing to the sister was less than \$10,000, it is not to be added to the distributive shares passing to the nephews, and ascertaining whether such last distributive shares are subject to taxation." The court in *Re Conklin* (N. Y.) *supra*, referring to the provision of the statute that the word "property" shall mean the property of the decedent "transferred to those not herein specifically exempted from the provisions of this article," states that the "sum of this law is, therefore, that, given an estate of less than \$10,000 value, it is taxable only when that part of it passing to persons not specifically exempted equals or exceeds \$500 in value. In the case at issue the amount passing to the sisters is specifically exempted, the estate being less than \$10,000, and the

amount passing to those not specifically exempted is less than \$500, and likewise not taxable." The reasoning of the courts which have come to the opposite conclusion is stated as follows in *Re Garland* (1903) 88 App. Div. 380, 4 N. Y. Supp. 630, *supra*: "A widow was not a person exempted from the operation of the law; a transfer to her was not taxable unless the total value of the personal property passing under the transfer was \$10,000 or more. The exemption referred to in the statute had reference to the persons to whom transfers are made, such as a bishop or a religious corporation, and not to the value of the property transferred to such person."

The statutes under which this theory, that the amount of the entire estate determines the exemption, has been adopted, have been of various forms. In *McGhee v. State* (1898) 105 Iowa, 9, 74 N. W. 695, there was held to be but one exemption under a statute declaring that "all property within the jurisdiction of the state . . . which shall pass by will or by the intestate laws . . . to any person in trust or otherwise . . . shall be subject to a tax of 5 per centum of its value above the sum of \$1,000, after the payment of all debts, for the use of the state." The court states that "the statutory phrase 'to any person' does not necessarily mean one person only, but will include more than one when that is required to give the statute the effect it was intended to have. The administrator, executor, or trustee charged with the duty of settling the estate is liable for the payment of the tax, excepting that in some cases he is required to collect the tax from the person who is to receive the property, and to do certain things provided by statute to procure a lien for the tax upon property subject to it. But the tax is only payable on account of the property of an estate in excess of \$1,000 which remains 'after the payment of all its debts.' To whose debts does this statute refer? . . . It is evident that the debts to be paid are those which are claims against the estate of decedent,

and we are of the opinion that both of the phrases 'above the sum of \$1,000' and 'after the payment of all debts' have direct relation to the estate of the decedent. The legislative intent as to this may be expressed thus: 'All property within the jurisdiction of this state which shall pass by will or the intestate laws of this or any other state, or by deed, grant, sale, or gift made . . . other than to or for the use of the persons specified, 'shall be subject to a tax of 5 per centum of its value above the sum of \$1,000 after the payment of all its debts, for the use of the state.' Other portions of the act tend to justify the interpretation we adopt, and we do not doubt that it expresses the legislative intent. It will, as nearly as is practicable, operate uniformly where the conditions are the same, and thus produce equality in results." The court then refers to the case of *Re Howe* (1889) 112 N. Y. 100, 2 L.R.A. 825, 19 N. E. 513, and states that "we must decline to follow that case so far as it can be regarded as applicable to the statute under consideration."

The statute involved in *Stellwagen v. Wayne Probate Judge* (1902) 130 Mich. 166, 89 N. W. 728, provided that "when the property or any beneficial interest therein passes by any such transfer to [certain specified persons] . . . such transfer of property shall not be taxable under this act unless it is personal property of the value of \$5,000 or more, in which case it shall be taxable under this act at the rate of 1 per centum, upon the clear market value of all such property in excess of \$5,000." This statute is held by the court to be a substantial copy of a pre-existing statute of the state of New York, which was construed in *Re Hoffman* (1894) 143 N. Y. 327, 38 N. E. 311, and there held to have been enacted for the express purpose of making plain an intent that the exemption should be taken from the estate of the decedent as a whole, and not from each interest transferred. The statute having been so construed, that construction was followed. There is, however, a strong dissenting opin-



ion by Grant, J., in which the opposite view is taken.

The statute involved in *State ex rel. Gilmore v. District Ct.* (1912) 45 Mont. 385, 122 Pac. 922, Ann. Cas. 1914A, 469, provided that "all property which shall pass by will or by the intestate laws of this state from any person . . . to any person or persons . . . shall be and is subject to a tax of \$5 on every \$100 of the market value of such property. . . . Provided that an estate which may be valued at a less sum than \$7,500 shall not be subject to any such tax or duty."

The statute involved in *Re Inheritance Tax* (1897) 5 Ohio S. & C. P. Dec. 555, provided that "all property which shall pass . . . shall be liable to a tax of 5 per centum on its value above \$2,000."

The statute involved in *Howell's Estate* (1892) 147 Pa. 164, 23 Atl. 403, provided that "all estate, real, personal, and mixed, of every kind whatsoever . . . passing from any person . . . to any person or persons," shall be liable to a tax of \$5 "on every hundred dollars of the clear value of such estate or estates." It was then provided that "no estate which may be valued at a less sum than \$250 shall be subject to a duty or tax."

The Pennsylvania statute involved in *Com. v. Boyle* (1885) 2 Del. Co. Rep. (Pa.) 385, provided that "all estates, real, personal, and mixed, of every kind whatsoever passing from any person . . . to any person . . . shall be, and they are made subject to a tax or duty of . . . on every hundred dollars of the clear value of such estate or estates, etc. Provided that no estate that may be valued at a less sum than \$250 shall be subject to duty or tax."

The statute involved in *Dixon v. Ricketts* (1908) 26 Utah, 215, 72 Pac. 947, provided that "all property, within the jurisdiction of this state, and any interest therein . . . which shall pass by will or by the statute of inheritance . . . to any person, in trust or otherwise, shall be subject to a tax of 5 per centum of its value

above the sum of \$10,000, after the payment of all debts."

The statute under which *Atty. Gen. v. Aberdare* [1892] 2 Q. B. (Eng.) 684, 61 L. J. Q. B. N. S. 615, 67 L. T. N. S. 588, 56 J. P. 806, was decided, made estate duly payable "where the value of any succession exceeds £10,000."

As shown above, the earlier New York cases adhere to the rule that the exemption under such statutes as are under discussion in this note related to the share taken by the legatees, and not to the amount of the estate. In 1892, there was a revision of the New York law on the subject of inheritance taxation, and a section inserted, to the effect that "the words 'estate' and 'property,' as used in this act, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those not specifically exempted from the provisions of this act, and not as the property or interest therein, passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees. . . . The word 'transfer,' as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift in the manner herein prescribed." Under this statute it is held in *Re Hoffman* (1894) 143 N. Y. 327, 38 N. E. 311, that the exemption must be determined by the entire estate of the deceased. The court states that "it will be observed that the idea of the lawmaker is explained by declaring not only what the words 'estate' and 'property,' as used in the act, shall mean, but also what they shall not mean; and the negation is a denial in terms of the precise construction which this court had previously adopted in determining what was meant by the word 'estate' when used ambiguously and without qualifying words, as it was used in connection with limitations of value. The Wisconsin act is stated in *Black v. State* (1902) 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522, to be, in all essential respects, a

literal copy of the New York law, and in the Wisconsin act the words "estate" and "property" are defined as they are in the New York law, to mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, and not the property or interest passing to individual legatees, devisees, heirs, next of kin, donees, or vendees, and an interpretation is given to this act similar to that given to the New York statute.

The New York law was again changed in 1910 (see *supra*, II. b.).

Only one exemption was allowed in *People v. Freese* (1915) 267 Ill. 164, 107 N. E. 857, but the report of that case is not clear as to what contentions were made.

### III. Rule as to graduated rate.

The only cases that have decided the question as it relates to the graduated rate hold that such rate is measured separately by the amount of each legacy, and not by the sum of the whole estate. *Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *RE CORBIN* (reported herewith) ante, 685. The South Dakota statute was so construed in *Re McKennan* (1910) 26 S. D. 369, 33 L.R.A. (N.S.) 606, 126 N. W. 611, but it seems no question was raised as to this construction. On the contrary, the amount of the estate was made the basis of the computation of the tax in *Posey v. Com.* (1918) 123 Va. 551, 96 S. E. 771, but no question was raised in this regard. The statute under consideration was as follows: "Where any estate in the commonwealth of any decedent shall pass under a will or under the laws regulating descents and distributions to any person or to or for the use of any person, the estate so passing shall be subject to a tax at the rate of 5 per centum on every hundred dollars value thereof." The statute then provided for a different rate for certain specified classes, and then followed the provisions as to the progressive feature as follows: "When the amount of the market value of such property or interest exceeds \$15,000, the rate of the tax upon such excess shall be as follows: (1) Upon all in excess of

\$15,000 up to \$50,000, at the primary rate; (2) upon all in excess of \$50,000 and up to \$250,000, two times the primary rate; (3) upon all in excess of \$250,000 and up to \$1,000,000, three times the primary rate; (4) upon all in excess of \$1,000,000, four times the primary rate."

It is apparent that there are some considerations which demand that the amounts passing to the various beneficiaries shall be determinative of the graduated rate which are not present when a determination of the basis for computing exemptions is involved. Whether, however, in a jurisdiction which determines the exemptions by the amount of the estate, the amount of the estate will be made the basis for computing a graduated rate, cannot be foretold. Allowance must, of course, be made for differences in the statutory provisions relating to the two matters.

The statute involved in *Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, provided: "That any person or persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value passing . . . from any person . . . either by will or by the intestate laws of any state or territory, or any personal property or interest therein transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons . . . in trust or otherwise, shall be and hereby are made subject to a duty or tax to be paid to the United States as follows, that is to say: Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be . . . where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one half," etc.

The court, after construing the statute as taxing only the legacies, continues: "Granting, however, there is doubt as to the construction in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased,

we should be compelled to solve the doubt against the interpretation relied on. . . . We are, therefore, bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." W. A. E.

CHARLES T. PLUNKETT et al., Exrs., etc., of William B. Plunkett,  
Deceased,  
v.

OLD COLONY TRUST COMPANY et al.

*Massachusetts Supreme Judicial Court — September 10, 1910.*

(233 Mass. 471, 124 N. E. 265.)

**Tax — where falls.**

1. The Federal estate tax rests upon the residue of the estate, and is not apportioned between the legatees, in the absence of any provision in the will requiring such apportionment.

[See note on this question beginning on page 708.]

**Statute — interpretation — consideration of heading.**

2. The heading or title of a statute may properly be considered in interpreting the statute.

[See 25 R. C. L. 1031.]

**— examination of records.**

3. In construing doubtful language in a statute records of legislative proceedings incident to the passage of the statute may be examined, but not debates of individual members as a general thing.

[See 25 R. C. L. 1037-1040.]

**Tax — estate — what is.**

4. An estate as distinguished from a legacy tax is imposed upon the interest which ceased by reason of the death, not upon the interest to which some person succeeds.

**— estate — Federal — what affects.**

5. The estate tax imposed by act of Congress is upon the entire estate and not upon the particular devise, bequest, or distributive share of the individual beneficiary.

RESERVATION by the Supreme Judicial Court for Suffolk County (Crosby, J.) for the determination by the full court of a suit by plaintiffs as executors of the estate of William B. Plunkett, deceased, for instructions regarding the payment of the Federal estate tax. *Decree entered instructing payment out of the residue of the estate.*

The facts are stated in the opinion of the court.

Mr. Charles N. Stoddard, in propria persona:

The Federal estate tax is an excise on the privilege of transmitting property by will or under the intestate laws of the state of the domicil of the deceased.

Knowlton v. Moore, 178 U. S. 41, 47,

44 L. ed. 969, 971, 20 Sup. Ct. Rep. 747; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512.

The Federal estate tax, being there-

fore an excise, must meet two requirements of the Federal Constitution in order to be valid.

*Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; *Knowlton v. Moore*, 178 U. S. 41, 47, 44 L. ed. 969, 971, 20 Sup. Ct. Rep. 747; *Fuller v. Gale*, 78 N. H. 544, 103 Atl. 308; *Re Douglass*, 104 Misc. 359, 171 N. Y. Supp. 956; *Re Ferris*, decided by Surrogate Cohalan, N. Y. L. J. Dec. 26, 1918; *Re Tyler*, 89 N. J. Eq. 170, 104 Atl. 298.

The Federal estate tax is to be paid pro rata by all who share in the estate.

*Re Douglass*, 104 Misc. 359, 171 N. Y. Supp. 956.

The Federal estate tax is not an item of expense of administration.

*Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078; *Re Penfold*, 216 N. Y. 171, 110 N. E. 497; *Re Gihon*, 169 N. Y. 443, 62 N. E. 561; *Re Bierstadt*, 178 App. Div. 836, 166 N. Y. Supp. 168; *Re Hamlin*, 185 App. Div. 153, 172 N. Y. Supp. 787; *Shippen v. Burd*, 42 Pa. 461.

The Federal estate tax, as well as other inheritance taxes, is not a debt or claim against the decedent.

*Bradford v. Storey*, 189 Mass. 104, 75 N. E. 256; *United States v. Fitta*, 197 Fed. 1007; *United States v. Priest*, 210 Fed. 332.

The levying of a tax based on the total amount of the estate is constitutional.

*Minet v. Winthrop*, 162 Mass. 118, 26 L.R.A. 259, 38 N. E. 512; *Knowlton v. Moore*, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19.

It cannot be said that the will shows an intention on the part of the testator for the payment of the tax in any way other than what had been customary at the time his will was drawn, and that, under the Massachusetts law, was for each beneficiary to pay the tax on his particular legacy.

1 *Cooley*, Taxn. 8d ed. p. 356; *Re Dows*, 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Re Penfold*, 216 N. Y. 171, 110 N. E. 499; *Goddard v. Goddard*, 9 R. I. 293.

*Messrs. Pillsbury & Dana*, for defendants:

When the 1916 Act was passed, the distinction between legacy and succe-

sion taxes and an estate tax was clearly established in the United States.

*Knowlton v. Moore*, 178 U. S. 41, 48, 44 L. ed. 969, 972, 20 Sup. Ct. Rep. 747.

The Federal tax of 1916 is an estate tax.

*Re Hamlin*, 226 N. Y. 407, post, 701, 124 N. E. 4; *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 166 N. W. 125; *Corbin v. Townsend*, 92 Conn. 501, 103 Atl. 647; *Re Roebling*, 89 N. J. E. 163, 104 Atl. 295; *Re Bourne* [1893] 1 Ch. 188, 62 L. J. Ch. N. S. 69, 3 Reports, 52, 67 L. T. N. S. 586, 41 Week. Rep. 70; *Re Boxer* [1910] 2 Ch. 69, 79 L. J. Ch. N. S. 492, 108 L. T. N. S. 126; *Robertson v. Broadbent*, L. R. 8 App. Cas. 812, 53 L. J. Ch. N. S. 266, 50 L. T. N. S. 243, 32 Week. Rep. 205.

The tax cannot be apportioned unless so directed by the will of the decedent.

*Re Hamlin*, 226 N. Y. Ct. App. 407, post, 701, 124 N. E. 4.

There is no intimation by the testator that he intended the tax to be borne pro rata by the several legatees and devisees.

*Re Boxer* [1910] 2 Ch. 69, 79 L. J. Ch. N. S. 492, 108 L. T. N. S. 126.

*Rugg*, Ch. J., delivered the opinion of the court:

This case is reserved upon the pleadings for the determination of this court. The material facts are that William B. Plunkett, late of Adams, in the county of Berkshire, died testate on the 25th of October, 1917, leaving as his heirs at law two sons, each of whom had children, and one of whom has since deceased. His will was executed on the 15th of September, 1909, the first codicil on the 28d of October, 1911, and the second codicil on the 19th of July, 1917. None of these testamentary instruments contain any provision respecting the payment of succession or inheritance taxes under either state or Federal laws. The state legacy and succession tax had been enacted before the execution of the will, and remained in force as amended at the time of the execution of both codicils. Stat. 1909, chap. 490, part 4. The Federal "estate tax" was enacted shortly before the execution of the last codicil. The estate of the testator was of

such size that the Federal tax assessed upon it was \$72,476.15. The provision for one son under the will and codicils was a gift outright of property valued at \$14,275, and a gift of property valued at \$382,616.75 to a trustee upon a spendthrift trust, to pay the income to that son during his life, with other life estates at his death and gifts over of the remainder. A legacy amounting to \$126,760 was given to a trustee to hold until the testator's grandchildren should "arrive at the age of twenty-five years, respectively," when it was to be divided equally among them. The residue of the estate, valued at \$381,109.72, was bequeathed to the testator's other son. This petition by the executors is brought to determine whether this Federal tax, which has been paid, should be charged entirely against the residue of the estate, or apportioned pro rata among all the devisees and legatees. That is the single question presented. An important factor in the answer of this question is the meaning of the Federal statute on the point whether the tax is imposed with reference to the entire net estate or with reference to the particular devises, bequests, or distributive shares.

The tax was established by the Act of Congress of September 8, 1916 (39 Stat. at L. 756, chap. 463, Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312), entitled "An Act to Increase the Revenue and for Other Purposes," as amended by Acts of March 3, 1917, chap. 159, 39 Stat. at L. 1000, and Oct. 3, 1917, chap. 68, 40 Stat. at L. 300, Comp. Stat. § 6336aa, Fed. Stat. Anno. Supp. 1918, p. 336. The relevant sections of the successive acts are grouped respectively under "Title II. Estate Tax," "Title III. Estate Tax," and "Title IX. War Estate Tax." The tax thus entitled is "imposed upon the transfer of the net estate of every decedent dying after the passage of this act." Section 201 (Comp. Stat. § 6336**½**b). Subsequent sections contain directions for the ascertainment of the net

value of estates of deceased persons. Briefly and compendiously stated the net value comprehends all estate left by a decedent within the purview of the act, after deducting debts, losses, and expenses of administration and an exemption of \$50,000. Sections 202, 203 (§§ 6336**½**c, 6336**½**d). The tax is in general terms, and is a percentage upon the amount of the net estate. § 201. It is due one year after the death of the decedent. § 204 (§ 6336**½**e). It must be paid by the executor or administrator, and no direction is found in the act for apportionment among legatees or devisees. § 207 (§ 6336**½**h). The intent is expressed by § 208 (§ 6336**½**i) that, unless otherwise directed by will, the tax shall be paid out of the estate before distribution. The tax, if not sooner paid, is made a lien upon the gross estate for a period of ten years, except that it is divested as to such part as is used to defray charges against the estate, and expenses of administration when allowed by the court of appropriate jurisdiction. § 209 (§ 6336**½**j).

The contention that the tax is on the particular devises, bequests, or distributive shares is met at the outset by the heading or title given to the tax by the statute itself, which describes the kind of pecuniary imposition levied as an "estate tax." This is properly to be considered in interpreting a statute of the United States. *Knowlton v. Moore*, 178 U. S. 41, 65, 44 L. ed. 969, 978, 20 Sup. Ct. Rep. 747. The sections of the act prefaced by this heading, or title, refer exclusively to the value of the "net estate" as the basis for the ascertainment of the tax. There is no mention whatever in this connection of legacies, devises, or distributive shares. They are wholly omitted. The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property, and looks only to the net estate itself as defined.

The words of the act of Congress

Statute—  
interpretation—  
consideration of  
heading.

imposing the tax point strongly toward the interpretation that the tax is on the estate, and not on the particular devises, legacies, or distributive shares. The words "net estate" are used uniformly in the operative parts of the act to the exclusion of phrases of other significance.

Two considerations fortify this interpretation:

(1) The War Revenue Act of 1898, being an act approved on June 13 of that year (80 Stat. at L. 464), chap. 448, §§ 29, 30, plainly and by its express words imposed a tax on particular legacies and distributive shares arising from the property left by a decedent, and not on the whole personal estate so left. *Knowlton v. Moore*, 178 U. S. 41, 43, 65, 67, 71, 44 L. ed. 969, 970, 978, 980, 981, 20 Sup. Ct. Rep. 747. The contrast between the terms of that earlier act and those of the present throws a clear light on the meaning of the act here in question. If Congress had intended to levy a tax on legacies and distributive shares, it naturally would have adopted the words of its Act of 1898, which had been already used, and whose significance had been established by the highest judicial authority. Employment of other language of quite different import indicates a change of purpose.

(2) It is permissible to examine records of legislative proceedings incident to the passage of a statute to illumine its doubtful language, although its plain meaning cannot be thereby affected; but for this purpose resort commonly cannot be had to the debates of individual members. *Old South Asso. v. Boston*, 212 Mass. 299, 305, 99 N. E. 235, and cases there collected; *United States v. St. Paul, M. & M. R. Co.* 247 U. S. 310, 318, 62 L. ed. 1130, 1134, 38 Sup. Ct. Rep. 525. The design of the framers of the Act of 1916 to establish an estate tax as distinguished from a legacy or distribution tax is manifested by the report of the commit-

tee on ways and means of the national House of Representatives, to which the Revenue Bill had been referred. In that report made on July 5, 1916 (Report No. 922, 64th Congress, 1st Session, page 5, under the heading "Estate Tax") are found these words: "Thirty states have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other states have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares."

An estate tax, as distinguished from a legacy or succession tax, is well recognized. It was said in *Minot v. Winthrop*, 162 Mass. 113, 124, 26 L.R.A. 259, 38 N. E. 516: "The right or privilege taxed can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or by descent, to certain persons, or as the right or privilege of these persons to receive the property."

The difference between the nature of the two kinds of taxes was pointed out and defined by a quotation from *Hanson's Death Duties*, by the present Chief Justice of the United States in *Knowlton v. Moore*, 178 U. S. 41, at page 49, 44 L. ed. 969, 973, 20 Sup. Ct. Rep. 751, in these words: "What it [that is, an estate tax] taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

An estate tax is imposed upon the net estate transferred by death, and not upon the succession result-

—examination  
of records.

Tax—estate—  
what is.

ing from death. *Re Roebling*, 89 N. J. Eq. 163, 104 Atl. 295.

The conclusion seems to us to follow irresistibly that the tax here in question is an estate and not a legacy or succession tax. This is in accord with the decision in *Re Hamlin*, 226 N. Y. 407, post, 701, 124 N. E. 4. Although the precise point was not presented for decision in *Corbin v. Townsend*, 92 Conn. 501, 505, 103 Atl. 647; *People v. Pasfield*, 284 Ill. 450, 453, 120 N. E. 286; *State ex rel. Smith v. Probate Ct.* 139 Minn. 210, 211, 166 N. W. 125, or *Knight's Estate*, 261 Pa. 537, 539, 104 Atl. 765, in each of those decisions there is a dictum to the effect that this is an estate tax. See, however, *Fuller v. Gale*, 78 N. H. 544, 103 Atl. 308.

The provisions of § 208 of the act, respecting "a just and equitable contribution" to one from whose share in the estate the tax has been collected "by the persons whose interest in the estate . . . would have been reduced" if the tax had been paid before distribution, or "whose interest is subject to equal or prior liability for the payment of taxes," affords no warrant for applying what may be thought, in a special instance, to be general equitable considerations in opposition to fixed principles as to the settlement of estates. That section is inapplicable to the facts here disclosed.

The further step follows inevitably from what has been said, that the law makes no provision for apportionment of the tax among legatees, but leaves it simply to be paid out of the estate before distribution is made.

The will and codicils of the testator contain no direction respecting the payment of this tax. There is nothing written in any of these testamentary instruments which rightly can be construed as expressing the purpose of the testator on

the subject. Although the last codicil was executed after the enactment of the Federal taxing law, no reference is found therein touching the payment of the taxes imposed. So far as any inference may be drawn, it would seem to be that taxes were intended to fall where the law placed them. It is not permissible for us to speculate as to the existence of an intent to make a different provision from that provided by law, in the absence of any expression of testamentary purpose on the subject. It is the general rule that, failing any testamentary provision to the contrary, debts, charges, and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied. *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137. The tax is a pecuniary burden or imposition laid upon the estate. *Boston v. Turner*, 201 Mass. 190, 193, 87 N. E. 634. In its nature, it is superior to the claims of the residuary legatee. Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. *Re Hamlin*, 226 N. Y. 407, 418, 419, post, 701, 124 N. E. 4. Decree is to be entered instructing the executors accordingly.

So ordered.

#### NOTE.

The question decided in the reported case (*PLUNKETT v. OLD COLONY TRUST CO.* ante, 696), as to whether the Federal estate tax is to be charged upon the specific legacies or upon the residuary estate, is discussed in the annotation to *RE HAMLIN*, post, 708.

RE ACCOUNTING OF GRACE E. HAMLIN et al., Exrs., etc., of Mary E. Daniels, Deceased, Appts.

CHAUNCEY J. HAMLIN, Jr., et al., Appts.

MARY K. WELLINGTON, Exrx., etc., of Grace A. Wellington, Deceased, et al., Respts.

*New York Court of Appeals — May 30, 1910.*

(226 N. Y. 407, 124 N. E. 4.)

**Tax — estate — Federal — how imposed.**

1. The Act of Congress of 1916, imposing a tax equal to certain percentages in value of the net estate upon the transfer of the net estate of each decedent, imposes the tax upon the entire estate rather than upon the legatees or distributees.

[See note on this question beginning on page 708.]

**Statute — construction — what considered.**

2. In ascertaining the intention of the legislature in the enactment of a statute, such historical and other facts as are reasonably within the scope of judicial cognizance may be considered, including reports of committees in charge of the bill and changes made in its frame in the course of passage.

[See 25 R. C. L. 1035, 1038.]

**Tax — estate — conversion into legacy tax.**

3. The imposition of a tax upon an

estate is not impliedly converted into one upon the legatees or distributees, by provisions for contributions to those entitled to reimbursement, if the tax is collected out of the portion of the estate passing to them and making the trustee or transferee personally liable for the tax if the tax is not paid when due.

— where burden falls.

4. The tax falls upon the residuary, and not upon the particular, legatees in case the tax is imposed upon the net value of the estate.

**APPEAL** by the executors and residuary legatees of the estate of Mary E. Daniels, deceased, from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing in part a decree of the Surrogate's Court for Erie County (Hart, S.), apportioning among legatees of the testatrix, payment of the Federal estate tax, in a proceeding for settlement of the accounts of the executors of her estate. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. O'Brian, Donovan, Goodyear, & Hellings, for executors, appellants:

The language of the statute imports an apportionment of the tax among legatees. Such pro rata apportionment is equitable.

Re Sherman, 179 App. Div. 497, 166 N. Y. Supp. 19; Re Bierstadt, 178 App. Div. 836, 166 N. Y. Supp. 168.

The pro rata apportionment is in line with general custom and brings the estate tax within the constitutional power of Congress.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Gleason & O. Inheritance Taxn. 484-497; Re

Becker, 26 Misc. 633, 57 N. Y. Supp. 940; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Re Brady, N. Y. L. J. Jan. 11, 1919; Re Douglass, 104 Misc. 359, 171 N. Y. Supp. 956; Knight's Estate, 261 Pa. 537, 104 Atl. 765.

Mr. Richard L. Ball, for infant appellants:

Inequality and injustice will be produced if the construction of the statute made by the appellate division is affirmed.

Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747.

Mr. Wilson M. Powell, for Society of New York Hospital, amicus curiæ:

The act itself provides that the right



of transfer be taxed, and that the sum total of the legacies shall be the measure of the tax.

*Smith v. Browning*, 225 N. Y. 363, 122 N. E. 217.

It is inequitable to charge the tax against the residuary legatee.

*Knowlton v. Moore*, 178 U. S. 77, 44 L. ed. 984, 20 Sup. Ct. Rep. 747; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 168.

The tax is not an administration expense, and therefore should not be charged against the residuary.

*Re Bierstadt*, 178 App. Div. 836, 166 N. Y. Supp. 168; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078; *Bullard v. Redwood Library*, 37 R. I. 107, 91 Atl. 30; *Goddard v. Goddard*, 9 R. I. 293.

The tax should be a charge proportionately against all legacies.

*Fuller v. Gale*, 78 N. H. 544, 103 Atl. 308.

Messrs. Douglas, Armitage, & McCann, for Walter Douglas et al., amici curiæ:

The tax should be distributed among all the legatees alike.

*Knowlton v. Moore*, 178 U. S. 77, 44 L. ed. 984, 20 Sup. Ct. Rep. 747.

It is inequitable to charge the tax against the residuary legatee.

*Ibid.*

The tax is not an administration expense, and therefore should not be charged against the residuary.

*Re Bierstadt*, 178 App. Div. 836, 166 N. Y. Supp. 168; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078; *Bullard v. Redwood Library*, 37 R. I. 107, 91 Atl. 30; *Goddard v. Goddard*, 9 R. I. 293.

The tax should be charged pro rata on all legacies.

*Re Douglass*, 104 Misc. 359, 171 N. Y. Supp. 956; *Fuller v. Gale*, 78 N. H. 544, 103 Atl. 308; *Corbin v. Townsend*, 92 Conn. 501, 103 Atl. 647; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765; *Bullard v. Redwood Library*, 37 R. I. 107, 91 Atl. 30.

Mr. G. B. Wellington, for respondents:

The tax is not a legacy tax, but an estate tax.

*Gribble v. Weber* [1896] 1 Ch. 914, 65 L. J. Ch. N. S. 544, 74 L. T. N. S. 244, 44 Week. Rep. 489; *Re Gibbs* [1898] 1 Ch. 625, 67 L. J. Ch. N. S. 282, 78 L. T. N. S. 289, 14 Times L. R. 317, 46

Week. Rep. 477; *Re Smyth* [1917] W. N. 332, 52 L. J. N. C. 805, 144 L. T. Jo. 25; *Re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed in 222 N. Y. 540, 118 N. E. 1078.

Mr. McCready Sykes, with Messrs. Rhinelander, Seymour, & Barnard, for Jefferson B. Fletcher, amicus curiæ:

Laws imposing estate taxes and laws imposing legacy or inheritance taxes are uniformly characterized by differences in the language used. The Federal act is plainly an Estate Tax Law.

*Knowlton v. Moore*, 178 U. S. 41, 77, 109, 44 L. ed. 969, 984, 996, 20 Sup. Ct. Rep. 747.

Hogan, J., delivered the opinion of the court:

Mary E. Daniels, a resident of Erie county, died January 3, 1917, leaving a will executed July 8, 1907, which will was admitted to probate on January 16, 1917. The executors named therein duly qualified.

The testatrix, by her will, bequeathed to her daughter certain articles of personal property, and made bequests of money to nine individuals aggregating \$160,000, amongst whom were George B. Mary, and Grace Wellington, cousins, each of whom was given a legacy of \$25,000. The residue and remainder of the estate was bequeathed and devised to trustees, for Grace E. Hamlin and Chauncey J. Hamlin, with remainder to the children of Chauncey J. Hamlin, of whom there are three, all minors.

The executors of the will, having paid to each of the legatees named in the will the amount of the legacies given them, after deducting from each legacy the amount of transfer or inheritance taxes, together with a proportionate amount of the Federal estate tax, on the 6th day of April, 1918, filed their account with the surrogate of Erie county.

The account disclosed, so far as the Federal tax is involved, that the net estate of the testatrix taxable was \$1,170,449.29; that the Federal tax as fixed thereon was \$51,226.96 or .0437667 per cent of the whole net estate; that the executors had deducted from each legacy on account of that tax the stated per

centum upon the amount of the legacy; thus, upon a legacy of \$25,000, the deduction was \$1,094.17.

Objections were filed on behalf of the three legatees in the \$25,000 class to such deduction made against each of them, upon the grounds: (1) That said sum was not chargeable against them, but if chargeable should not exceed in amount \$250 against each; (2) that under the act of Congress no apportionment of the Federal tax can be made, but that the whole thereof is payable by the executors out of the estate, but, in the event that an apportionment is to be made, the method of apportionment applied is erroneous. The objections were overruled and a decree entered confirming the account of the executors.

From such part of the decree as approved, allowed, and confirmed the action of the executors in apportioning pro rata the Federal tax and dismissing the objections filed to the account, the respondents legatees appealed to the appellate division. The latter court reversed the decree of the surrogate so far as appealed from (185 App. Div. 153, 172 N. Y. Supp. 787), and remitted the matter to the surrogate's court with directions to strike from the account the amount of the Federal tax charged against each of their legacies; the court unanimously holding that the tax was payable from the estate, and the legacies were not chargeable with any part of the same.

The sole question presented for determination arises under the objections filed to the account of the executors, viz.: Was any portion of the Federal tax chargeable against the legacies of the respondents? If so, what proportion of the same?

The act of Congress in force at the time of the death of the testatrix is contained in the Internal Revenue Law of September 8, 1916, chapter 463, designated under the title "Estate Tax." 39 Stat. at L. 777, Comp. Statutes, § 6336½a, Fed. Stat. Anno. Supp. 1918, p. 305, and following.

Section 6336½b provides: "Taxing Percentages Based on Value of Net Estate.—A tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, [§ 6336½d] is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

Then follows a table of percentages, viz., "1 per centum of the amount of such net estate not in excess of \$50,000," and eight several specific percentages, of the amounts by which such net estate exceeds a stated sum, but does not exceed a sum mentioned and one additional rate, "10 per centum of the amount by which such net estate exceeds \$5,000,000."

The act then provides the manner in which the value of the gross estate and the net value of the estate shall be determined. Sections 6336½c, 6336½d. The latter section, in substance, is as follows: "Net Value of Estate, How Determined.—For the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate . . . support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and (2) an exemption of \$50,000."

The tax becomes due one year after a decedent's death. § 6336½e. The executors were required, within thirty days after qualifying as such, or after coming into possession of the property of decedent, to give written notice to the collector of internal revenue of the district in which the testatrix was domiciled at

the time of her death, and file with him a return, under oath, setting forth the value of the gross estate, the deductions allowed under § 6336*d*, the value of the net estate as determined under that section, and tax paid or payable thereon. "The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes" (§ 6336*f*), which provisions were by § 6336*i* made applicable to the Estate Tax Law. Payment of the tax is required to be made by the executor to the collector or deputy collector of internal revenue. Section 6336*h*.

In 1898, the Congress, for the purpose of meeting existing conditions, enacted a law known as the War Revenue Law (Act of Congress of June 13, 1898, chap. 448, 30 Stat. at L. 448, Comp. Stat. § 6144, 4 Fed. Stat. Anno. 2d ed. p. 135). That law imposed various taxes, amongst which was one under the heading, "Legacies and Distributive Shares of Personal Property." §§ 29, 30. Section 29 of the law provided "that any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows—that is to say: Where the whole amount of said per-

sonal property shall exceed in value ten thousand [dollars] and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be."

Then followed five classifications of beneficiaries, each varying in the rate of tax imposed, and a further provision of increase of rate of the tax dependent upon the amount or value of the property transferred. The validity and interpretation of the Law of 1898 was the subject of consideration by the United States Supreme Court. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. Mr. Justice White, writing for the court, reviewed at length the history of laws imposing death duties, impost and excise taxes, and various acts of the Congress in the enactment of revenue laws, and fully treated of the distinction between a tax imposed on the whole personal estate and a tax laid upon legacies or distributive shares, concluding that under the Law of 1898, the validity of which was sustained, the tax therein provided for was not upon the whole estate of a decedent, but was one imposed upon particular legacies or distributive shares.

In 1916, when the Congress was again confronted with the necessity of providing revenue, we may assume that the framers of a proposed law would, in the first instance, recall the Law of 1898, and the decision of the United States Supreme Court in the *Knowlton Case*, to the end that any proposed legislation should be within constitutional limitations and consonant with the decision of the court. Had the Congress of 1916 intended to impose a tax upon legacies or distributive shares, the task would be lightened by practically following the Act of 1898, as construed by the court, with any changes deemed advisable in the rate of the tax imposed. That the Congress did intend, by the Law of 1916, to impose a tax on the net value of the estate of a decedent at a flat rate dependent upon the

amount of the same, rather than upon legatees or distributees, is evident by a comparison of the Act of 1916 with the Act of 1898. In the latter statute, the provision imposing the tax was embodied under a heading, "Legacies and Distributive Shares of Personal Property." Under the Act of 1916 the tax imposed is characterized as "Estate Tax." Under the Statute of 1898, the tax was imposed upon legacies and distributive shares and any interest which may have been "transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons." Then followed a provision enumerating several classes whereby the rate of the tax imposed varied, depending upon relationship or nonrelationship between the decedent and the beneficiaries. Under the Act of 1916, the tax is imposed upon the net value of the estate of decedent as the same shall be determined as in the act provided. As to transfers, etc., made in contemplation of death, such transfers are to be included in the value of the gross estate and considered as a part of the same prior to the determination of the value of the net estate. The number of legatees, their relationship or nonrelationship to a decedent, etc., do not enter into consideration in a determination of the value of the estate. The sole basis of taxation is the net value of the estate, and the tax is determined upon the amount thereof.

As bearing upon the intention of the legislature of this state in the enactment of a statute, we may consider such historical or other facts as are reasonably within the scope of judicial cognizance. *People v. Charles Schweinler Press*, 214 N. Y. 395, L.R.A.1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059. It is also permissible in an interpretation of

an act of Congress to refer to the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, under proper qualifications. *United States v. St. Paul, M. & M. R. Co.* 247 U. S. 310, 318, 62 L. ed. 1130, 1134, 38 Sup. Ct. Rep. 525. Within the limitations of the rules prescribed, an examination of the records of the Congress discloses the following facts: The House of Representatives' Bill (No. 16,763) was referred to the committee on ways and means, of which Mr. Kitchin was chairman. On July 5, 1916, the committee on ways and means through its chairman reported the bill to the House of Representatives (Report No. 922, 64th Congress, 1st Session); and recommended that the bill do pass. The report of the committee under the heading "Estate Tax" reads: "Thirty states have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other states have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate, rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal government and the various states, and the same can be readily administered with less conflict than a tax based upon the shares."

On July 6th, when the proposed measure was under consideration in the committee of the whole, while Mr. Kitchin, the chairman of the ways and means committee, was explaining the nature of the estate tax, he was asked by a member of the House if he recalled how the proposed tax rate compared with the inheritance tax rates in the state of New York, to which inquiry Mr. Kitchin replied: "No, I do not know. We levy an entirely different sys-

Statute—  
construction—  
what  
considered.

tem of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal government, through the Treasury Department, going into the courts contesting and construing wills and Statutes of Distribution."

On August 16th, while the bill (H. R. 16,763), having passed the House of Representatives, was in the Senate, the committee on finance, through Senator Simmons, made a report thereon to the Senate, in the course of which he stated: "The report of the committee on ways and means of the House of Representatives states with such clearness, ability, and sufficiency the reasons for raising this additional revenue by impositions upon incomes, inheritances, and munitions of war that your committee contents itself with incorporating in its report that part of the report of the ways and means committee dealing with this subject."

Then follows, under the head of "Estate Tax," the language already quoted from the report made by Mr. Kitchin from the committee on ways and means. Senate Report No. 793, part 1, 64th Congress, 1st Session.

The Senate recommended additional classifications to those contained in the House bill, which were subsequently adopted and are found in the present act.

The plain intent and obvious meaning of the act of Congress under consideration, especially when considered in connection with the facts surrounding the enactment of the same, indicate clearly that the act imposes an "estate tax" as distinguished from an inheritance tax, that the tax is payable by the estate rather than by the legatees, as determined by the appellate division.

The appellants admit that the act does not contain an express direction as to how the estate tax shall

be apportioned, but argue that the language of certain sections thereof and amendments disclose an intention that the tax should be apportioned pro rata. In support of the suggestion, counsel cites § 6336*i*, which reads: "If the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a *just and equitable contribution* by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

Counsel submits that the words, "*just and equitable contribution*," which words I have italicized, were intended to adopt a method for equitably apportioning the tax among all persons benefiting from the transfer of the estate, especially when construed in connection with § 6336*j*, which reads: "Unless the tax is sooner paid in full, it shall be

a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth."

To hold that the Congress, by the language of the sections referred to, intended by implication to provide that the tax imposed by the act was one upon legacies, the tax to be paid by legatees, would not only violate the clearly expressed intention of the Congress, but require us to ignore the historical facts surrounding consideration of the measure by the Congress. When

**Tax—estate—  
conversion into  
legacy tax.**

the Congress provided that the tax was imposed upon the value of the net estate, the manner in which said value should be determined, and that the executor should pay the tax, and in § 6336*i*, above quoted, said, "It being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the es-

tate before its distribution," the conclusion is inevitable that the tax was not imposed on legacies, the tax to be paid by the legatees, rather than by the executor out of the estate before distribution. Had the Congress desired to provide for an apportionment of a tax amongst legatees, it might readily have used language adopted by that body in 1901 (31 Stat. at L. 948, chap. 806, § 11) when it amended § 30 of the Act of 1898, reviewed in the Knowlton Case, *infra*, by adding thereto, "Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged," or, as provided in our statute, that the executor shall deduct the tax on a legacy or distributive share.

Dissenting, as we do, from the argument of counsel for appellants in his application of the sections quoted, it would not be profitable to analyze the sections at length. As stated by Mr. Kitchin, chairman of the ways and means committee, the basis of the tax "prevents the Federal government, through the Treasury Department, going into the courts contesting and construing wills and Statutes of Distribution." Much might be written upon the application of the sections quoted, as to the intention of the Congress to insure the payment of the tax, the administrative features of the sections, and cases illustrated where the sections would or would not apply, but such questions are not before us in this case, and discussion thereof should be avoided until such time as a case involving the same is presented.

Counsel for appellants also calls attention to amendments made to the Law of 1916 by the Act of Congress of February 24, 1919, chap. 18, 40 Stat. at L. 1057, which in effect provide that the value of the gross estate of the decedent shall include "to the extent of the amount receivable by the executor as insurance under policies taken out by the

decendent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life" (§ 6336½c, new § 402); also, amendment to § 6336½i, new § 408, which provides: "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio,"—and submits that thereby the Congress required the beneficiaries of insurance policies and of transfers made in contemplation of death to pay a tax on their respective interests, computed on the basis of the whole net estate, while under the decision of the appellate division in the case at bar all general legatees would receive their legacies in full. Counsel in his brief expressed doubt

as to the constitutionality of such amendment, but such question is not before us, and reference is made to the same only as bearing upon the intention of the Act of 1916. Viewed from that standpoint, the conclusions already expressed as to the Act of 1916 remain unchanged.

I have not deemed it necessary to refer to the power of the Congress to enact the law under consideration. To one interested in such question, the careful and exhaustive opinion of Mr. Justice White in the Knowlton Case, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, will be of interest. As to the equity of requiring payment of the tax by the residuary legatees and relieving the remaining legatees from any contribution to the same, the question <sup>—where burden falls.</sup> is susceptible of conflict of opinion. The Congress has spoken, and it is our function to interpret, not to legislate.

The order of the Appellate Division should be affirmed, with costs payable out of the estate.

Hiscock, Ch. J., and Chase, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

## ANNOTATION.

### Liability as between residuary estate and legacies or devisees for Federal estate tax.

The majority of cases which have passed upon the Federal inheritance or estate tax act of September 8, 1916 (39 Stat. at L. 777, chap. 463, §§ 200-212, Comp. Stat. §§ 6336½a-6336½m, Fed. Stat. Anno. Supp. 1918, pp. 305-310), hold that it is imposed upon the estates of decedents, and not upon legatees or devisees. *RE HAMLIN* (reported herewith) ante, 701; *PLUNKETT v. OLD COLONY TRUST CO.* (reported herewith) ante, 696.

The general theory of these cases that the Federal estate tax of 1916 is a tax upon the estates of decedents is supported by the cases adhering to the majority view as to whether the amount of the Federal tax is to be

deducted before the state tax is computed, discussed in the annotation to *People v. Northern Trust Co.* post, 714.

A different view has been taken of this statute. In *Fuller v. Gale* (1918) 78 N. H. 544, 103 Atl. 308, a petition by an executor for the construction of a will in which advice was asked as to "what, if any, part of the estate tax imposed by the United States falls upon the legacies other than residuary," the court answered the question as follows: "The estate tax imposed by act of Congress is to be paid pro rata by all who share in the estate. It is not a property tax, but one imposed upon the transfer of the net es-

tate.' 39 Stat. at L. 777, chap. 463, § 201, Comp. Stat. § 6336½b, Fed. Stat. Anno. Supp. 1918, p. 305. It is not like the foreign inheritance taxes considered in *Kingsbury v. Bazeley* (1908) 75 N. H. 13, 139 Am. St. Rep. 664, 70 Atl. 916, 20 Ann. Cas. 1355, but is imposed by a law which applies to the devolution of estates in this jurisdiction. It not being otherwise directed by the will, the tax is to be paid out of the estate and charged pro rata to each beneficiary."

In *Re Douglass* (1918) 104 Misc. 359, 171 N. Y. Supp. 956 (decided before the reported case), it was held in the case of the will of a testator executed before the passage of the United States estate tax law, that the amount of the tax should not be paid as an administration expense and thus charged wholly to the residuary legatees, but should be deducted proportionately from each legacy. The court states that "while the act provides that the tax is imposed upon the transfer of the estate, and not upon the transfer

of the interests of the respective legatees, it would be obviously unjust to the residuary legatees to deduct the tax in toto from the estate in the same manner as administration expenses are deducted. The will of testator was executed before the passage of the Revenue Act, and there would, therefore, be no justification for assuming that he contemplated the enactment of such a law and the payment of the tax exclusively out of the shares of the residuary legatees. . . . It seems, therefore, that the tax should be deducted proportionately from each legacy, and that the amount to be deducted is that proportion of the entire tax assessed against the estate which the individual legacy bears to the entire net estate."

But see *RE HAMLIN* (reported herewith) ante, 701.

See discussion of theory of Act of 1898, in *Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, in subd. III. of the note to *Re Coradin*, ante, 695. W. A. E.

## PEOPLE OF THE STATE OF ILLINOIS

v.

NORTHERN TRUST COMPANY, Exr., etc., of Charles W. Pardridge,  
Deceased, Appt.

*Illinois Supreme Court—October 27, 1919.*

(289 Ill. 475, 124 N. E. 662.)

### Tax — estate — deduction of Federal tax.

1. The Federal estate tax imposed upon the estate of a decedent should be deducted as a charge or expense against the estate before assessing the tax imposed by the law of a state.

[See note on this question beginning on page 714.]

### — trust — power of revocation — effect.

2. A trust established by a man for the benefit of his children and their appointees does not become taxable as in contemplation of death merely because a power of revocation is reserved in it.

### Statute — adoption — construction given it.

3. Where a statute is adopted by a state after it has been construed by the courts of the state of its origin, it is held to have been adopted with the construction so given it.

[See 25 R. C. L. 1069.]

APPEAL by defendant from a judgment of Cook County Court (Cooke, J.) in favor of plaintiff in a suit to subject property of decedent to an inheritance tax. *Reversed.*

The facts are stated in the opinion of the court.



Messrs. Fisher, Boyden, Kales, & Bell and Darrell S. Boyd for appellant.

Messrs. Edward J. Brundage, Attorney General, LeRoy Millner, Walter K. Lincoln, and Henry F. Hawkins for the People.

Duncan, J., delivered the opinion of the court:

The Northern Trust Company, executor of the estate of Charles W. Pardridge, deceased, has appealed from a judgment of the county court of Cook county, requiring appellant to pay inheritance taxes in the amount of \$31,818.20 upon the property interests disposed of by two deeds of settlement executed by Pardridge in his lifetime and a further inheritance tax of \$53,144.20 on interests disposed of by his will.

There are three questions raised by the assignment of errors on this record: (1) In computing the state inheritance tax on the value of the property passing by the will of the testator, is appellant entitled to have first deducted therefrom the Federal estate tax? (2) Are the property interests disposed of by the aforesaid deeds of trust subject to an inheritance tax? (3) If the properties transferred by the deeds of trust are taxable, should they be taxed according to their value on their respective dates or as of the date of the testator's death?

It is conceded by appellee that the court erred in holding that the properties transferred by the deeds of trust should be assessed on their values at the respective dates of the deeds instead of their values at the date of the testator's death, and in the view that we have taken of this case that question need not be further considered.

The only question relative to the tax assessed on the property passing by the will of the testator is the refusal of the court to first deduct the Federal estate taxes as an expense of the estate before assessing the tax on the property passing by will. The testator died November 17, 1917. He left an estate valued by the inheritance tax appraiser at \$2,-871,151.71, which he disposed of by

will. The county court, in assessing the state inheritance tax on that property, refused to deduct the Federal estate tax paid by the executor, <sup>Tax—estate—  
deduction of  
Federal tax.</sup> amounting to \$316,-432.40. In this ruling the court erred. The Federal estate tax is a charge or an expense against the estate of the decedent rather than against the shares of the legatees or the distributees, and as part of the expense of administration this tax should be deducted before computing the state inheritance tax. *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286.

The two deeds in question contained substantially the same provisions, were absolute in form, and were executed to the Northern Trust Company, as trustee, on May 6, 1910, and on December 18, 1911, respectively. The real estate and leasehold interests so conveyed were valued by the inheritance tax appraiser at \$2,333,333.33. Besides the tax assessed on this property, on a large balance thereof there is still left in suspense, under the judgment of the court, a state inheritance tax by reason of the fact that some of the beneficiaries cannot be ascertained until the exercise of certain powers of appointment. Trust instruments separate and apart from the deeds were executed on the respective days that the deeds were executed, and they are substantially the same in form and contain substantially the same provisions. They provide that the trustee shall take possession of the trust property, with complete power to manage, lease, care for, and protect the same; to collect the rents and incomes therefrom; to pay taxes and assessments levied thereon; to repair and keep the buildings in repair and rebuild the same if destroyed; to insure the same against fire and other casualties usually insured against by prudent owners in Chicago; and to have the right to institute and defend all legal proceedings affecting the same. The trustee is to hold the property

in trust for the testator's four children, Edward W. Pardridge, Albert J. Pardridge, Evelyn Florence Pardridge Engalitcheff, and May Aline Pardridge Sargent, for their natural lives and until the death of the last survivor of them in equal shares as tenants in common, and is to hold the share of each deceased child in trust for such person or persons as such deceased child shall by last will or testament have appointed. In default of such appointment the trustee shall hold such deceased child's share in trust for the issue of such deceased child, and if any child shall die without issue its portion shall be divided equally among the other shareholders of the trust estate. The distribution of the trust estate is to be made upon the death of the last survivor of the four children. During the lifetime of each of the four children the trustee is to pay in monthly instalments the net income arising from such child's share, and from and after the death of any of said four children, and until the death of the last survivor of them, the net income arising from such deceased child's share is to be paid in monthly instalments to the person or persons for whom such share is held under the terms of the trust agreements. The deeds also provide that a majority of the four children then living may at any time, by an instrument under seal delivered to the trustee, admit their brother Charles A. Pardridge as a tenant in common with them in such property, with like powers and privileges granted to him for the receiving and appointing persons to receive said property and the issues and profits thereof. His interest, however, is at no time to exceed one fifth of the income of said trust estate, and in case he is so admitted as a beneficiary the final distribution of the property is to be made on the death of the last survivor of the five brothers and sisters, and during his lifetime the trustee is to hold the property for the benefit of the five brothers and sisters upon the same terms as pro-

vided in the original trust agreement for the original four brothers and sisters. The deeds provide for compensation to the trustee and for the appointment of the two sons Edward W. and Albert J. Pardridge, and the survivor of them, as the agent of the trustee in the management of the trust estate, and also fix their compensation and require them to give a bond. Their powers and duties are to determine the rental to be charged for the property and to negotiate and prepare all leases for the same, to assume entire charge of affairs and make all contracts for the same, pay all taxes and assessments against the trust estate and insure the same, and to render statements of accounts of all the receipts and disbursements concerning the same. The trustee has full authority to remove said agents, or either of them, in case of neglect or misconduct or inability to discharge their duties as such. In case the trustee shall resign, the majority of the beneficiaries then entitled to share in the net income of the trust estate are given the right to name the successor of the trustee. By the terms of the trust deeds no person entitled to a share of the net income of the trust estate shall have the right to anticipate the same, nor to sell, assign, mortgage, pledge, or otherwise dispose of or encumber his share in the trust estate or any part of it or the income therefrom, and no share of the trust estate, or the income arising therefrom, shall be liable for his or her debts or be subject to attachment, garnishment, execution, creditor's bill, or other legal or equitable process. The trust agreements finally reserve to the settlor the right of revoking the deeds and each and every trust therein created and declared, either in whole or in part, by notice in writing to the trustee, and in case of such revocation said trust estate, or the portion thereof so revoked, shall be conveyed by the trustee to the settlor, to be held by him as his sole and absolute property

and discharged from all trusts declared in said trust agreements.

Oral testimony was offered in the county court showing clearly that the provision for the revocation of the trust agreements was inserted by the attorney who drew up the same at his own suggestion, and without any instructions from the settlor with reference to the same. The testimony further shows that the settlor exercised no further control over the property whatever after the trust agreements and conveyances were executed, and received none of the income therefrom. He even declined to be consulted about the management thereof when on one occasion one of the sons sought his advice. The trustee accepted the trust, and up until the settlor's death managed the property according to the provisions of the trust agreement and without consulting him with reference to the same, and the settlor never offered any suggestions as to the management of the property to anyone. About all this testimony was excluded by the court over appellant's objections. The court, however, found as facts that neither one of said trust instruments was made by the settlor in contemplation of death, and that neither one of said instruments was intended to take effect in possession or enjoyment at or after his death, and that both of said instruments were intended to, and that they actually did, take effect in possession and enjoyment on the respective dates of their execution. The court further found that the donor did not, during his lifetime and subsequent to the respective dates of execution of said deeds, exercise any dominion, power, or control over said property, and did not during his lifetime, by any instrument in writing or otherwise, revoke the trust deeds, or either of them, in whole or in part.

The oral evidence and the trust deeds and the trust instruments all sustain the finding of the court as to the facts, and there is no conten-

tion whatever between the parties to this record in that regard. By the written instruments the grantor or settlor intended to make a voluntary settlement of a large part of his property. The only right or power reserved in the deeds was the right of revocation. The instruments cannot be construed in any way as reserving any right in the settlor to alter or amend the trust or to add to or withdraw from the trust any portion of the property or to exchange any portion of the property by substituting other properties for the same. The instruments give no right of control to the settlor of any of the properties conveyed, or even the right to direct the management or enjoyment of the trust estate. The evidence is undisputed, also, that he never, in fact, exercised or sought to exercise any right of control, disposition, or enjoyment over the property, and never received a penny of the income or profits of the same. He expressed it as his wish, when consulted by one of his sons, that they and the trustee should manage and control the property and to use their own judgment, and that he did not want to be longer bothered or troubled by such affairs. The mere right of revocation would not have been written in the trust instruments had it not been suggested by his attorney, and the attorney advised it as a matter of protection of the donees in case any of them proved to be spendthrifts or otherwise incapable of protecting their own interests. This character of deed, with such a power of revocation, has long been recognized by our law as a proper mode of an ancestor deeding his property to his children and of protecting them in the use and enjoyment of the same. All well-skilled and farseeing lawyers, advising for the benefit of their clients, usually suggest the insertion of such a clause of revocation, and no court, so far as we know, has ever declared that such a deed is testamentary in character, or is to be held to take effect only after death, by reason, alone, of such

(239 Ill. 475, 124 N. E. 662.)

a clause of revocation. In fact, it is not possible for such a clause to have such effect. As a matter of fact, such a deed takes effect at once, and continues in full force and effect until actually revoked. If revoked it can only be revoked during the life of the grantor, and if he does not call into effect such power of revocation during his lifetime it continues in full force and effect forever after his death. If he revokes the deed under such a power the deed becomes a nullity, and the title will be reinvested in the settlor by the deed of reconveyance by the trustee.

The court in substance held as a proposition of law that the powers of revocation reserved to the grantor in the trust instruments were sufficient, in themselves, to cause the property passing by the deeds of trust to be taxable under § 1 of the Inheritance Tax Act. So far as applicable that section provides: "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, . . . when the transfer is of property made by a resident, . . . by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." Hurd, Stat. 1917, p. 2500.

There is no contention that the deeds were made in contemplation of death. It is admitted that they were not so made. As the deeds were not intended to take effect in possession or enjoyment at or after the death of the settlor, and as this is also an admitted fact, the conveyance does not come within the statute, and the property

—trust—power  
of revocation—  
effect.

was not taxable under our Inheritance Tax Law. Our Inheritance Tax Law, so far as this provision is concerned, was literally copied from the New York statute. The New York court of appeals confirmed, without delivering an opinion, the

appellate division of the supreme court in holding that the mere power reserved in a deed to revoke the same did not operate to change the effect of the deed, but that the deed took effect at once, and was so intended, and that the property should not have been included in an appraisal of an estate for the purpose of taxation under the New York Inheritance Tax Act (Consol. Laws, chap. 60, §§ 220-245). *Re Masury*, 28 App. Div. 580, 51 N. Y. Supp. 331, affirmed by New York court of appeals in 159 N. Y. 532, 53 N. E. 1127. Where a statute is adopted from another state or country, and the same has been

construed by the court of such state or country, it is the general rule that the statute is to be held to have been adopted with the construction so given to it, and particularly where the statute itself does not express an intention to the contrary. *People v. Carpenter*, 264 Ill. 400, 106 N. E. 302.

Statute—  
adoption—  
construction  
given it.

We have been referred to other New York cases, and particularly to the case of *Re Bostwick*, 160 N. Y. 489, 55 N. E. 208, as making a different holding from that in *Re Masury*, just cited. The *Bostwick* Case does not in any wise overrule the former decision of the New York court of appeals, but serves to distinguish that case from the cases later considered by that court.

The construction that we have placed upon this statute will not, in our judgment, aid parties in evading the Inheritance Tax Law. Whenever it becomes manifest that a deed was intended as an evasion of the Inheritance Tax Law the state will be protected in the collection of the inheritance tax, no matter what the form of the deed may be. We are entirely unwilling, however, to declare that trust deeds and trust instruments in the form in which we find those under consideration in this record render the property conveyed taxable under our Inheritance Tax Act by the mere insertion of a

clause of revocation so useful and so long in use for the protection of grantees in such deeds, when it so clearly appears that that was the sole intention as it does in this case.

The judgment of the county court is reversed in so far as it affects

the property conveyed by the trust deed, with directions to modify the judgment affecting the property transferred by will in accordance with the views herein expressed.

Reversed and remanded, with directions.

## ANNOTATION.

### Deduction of Federal estate tax before computing state tax.

The question under annotation herein has been raised under two Federal statutes, viz., that of 1898 (June 13, 1898, chap. 448, 30 Stat. at L. 464, §§ 29, 30) and that of 1916 and 1917 (Act Sept. 8, 1916, 39 Stat. at L. 777, chap. 463, §§ 200-212, as amended March 3, 1917, 39 Stat. at L. 1002, chap. 159, § 300, Comp. Stat. § 6336½b, Fed. Stat. Anno. Supp. 1918, p. 305). With the exception of the New York and Wisconsin decisions the authorities agree with the reported case (*PEOPLE v. NORTHERN TRUST CO.* ante, 709), that the amount paid the Federal government is an expense of administration, and should be deducted from the estate and the state tax computed on the balance.

#### Statute of 1916-1917.

*Corbin v. Townshend* (1918) 92 Conn. 501, 103 Atl. 647; *People v. Pasfield* (1918) 284 Ill. 450, 120 N. E. 286; *State v. First Calumet Trust Sav. Bank* (1919) — Ind. —, 125 N. E. 200; *State ex rel. Smith v. Probate Ct.* (1918) 139 Minn. 210, 166 N. W. 125; *Re Roebbling* (1918) — N. J. Eq. —, 104 Atl. 295; *Re Tyler* (1918) — N. J. Eq. —, 104 Atl. 298; *Knight's Estate* (1918) 261 Pa. 537, 104 Atl. 765.

#### Statute of 1898.

*Hooper v. Shaw* (1900) 176 Mass. 190, 57 N. E. 361.

The fact that an intestate estate is involved has been held not to change the rule. *Re Tyler* (1918) — N. J. Eq. —, 104 Atl. 298.

These courts construe the Federal Act of 1916 as a tax upon the estate. In *Corbin v. Townshend* (Conn.) supra, it is stated that by § 208 of the Federal Act the intent of the act is expressed to be, so far as is practica-

ble, and unless otherwise directed by the will of the decedent, that "the tax shall be paid out of the estate before its dissolution;" that the "executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate, and the share of the beneficiary is diminished by just so much." The court in *People v. Pasfield* (1918) 284 Ill. 450, 120 N. E. 286, states that "as the duty is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or charge against the estate of the decedent, and not an express charge against the shares of the legatees or distributees of the decedent. The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent as was given the Federal Act of 1898 by the court in *Knowlton v. Moore* (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. The Federal Estate Tax Act of September 8, 1916, necessarily operated to lessen by the amount of such tax the clear value of the beneficial interest which passed to the heirs and legatees in the instant case and prevented their receiving any part of that tax, and the ruling of the county court that the

same should be deducted before computing the state tax was correct." The court in *Re Roebling* (1918) — N. J. Eq. —, 104 Atl. 295, states that the value of the net estate is the unit of taxation under the Federal act, that "there is no apportionment of it among the various transferees, nor is the real estate devised or descending liable to contribution. On the contrary, the collector may recover the tax by a sale of the land, and in that event the devisee or heir at law shall be reimbursed out of any part of the personal estate unadministered or by an equitable contribution by those whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate. . . . To be more precise, it is imposed upon the estate transferred by death, and not upon the succession resulting from death."

The state statutes of these states, on the other hand, are construed to tax the property passing to the beneficiary. In *State ex rel. Smith v. Probate Ct.* (1918) 139 Minn. 210, 166 N. W. 125, the state statute is said to "impose a tax upon the transfer of property 'by will or by the intestate laws' from the person who died possessed thereof, and provides that the tax shall be a specified per centum of the clear value of the beneficial interest in the property which passes to the beneficiaries designated by the will or the statute. Gen. Stat. 1913, §§ 2271, 2272." And the court, discussing the character of this statute, says that "according to the statute the tax is to be computed only upon the clear value of the property or the interest therein which actually passes to the beneficiaries. And is not to be computed upon the amount expended in administering the estate or in paying proper charges against it. . . . The Federal tax operated to lessen by the amount of such tax the clear value of the beneficial interest which passed to the two children, and the ruling of the probate court was correct." The court in *Re Roebling* (N. J.) *supra*, states that under the state statute the tax is not imposed upon the immediate transfer of property occasioned by death,

"but upon the transfer to any person or corporation when the transfer is the subject of a legacy or devise of distribution or descent). In other words, it is not on the transitory succession of the executor or administrator, but upon the separate successions of the transferees, whether the succession be of the whole of the estate—a universal succession—or of the singular succession of a legatee or devisee. . . . The tax is not upon the aggregate value of the estate transferred, apportioned among the transferees, but is assessed upon the value of the several interests and is levied upon kindred at varying rates depending upon the relationship of the transferees to the decedent. Each transferee is liable for the tax upon his share of the estate, which is to be deducted from the legacies or distributive shares by the executor, and for the payment of which he is personally liable." The inheritance taxes due the state of Connecticut under its statute are stated in *Corbin v. Townshend* (1918) 92 Conn. 501, 103 Atl. 647, to be measured by the amount of property passing to the beneficiary.

One of the courts taking the foregoing view under the Statute of 1916-1917 makes a distinction between the provisions of that act and that of 1898. *People v. Paseld* (1918) 284 Ill. 450, 120 N. E. 286. But the theory that the Federal tax must be deducted before computing the state tax has been adhered to under the Act of 1898. *Hopper v. Shaw* (1900) 176 Mass. 190, 57 N. E. 361. In holding that a tax payable under the Statute of 1898 is deductible and that a state tax should be computed on the balance, the court states that "whatever the nature of the state succession tax, it is admitted and is obvious that the value of the property concerned is made the measure of the tax. This appears from the words of the act, which also show at what moment the value is to be taken. The words are 'property . . . which shall pass . . . to any person.' Without throwing doubt upon the power of the state to adopt a harsh rule such as has been applied to some of the surrogates in New York, we are

of opinion that these words most naturally signify the property which the legatee actually would get were it not for the state tax imposed by the sentence in which the words occur. . . . The question is not one of precedence between the commonwealth and the United States, as it was put by the assistant attorney general. It is in substance one of justice, and in form one of construction. The United States recognizes, as it ought, the same principle by deducting the state succession tax before computing its own."

In New York and Wisconsin it is held that the Federal tax cannot be deducted and the state tax computed only on the balance, but that the state tax must be computed without deduction of the Federal tax.

#### **Statute of 1898.**

Re Gihon (1902) 169 N. Y. 443, 62 N. E. 561; Re Vanderbilt (1902) 71 App. Div. 611, 75 N. Y. Supp. 969, affirmed in (1902) 172 N. Y. 69, 64 N. E. 782, reversing (1902) 68 App. Div. 27, 74 N. Y. Supp. 450; Re Becker (1899) 26 Misc. 633, 57 N. Y. Supp. 940; Re Irish (1899) 28 Misc. 647, 60 N. Y. Supp. 30; Re Curtis (1900) 31 Misc. 83, 64 N. Y. Supp. 574.

#### **Statute of 1916-1917.**

Re Bierstadts (1917) 178 App. Div. 836, 166 N. Y. Supp. 168; Re Sherman (1917) 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed without opinion in (1917) 222 N. Y. 540, 118 N. E. 1078; Re Week (1919) — Wis. —, 172 N. W. 732.

In holding that the amount of the Federal tax under the Act of 1898 could not be deducted before computing the amount of the state tax, the court of appeals of New York in Re Gihon (1902) (N. Y.) *supra*, emphasizes the similar character of the state and Federal tax. The court says: "The Federal tax is of exactly the same nature as the state tax,—a tax, not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property. Knowlton v. Moore (1900) 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. The Federal tax is necessarily of

this character, for a direct tax, unless apportioned according to population, would be repugnant to the Constitution of the United States. Under that statute also it is the amount of the legacy, not of the estate, that determines the rate of taxation. Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate."

The court in Re Bierstadts (1917) 178 App. Div. 836, 166 N. Y. Supp. 168, as well as the court in Re Sherman (1917) 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed without opinion in (1917) 222 N. Y. 540, 118 N. E. 1078, treats the Federal estate tax under the Act of 1916-1917 as a tax imposed upon the transfer of property. The court in Re Sherman states that it is imposed upon the transfer of the net estate, that the fact that it is to be paid out of property does not render it a tax on property. The court argued further with reference to the Federal tax that if the Federal government "may impose an inheritance tax which is entitled to be deducted from the estate prior to the assessment of the state transfer tax, it has interfered with such conditions and has diminished the amount which the state has appropriated as a condition of the transfer being had by the percentage upon the sum appropriated by the Federal government. The state transfer tax will thus have become one, not upon the whole estate transmitted, but one upon the whole estate less the amount of the Federal tax. This lessening of the transfer tax, while not large in the case at bar would aggregate a very considerable sum when applied to all the estates subject to tax within the state. The constitutionality of the Federal act entitled to such a construction and effect might well be doubted." And the court concludes, as above stated, that the Federal tax cannot be deducted before computing the state tax.

The court in Re Week (1919) — Wis. —, 172 N. W. 733, states that "if the Federal estate tax, so-called, should be deducted in ascertaining the amount upon which the inheritance

tax of this state is to be computed, it must be by force of our own statute. . . . The question, therefore, is this: Does our statute provide for the deduction of the Federal estate tax in ascertaining the amount upon which the state inheritance tax shall be computed? There is no express provision to that effect. Is one implied? Our inheritance tax law was enacted pursuant to the power of the legislature to reasonably regulate transfers of property and business transactions as stated in *Nunnemacher v. State* (1906) 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711. It is a tax imposed on a transaction; the transaction being the passing of property from the dead to the living. It is not a tax upon the property itself, and consequently neither the property nor the value thereof necessarily and inherently constitutes the basis for the amount of the tax. The tax being based on a transaction, however, some basis must be fixed by the legislature by which the tax shall be determined. The legislature has made such basis the clear market value of the property at the time of the transfer. The transfer contemplated occurs at the instant of death. . . . There is no provision made in the statute for any deduction from the value of the estate as it may be determined to be as of the date of the death of the deceased, and we see no warrant for reading into the statute provisions for the deduction of any amount which the legislature did not see fit to in-

sert." The court then states that a different conclusion might be necessary if, under the Wisconsin statute, the tax were computed upon the value of the property finally and as of the time of passing to the legatee or devisee, and states that it was this consideration which largely influenced the conclusion announced by the courts of Illinois, Connecticut, New Jersey, Pennsylvania and Minnesota, *supra*. As shown above these courts have come to a conclusion contrary to that of the Wisconsin court. It is not altogether clear that the view taken in these cases as to the basis of the computation of the tax is due to different statutory provisions than those involved in the Wisconsin case.

The Wisconsin court further states that there may be some difficulty in reconciling its conclusion "with the prevailing practice of deducting expenses of administration. We realize that our logic would lead to a rejection of such deduction. We have no disposition, however, to disturb the practice that has uniformly prevailed."

A situation similar to that arising under our form of government exists in Australia, and it has there been held, in accord with the New York and Wisconsin cases, that the tax due the commonwealth should not be deducted before computing the tax due to a province. *Commercial Bkg. Co. v. Federal Comr.* (1917) 23 C. L. R. (Austr.) 102. W. A. E.

BERTHA MORLANG et al.

v.

CITY OF PARKERSBURG, Appt.

*West Virginia Supreme Court of Appeals — September 23, 1919.*

(— W. Va. —, 100 S. E. 394.)

**Highway — paving strip adjoining walk — effect.**

1. Where the owner of property abutting upon a city street constructs the building upon his property  $3\frac{1}{4}$  feet back from the street line, and paves the same in the same manner as the sidewalk is paved, and permits



the public using such sidewalk to also use such paved strip between the front of his building and the street line as a sidewalk, he will not be held to have thereby dedicated the same to the public by implication, unless it be further shown that the public authorities, with his knowledge, exercise acts of dominion thereon indicative of their belief that the same has been dedicated to the public.

[See note on this question beginning on page 727.]

— dedication — necessity of intent.

2. The law recognizes two classes of dedications of a street to a city, express and implied, the intent to dedicate being essential to both, though in the latter case it may be shown by acts of the owner justifying the public authorities in believing the intention exists, where they act upon such belief, even though the owner may never have actually intended a dedication.

[See 8 R. C. L. 890.]

— clarity of proof.

3. Dedication being an exceptional and peculiar mode of passing title to interest in land, the proof thereof must be full and clear; and the acts proved, which it is claimed constitute such dedication, must be inconsistent with any construction other than that of a dedication. Merely building the front of one's house back from the property line is, alone, not sufficient to prove intent to dedicate to the public

the strip of land between the property line and the front of the house.

[See 8 R. C. L. 890.]

— paved strip adjoining — right to use.

4. A municipal corporation cannot prevent the use by its owner, in a lawful way, of a paved strip between the street line and a building set a few feet back from the street, where it is not shown that the strip has become a part of the highway, or that the municipal authorities have so treated it.

[See 13 R. C. L. 189.]

Tax — on dedicated strip — effect.

5. Payment of taxes assessed by a municipality upon a strip of land claimed to have been dedicated to it, while evidence tending to defeat the presumption of a dedication, is, under most circumstances, of little probative force.

[See 8 R. C. L. 902.]

**APPEAL** by defendant from a judgment of the Circuit Court for Wood County in favor of plaintiffs in a suit brought to enjoin defendant from interfering with them in making certain contemplated improvements. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McCluer & McCluer, for appellant:

Dedication of properties for public use is express or implied.

McQuillin, Mun. Corp. § 1539, note 8; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452; *Athens v. Burkett*, — Tenn. —, 59 S. W. 404; *Richmond v. Stokes*, 31 Gratt. 713; *Campbell v. Elkins*, 58 W. Va. 308, 2 L.R.A. (N.S.) 159, 52 S. E. 220; *Harper's Ferry v. Kaplon*, 58 W. Va. 482, 52 S. E. 492; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17; *Post v. Clarksburg*, 74 W. Va. 50, 52 L.R.A. (N.S.) 773, 81 S. E. 562.

Intent to dedicate may be inferred by mere user by the public.

McQuillin, Mun. Corp. § 1563, note 10; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Wheeling v. Campbell*, 12 W. Va. 36.

The right of the public to the use of the property as a public street has been repeatedly recognized by the owners thereof, and the doctrine of estoppel applies.

*Champ v. County Ct.* 72 W. Va. 475, 78 S. E. 362; *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Briar Creek R. Co. v. Kanawha C. R. Co.* 70 W. Va. 227, 73 S. E. 726; *Mylius v. Koontz*, 69 W. Va. 621, 73 S. E. 319.

The statutory method must be followed where it becomes necessary to buy or condemn lands for street purposes, but this does not deprive the municipality of its right to streets by common-law dedication.

McQuillin, Mun. Corp. § 1583; 23 Cent. L. J. p. 3; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8.

The owners will not now be permitted to retract dedication heretofore made.

Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275.

Payment of taxes assessed by the municipality, while evidence tending to defeat the presumption of a dedication, is, under most circumstances, of little probative force.

McQuillin, Mun. Corp. § 1567; Boise City v. Hon, 14 Idaho, 272, 94 Pac. 167; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Myers v. Ocean-side, 7 Cal. App. 87, 93 Pac. 686.

There is, therefore, nothing in plaintiffs' contention that the erection of the balcony by plaintiffs could not, in any event, operate against the city's rights in the premises.

Ralston v. Weston, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326; Clifton v. Weston, 54 W. Va. 250, 46 S. E. 360.

Messrs. Van Winkle & Ambler, for appellees:

The city had no power to widen the east side of Market street, between Fourth and Fifth streets, except in the manner and form prescribed, and subject to the limitations of the power conferred upon it, by the several acts and charters. It could not widen the sidewalk in front of only a few properties under its charters.

13 R. C. L. 56, 139; Franklin v. Fiske, 13 Allen, 211, 90 Am. Dec. 194; State, Mangles, Prosecutor, v. Hudson County, 55 N. J. L. 88, 17 L.R.A. 785, 25 Atl. 322; Fruth v. Board of Affairs, 75 W. Va. 456, L.R.A.1915C, 981, 84 S. E. 105; Eubank v. Richmond, 226 U. S. 187, 57 L. ed. 156, 42 L.R.A. (N.S.) 1128, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; State ex rel. Sale v. Stahlman, 81 W. Va. 335, L.R.A.1918C, 77, 94 S. E. 497.

The burden of proof is upon the city to prove that there was a contract between all of the landowners on the east side of Market street between Third and Fifth streets, to set their buildings back from the established street line, and to dedicate the intervening strip to the public, and that there was a dedication and acceptance of the strip in front of the Fred Rose (now Morlang) property, to the city of Parkersburg.

Mason City Salt & Min. Co. v. Mason, 23 W. Va. 211; Miller v. Aracoma, 30 W. Va. 606, 5 S. E. 148; 13 Cyc. 476; McQuillin, Mun. Ord. § 1569; Com. v. Kelly, 8 Gratt. 632; Harris v. Com. 20 Gratt. 828.

There was no dedication, express

or implied, of the property in controversy.

McQuillin, Mun. Corp. § 1568; Com. v. Kelly, and Harris v. Com. supra; Pierpont v. Harrisville, 9 W. Va. 215; Mason City Salt & Min. Co. v. Mason, and Miller v. Aracoma, supra; Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. 1020; Dicken v. Liverpool Salt & Coal Co. 41 W. Va. 511, 23 S. E. 582; Hast v. Piedmont & C. R. Co. 52 W. Va. 400, 44 S. E. 155; State v. Dry Fork R. Co. 50 W. Va. 237, 40 S. E. 447; Holdane v. Cold Spring, 21 N. Y. 477; West Point v. Bland, 106 Va. 792, 56 S. E. 803; Provident Trust Co. v. Spokane, 63 Wash. 92, 114 Pac. 1030; Talbott v. Richmond & D. R. Co. 31 Gratt. 688; Keppler v. Richmond, — Va. —, 98 S. E. 754; Ralston v. Weston, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 826; 8 R. C. L. 904, § 29; Savannah v. Standard Fuel Supply Co. 140 Ga. 353, 48 L.R.A. (N.S.) 470, 78 S. E. 906.

The use of a strip of land between the sidewalk and buildings, by the public, in conjunction with the owners' use of such strip for steps, billboards, or a place to display goods, will not effect a dedication; but the use is permissive.

McQuillin, Mun. Corp. § 1568; Gowen v. Philadelphia Exch. Co. 5 Watts & S. 141, 40 Am. Dec. 491; Keppler v. Richmond, — Va. —, 98 S. E. 747; Temby v. Ishpeming, 140 Mich. 146, 69 L.R.A. 618, 112 Am. St. Rep. 392, 103 N. W. 588; Johnson v. Robertson, 156 Iowa, 64, 135 N. W. 585, Ann. Cas. 1915B, 138; Clatskanie v. McDonald, 85 Or. 670, 167 Pac. 561; Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14; Griffin's Appeal, 109 Pa. 150; Weiss v. South Bethlehem, 186 Pa. 294, 20 Atl. 801; Palmer v. Chicago, 248 Ill. 201, 93 N. E. 765; Garrison v. Flatwoods, 72 W. Va. 499, 78 S. E. 667; Rau v. Freund, 165 Wis. 27, 160 N. W. 1063; Waters v. Philadelphia, 208 Pa. 189, 57 Atl. 523; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; State v. Hood, 143 Mo. App. 313, 126 S. W. 992; Postal v. Martin, 4 Neb. (Unof.) 534, 95 N. W. 8.

The deed from Rose to Morlang, containing covenants of general warranty, and calling for the entire lot, 90 by 23 feet, without any restrictions or reservations of any character, is against a dedication.

Garrison v. Flatwoods, 72 W. Va. 499, 78 S. E. 667; Quinn v. State, 49 Ala. 353; Case v. Favier, 12 Minn. 89, Gil. 48; Eugene v. Lowell, 72 Or. 237.

143 Pac. 903; *San Antonio v. Rowley*, 48 Tex. Civ. App. 376, 106 S. W. 753.

Payment of taxes is evidence against a dedication.

*Clatskanie v. McDonald*, 85 Or. 670, 167 Pac. 561; *Parrott v. Stewart*, 65 Or. 254, 132 Pac. 523; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. 207; *Lockey v. Bozeman*, 42 Mont. 387, 113 Pac. 286; *Wilder v. St. Paul*, 12 Minn. 192, Gil. 116; *Toledo v. Converse*, 21 Ohio C. C. 239; *Hanford v. Seattle*, 92 Wash. 257, 158 Pac. 987, Ann. Cas. 1917B, 195; *Topeka v. Cowee*, 48 Kan. 345, 29 Pac. 560; *Reuter v. Lawe*, 94 Wis. 300, 34 L.R.A. 733, 59 Am. St. Rep. 891, 68 N. W. 955; *Mansur v. State*, 60 Ind. 357.

An equitable estoppel cannot arise, except when justice to the rights of others demands. Its office is to protect a party from injury which, but for the estoppel, he could not escape. Consequently, the estoppel should be limited to what may be necessary to prevent injury.

10 R. C. L. 698; *Keppler v. Richmond*, — Va. —, 98 S. E. 753; *Davis v. Spragg*, 72 W. Va. 672, 48 L.R.A. (N.S.) 173, 79 S. E. 652; *Bigelow, Estoppel*, 6th ed. p. 692; *East v. Dolihite*, 72 N. C. 562; *Adler v. Pin*, 80 Ala. 351; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Rainey v. Hines*, 120 N. C. 376, 27 S. E. 92; 16 Cyc. 744; *Smith v. Powell*, 98 Va. 431, 36 S. E. 522; *Richmond v. Stokes*, 31 Gratt. 713; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11.

Ritz, J., delivered the opinion of the court:

In the year 1878, one Fred R. Rose was the owner of a lot situate in the city of Parkersburg, fronting 23 feet on the east side of Market street, and extending back a distance of 90 feet. This lot is part of what is known on the original plat of the city as inlot No. 92, and is between what is now known as Fourth street and Fifth street in said city, the north line of the same being at a distance of 49 feet from the corner of said Market street and Fifth street. At that time, to wit, in the year 1878, there were erected upon this lot, and upon the adjoining lots to the north and south of it, frame structures which were used for various sorts of retail mercantile business. In May of that year

a fire occurred which destroyed all of the buildings from the corner of Fifth street down to a point more than halfway in the block, where a brick building stood owned by one Randolph Logan. Immediately thereafter the owners of the lots began to erect new buildings thereon. Rose, who owned the lot in question, as well as the lot next to it on the south, when he erected his new buildings, placed the front of them back  $3\frac{1}{2}$  feet from the street line. The two buildings on the two lots north of Rose, and between his lots and the corner of Fifth and Market streets, were erected upon the old line. South of Rose's the buildings were erected on a line  $3\frac{1}{2}$  feet from the street line down to the Logan brick building, which was not destroyed. This brick building stood some distance back from the street, and was occupied as a residence. Shortly after this time Logan extended this building to the street line, and it was occupied in this condition for many years as a cigar store. In 1913, it was torn down and replaced by a large brick building, the front of which was placed at a distance of  $2\frac{1}{2}$  feet from the street line. South of this Logan property new buildings have been erected at various times upon the lots, the fronts of none of which were placed upon the actual street line, being from  $2\frac{1}{2}$  to 3 feet back therefrom. In the block between Third and Fourth streets, on the east side thereof, all of the buildings are placed 3 feet back from the actual line of the street. After Rose and the adjoining property owners had erected the buildings, as above indicated, they paved the space between their buildings and the curb with brick, at their own expense, making the sidewalk in front of their premises  $14\frac{1}{2}$  feet wide, instead of 11 feet, as it had been prior to that time. In the year 1888, Rose sold the lot in controversy, together with the house thereon, to Theodore Morland, the husband of one of the plaintiffs and the father of the other two. At that time the space in front

of the building, between it and the curb, was paved with brick, and the whole thereof used as a sidewalk. Some time after this Morlang and the owners of the adjacent properties took up the brick paving, and put down concrete pavement in front of their premises. This pavement was extended clear back to the front of the buildings. The building on the lot immediately to the north of the Morlang lot extended out to the street line—that is,  $3\frac{1}{2}$  feet further than the Morlang building—and that condition has existed up until this time. The space of  $3\frac{1}{2}$  feet between the front of the Morlang building and the actual street line is in no way distinguished from the other part of the sidewalk. It is paved with the same character of material, and there are no marks to indicate where the street ends and the Morlang lot begins. A number of years ago the Morlangs built a balcony on the front of their building, at the level of the second floor, extending out over this  $3\frac{1}{2}$  feet of space. No permission was asked of the city authorities to construct this balcony, nor was any objection made to the construction thereof by the city authorities without permission, although an ordinance of the city requires that permission be obtained from the city authorities before any structure may be erected overhanging any of the streets or public places of the city. It is further shown that this lot has been assessed and taxes paid thereon at all times as a lot 23x90 feet, no deduction having ever been made therefrom because of this  $3\frac{1}{2}$ -foot strip. It is further shown that at various times this controverted strip was used by the merchants and others doing business in the buildings along this street for the display of their wares and merchandise, for the storage to some extent of boxes and barrels thereon, but it does not appear that this was done to any greater extent than was done by other merchants in other parts of the city, where the buildings were erected flush with the street line.

There is some evidence indicating that in 1878, at the time of the fire above referred to, Rose, who was then the owner of the lot in question, had conversations with some of the owners of adjoining lots in regard to setting their buildings back. Some refused to do so, and some apparently followed the example set by Rose. The witnesses who testify upon this question say that they understood Rose's purpose to have been to create better conditions for the conduct of the business carried on in the buildings. Some of the witnesses say that Rose expressed the view that by setting the buildings back the owners would always have a clear space where the occupants of the store-rooms could display their merchandise without obtaining permission from the public authorities to use part of the street. Not one of them testify that he ever suggested that the strip of land left between the building line and the actual street line was to be dedicated to the city or become a part of the public street. No ordinance was ever passed by the city of Parkersburg widening Market street at this point, nor is there any evidence that the city or its officers ever acted upon any supposed dedication of this strip to the city by Rose and the adjoining property owners. In 1914 Rose's tenant desired to extend the front of the building out to the street line. He was engaged in the business of selling ladies' wearing apparel, and this business required his goods to be displayed in such manner that passers-by would have a ready view thereof. This could not be with the wall of the adjoining building on the north projecting out  $3\frac{1}{2}$  feet. Prior to the time this tenant went into the building it was occupied as a saloon. At the request of this tenant the owners of the property made application to the mayor of the city of Parkersburg for permission to erect the front upon this  $3\frac{1}{2}$ -foot strip. They were informed by the mayor that he would submit the

matter to the council. This was done, and the council, upon the advice of the city's attorney, refused the permission, claiming for the first time, so far as this record shows, that this 3½-foot strip had been dedicated to the city as a public street. The owners of the property, when informed by the mayor of this contention, immediately repudiated the same, and insisted that it was their private property, and that they would build thereon. Much is made in argument of the fact that they made the application to the city instead of proceeding with the building as above indicated. They say that it was their understanding that it was necessary to get a permit from the city authorities to make any such extensions or improvements to a building, and it was for such permission that they were applying. We cannot doubt their statements in this regard, inasmuch as the mayor to whom they made this application is not introduced by the city, and in no way contradicts their statements. Again, in 1917, when new city officers came in, they took it up with the city authorities through the new mayor, for the purpose of seeing if authority would not be granted to them to make this improvement of the building without, as they say, having a lawsuit. They had a conference with him and explained the situation, submitted to him a plan of the improvements contemplated, and, as they state, he advised them that he saw no objection thereto, but that he would submit the same to the council for its action. This was done, and the council, upon the advice of the city solicitor, refused to grant the permit. This action of the council was communicated to the plaintiffs by the mayor, and he advised them that it seemed to be a difference of opinion between the city's lawyer and the plaintiffs' lawyer as to who had the right to control the 3½-foot strip; that in his view the proper way to test it would be for the plaintiffs to go on with the improve-

ments, regardless of the city's action in refusing the permit, and, when the city attempted to stop them, to apply for an injunction to enjoin the city's interference therewith. Plaintiffs adopted the mayor's advice in this regard. These negotiations with the mayor by the plaintiffs are testified to fully by them, and are in no wise contradicted by that officer. Plaintiffs did begin to make the improvements in accordance with the plan submitted to the mayor as aforesaid. The city authorities immediately stopped them from going on with the work, and the plaintiffs thereupon filed their bill, asking that the city and its agents be enjoined from interfering with them in making the improvements contemplated. A temporary injunction was granted, and the improvements proceeded with, when the city made application for a counter injunction to prevent the plaintiffs from making the improvements pending the litigation. This injunction was also granted, but was subsequently modified so as to allow the improvements to be so far completed as to prevent damage to the building. Upon the hearing of the case the circuit court dissolved the injunction granted upon the city's cross application, and perpetuated the injunction granted to the plaintiffs, holding that the strip of land belonged to the plaintiffs, and that the city had acquired no easement therein.

The chief reliance of the city upon this appeal is that there was an implied dedication of this strip of land to the city for public use, which implied dedication was accepted by the user thereof. There is no contention that there was an express dedication, either in writing or orally, nor that there was an express acceptance of any dedication by the city. Upon the other hand, the plaintiffs contend that there has never been any such conduct upon their part, or upon the part of their predecessors in title, in connection with this strip of land, as would im-

ply a dedication thereof to the public. That an owner of real estate, under circumstances like this, may dedicate an easement therein to the public without any expression of his intent in that regard, or without

Highway—  
dedication—  
necessity of  
intent.

any writing conveying the same, there is no doubt. It

must be borne in mind that title to real estate, or any interest therein, is ordinarily passed by deed or will, and, while one may lose his land without an actual conveyance of the same, the acts and conduct upon his part, and upon the part of the one claiming to have acquired such title in such way, must be so unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to the public use, and the intention of the public authorities to accept the same for that purpose. McQuillin on Municipal Corporations, § 1568, and authorities there cited. It may be said that, in order to the validity of such implied dedication, it must be shown that the owner intended to part with the easement in his property for the public use. By this we do not mean that an expression of such intent upon his part need be proven. In

—clarity of  
proof.

fact, he may not have actually had

such purpose in his mind, but his acts and conduct in regard to the property must be of such character that the public, dealing with him upon the strength of such conduct, could not but believe that his intention was to vest an easement therein in the public. There seems to be no trouble about this general principle of law, but it is the application of it to the facts existing here which leads to the controversy.

Counsel for the city contend that the owners' conduct in connection with and treatment of this 3½-foot space, since the year 1878, was such as to indicate the clear intent and purpose upon their part to dedicate it to the public for public use, while the plaintiffs contend that the con-

duct shown is entirely consistent with the permissive use thereof by the public. As above stated, it is not proven that the plaintiffs, or Rose, under whom they claim, ever made any declaration of dedication of this property, nor is anything further shown than that Rose, in connection with some of the adjoining owners in erecting their buildings, left this space in front thereof. His purpose in doing so, some of the witnesses say, was to widen the sidewalk in order that the business conducted in the buildings might be more advantageously carried on. By others it is said that the purpose was to leave a space in front of the buildings so that merchants doing business therein could display their goods upon the outside without trespass upon the city street, and without getting any leave from the city therefor. That this space was used in the display of goods there can be no question. It appears that the balcony above referred to was erected, extending over this space, without permission from the city authorities. It also appears that cellar gratings were put in in front of the building in this space, without any authority from the city. The only thing which it can be said that the owners of the property have done upon which an implied dedication can rest is that they permitted the public to travel over this part of the sidewalk constructed by them at their own expense, and not under any requirement imposed upon them by the city. Will a dedication be implied from this state of facts? Counsel for the respective parties, with commendable zeal and thoroughness, have examined the authorities bearing upon this question, and have given the result of their efforts to this court, not only in oral argument at the bar, but in elaborate printed briefs. From the textbooks may be gleaned the general statements of law above declared, but we must look to the decided cases to discover the application that has been made of these

general principles to particular states of fact.

Counsel for the city cite and rely upon many cases wherein municipal corporations were held liable for damages for personal injury upon proof of a user of a street by the public, and insist that such proof is sufficient to show title to the public in the easement over the land. There is quite a different question involved when a contest arises between the owner of the fee and the public claiming an easement thereover, than the one that arises between the public and a party injured because of the improper condition of what is used as a public street. As between a citizen using a street laid out and worked by the public officers as a public street, it has been frequently held that proof of the exercise of acts of dominion over the street by the public is sufficient to charge liability upon a municipal corporation for an injury received because of the bad condition of such street. Proof that the city authorities expended the public moneys in improving such street or in working thereon has been held sufficient to establish it as a public street for the purpose of recovery for an injury caused by defects, but it could not be said that such proof would be sufficient to deprive the owner of land of his title thereto unless it could be further shown that he knew of such acts of ownership by the public and acquiesced therein. The proof in this case on behalf of the city is far short of that which has been required in the suits to recover damages for injuries above referred to. In those cases it has generally been required that it be shown that the public authorities have exercised dominion over the particular street or way by expending the public moneys thereon in the way of improvements, or by some such unequivocal conduct. In this case it is not shown that any public officer ever did anything indicating the intention upon the part of the city authorities to claim an interest in this

strip of land. No public moneys were ever expended thereon. No public officer ever made any declaration or committed any act which indicated an intention upon the part of the public authorities to adopt <sup>-paving strip</sup> adjoining walk <sup>-effect.</sup> this strip of land as a public way, but, even if they had, it would not be conclusive against the landowner, unless done with his full knowledge and acquiescence.

The case of *Denning v. Roome*, 6 Wend. 651, is cited and relied upon by counsel for appellant as controlling in this case. It is true, that case in its facts is somewhat similar to the case here. However, it has its distinguishing characteristics, and it is because of these elements, existing there, which do not exist here, that there was held to be an implied dedication of the strip of land involved. In that case a street 40 feet wide extended in front of the plaintiff's property. This street by an ordinance was widened to the width of 60 feet, and after the passage of this ordinance so widening the street, which took a strip off the front of the plaintiff's lot, the same was used in this widened condition for a period of nineteen years. During that time the street thus widened had been paved by the city, and an assessment for the cost thereof made against the abutting property owners, including the plaintiff, which assessment plaintiff paid without objection. It will thus be seen that in that case not only was the strip of land involved used by the public, but the public authorities, by passing an ordinance widening the street to 60 feet, incorporated it in the street as thus laid down, and by paving the same exercised dominion over it entirely inconsistent with the plaintiff's contention that the city had no easement therein, and by his payment of this assessment for improving the street in its widened condition he acquiesced in the adoption of the same as a public street. Had the city of Parkersburg passed

an ordinance widening Market street the additional distance of 3½ feet in front of the plaintiffs' property, and paved the same for this additional distance, and assessed the cost thereof against the plaintiffs or their predecessor, and collected such costs from them, it might be said that by the passage of such ordinance, and the making of such improvements, the city unequivocally claimed the right to the street in its widened state, and by the payment of such assessment the plaintiffs or their predecessor acquiesced in and approved that contention of the public authorities. These elements, however, which were controlling in that case, do not exist here.

This case is more like that of *Keppler v. Richmond*, — Va. —, 98 S. E. 747. In that case the plaintiff owned a lot fronting on one of the streets of the city, and extending back along another of the city streets to an alley. More than fifty years before the litigation arose plaintiff had built upon this lot a building fronting on the street in front thereof, and three other buildings fronting on the street at the side of the lot, leaving a space extending all the way across the rear of his lot, 11 feet wide, unoccupied by any building. About the time the buildings were erected the alley at the rear of the lot was paved by the plaintiff with cobblestones, including not only the public part of the alley, but the strip off the rear of his lot above referred to. A sidewalk next to the building about 3 feet wide was made, and a side entrance into the building from this walk. This paving, including the public alley and the strip off the rear of plaintiff's lot, was all of the same character. The public used all of the space thus paved, that part of it on the plaintiff's lot as well as the part thereof included in the public alley, and it so used the same for more than fifty years. There had been no improvement made upon this land of the plaintiff by the public authorities, and dominion

had never been exercised thereover by such authorities. It will thus be seen that that case in its facts is very nearly like the case at bar. In the case we have here the erection of the balcony a few years ago, extending out over the 3½-foot strip, by the plaintiffs, indicates upon their part that they did not consider this strip of land as belonging to the public. This element was lacking in the case above cited. In a well-reasoned opinion, in which the authorities are numerous cited and commented upon, the court of appeals of Virginia held that the public acquired no easement in the plaintiff's land by reason of the use of it for all that time; that this use was merely permissive, and was not inconsistent with his right to claim the same thereafter.

The case of *Weiss v. South Bethlehem*, 136 Pa. 294, 20 Atl. 801, is very similar in its facts to the case here. There a strip off of plaintiff's lot had been used for many years by the public in connection with the use made thereof by himself, but, because of the fact that such public use was not inconsistent with the idea that it was permissive upon the part of the plaintiff, an implied dedication of the easement therein was denied. A similar holding was made upon a very similar state of facts in *Griffin's Appeal*, 109 Pa. 150.

In the case of *Gowen v. Philadelphia Exch. Co.* 5 Watts & S. 141, 40 Am. Dec. 489, the supreme court of Pennsylvania had before it a very similar question. The controversy there arose between adjoining property owners. The Philadelphia Exchange had erected a building upon its property, leaving in front thereof a space which had been paved by it and used in connection with the sidewalk in front of the same. The public had continuously used this space for many years, as though it had been part of the public sidewalk, without objection upon the part of the owners of the building; but it did not appear that the public authorities had ever laid any



claim to the property or had ever done anything thereon. The owner of the adjoining property, whose building extended out to the actual street line, made a side door, opening upon this vacant space in front of the defendant's property. The defendant thereupon built a brick wall upon its property in front of this door, extending the same to the street line, blocking up plaintiff's side door. Suit was then brought to compel the removal of this wall, upon the theory that the defendant had impliedly dedicated the strip of land in front of its building to the public, and that the plaintiff had a right to have access to his building from this public street. The court, however, denied the relief, holding that there was no such state of facts as would raise a dedication by implication.

In the case of *Palmer v. Chicago*, 248 Ill. 201, 93 N. E. 765, it appeared that the public had been allowed to travel over a strip of plaintiff's land, lying vacant adjoining a public street, for a long time, without objection upon his part. During all of the time there had been no denial of the right of the public to travel over the land. No public street was ever extended over the same, nor had the public authorities ever exercised any dominion thereover. It was held that such public use was not inconsistent with the ownership thereof by the plaintiff, and the theory of an implied dedication was denied. In the case of *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14, a similar holding upon a very analogous state of facts to that involved here was made.

In the case of *Clatskanie v. McDonald*, 85 Or. 670, 167 Pac. 560, the supreme court of Oregon had before it the question of an implied dedication arising from the use of a strip of land in front of a building, and held that where the owner of land built his hotel back from the street with a sidewalk to the street line, and with a roof over it, and induced other builders to conform to his building line, he was not es-

topped from claiming the title to the actual street line, in the absence of a showing that the other property owners constructed their buildings on the line because of their belief that they could use the sidewalk in front of the hotel. It was also held in that case that the fact that the whole of the lot continued to be assessed for taxation without any deduction for the part thus claimed to have been dedicated was evidence tending to rebut the presumption of the dedication. We think the probative force of such evidence would ordinarily be very slight, however.

Tax-on dedicated strip—effect.

From these authorities it would seem clear that to create a dedication by implication the owner of the real estate must have done some act from which a positive intent upon his part to dedicate the land to the public can be drawn. The fact that the public was permitted to use a strip of land under circumstances such as exist here, without objection by the owner, is not sufficient from which to imply a dedication. It is not shown that either the plaintiffs, or Rose, under whom they claim, ever did anything of an affirmative character, expressing an intention to dedicate, but during the time that the public have been permitted to use this strip of land it appears that the owners of it have made uses of it inconsistent with the theory that they had dedicated it to the public use. It is shown that the ordinance of the city of Parkersburg required anyone desiring to erect any structure overhanging a street or sidewalk to obtain permission to do so. The owners of this property erected such a structure overhanging this space without obtaining this permission, and without their right thereto being questioned by the authorities. It is shown that they put in cellarways on this strip without authority from the city, and without their right thereto being questioned. During all of the time that the public have been permitted to use this strip of

land the plaintiffs, and Rose, under whom they claim, have paid the taxes thereon to the city of Parkersburg; and while this, of itself, is not very strong evidence, still it is some evidence, that they did not intend to dedicate it to the public, and likewise that the public authorities did not accept the dedication, else they would not have collected taxes from the plaintiffs upon the land. The first time, so far as this record discloses, that the public authorities ever asserted an interest or right in this strip of land was when the plaintiffs desired permission to erect an extension to their building over the same, and, instead of acquiescing in the city's claim at that time, the same was resisted and contested by the plaintiffs, and their complete title to the land asserted and claimed.

Counsel for the city rely upon § 56aX of chapter 43 (§ 1777) of the Code, and the construction placed thereon by the case of *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8, to support the city's contention of an implied dedication in this case. The construction given that statute in that case does not support counsel's contention. It is quite true, as we have above asserted, that if the public was permitted to use this strip of land, and the city had accepted the same and made claim

thereto, then a dedication might be implied. In that case it was held that there had been no such user by the public or acquiescence therein by the owner, or recognition or acceptance by the town authorities, as constituted an easement by implication. The theory upon which acts of dominion over the property by the public officers are held to be evidence of an easement by implication is that such acts are inconsistent with any other theory than that the public has such easement in the property, and the owner, being fully cognizant of such acts and acquiescing therein, will be taken, without other proof, to have, by such acquiescence, shown an intent upon his part to appropriate the property to the use which the public is making of it. Nothing of that kind, however, is shown in this case.

Finding, as we do, that the state of facts disclosed by this record is not sufficient to show an implied dedication of this strip of land to the public, the court's decree perpetuating the in-  
Highway—paved strip adjoining—right to use.
junction inhibiting the defendant from interfering with the plaintiffs in the construction of their addition thereon is clearly right, and the same is affirmed.

### ANNOTATION.

#### Implied or constructive dedication of land between street line and building.

##### General rule.

Although there are comparatively few cases on the subject, it appears to be the rule that land between the street line and a building is not dedicated by implication to the public, by the fact that the space is used by the public as part of the street, without objection from the owner. It is necessary for the owner to do some act from which can be drawn a positive intent to dedicate the land to the public. *Valentine v. Boston* (1839) 22 Pick. (Mass.) 75, 33 Am. Dec. 711; *Fall River Print Works v. Fall River* (1872)

110 Mass. 428; *Baker v. Squire* (1895) 77 Mo. App. 329; *Clatskanie v. McDonald* (1917) 85 Or. 670, 167 Pac. 560; *Biddle v. Ash* (1838) 2 Ashm. (Pa.) 211; *Gowen v. Philadelphia Exch. Co.* (1843) 5 Watts. & S. (Pa.) 141, 40 Am. Dec. 489; *Duncan v. Hanbest* (1857) 2 Brewst. (Pa.) 362; *Neill v. Gallagher* (1874) 10 Phila. (Pa.) 172; *Keppler v. Richmond* (1919) — Va. —, 98 S. E. 747. See the reported case (*MORLANG v. PARKERSBURG*, ante, 717).

##### Application of rule.

In *Fall River Print Works v. Fall River* (1872) 110 Mass. 428, it ap-

peared that the plaintiffs, when they erected their mill, left a space between the street and the wall of the mill. There was nothing to distinguish this strip from the sidewalk, and it was used by the public in common with the street. The defendants contended that the space had been dedicated to the public use, and that, therefore, the owners were not entitled to compensation when the street was formally widened so as to include this strip. The court held that the space had not become part of the highway by implied dedication, and that instructions to that effect were properly refused.

Compare *Valentine v. Boston (Mass.) supra*, wherein it appeared that a street in the defendant city was laid out at a width of 35 feet. Subsequently the petitioner's predecessors in title set their buildings back 10 feet, and this space was used as part of the highway for nearly a century. It was held that the public had acquired title by the lapse of time, the court saying: "Now, from the uninterrupted public use of this land for a century, we can entertain no doubt that an easement was established in it. And whether it may have been acquired by a grant, or dedication, or the presumption of a laying out, and whether it may be viewed as a private way for the town or as a highway for the public, seem to us to be useless speculations; for in either event the owners held it subject to a servitude, and the public or the city had acquired an easement over it."

In *Baker v. Squire* (1895) 77 Mo. App. 329, an action was brought by the owner of a building to enjoin the tenants of a contiguous building from adding a bay window to the same. Several years prior to the institution of the action, the plaintiffs and the defendant's predecessor in title set their respective buildings back several feet from the street line. It was contended by the plaintiffs that this land between the buildings and the street line had been dedicated to the public. The court, in holding that there had been no dedication, said: "The fact of the omission to build on the 4 feet of frontage when the edifice was con-

structed is not, of itself, evidentiary of a dedication, and, if it could be so construed, it would not become effective as such, in the absence of proof of the further essential fact of acceptance thereof by the public. . . . As to that, the evidence is undisputed that the strip in controversy was used by the present and former tenants for the purposes of displaying merchandise kept in the building, that taxes were regularly paid thereon, and that at the times of the various sales of the lot the measurements of each deed called for this portion, and it was actually pointed out to the vendees as an integral part of the land acquired by them under their respective deeds."

In *Clatskanie v. McDonald* (1917) 85 Or. 670, 167 Pac. 560, it appeared that the defendants' hotel was set back a distance of 3 feet from the street line, and the plaintiff city claimed title to this strip of land between the building and street line. The strip was included as a part of the sidewalk, and had been used as such by the public for several years. In holding that there had been no dedication of the property, the court said: "In order to sustain the estoppel contended for, the city should have proved that other property owners were induced to construct their buildings substantially in line with defendants' hotel by a belief, induced by defendants, that the strip of land in front of these buildings could be used as a sidewalk without claim thereto by defendants. The evidence fails to establish these facts. There is no evidence that other property owners constructed their buildings on the line selected because of their belief that they could use the sidewalk in front of defendants' hotel."

In *Biddle v. Ash* (1888) 2 Ashm. (Pa.) 211, it appeared that the defendants' predecessor in title had placed the front wall 5 feet back from the street line, and this line was, by common consent, adopted by the adjoining property owners, and they erected their buildings on a line with it. The defendants had erected an iron railing around the 5-foot space about five years before the institution of the ac-

tion. The defendants, in rebuilding, attempted to bring the front wall of their buildings 5 feet forward. The plaintiff sought an injunction to restrain the erection of the building on this line, contending that it had been dedicated to the public use. It was held that there was no dedication.

In *Gowen v. Philadelphia Exch. Co.* (1843) 5 Watts & S. (Pa.) 141, 40 Am. Dec. 489, it appeared that the defendants, in erecting their building, built back from the street line, and paved the intervening space, which was used as part of the walk. The plaintiff, at a later date, built a door in the side of his building which adjoined that of the defendants. Subsequently, the defendants erected a wall on the walk between their buildings and the street line, and thereby shut off the plaintiff's right of passage. Plaintiff brought this action for an injunction to compel its removal. It was held that the space had not been dedicated to the public.

In *Duncan v. Hanbest* (1857) 2 Brewst. (Pa.) 362, the plaintiff sought an injunction to restrain the defendant from building out to the street line. It appeared that the defendant's building, when erected, was set back from the line of the street about 2½ feet. When the plaintiff and other landowners erected their dwellings, they built on a line with the defendant's property. The defendant had taken steps to extend his building to the street line. In discussing the question whether the space had been dedicated to the public use, the court said: "A considerable part of the space in front of defendant's building is now, and for a long time heretofore has been, used for a cellar door and doorway. This use disproves the intent to dedicate to the public use, and indicates sufficiently the claim of ownership up to the line of the street. The right to extend the building to the line of the street is incident to the ownership of the ground, and is not lost by nonuser; nor can its exercise be prohibited by an allegation that it will inconvenience an adjoining owner."

In *Neill v. Gallagher* (1874) 10 Phila. (Pa.) 172, an action was

brought to restrain the defendant from building a bay window on the first floor of his house. It appeared that the defendant's predecessor in title moved his house back 5 feet from the recorded street line. Subsequently, other houses on the street were erected, all built even with the defendant's. The plaintiff contended that the defendant, by setting his house back 5 feet, had dedicated the space to the public use. The court refused an injunction on the ground that the plaintiff's right was, at best, doubtful, referring to the fact that all the owners had set their buildings back to a uniform frontage "thus practically widening the street," as a circumstance possibly distinguishing earlier cases which held that there was no dedication.

In *Keppler v. Richmond* (1919) — Va. —, 98 S. E. 747, it appeared that there was an alley in the rear of the plaintiff's property, which was maintained at a width of 10 feet. The plaintiff's buildings did not extend back to this alley, but there existed a space of 11 feet from the building to the alley line. The alley and the 11-foot space had been paved, and were all used by the public. The owner of the strip in question attempted to extend his building line so as to include this strip, but the city claimed that it had been dedicated by implication, to the public use. The court held that there had been no dedication.

In the reported case (*MORLANG v. PARKERSBURG*, ante, 717), it appeared that the building of the plaintiff was erected 3½ feet from the street line. The space between the street and building was in no way distinguishable from the other part of the sidewalk. Subsequently, the plaintiff sought to extend the front of her building, but was stopped by the defendant city, it claiming that the strip had been dedicated to the public use. It is held that the strip was not dedicated to the city, because, to create a dedication by implication, the owner must have done some act from which a positive intent to dedicate the land to the public can be drawn. E. C. B.

## EDWARD F. GERBER COMPANY, Plff. in Err.,

v.

## D. SCOTT THOMPSON.

*West Virginia Supreme Court of Appeals — October 14, 1919.*

(— W. Va. —, 100 S. E. 783.)

**Power — to confess judgment — amount which may be found due.**

1. A paper purporting to confer authority to confess judgment for such amount as may be found due from one party to another, upon their dealings in the future, is invalid because of the uncertainty and indefiniteness of the amount for which such confession of judgment is attempted to be authorized.

[See note on this question beginning on page 785.]

**— definiteness.**

2. A power of attorney purporting to give authority to confess judgment must state the amount for which such judgment is to be confessed, or at least contain facts from which such amount can be definitely ascertained.

[See 15 R. C. L. 653.]

**Attachment — effect of judgment.**

3. A judgment in an attachment suit, where no personal service is had upon the defendant therein, has no other effect than to reach the property which the nonresident defendant may have in the state, and after such property is exhausted such judgment is of no force or effect.

[See 2 R. C. L. 852.]

**Judgment — effect on privies.**

4. A judgment rendered by a court of competent jurisdiction after service of process upon the parties to be affected thereby is conclusive not only upon those who are actually parties thereto, but also upon all who are in privity with them.

[See 15 R. C. L. 1005.]

**— interest acquired before or after judgment.**

5. For the purpose of the application of the rule of *res judicata* to persons because of their privity with the parties to a suit, it must appear that the estate or interest of such a one was acquired from or through such actual party after the litigation. If his interest in the cause of action or the subject-matter of the litigation

was acquired prior to the litigation, he will not be bound by the judgment.

[See 15 R. C. L. 1015.]

**— effect on possible counterclaim.**

6. A judgment rendered in a suit for the recovery of money is not conclusive of the defendant's right to maintain a subsequent suit to recover a debt claimed to be due to him by the plaintiff in the former suit, when such claim was not pleaded or relied upon therein. The adjudication in such former suit, where the recovery of money is sought, is only conclusive of the matters actually put in issue therein, and such other matters as are defensive to the claim set up, and does not bar a suit upon a different claim which either of the parties may have against the other.

[See 15 R. C. L. 973 et seq.]

**Trial — several issues on pleas in bar.**

7. Where there is more than one issue upon pleas in bar in an action at law, they should all be tried together.

**Appeal — error in ruling on one issue in plea in bar.**

8. Where, however, the court below, with the assent of the parties, proceeds to the trial, without a jury, of only one of such issues, and erroneously finds for the defendant upon such issue, and renders judgment accordingly, this court will reverse the same, set aside the findings of the court below, and remand the cause for a trial upon the remaining issue, or issues.

Headnotes by RITZ, J.

**ERROR** to the Circuit Court for Harrison County to review a judgment in favor of defendant in an action brought to recover a balance alleged to be due by him under an agency contract with plaintiff's assignor. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Robert R. Wilson, for plaintiff in error:

Plaintiff had the right to enter confession of judgment against defendant in open court under power of attorney, as stipulated in the agent's contract.

Insurance Co. v. Barley, 16 Gratt. 382; *Caldwells v. Shields*, 2 Rob. (Va.) 305; 4 Minor, Inst. pt. 2, p. 726; *Manson v. Rawlings*, 112 Va. 384, 71 S. E. 564; 23 Cyc. 712; *Stringer v. Anderson*, 23 W. Va. 485; *Richardson v. Jones*, 12 Gratt. 53; *Farquhar v. Dehaven*, 70 W. Va. 738, 40 L.R.A. (N.S.) 956, 75 S. E. 65, Ann. Cas. 1914A, 640; *Bush v. Hanson*, 70 Ill. 480; *Cross v. Moffat*, 11 Colo. 210, 17 Pac. 771; 30 Am. & Eng. Enc. Law, 117.

A former judgment, to operate as a bar as *res judicata*, must combine the four essential elements, viz.: Court of competent jurisdiction, decision on the merits, identity or privity of parties, and identity of causes of action.

23 Cyc. 1527-1529; *Hall v. Lowther*, 22 W. Va. 570; *Stone v. Myers*, 9 Minn. 310, Gil. 287, 86 Am. Dec. 104; *Lawson v. Conaway*, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Iguano Land & Min. Co. v. Jones*, 65 W. Va. 59, 64 S. E. 640; *Bigelow, Estoppel*, 1913, 6th ed. 206; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Hanham v. Sherman*, 114 Mass. 19; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 875, 40 S. E. 420; *Hudkins v. Crim*, 72 W. Va. 418, 78 S. E. 1043; *Kennedy v. Davison*, 46 W. Va. 433, 33 S. E. 291; *Hudson v. Iguano Land & Min. Co.* 71 W. Va. 402, 76 S. E. 797; *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827; *Pomeroy Nat. Bank v. Huntington Nat. Bank*, 72 W. Va. 534, 79 S. E. 662; *Parr v. Howell*, 74 W. Va. 413, 82 S. E. 126.

Messrs. Clarence B. Sperry and John C. Southern, for defendant in error:

It was not error for the court to deny to plaintiff the right to confess judgment.

*Farquhar v. Dehaven*, 70 W. Va. 738, 40 L.R.A. (N.S.) 956, 75 S. E. 65, Ann. Cas. 1914A, 640; 2 Enc. Pl. & Pr. 981; *Fortune v. Bartolomei*, 164 Ill. 51, 45 N. E. 274; *Hancock v. Hillegas*, 2 Dall. 380, 1 L. ed. 424, Fed. Cas. No. 6,010.

Judgments in attachments are conclusive.

23 Cyc. 1408; *Vanfleet, Collateral Attack*, pp. 372, 373; 1 Black, Judgm. p. 300; *Freeman, Judgm. § 607*; *Coop-*

*er v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *Britain v. Cowen*, 5 Humph. 315; *Thacker v. Chambers*, 5 Humph. 813, 42 Am. Dec. 431; *Hall v. Heffy*, 6 Humph. 444; *Skinner v. Moore*, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155; *Sessions v. Stevens*, 1 Fla. 269, 46 Am. Dec. 339; *Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Harrison v. Pender*, 44 N. C. (Busbee, L.) 78, 57 Am. Dec. 573.

Such judgments cannot be collaterally attacked.

*Johnson v. Ludwick*, 58 W. Va. 465, 52 S. E. 489; *Houston v. McCluney*, 8 W. Va. 156; *Freeman v. Alderson*, 119 U. S. 187, 30 L. ed. 373, 7 Sup. Ct. Rep. 165; *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. 352; 2 Black, Judgm. § 793; 2 *Freeman, Judgm.* 4 ed. § 606; *Dulin v. McCaw*, 39 W. Va. 727, 20 S. E. 681; *Vance v. Snyder*, 6 W. Va. 32; *Meadows v. Justice*, 6 W. Va. 198; *Handy v. Scott*, 26 W. Va. 710; *Platt v. Howland*, 10 Leigh, 510; *Barbee v. Pannill*, 6 Gratt. 443.

Ritz, J., delivered the opinion of the court:

On the 3d of January, 1913, the defendant D. Scott Thompson entered into a contract with the Pennsylvania Sales Corporation, assignor of the plaintiff in this case, by which he became the agent of that concern for the sale of Michigan automobiles and their accessories in certain designated territory. The provisions of the contract, so far as they are material to the determination of the questions involved here, are that Thompson deposited \$1,000 with the Sales Corporation, to be held by it as security for the payment of any amount which he might owe, and to be refunded to him by crediting it on the automobiles sold by him, at the rate of \$100 for each of such machines so sold. The contract further fixed the price at which such machines and their accessories were to be sold, and the compensation to be allowed to Thompson for making the sales. It further provided that in case of the failure of Thompson to remit the invoice price of the automobiles and parts

shipped and sold under the agreement, at the time provided in the contract, he, the said Thompson, authorized any attorney of a court of record selected by the other party to confess judgment in any court of law of competent jurisdiction for the amount of any unpaid balance.

This suit was brought by Edward F. Gerber Company, a corporation, assignee of the Pennsylvania Sales Corporation, to recover a balance alleged to be due by the said Thompson upon the contract aforesaid. An affidavit was filed with the declaration, in which was stated the amount which the plaintiff claimed the right to recover. When the case was called for trial, the plaintiff by its attorney appeared and moved to be permitted to confess judgment in favor of the plaintiff against the defendant, for the sum claimed in the affidavit. The defendant resisted this motion and asked to be allowed to file his counter affidavit and plea of non assumpsit. The court below declined to allow plaintiff's attorney to confess judgment, but permitted the counter affidavit to be filed, together with the plea of non assumpsit. Subsequently the defendant filed his special plea of *res judicata*. This special plea is based upon an attachment proceeding instituted by the defendant against the Pennsylvania Sales Corporation in December, 1913. It appears that the defendant instituted in the circuit court of Harrison county an action in assumpsit in December, 1913, to recover the \$1,000 deposited by him under the contract. No service of process was had upon the defendant, but the jurisdiction was sustained by levying an attachment sued out in said cause on one of the machines shipped to Thompson for sale. Without any appearance on behalf of the Sales Corporation, a judgment was taken condemning the said machine to sale in satisfaction of plaintiff's demand. It was sold, the sale confirmed, and the proceeds thereof paid over to the plaintiff, and this proceeding Thompson now sets up as *res judicata* in this

suit. A trial was had in the court below upon the issue raised by the plea of *res judicata* alone, and the court found thereon in favor of Thompson, and rendered judgment accordingly, from which judgment this writ of error is prosecuted.

The plaintiff's first contention is that the court erred in not granting its motion to confess judgment by its attorney in its favor, against the defendant, because of the provision in the contract referred to. This contract created the defendant Thompson an agent for the sale of the Sales Corporation's goods, at an agreed price. At the time it was entered into there was no amount due by Thompson, and the provision authorizing the confession of judgment simply provided that when any amount might become due and unpaid, in accordance with the terms of the contract, the plaintiff, through its attorney, might confess judgment in its favor. It will be observed that there is nothing in the contract from which such amount can be determined. It depended entirely upon the future dealings of the parties. Ordinarily, an authority to confess judgment ought to be as

**Power—  
definiteness.**

certain in its terms as the judgment itself. The amount for which such judgment is to be confessed should be clearly stated, or else facts and figures given in the power itself, from which the amount can be certainly determined. Such is not the case here, and for that reason alone the alleged power of attorney conferred no

**—to confess  
judgment—  
amount which  
may be found  
due.**

authority to confess judgment for any amount. 23 Cyc. 704; 15 R. C. L. 653; *Bennett v. Haley*, 142 Pa. 253, 21 Atl. 814; *Little v. Dyer*, 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905; *Fortune v. Bartolomei*, 164 Ill. 51, 45 N. E. 274; *Holden v. Bull*, 1 Penr. & W. 460; *Connay v. Halstead*, 73 Pa. 354; 11 Enc. Pl. & Pr. 981. The court did not err in denying plaintiff's motion to confess judgment and permitting the de-

fendant to file his counter affidavit and plea.

The plaintiff, however, contends that the court below erred in finding for the defendant on his special plea of *res judicata*. As before stated, this special plea relied upon the judgment in an attachment suit brought by Thompson against plaintiff's assignor, in which no service of process was had, but which jurisdiction was sustained by reason of a levy made on one of the automobiles shipped to Thompson by the Sales Corporation. In this suit Thompson filed an account upon which he asked recovery, and it was for the \$1,000 advanced by him to the Sales Corporation under the contract. The judgment was in his favor for this sum, with its interest, and adjudged that the property attached was liable to be sold in satisfaction thereof. What is the effect of such a judgment? The defendant contends that it is conclusive of all controversies existing between the parties, while the plaintiff contends that it is conclusive of nothing except the fact that Thompson was entitled to have the particular property upon which the levy was made sold to satisfy his alleged debt. A proceeding by way of attachment partakes somewhat, in its nature, both of a proceeding in *rem* and one in *personam*. It is not, strictly speaking, a proceeding in *rem*, although it partakes more of the nature of such a proceeding, where no service of process has been had, than it does of a proceeding in *personam*. There is this difference, however. In a pure proceeding in *rem*, the judgment is conclusive against the world as to the right in the property or thing seized, or the status sought to be determined; while in a proceeding by attachment, where there is no service of process the attachment is only conclusive upon the parties to it and their privies. If a stranger claims to own the property, he would not be bound by the adjudication in the attachment proceeding, while in a pure proceeding in *rem*, everyone

is bound by the adjudication. It will thus be seen that the effect of such a judgment is not as broad as a judgment in a proceeding purely in *rem*. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Bigelow, Estoppel*, p. 330.

But what is the effect of such a judgment upon the parties to the proceeding? It is for no other purpose, and has no other effect, than to reach the property which a non-resident defendant may have in the state, where there is no personal service of process. It is confined exclusively to such property, and is of no further force

Attachment—  
effect of  
judgment.

when that is exhausted. It is evidence of nothing beyond this, and does not bind or conclude the defendant as to anything else. A suit could not be maintained on it in any other court in the same state or elsewhere, nor would the plaintiff in such a proceeding, in whose favor the judgment was rendered, be precluded from bringing another action on the original consideration for such balance as may be due after exhausting the property attached. To hold that a judgment thus rendered has any vitality, after exhausting the only thing conferring the jurisdiction, is violative of a principle inherent in our government, which constitutes an inflexible rule of the common law, and that is that no one can be condemned unheard. It cannot be disputed that whatever interest the Pennsylvania Sales Corporation had in the property attached passed by the judgment and sale thereunder, but after exhausting that subject-matter the judgment is of no force or effect, and can afford no advantage to either party as an adjudication of any other matter. 7 Rob. Pr. p. 51; *Stone v. Myers*, 9 Minn. 303, Gil. 287, 86 Am. Dec. 104.

But the plaintiff argues that, even though the judgment relied upon be treated as one rendered upon default after service of process, it would not be a bar to this suit for two reasons: First, that this suit



is brought by an assignee of the defendant in the former suit, and it does not appear whether the rights of the plaintiff here were acquired before or after the institution of the former suit, it being contended that, if such rights were acquired under the assignment before such suit was brought, the same could have no effect upon the plaintiff in this suit; and, second, that the subject-matter of this suit was neither involved nor litigated in the former suit.

It is well settled that a judgment is conclusive, not only upon the parties to the litigation, but also upon

**Judgment—  
effect on privies.**

all persons who are in privity with them. Privy is said to be a mutual or successive relationship to the same rights of property, and if it is sought to bind one as privy by an adjudication against his predecessor, in title, it must appear that at the time he acquired the right, or

**—interest  
acquired before  
or after judgment.**

succeeded to the title, it was then affected by the adjudication, for, if the right was acquired by him before the adjudication, then the doctrine cannot apply. *Black*, Judgm. § 549; *Freeman*, Judgm. § 162; *United States v. Louisville*, 169 U. S. 249, 42 L. ed. 735, 18 Sup. Ct. Rep. 358; *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078; *Maxwell v. Leeson*, 50 W. Va. 361, 88 Am. St. Rep. 475, 40 S. E. 420; *Hudkins v. Crim*, 72 W. Va. 418, 78 S. E. 1043; *Steel v. Long*, 104 Iowa, 39, 73 N. W. 470. It will, therefore, be

**—effect on  
possible  
counterclaim.**

seen that it was necessary not only to show that the plaintiff in this suit was the assignee of the defendant in the other suit, but that it became such assignee after the institution of such former suit. This does not appear from the proof submitted, and for that reason the court erred in his findings upon the plea of *res judicata*.

Nor can it be said, we think, that the matters involved in this suit

were in any wise involved in the former proceeding which is set up as a bar to this action. The former litigation had no other object than the recovery of the \$1,000 advanced by Thompson to the Sales Corporation as security for property delivered to him for sale. It did not involve, in any wise, amounts which he might owe to the Sales Corporation. It is true the Sales Corporation might have filed these amounts as offsets in that suit, and had this been done the same would have become involved, and the adjudication in that suit would have concluded the Sales Corporation as to the claim set up. But one who is sued upon a claim is under no obligation to plead offsets thereto, or to set up some independent cause of action in defense thereof. Even after he is served with process and allows a judgment to go against him by default, he is only concluded as to such matters as are defensive to the cause of action set up. He could not thereafter say, of course, that he did not owe the money for which suit was brought; but if he has a claim against the plaintiff in such suit, he is not barred from setting it up in another and independent suit to recover the same. 23 Cyc. 1131 et seq.; 15 R. C. L. p. 987; *Lawson v. Conaway*, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; *Vanfleet*, Former Adjudication, § 217. We are, therefore, of the opinion that the court below was wrong in holding that the cause of action here was barred by the former proceeding, for the reason that it was in no wise involved in that proceeding, and there was no adjudication there affecting the cause of action relied upon in this suit.

As before stated, the defendant in this suit pleaded the general issue of non assumpsit, as well as the special defense of *res judicata*. The issues upon these pleas should have been tried together.

**Trial—several  
issues on pleas  
in bar.**

It is apparent, however, that the trial

in the circuit court was only of the issue made upon the special plea of *res judicata*. Neither party objected to the suit proceeding in this way. In fact, it is apparent that it so proceeded with the consent and the desire of both parties.

Finding that the conclusions of the court below are wrong upon this issue, we will set aside the

judgment rendered thereon, and reverse the court's findings; but inasmuch as the issue joined upon the plea of non assumpsit has never been tried, we will not render judgment here in favor of either of the parties, but will remand the cause to the Circuit Court for a trial upon that issue.

Appeal—error in ruling on one issue in plea in bar.

### ANNOTATION.

#### Necessity that warrant of attorney to confess judgment state amount.

There are comparatively few cases dealing directly with the question of preciseness of amount in warrants of attorney to enter judgment. The modern statutes are generally explicit, and most of the cases reported seem to turn on the question whether the "nature of the liability" is sufficiently described. It may be said, however, by way of preface, that there seems to be no objection to authorizing a judgment to be entered for any sum due on a described obligation as "for such amount as may appear to be unpaid thereon" (*Pirie v. H. Stern, Jr. & Bro. Co.* (1897) 97 Wis. 150, 65 Am. St. Rep. 103, 72 N. W. 370); and, where the warrant of attorney was attached to a bond in a certain sum it was held proper to authorize judgment to be entered for any sum due thereon (*Martin v. Belmont Bank* (1844) 13 Ohio, 250). So it has been held that a judgment which was entered on a warrant of attorney, giving a copy of a promissory note, and authorizing confession of judgment for such sum as shall appear at the time of confession to be due on such note, could not be collaterally attacked for irregularity. *Patterson v. State* (1850) 2 G. Greene (Iowa) 492. But in *Hancock v. Hillegas* (1797) 2 Dall (U. S.) 380, 1 L. ed. 424, Fed. Cas. No. 6,010, where, after several payments on a promissory note in several modes, and before any settlement of accounts, the defendant entered into an agreement that judgment should be entered against him by an attorney, "for the amount that may be due," it was held that the plaintiff,

either by arbitration or by a jury, should have proceeded to make the settlement, with notice to the defendant before he entered the judgment, or at least before he issued the execution.

A warrant of attorney to confess judgment should state the amount, or else facts and figures from which it can be certainly determined. *Little v. Dyer* (1891) 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905; *Harwood v. Hildreth* (1853) 24 N. J. L. 51; *Conway v. Halstead* (1873) 73 Pa. 354; *Dalton v. Willingmyre* (1913) 23 Pa. Dist. R. 699; *EDWARD B. GERBER CO. v. THOMPSON* (reported herewith) ante, 730; *Dilley v. Van Wie* (1858) 6 Wis. 209.

Compare, however, *Holden v. Bull* (1830) Penr. & W. (Pa.) 460, where it was held that a judgment bond to the county treasurer for \$100 was good, although the warrant therein to confess judgment was conditioned that the obligor would pay a fine and bill of costs in a suit by the commonwealth against the obligor, then uncertain as to amount (but that if execution issued before the amount due was ascertained, it would be set aside).

It is held in the reported case (*EDWARD F. GERBER CO. v. THOMPSON*) that a warrant of attorney to confess judgment for the amount of any unpaid balance from a salesman of the creditor was insufficient, as the amount was uncertain.

A warrant of attorney to confess judgment for \$9,200, accompanying a bond in the penalty of \$18,400, conditioned for the payment of \$9,200 in one

year from date, and stating further, that "the above bond is subject to the conditions of an agreement between the parties, of the same date," will not permit the entry of judgment of confession. *Harwood v. Hildreth* (1853) 24 N. J. L. 51, *supra*.

Where, on breach of a contract of hire of personal property, the bailor might retake possession, a warrant of attorney to confess judgment would not enable the prothonotary to enter judgment, as the amount of rent might depend upon whether the bailor had retaken possession, and this could not be shown except by going outside the instrument. *Dalton v. Willingmyre* (1913) 23 Pa. Dist. R. 699, *supra*.

Where a promissory note read, "subject to the provisions contained in an agreement this day made between said Carter and myself," and the language of the warrant of attorney does not appear, the court said: "Nor does the warrant of attorney help the matter, for the power to confess judgment is only for the amount due, and that must depend upon the equities before mentioned, which would require to be adjusted before the authority of the attorney to confess the judgment would be complete." *Dilley v. Van Wie* (1858) 6 Wis. 209, *supra*.

But it was held in *State Mut. Bldg. & L. Asso. v. Batterson* (1908) 77 N. J. L. 57, 71 Atl. 115, that "where a bond and warrant of attorney to confess judgment is given to secure the payment of a sum of money at such times, in such places, and in such instalments, as may be required by the constitution, by-laws, and regulations of a building and loan association, with the provision that, upon default, the whole may become immediately due at the option of the obligee, judgment may be entered upon the bond and warrant, notwithstanding no definite date of payment is mentioned in the bond."

Where a contract for the purchase of land at a price payable in yearly instalments provided that the buyer, in case of default, does hereby confess judgment for the whole amount unpaid, and showed indorsements, some partial in amount, there being no

payments indorsed for some of the years, it was held that this was sufficiently definite to enable the prothonotary to enter judgment. *Whitney v. Hopkins* (1890) 135 Pa. 246, 19 Atl. 1075.

A power of attorney to confess judgment for the unpaid amount of the price of land purchased, the number of acres to be ascertained by survey, is insufficient to enable the prothonotary to enter judgment. *Conway v. Halstead* (1873) 73 Pa. 354, *supra*, where the court referred to the statute making it the duty of the prothonotary, upon the application of the holder of a bond or other instrument containing a warrant of attorney to confess judgment, "to enter judgment against the person or persons who executed the same, for the amount which, on the face of the instrument, may appear to be due," and said: "This act does not confer upon the prothonotary all the power of an attorney at law to confess a judgment, but only authorizes him, without the agency of an attorney, to enter a judgment in the way specified in the act, to wit, for the amount which, from the face of the instrument, may appear to be due. This would probably embrace a case where the sum due can be ascertained by calculation from the face of the writing. . . . But in this case the sum or amount due could by no possible calculation be made to appear from the face of the instrument. It was an agreement for the sale of a tract of land by loosely stated boundaries, and no quantity stated. The price was to be at the rate of \$10 an acre, and the number of acres was to be ascertained by a survey. Until the number should be thus determined, a matter wholly outside of the face of the paper, the amount of the purchase money could not be known. The prothonotary had no guide, therefore, in entering the judgment."

A warrant of attorney to confess judgment is void where it gives authority "to confess judgment from time to time for any rent which may be then due by the terms of this lease, with costs, and to waive all errors and all right of appeal from any such judg-

ment or judgments," where, by the terms of the lease, amounts paid by the lessor for water rates, gas bills, and certain expenses were to be "so much additional rent," so that a judicial investigation would be required to fix the amount due under the lease. The court referred to the Illinois statute, providing that "any person, for a debt bona fide due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process," and said, *inter alia*: "The word 'debt,' in this statute, is used as indicative of a sum certain that is owing from one person to another. . . . Our conclusion is that the warrant of attorney contained in the lease here in question attempted to authorize a proceeding which was unknown to the common law and not contemplated by the statute." *Little v. Dyer* (1891) 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905, *supra* (the report is not so clear as might be that the amounts to be "so much additional rent" were included in the confession, but the case is so construed in the *Fortune Case* (Ill.) *infra*). But where, under a similar lease, the confession of judgment was simply for instalments of rent, the warrant of attorney was held good for that purpose. *Fortune v. Bartolomei* (1896) 164 Ill. 51, 45 N. E. 274, followed in *Scott v. Mantonya* (1897) 164 Ill. 478, 45 N. E. 977.

It may be noted in this connection that authority to confess judgment, contained in a power of attorney attached to a lease, for any rent that may be due by the terms of the lease, does not extend to rent accruing when the lessee is holding over after the expiration of the lease,—especially if the additional term is, by agreement of the parties, not to be under the terms and conditions of the old lease. *Weber v. Powers* (1904) 213 Ill. 370, 68 L.R.A. 610, 72 N. E. 1070.

In *Gambia v. Howe* (1846) 8 Blackf. (Ind.) 133, and in *Veach v. Pierce* (1854) 6 Ind. 48, where it was held that warrants of attorney to confess judgments on promissory notes not fully described were insufficient, the cases seem to rest on the omission of the "nature of the liability," and perhaps

not on absence of the amount of the notes.

A note with authority to confess judgment "for such amount as may appear to be unpaid thereon, together with costs and \$50 attorney's fees," is not a promissory note in Alberta, because uncertain in amount. *Waters v. Campbell* (1913) — Alberta, — 14 D. L. R. 448. The court said: "If the authority contained in it is valid, the provision regarding costs, in my opinion, renders the amount payable uncertain. I think it an agreement, not a promissory note, and an agreement which, though I have no doubt it is valid in the state of Illinois where it was made, is, so far as the authority contained in it is concerned, invalid in this jurisdiction, as being contrary to the policy of the law. No doubt it would be good as evidence of a debt to the amount of the principal sum."

It has been held, in Illinois, that where a warrant of attorney allows "a reasonable attorney's fee," the amount should be fixed by the court. *Campbell v. Goddard* (1886) 117 Ill. 251, 7 N. E. 640; *Campbell v. Goddard* (1887) 123 Ill. 220, 14 N. E. 261.

In *Allport v. Meutsch* (1911) 165 Ill. App. 172, the court expressed the opinion that under a warrant to enter judgment for ——— dollars, attorney's fees, a judgment without attorney's fees would be good. (It may be noted in this connection that it has been held that a warrant of attorney, including power to enter judgment for attorney's fees in a certain sum, will support a confession and judgment including a less amount for attorney's fees than specified in the warrant. *Kellogg v. Keith* (1879) 4 Ill. App. 386. But in *Tucker v. Gill* (1871) 61 Ill. 236, where the warrant of attorney recited a note for \$26,000 and interest, and the cognovit confessed a judgment for \$50,000, it was held error for the clerk to enter judgment for \$26,000.)

The following cases, while not strictly in point, are of interest in this connection:

Where a bond for \$2,000 was accompanied by a warrant of attorney to confess judgment for \$2,000, the con-

dition of the bond being the proper accounting of the obligee's clerk, and judgment was confessed for \$357.84, the amount of two sums which were debts before the date of the bond, and not within it, the court said: "It is possible the defendants did not contemplate, when they signed a warrant of attorney authorizing a confession of judgment against them in the penal sum of \$2,000, that the plaintiff's attorney would appear for them, the defendants, and proceed to liquidate the damages. Such action was not authorized by the warrant of attorney. Moreover, the record shows that the sum for which the judgment was confessed was for debts which arose prior to the date of the bond, and which were not covered by its conditions. It thus appears upon the face of the record that the judgment was confessed without any lawful authority." *Bennett v. Haley* (1891) 142 Pa. 253, 21 Atl. 814.

In *Chapin v. Clemison* (1847) 1 Barb. (N. Y.) 311, a warrant of attorney, absolute on its face to enter judgment for \$1,000, had on its back an indorsement, signed by the defendant, stating that the judgment to be entered up thereon, was intended to secure an indebtedness for goods to be sold on the day judgment was entered, to the amount of \$500, and also to secure a similar amount for goods thereafter to be sold, and it was agreed that, in case the plaintiff should deem himself insecure, he might issue execution for whatever sum might be due to him for principal and interest. It was held that the judgment did not secure any indebtedness accrued before the date it was entered.

Interest will be allowed where such can be seen to have been the intent of the parties.

Thus, where an old warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon. *Chalk v. Walton* (1843) 5 Mann. & G. 573, 134 Eng. Reprint, 689, 6 Scot. N. R. 693, 1 Dowl. & L. 39.

Where a warrant of attorney authorized the judgment to be entered up for double the amount of the sum actually due, and contained a defeasance on payment of that sum, with interest, on a certain day, it was held that the judgment creditor was entitled to interest, up to the amount of the penalty of the judgment. *Tunstall v. Trappes* (1830) 8 Sim. 297, 57 Eng. Reprint, 1010.

Where a statement recited a note, not speaking of interest, and then stated that no part of the note or interest had been paid, it was held that the interest was properly included in the judgment. *Rothschild v. Manne-sovitch* (1898) 29 App. Div. 580, 51 N. Y. Supp. 253.

But where there was a power to confess judgment for assessments, the court reports the matter as follows: "The agreement authorized judgment for the 'amount expended on the two lots.' The judgment was for \$2,936.98. The principal and interest amounted to that sum, but the agreement cannot, we think, be construed to allow judgment for the interest, but only for the sum alleged to have been expended. Powers of attorney to confess judgment must, like other powers, be strictly pursued." *Cordray v. Galveston* (1894) — Tex. Civ. App. —, 26 S. W. 245. B. B. B.

MERVIN ECKELS et al.  
v.

WALTER WEIBLEY et al., Appts.

Pennsylvania Supreme Court — July 6, 1911.

(232 Pa. 547, 81 Atl. 645.)

**Injunction — against nuisance.**

1. An injunction may be granted against the threatened establishment of a barn and yard for conducting a horse and cattle business in a residence section of a borough which will be a nuisance to neighboring property, although nothing has yet been done which would support an action at law or which has injured the complainant.

[See note on this question beginning on page 749.]

**—against threatened nuisance.**

2. Although an injunction will not lie to allay mere fears and apprehension, nevertheless, if it is shown that there is a reasonable and just ground to apprehend the establishment of a nuisance threatened by defendant, and

which he has power to commit, and it is reasonably certain that the health and comfort of those complaining will be disturbed by the threatened act, the writ will issue.

[See 20 R. C. L. 478; see annotation in 3 A.L.R. 321.]

APPEAL by defendants from a decree of the Court of Common Pleas for Cumberland County (Swope, P. J.) granting an injunction restraining a threatened nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Jasper Alexander, John W. Wetzel, and Conrad Hambleton, for appellants:

An injunction cannot be issued before the fact of nuisance is determined by a trial at law.

Woodroffe v. Hagerty, 35 Pa. Super. Ct. 579; Baer v. Wilmoth, 39 Pa. Super. Ct. 74; New Castle v. Raney (McClain v. New Castle) 130 Pa. 560, 6 L.R.A. 737, 18 Atl. 1066; Mowday v. Moore, 133 Pa. 611, 19 Atl. 626; Rhea v. Forsyth, 37 Pa. 503, 78 Am. Dec. 441; Wood v. McGrath, 150 Pa. 451, 16 L.R.A. 715, 24 Atl. 682.

Livery stables erected on city streets are not nuisances per se but may become nuisances if constructed and conducted in a negligent manner.

Fischer v. Sanford, 12 Pa. Super. Ct. 435; Alexander v. Stewart Bread Co. 21 Pa. Super. Ct. 526; Oehler v. Levy, 17 L.R.A. (N.S.) 1027, note.

Messrs. F. B. Sellers, Jr., and Paul Willis, for appellees:

When the bill is to enjoin a threatened, as distinguished from an existing, nuisance, the requirement of a previous trial at law cannot be applied. No such question can be tried at law. No nuisance exists. The object of the

bill is to enjoin the defendants from creating one.

5 Pom. Eq. Jur. 884; Porter v. Witham, 17 Me. 294; Varney v. Pope, 60 Me. 192; Tracy v. LeBlanc, 89 Me. 304, 36 Atl. 399; Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108; High, Inj. 3d ed. §§ 21, 768; McArthur v. Kelly, 5 Ohio 139; Wood, Nuisances, § 777; Wentz v. Commonwealth Fuel Co. 232 Ill. 526, 83 N. E. 1049; Bispham, Eq. 492; Com. ex rel. Tyrone v. Stevens, 178 Pa. 543, 36 Atl. 166; Adams, Eq. § 211; United States v. Luce, 141 Fed. 418; Wahle v. Reinbach, 76 Ill. 324.

Courts have power by injunction to restrain the establishment of threatened nuisances.

Joyce, Nuisances, § 419; Wier's Appeal, 74 Pa. 230; Czarniecki v. Bollman, 9 Sadler (Pa.) 32, 11 Atl. 660.

Brown, J., delivered the opinion of the court:

The injunction appealed from followed findings by the court below that the defendants were about to engage in the horse and cattle business in an exclusively residential section of the borough of Carlisle,

but not yet compactly built up; that for the purpose of doing so they had erected on a lot owned by them a shed 140 feet in length and 14 feet wide, and were about to build a barn in connection with it 60 feet long and 40 feet wide; that the capacity of the proposed stockyard would be for from forty to fifty head of cattle and for from thirty to thirty-five head of horses; that the defendants proposed to deal in western cattle and horses, to be delivered to them by rail, and such delivery would necessitate a practically constant driving of both cattle and horses in and out of the yard and over the public streets of the borough; that they proposed to occasionally hold public sales of cattle and horses on their premises and to exhibit and sell them on Graham street, on which their yard fronted; that the operation of the yard as proposed by the defendants would result in the breeding of great quantities of flies, would engender noxious odors and occasion disturbance and noise, would render the enjoyment of the plaintiffs' property uncomfortable, and be detrimental to their health; that the use of their property by the defendants for the large business which they proposed to carry on in the sale and exchange of cattle and horses was an unreasonable use of it, and it was selected by them for the purpose of carrying on their business for the sole reason that it was near their residences, and their business could, therefore, be more conveniently conducted by them at that point. The argument of counsel for appellants, in pressing for a reversal of the decree, is largely directed to an effort to show that the foregoing facts ought not to have been found. After a review of all the testimony, we have not been convinced that error was committed in any of the findings complained of. There was testimony in support of all of them, and it was for the court below to weigh the evidence and to determine what facts had been established by it. This the learned trial judge did,

and his eighteenth finding of fact is that he had arrived "at the clear and certain conclusion, from all the evidence in the case, that the operation of the proposed yard would work irreparable injury to the complainants by rendering their homes uncomfortable and endangering their health."

The second complaint of the appellants is that the injunction was issued before the existence of a nuisance maintained by them had been established as a fact by a trial at law. At the time the bill was filed no injury had been sustained by the appellees. Nothing had been done by the appellants for which an action at law could have been brought. Actual irreparable damages, actual depreciation of property, did not exist. It was to prevent these consequences and the perpetration of a wrong, for which no adequate remedy existed at law, that this proceeding was properly instituted. *Wier's Appeal*, 74 Pa. 230; *Joyce, Nuisances*, § 419; *High, Inj.* 3d ed. § 23. To sustain the appellants' contention would be to disallow the remedy of injunction in cases where a nuisance had not already been set up, but is merely threatened. While it is true that an injunction will not issue to allay mere fears and apprehension, nevertheless, if it be shown that there is **Injunction—  
against  
nuisance.** reasonable and just ground to apprehend the establishment of a nuisance, threatened by a defendant and which he has power to commit, and it is reasonably certain that the health and comfort of those complaining will be impaired by the threatened act, the writ will go out. No remedy in an action at law would be adequate in such a case. To hold that such a nuisance as the court below found would follow from what the appellants proposed to do could not be prevented in advance of its actual existence would be but little **—against  
threatened  
nuisance.** better than a mockery of justice to those to be affected by it. *Wahle*

v. Reinbach, 76 Ill. 322. "The reasons for preventing a prospective mischief are at least as cogent as those for abating a present one. In the latter instance the courts act more readily because they are sure of their ground. The evil is visible. But the call for protection against an apprehended injury, reasonably certain to befall, is as imperative as that for relief from one now felt. Nor is the complainant required to wait until some harm has been experienced or to show with absolute certainty it will occur. One requirement would make the remedy largely useless and the other impracticable. *Miley v. O'Hearn*, 13 Ky. L. Rep. 834, 18 S. W. 529. While perhaps proof that it is inevitable or will necessarily ensue may be properly demanded when nothing more than discomfort is anticipated, when danger to health or life is threatened, a reasonable certainty is enough. *Wood, Nuisances*, § 100. A party does not have to stand by un-

til his family have sickened or died." *Holke v. Herman*, 87 Mo. App. 125.

The assignments of error are overruled, and the decree is affirmed, at appellants' costs.

## NOTE.

The reported case (*ECKELS v. WEIBLEY*, ante, 739) illustrates well the rule that where acts threatened or in progress will, if continued, inevitably result in a nuisance justifying relief, the court may interfere in advance and restrain the consummation of the nuisance. In the class of decisions which the *ECKELS CASE* represents, the courts have been cautious in interfering in advance, applying the rule generally that equity will not interfere where the nuisance is contingent and depends on the manner of operation or use of the premises. For a full discussion of the question of the right to enjoin the threatened or anticipated nuisance, see post, 749.

ALA R. PHIPPS et al., Appts.,

v.

ROGUE RIVER VALLEY CANAL COMPANY, Respt.

*Oregon Supreme Court (Dept. No. 1)—April 18, 1916.*

(80 Or. 175, 156 Pac. 794.)

**Injunction — condemnation for irrigation ditch — nuisance.**

1. The condemnation of a right of way for an open irrigation ditch to take the water from a sewage polluted stream will be enjoined if its use will result in a foul and noisome condition of the ditch inimical to health at times of low water, although the intention is to take the water from the stream only at times of flood, when the sewage is rendered innocuous by the volume of the water.

[See note on this question beginning on page 749.]

— against threatened nuisance.

2. A mere tendency to injury is not sufficient to warrant an injunction against an alleged nuisance, but there must be something actually appreciable which of itself arrests the attention, and rests not merely in theory, but strikes the common sense of the ordinary citizen.

[See 20 R. C. L. 478.]

— against irreparable injury.

3. An irreparable injury which a court of equity will enjoin includes that degree of wrongs of a repeated and continuing kind which produce hurt, inconvenience, or damage that can be estimated only by conjecture, and not by any accurate standard of measurement.

[See 14 R. C. L. 346.]



**APPEAL** by cross complainants from a decree of the Circuit Court for Jackson County dismissing their cross bill filed to enjoin the maintenance of actions by defendant to condemn a right of way for an irrigation ditch across certain tracts of land owned by cross complainants. *Modified.*

Statement by Moore, Ch. J.:

The Rogue River Valley Canal Company, a corporation, commenced actions in the circuit court of the state of Oregon for Jackson county, against Ala R. Phipps and her sons and daughters, to condemn a right of way for an irrigating ditch across tracts of land owned by them in severalty in the northwest part of the city of Medford. The defendants in that action, having filed answers therein, also as plaintiffs instituted this suit in equity, in the nature of a cross bill, to enjoin the maintenance of such actions. The latter cause, being at issue, was tried, and from the testimony taken the court made findings of fact, *inter alia*, that the contemplated ditch, when constructed and used at the time and in the manner intended, would not constitute a nuisance, and thereupon dismissed the suit, from which decree the plaintiffs appeal.

**Mr. W. E. Phipps**, for appellants:

The proposed ditch was a nuisance. Joyce, Nuisances, § 2; Wessinger v. Mische, 71 Or. 239, 142 Pac. 612; Caraduc v. Schanen-Blair Co. 66 Or. 313, 133 Pac. 636; Bernard v. Willamette Box & Lumber Co. 64 Or. 228, 129 Pac. 1039; Baines v. Marshfield & Suburban R. Co. 62 Or. 510, 124 Pac. 672; Bourne v. Wilson-Case Lumber Co. 58 Or. 48, 113 Pac. 52, Ann. Cas. 1918A, 245; Ulmen v. Mt. Angel, 57 Or. 547, 36 L.R.A. (N.S.) 140, 112 Pac. 529; Kane v. Littlefield, 48 Or. 303, 86 Pac. 544; Blagen v. Smith, 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292; Fleischner v. Citizens' Real Estate & Invest. Co. 25 Or. 119, 35 Pac. 174.

The ditch, if constructed, will menace the health of the plaintiffs and community, and become a nuisance by reason of irreparable injury and damage to plaintiffs' property.

29 Cyc. 1224; Bernard v. Willamette Box & Lumber Co. 64 Or. 225, 129 Pac. 1089; Parrish v. Stephens, 1 Or. 74; Wood, Nuisances, 22, 27; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Acme Fertilizer Co. v. State, 34 Ind. App. 346, 107 Am. St. Rep. 210, 72 N. E.

1037; People v. Pelton, 36 App. Div. 450, 55 N. Y. Supp. 815, 159 N. Y. 537, 53 N. E. 1129; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; Butterfoss v. State, 40 N. J. Eq. 329; State v. Portland, 74 Me. 268, 43 Am. Rep. 586; Lead v. Inch, 116 Minn. 467, 39 L.R.A. (N.S.) 234, 134 N. W. 218, Ann. Cas. 1913B, 891; Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; Sloss-Sheffield Steel & I. Co. v. Johnson, 147 Ala. 384, 8 L.R.A. (N.S.) 226, 119 Am. St. Rep. 91, 41 So. 907, 11 Ann. Cas. 285; Tilly v. Mitchell & L. Co. 120 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969; Long v. Wilson, 119 Iowa, 267, 60 L.R.A. 720, 97 Am. St. Rep. 315, 93 N. W. 282; Texarkana v. Leach, 66 Ark. 40, 74 Am. St. Rep. 68, 48 S. W. 807; Melker v. New York, 190 N. Y. 481, 16 L.R.A. (N.S.) 621, 83 N. E. 565, 13 Ann. Cas. 544.

The fact that the defendant has condemnation actions pending against plaintiffs renders it no less amenable to the process of injunction, for the injury sought to be done is irreparable and cannot be compensated in damages.

Baines v. Marshfield & Suburban R. Co. 62 Or. 510, 124 Pac. 672; Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 226, 67 Am. St. Rep. 344, 41 So. 907, 11 Ann. Cas. 285; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Micelli v. Andrus, 61 Or. 78, 120 Pac. 737; Union Power Co. v. Lichty, 42 Or. 563, 71 Pac. 1044; Blagen v. Smith, 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292; Kane v. Littlefield, 48 Or. 303, 86 Pac. 544; Oregon-Washington R. & Nav. Co. v. Castner, 66 Or. 581, 135 Pac. 174; Mendenhall v. Harrisburg Water Power Co. 27 Or. 43, 39 Pac. 399; Smith v. Gardner, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771; Esson v. Wattier, 25 Or. 10, 34 Pac. 756; Luhrs v. Sturtevant, 10 Or. 171; Oliver v. Klamath Lake Nav. Co. 54 Or. 95, 102 Pac. 786; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715.

The proposed diversion works and ditch were both a public and private nuisance.

Richards v. Daugherty, 133 Ala. 569, 31 So. 984; Wood, Nuisances, 22, 27; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Acme Fertilizer Co. v. State, 34 Ind. 346, 107 Am. St. Rep. 190, 72 N. E. 1037; People v. Pelton, 36 App. Div. 450, 55 N. Y. Supp. 815, 159 N. Y. 537, 53 N. E. 1129; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; Butterfoss v. State, 40 N. J. Eq. 329; State v. Portland, 74 Me. 268, 43 Am. Rep. 586; Lead v. Inch, 116 Minn. 467, 39 L.R.A. (N.S.) 234, 134 N. W. 218, Ann. Cas. 1913B, 891; Sloss-Sheffield Steel & L. Co. v. Johnson, 147 Ala. 384, 8 L.R.A. (N.S.) 226, 119 Am. St. Rep. 91, 41 So. 907, 11 Ann. Cas. 285; Joyce, Nuisances, § 483.

Plaintiffs are entitled to the presumption that all of the material acts alleged in the complaint were and are threatened to be committed by the defendant.

Thayer v. Buchanan, 46 Or. 106, 79 Pac. 343; Blackburn v. Lewis, 45 Or. 422, 77 Pac. 746; Kaston v. Storey, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217; Boothe v. Farmers' Nat. Bank, 47 Or. 299, 83 Pac. 785; Jennings v. Oregon Land Co. 48 Or. 287, 86 Pac. 367; 1 Estes, Pl. 4th ed. § 192; 1 Greenl. Ev. 14th ed. § 67, p. 97; 22 Cyc. 933.

Messrs. Neff & Mealey for respondent.

Moore, Ch. J., delivered the opinion of the court:

The evidence shows that Bear creek, a non-navigable stream from which the defendant's proposed irrigating ditch is designed to divert water, flows northerly through Jackson county. This stream receives the sewage of Ashland, Talent, Phoenix, and Medford, and the street litter and compost of the latter city also are discharged by storm sewers into the creek. The rains and melting snow on the mountains keep up quite a volume of water in Bear creek until the warm weather dries up that stream in most places, leaving, however, pools of stagnant water and sand and gravel bars, which places, by reason of the heat, cause the sewage and foul matter cast into the stream to become very offensive. The water in the creek usually becomes low in June of each year, and

continues in that condition until about September, when the drought is broken. The defendant owns a series of ditches, which take water from Fish lake, Four Mile lake, and the surplus from the north and south forks of Little Butte creek and from Antelope creek. From these streams a sufficient quantity of water cannot always be obtained properly to irrigate about 70,000 acres of arable land which lie under the ditches mentioned. In order to augment the supply the defendant secured from the state engineer permission to divert from Bear creek the surplus water after the measure of lower prior appropriators on that stream had been satisfied. Thereupon a survey and plat were made of the proposed supplemental ditch; the point of diversion being located on Mrs. Phipps's land and thence crossing northwesterly the premises of the other plaintiffs. As no agreement could be reached as to the compensation which should be paid for the easement demanded, actions at law to condemn the right of way were instituted by the defendant. In order to prevent the maintenance of such actions at law, this suit in equity was instituted, terminating in a decree as hereinbefore stated.

It is contended by appellants' counsel that to permit the filthy water from Bear creek to flow in an open ditch across the plaintiffs' premises will at all times create such a stench as to render the atmosphere impure, producing sickness, and causing the contemplated diversion to become a nuisance, and, such being the case, an error was committed in dismissing the suit. Such anticipated consequences are denied by defendant's counsel, who maintain that the intended diversion will be undertaken only when the water flowing in the creek is at a high stage, thereby carrying off through the ditch the sewage, which will be rendered innocuous by the then volume of the current; that the plaintiffs' apprehension of injury is not sufficient to authorize equitable intervention, and, this being so,

no error was committed as alleged. One of the cases relied upon by defendant's counsel to support the legal principle last asserted is *Eason v. Wattier*, 25 Or. 10, 34 Pac. 756, where it was ruled that in order to justify a court of equity in interfering by injunction to abate a nuisance, the thing that unlawfully worketh hurt, inconvenience, or damage must be an actual existing offense, and not merely apprehended. In that case it was insisted that by erecting in a stream a dam the water thus to be impounded would become foul, stagnant, and unhealthy, thereby impregnating the atmosphere with malaria, which noxious exhalation would render the plaintiff and his family liable to sickness. The dam so referred to had not been completed when that suit was commenced, and whether or not the consequences supposed would necessarily result was only problematical.

Where, however, it appears from the evidence that water confined by a dam has produced malaria causing illness, a court of equity will intervene to prevent a continuance of the injury. *Richards v. Daugherty*, 133 Ala. 569, 31 So. 934. In that case it was decided that where the erection of dams, which affect the natural flow of a running stream, results in injury to the health of persons living in the vicinity, such obstruction constitutes a nuisance and may be abated by a suit in equity by a person the health of whose family is injured thereby, without waiting the trial of the issue of nuisance vel non by an action at law. "It is difficult," says a text-writer, "to define just what degree of injurious influence must be reached in order to warrant the court in determining what circumstances constitute a nuisance. A

Injunction—  
condemnation  
for irrigation  
ditch—  
nuisance.

mere tending to injury is not sufficient; there must be something actually appreciable, which of itself arrests the attention, that rests not merely in theory,

but strikes the common sense of the ordinary citizen. The determination, however, of the question rests in sound judgment and depends upon common sense in each case. . . . If property cannot be enjoyed unless the health is endangered thereby, a nuisance exists. It is not necessary, however, in order to constitute a nuisance, that the annoyance should be of such a character as to endanger the health of a person or persons, or of the neighborhood; the act need not be positively unhealthy. It is sufficient if it occasions that which is offensive to the senses, and that it in any way renders the enjoyment of life and property uncomfortable, or that it prevents its enjoyment in as full and ample a manner as before, that it invades or violates a vested right and materially interferes with the ordinary comfort of human existence or renders one's dwelling house unfit for habitation; and if the enjoyment of life and property has been so rendered uncomfortable, it is not indispensable to sustain a right of action that one should, by the annoyance or alleged nuisance, have been driven from his dwelling or habitation. So even that which causes a well-founded, reasonable apprehension of damage may be a nuisance." *Joyce, Nuisances*, § 19. To the same effect see the first head-note to the case of *Melker v. New York*, 190 N. Y. 481, 16 L.R.A. (N.S.) 621, 83 N. E. 565, 13 Ann. Cas. 544. A danger which is apparent and real, as distinguished from an imaginary fear of injury, from an alleged nuisance, may warrant equitable relief. *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734.

An excerpt from the brief of plaintiffs' counsel is, in our opinion, fully justified, and reads: "The testimony herein of four physicians is to the effect that the ditch, if constructed, will menace the health of the plaintiffs and community, and fourteen other witnesses assert it will be a nuisance by reason of ir-

reparable injury and damage to plaintiffs' property."

The infliction of "irreparable injury," such as a court of equity will enjoin, includes also that degree of wrongs of a repeated or continuing

kind which produce  
—against threatened nuisance.  
hurt, inconvenience, or damage that can

be estimated only by conjecture, and not by any accurate standard of measurement. 29 Cyc. 1224; Bernard v. Willamette Box & Lumber Co. 64 Or. 225, 129 Pac. 1039.

Most of plaintiffs' witnesses, who on direct examination had testified as to the offensive odor emanating from the pools and bars to be found in Bear creek in the dry season, admitted on cross-examination that when the water in that stream was high they had not perceived such stench. Dave Phipps, one of the plaintiffs, however, who had lived near that stream many years, and evidently had a better opportunity than any other witness of observing the disgusting odor, testified that during the summers he was obliged to go to the mountains to avoid the prevailing foul atmosphere.

He was asked: You have worked a great deal in and around Bear creek there, haven't you?

He answered: Yes, sir.

Q. You have been marketing sand and gravel, have you?

A. Yes, sir.

Q. You may tell the court whether or not the water of Bear creek is foul and offensive at all times of the year.

A. Well, I won't let my cow drink out of it for milk for my own use.

Q. That did not answer the question. I want to know whether it is foul and offensive at all times of the year.

A. I think so.

Q. When were you down in there getting gravel the last time?

A. Last Saturday [referring to the week preceding February 1, 1915, when the trial of this cause was commenced].

Q. And what was the nature of Bear creek at that time and in this

sand and gravel that you got out of there?

A. Why, the odor is so bad it is pretty hard for a fellow to stay to shovel on a load where I was loading.

This testimony is not contradicted in any manner, except by the cross-examination of the witnesses, to which reference has been made. Though the contemplated open ditch may be used by the defendant only during the high water in the stream, when the volume recedes there will be found on the bottom and sides of the artificial conduit an accumulation of filth which, being exposed to the summer heat, must necessarily cause an offensive scent, not merely to be apprehended, but certainly to be expected, thereby  
—against irreparable injury.  
creating an intolerable nuisance, the maintenance of which a court of equity will enjoin in the proposed manner of the use.

The defendant will therefore be restrained from prosecuting its actions at law against the several plaintiffs, except on condition of conducting the water in suitable and safe pipes from the proposed intake on Bear creek to the ditch into which the water is to be discharged. In order to insure a faithful compliance with this requirement, it is ordered that the defendant give to the plaintiffs a good and sufficient bond, executed by some reputable bonding company, in the sum of \$12,000, the probable cost of putting in such pipes, the bond to be approved by the court and to serve as indemnity, in addition to the several sums to be awarded the plaintiffs in the condemnation actions. When the ditch is thus completed to the satisfaction of the court, the specified bond may be canceled upon the substitution of another like bond, executed in the same manner, for the sum of \$2,000, and conditioned for the maintenance of the conduit, as here indicated, without further damages to the plaintiffs, or to any of them.

The decree appealed from will be

modified, and one entered here in accordance with the view hereinbefore expressed.

Benson, Burnett, and McBride, JJ., concur.

#### NOTE.

The reported case (PHIPPS v. ROGUE RIVER VALLEY CANAL Co. ante, 741) is in line with many cases holding that

a court of equity may enjoin a threatened or anticipated nuisance where it clearly appears that a nuisance will necessarily result from the contemplated act or thing which it is sought to enjoin. And the courts have more readily interfered in cases where injury to health was threatened, as in the PHIPPS CASE, than where the prospective injury was only to property. For a discussion of the question of injunction to restrain a threatened or anticipated nuisance, see post, 749.

### HAMILTON CORPORATION, Appt.,

v..

ELLA S. M. JULIAN et al.

*Maryland Court of Appeals — June 26, 1917.*

(130 Md. 597, 101 Atl. 558.)

#### Injunction — against threatened bowling alley.

1. One residing in a residence district of a municipality may enjoin the threatened erection of a bowling alley and moving picture theater adjoining his residence if the act complained of will, in the judgment of reasonable men, be naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and, in view of all the circumstances of the case, will be in derogation of the rights of the complainant.

[See note on this question beginning on page 749.]

#### — against threatened nuisance.

2. An injunction lies to prevent threatened acts the completion of which will plainly result in a grievous nuisance.

[See 20 R. C. L. 478.]

#### Nuisance — bowling alley as.

3. Bowling alleys and moving pic-

ture theaters, while not nuisances per se, may become so when they create a disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood.

[See 20 R. C. L. 418.]

APPEAL by defendant from an order of the Circuit Court for Baltimore County (Duncan, J.) overruling its demurrer to a bill filed to enjoin the erection and maintenance of a bowling alley and a moving picture theater building upon its lot. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John B. Gontrum, Henry B. Mann, and John S. Biddison for appellant.

Messrs. C. M. Armstrong and J. Elmer Weisheit, for appellees:

A prospective nuisance may be enjoined.

Hendrickson v. Standard Oil Co. 126 Md. 577, 95 Atl. 153; Adams v. Mi-

chael, 38 Md. 123, 17 Am. Rep. 516; Warren Mfg. Co. v. Baltimore, 119 Md. 188, 86 Atl. 502; 5 Pom. Eq. Jur. 3d ed. § 524, p. 890; Miley v. A'Hearn, 13 Ky. L. Rep. 834, 18 S. W. 529.

Location where it necessarily works injury, of a thing lawful in itself, may make it a nuisance.

Ladies' Decorative Art Club's Ap-

peal, 10 Sadler (Pa.) 150, 22 W. N. C. 75, 13 Atl. 539; 21 Am. & Eng. Enc. Law, 690, 696; 29 Cyc. 1154; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Eng. Reprint, 642, 35 L. J. Q. B. N. S. 66, 11 Jur. N. S. 785, 12 L. T. N. S. 776, 13 Week. Rep. 1083, 25 Eng. Rul. Cas. 144, 11 Mor. Min. Rep. 50; Tuttle v. Church, 53 Fed. 426.

Noise alone, if of such a character as to be productive of actual physical discomfort to a person of ordinary sensibility, may create a nuisance and be the subject of an injunction.

Susquehanna Fertilizer Co. v. Spangler, 86 Md. 569, 63 Am. St. Rep. 533, 39 Atl. 270; Dittman v. Repp, 50 Md. 522, 33 Am. Rep. 325; Inchbald v. Barrington, L. R. 4 Ch. 388, 21 L. T. N. S. 259, 17 Week. Rep. 459.

That the establishment of the nuisances objected to will deprive the plaintiffs of the benefit of their property as a means of support, by making it unavailable as a place of residence for their boarders, is ground for an injunction.

Chappell v. Funk, 57 Md. 465; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 567, 63 Am. St. Rep. 533, 39 Atl. 270.

Equity will order that the bowling alley building be removed. It is not susceptible of being used for any other purpose.

Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 206; Wood, Nuisances, § 796; 29 Cyc. 1223.

Even if the things complained of constitute a public nuisance, the plaintiffs are entitled to an injunction upon their allegation of special injury.

Hendrickson v. Standard Oil Co. 126 Md. 535, 95 Atl. 153.

Briscoe, J., delivered the opinion of the court:

This is a bill in equity brought by the appellees against the appellant, in the circuit court for Baltimore county, for an injunction to enjoin and restrain the defendant from erecting, maintaining, and conducting a bowling alley and a moving picture theater building upon its lot in the village of Hamilton, in Baltimore county. The defendant is a corporation duly incorporated under the laws of the state of Maryland, and its incorporators reside and own a lot in the village of Hamilton, adjoining the plaintiffs' prop-

erty. The plaintiffs are also residents of Hamilton, and own a lot therein, improved by a dwelling house, which they occupy as a home, and where they also conduct a boarding house as a means of livelihood. The lot is described as situate on the southwesterly side of Hamilton avenue, having a frontage on this avenue of about 50 feet, and extending then southwesterly, with an even width of 50 feet, about 214.2 feet, and designated as lot No. 8 on the plat of the land of the Lauraville Hall & Land Company of Baltimore County.

The bill alleges that the village of Hamilton is exclusively a residential suburb of Baltimore city, and that the section of the plaintiffs' residence is exclusively a residential neighborhood, except several places of business necessary and suitable for the accommodation of the residents of the community, and that these by their ordinary and proper use are not calculated to interfere with or impair the reasonable use and enjoyment of property in the neighborhood by the owners and occupants thereof. The bill then avers that the defendant corporation is erecting and constructing on its lot adjoining the plaintiffs' property a building in which they are going to conduct public bowling alleys for profit, that the building is of large dimensions, over 100 feet in length by 50 feet in width, and is within 25 feet of plaintiffs' dwelling house, that this building is not susceptible of any other use, and that this use will impair the reasonable enjoyment of the plaintiffs' property as a residence and a boarding house. The bill further charges that the defendant is also about to erect and construct on its lot another building where they will conduct a moving picture theater, and this building will be within 21 feet of plaintiffs' dwelling, and that the uses to be made of both buildings, with the noises incident to such places, will work a special injury to the plaintiffs and their property; that both the bowling alleys and theater, to be

located and operated in the manner and way as proposed, will deprive them of the reasonable use and enjoyment of their property rights, render it untenable as a home for themselves, and destroy its use and benefit as a means of support for them, and make it undesirable and unavailable as a place of residence for their boarders and lodgers, and greatly impair its value.

The prayer of the bill is for an injunction restraining and enjoining the defendant, the Hamilton corporation, (1) from establishing, maintaining, or conducting a bowling alley or bowling alleys, upon the lot in the village of Hamilton, in the fourteenth election district of Baltimore county, designated as lot No. 9 on said plat of the Lauraville Hall & Land Company of Baltimore County; (2) that the defendant be enjoined from establishing, maintaining or conducting, or causing to be established, maintained, or conducted, upon the lot, a moving picture theater; (3) that the defendant be commanded and required to remove immediately the bowling alley building now being erected by them upon the lot, and enjoined from erecting hereafter a bowling alley building thereon; (4) that the defendant be enjoined from erecting or constructing on the lot a moving picture theater building; (5) and for other and further relief as their case may require.

Subsequently the case was heard upon the bill and a demurrer thereto, and from an order of court, passed on the 18th day of December, 1916, overruling the demurrer to the bill, with leave to answer, this appeal has been taken.

The cause and grounds of the demurrer are stated to be: (1) That the plaintiffs have not stated in their bill such a case as entitles them to any relief in equity against this defendant. (2) That the allegations of the bill are too general, vague, uncertain, indefinite, argumentative, and inferential to require this defendant to answer the same,

or to entitle the plaintiffs to any relief in the premises.

The object of the bill, it will be seen from its recitals, is in substance to enjoin and restrain a prospective, probable, or threatening nuisance, and the single question here involved is whether its averments of fact, as admitted by the demurrer to be true, are sufficient to entitle the plaintiffs to the relief sought by the bill. The rules of law controlling the rights of parties under similar facts and circumstances, alleged by the bill in this case, have been settled by numerous decisions of this court. In *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, it is said: "The general rule is that an injunction will only be granted to restrain an actual existing nuisance; but where it can be plainly seen that acts which, when completed, will certainly constitute or result in a grievous nuisance, or where a

**Injunction—  
against  
threatened  
nuisance.**

party threatens or begins to do, or insists upon his right to do, certain acts, the court will interfere though no nuisance may have been actually committed, if the circumstances of the case enable the court to form an opinion as to the illegality of the acts complained of and the irreparable injury which will ensue." See *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325; *Chappell v. Funk*, 57 Md. 465; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; *Hendrickson v. Standard Oil Co.* 126 Md. 578, 95 Atl. 153; *Singer v. James*, 130 Md. 382, 100 Atl. 642.

While it is true that bowling alleys and moving picture theaters, kept and conducted for profit, are not nuisances per se, yet they may be and may become so in certain places, when they create a disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood. 29 Cyc. 1154, 1168, 1183; *Harrison v. People*, 101 Ill. App. 224; *Cleveland v. Citizens'*

**Nuisance—bowling alley as.**

Gaslight Co. 20 N. J. Eq. 201; Tuttle v. Church (C. C.) 53 Fed. 426; Ladies' Decorative Art Club's Appeal, 10 Sadler (Pa.) 150, 22 W. N. C. 75, 13 Atl. 539. In Miley v. A'Hearn, 13 Ky. L. Rep. 834, 18 S. W. 530, the court held that in similar cases a party is not required to wait until the injury is inflicted. The object of the writ is preventive, and it wards off the injury. The case must be a clear one; but if the danger be probable and threatening, and likely to ensue, the aid of the court may be invoked. Broder v. Saillard, L. R. 2 Ch. Div. 692, 45 L. J. Ch. N. S. 414, 24 Week. Rep. 1011; Ball v. Ray, L. R. 8 Ch. 471, 28 L. T. N. S. 346, 21 Week. Rep. 282; Crump v. Lambert, L. R. 3 Eq. 409, 15 Week. Rep. 417; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Eng. Reprint, 642, 35 L. J. Q. B. N. S. 36, 11 Jur. N. S. 785, 12 L. T. N. S. 776, 13 Week. Rep. 1083, 25 Eng. Rul. Cas. 144, 11 Mor. Min. Rep. 50.

In the present case, the averments of the bill are sufficient, if they can be sustained by the proper proof, to

warrant the granting of the relief sought by the bill.

The real question in all such cases, as stated by the authorities, is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the party. A prospective or threatening nuisance is subject to the same test, and against which a party would have a clear right to preventive relief in equity.

*Injunction—  
against threatened  
bowling  
alley.*

In view of the averments of the bill in this case, and in the absence of answer and proof, we must hold upon the authorities that the court below was entirely right in overruling the demurrer, and in requiring the defendant to answer the plaintiffs' bill.

Order affirmed; the appellant to pay the costs.

## ANNOTATION.

### Right to enjoin threatened or anticipated nuisance.

#### I. General principles:

- a. Rule stated, 749.
- b. Degree of certainty, 757.
- c. Public inconvenience and comparative injury, 758.
- d. Substantial and irreparable injury, 760.
- e. Necessity that acts contemplated will create a nuisance *per se*:
  1. In general, 762.
  2. Erection of structures not nuisances *per se*, 763.
- f. Pleadings, 765.

#### II. Illustrations:

- a. Amusements, 766.
- b. Blacksmith shops, 766.
- c. Cemeteries, 767.
- d. Cotton gins, 770.

#### I. General principles.

##### a. Rules stated.

It is well settled that a court of

#### II.—continued.

- e. Dams, diversion of watercourses, 770.
- f. Garages and automobile supply stations, 771.
- g. Gas and oil, 772.
- h. Hospitals and pesthouses, 773.
- i. Mills, factories, and warehouses, 775.
- j. Powder magazines, 776.
- k. Privies, 777.
- l. Sewage and garbage, 777.
- m. Slaughterhouses, stockyards and similar establishments, 779.
- n. Stables, 780.
- o. Undertaking establishments, 782.
- p. Miscellaneous, 782.

equity may enjoin a threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the



contemplated act or thing which it is sought to enjoin.

**United States.**—*Georgetown v. Alexandria Canal Co.* (1838) 12 Pet. 91, 9 L. ed. 1012; *St. Louis v. Knapp, S. & Co.* (1882) 104 U. S. 658, 26 L. ed. 883, reversing (1881) 2 McCrary, 516, 6 Fed. 221; *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273 (recognizing rule); *Missouri v. Illinois* (1900) 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 231; *Spooner v. McConnell* (1838) 1 McLean, 337, Fed. Cas. No. 13,245; *Works v. Junction R. Co.* (1853) 5 McLean, 425, Fed. Cas. No. 18,046; *Silliman v. Hudson River Bridge Co.* (1857) 4 Blatchf. 74, Fed. Cas. No. 12,851, subsequent proceedings in (1859) 4 Blatchf. 395, Fed. Cas. No. 12,852; *Illinois & St. L. R. & Canal Co. v. St. Louis* (1872) 2 Dill. 70, Fed. Cas. No. 7,007; *Grand Trunk R. Co. v. A. Backus, Jr. & Sons* (1891) 46 Fed. 211.

**Alabama.**—*State v. Mobile* (1837) 5 Port. 279, 30 Am. Dec. 564; *Rosser v. Randolph* (1838) 7 Port. 238, 31 Am. Dec. 712; *Walker v. Allen* (1882) 72 Ala. 456; *Columbus & W. R. Co. v. Witherow* (1886) 82 Ala. 190, 3 So. 28; *Bellevue Cemetery Co. v. McEvers* (1910) 168 Ala. 535, 53 So. 272.

**California.**—*Cowell v. Martin* (1872) 43 Cal. 605; *Weis v. Superior Ct.* (1916) 30 Cal. App. 730, 159 Pac. 464.

**Colorado.**—*Seigle v. Bromley* (1912) 22 Colo. App. 189, 124 Pac. 191.

**District of Columbia.**—*Carr v. Washington & O. D. R. Co.* (1916) 44 App. D. C. 533, Ann. Cas. 1918D, 818.

**Delaware.**—*Gray v. Baynard* (1883) 5 Del. Ch. 499.

**Florida.**—*Lutterloh v. Cedar Keys* (1875) 15 Fla. 306.

**Georgia.**—*Coker v. Birge* (1851) 9 Ga. 425, 54 Am. Dec. 347, subsequent decision to same effect in (1851) 10 Ga. 336; *Norwood v. Dickey* (1855) 18 Ga. 528; *Cunningham v. Rome R. Co.* (1859) 27 Ga. 499; *Columbus v. Jaques* (1860) 30 Ga. 506; *DeGive v. Seltzer* (1879) 64 Ga. 423; *Whitaker v. Hudson* (1880) 65 Ga. 43; *De Vaughn v. Minor* (1886) 77 Ga. 809, 1 S. E. 433; *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178.

**Illinois.**—*Green v. Oakes* (1855) 17

Ill. 249; *Craig v. People* (1868) 47 Ill. 487; *Wahle v. Reinbach* (1875) 76 Ill. 322; *Snell v. Buresh* (1887) 123 Ill. 151, 13 N. E. 856; *Newell v. Sass* (1892) 142 Ill. 104, 31 N. E. 176; *Smith v. McDowell* (1893) 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141; *Field v. Barling* (1894) 149 Ill. 556, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850; *Dwight v. Hayes* (1894) 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Barrett v. Mt. Greenwood Cemetery Asso.* (1896) 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891; *Griswold v. Brega* (1896) 160 Ill. 490, 52 Am. St. Rep. 350, 43 N. E. 864; *Sutton v. Findlay Cemetery Asso.* (1915) 270 Ill. 11, L.R.A. 1916B, 1135, 110 N. E. 315, Ann. Cas. 1917B, 559; *Flood v. Consumers Co.* (1903) 105 Ill. App. 559; *St. John v. North Utica* (1910) 157 Ill. App. 504; *Rohrbach v. Cavallini* (1918) 210 Ill. App. 182.

**Indiana.**—*Pence v. Garrison* (1883) 93 Ind. 345; *First Nat. Bank v. Sarilla* (1891) 129 Ind. 201, 18 L.R.A. 48, 28 Am. St. Rep. 185, 28 N. E. 434; *Lake Erie & W. R. Co. v. Young* (1893) 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177; *Kaufman v. Stein* (1893) 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; *Radican v. Buckley* (1894) 138 Ind. 582, 38 N. E. 53.

**Iowa.**—*Payne v. Wayland* (1906) 131 Iowa, 659, 109 N. W. 203.

**Kansas.**—*Stotler v. Rochelle* (1910) 83 Kan. 86, 29 L.R.A. (N.S.) 49, 109 Pac. 788.

**Kentucky.**—*Louisville & T. Turnp. Road Co. v. Anderson* (1901) 110 Ky. 138, 61 S. W. 18; *Com. ex rel. Pratt v. McGovern* (1903) 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261; *Gibson v. Black* (1888) 10 Ky. L. Rep. 373, 9 S. W. 379; *Miley v. A'Hearn* (1892) 13 Ky. L. Rep. 834, 18 S. W. 529; *Alexander v. Tebeau* (1903) 24 Ky. L. Rep. 1805, 71 S. W. 427.

**Louisiana.**—*Fuselier v. Spalding* (1847) 2 La. Ann. 773.

**Maine.**—*Varney v. Pope* (1872) 60 Me. 192; *Tracy v. LeBlanc* (1896) 89 Me. 304, 36 Atl. 399; *Sterling v. Littlefield* (1903) 97 Me. 479, 54 Atl. 1108; *Whitmore v. Brown* (1906) 102 Me. 47, 9 L.R.A. (N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 516; *Houlton v. Tit-*

comb (1906) 102 Me. 272, 10 L.R.A. (N.S.) 580, 120 Am. St. Rep. 492, 66 Atl. 733.

**Maryland.**—*Lamborn v. Covington Co.* (1848) 2 Md. Ch. 409; *Roman v. Strauss* (1856) 10 Md. 89; *Hamilton v. Whitridge* (1858) 11 Md. 123, 69 Am. Dec. 184; *Dittman v. Repp* (1878) 50 Md. 516, 33 Am. Rep. 325; *Baltimore v. Fairfield Improv. Co.* (1898) 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 89 Atl. 1081; *Davis v. Baltimore & O. R. Co.* (1905) 102 Md. 371, 62 Atl. 572; *Turner v. King* (1912) 117 Md. 403, 83 Atl. 649; *Hendrickson v. Standard Oil Co.* (1915) 126 Md. 577, 95 Atl. 153; *HAMILTON CORP. v. JULIAN* (reported herewith) ante, 746.

**Massachusetts.**—*Charles River Bridge v. Warren Bridge* (1828) 6 Pick. 376; *District Attorney v. Lynn & B. R. Co.* (1860) 16 Gray, 243; *Cadigan v. Brown* (1876) 120 Mass. 493; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* (1882) 133 Mass. 361; *Wright v. Lyons* (1916) 224 Mass. 167, 112 N. E. 876.

**Michigan.**—*White v. Forbes* (1843) Walk. Ch. 112; *St. Johns v. McFarlan* (1875) 33 Mich. 72, 20 Am. Rep. 671; *Stone v. Roscommon Lumber Co.* (1886) 59 Mich. 24, 26 N. W. 216; *Whittemore v. Baxter Laundry Co.* (1914) 181 Mich. 564, 52 L.R.A. (N.S.) 930, 148 N. W. 437, Ann. Cas. 1916C, 818; *Barth v. Christian Psychopathic Hospital Asso.* (1917) 196 Mich. 642, 163 N. W. 62; *Saier v. Joy* (1917) 198 Mich. 295, L.R.A. 1918A, 825, 164 N. W. 507.

**Minnesota.**—*Wilder v. DeCou* (1879) 26 Minn. 10, 1 N. W. 48; *Nelson v. Swedish E. Lutheran Cemetery Asso.* (1910) 111 Minn. 149, 34 L.R.A. (N.S.) 565, 126 N. W. 723, 127 N. W. 626, 20 Ann. Cas. 790; *Trauernicht v. Richter* (1918) 141 Minn. 496, 169 N. W. 701.

**Mississippi.**—*Gwin v. Melmoth* (1844) Freem. Ch. 505; *Whitfield v. Rogers* (1853) 26 Miss. 84, 59 Am. Dec. 244.

**Missouri.**—*Welton v. Martin* (1842) 7 Mo. 307; *Glaessner v. Anheuser-Busch Brewing Asso.* (1890) 100 Mo. 508, 13 S. W. 707; *State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk* (1916) 269 Mo. 389, 190 S. W. 877; *Holke v.*

*Herman* (1901) 87 Mo. App. 125; *Caskey v. Edwards* (1908) 128 Mo. App. 237, 107 S. W. 37.

**Nebraska.**—*Lowe v. Prospect Hill Cemetery Asso.* (1899) 58 Neb. 94, 46 L.R.A. 237, 78 N. W. 488; *Bangs v. Dworak* (1906) 75 Neb. 714, 5 L.R.A. (N.S.) 493, 106 N. W. 780, 13 Ann. Cas. 202; *Letherman v. Hauser* (1906) 77 Neb. 731, 110 N. W. 745.

**New Hampshire.**—*Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co.* (1858) 37 N. H. 254; *Burnham v. Kempton* (1862) 44 N. H. 78; *Manchester v. Smyth* (1887) 64 N. H. 380, 10 Atl. 700.

**New Jersey.**—*Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co.* (1830) 1 N. J. Eq. 157, 21 Am. Dec. 41; *Atty. Gen. v. New Jersey R. & Transp. Co.* (1834) 3 N. J. Eq. 136; *Quackenbush v. Van Riper* (1835) 3 N. J. Eq. 350, 29 Am. Dec. 716; *Vanwinkle v. Curtis* (1836) 3 N. J. Eq. 422; *Robeson v. Pittenger* (1838) 2 N. J. Eq. 57, 32 Am. Dec. 412; *Shields v. Arndt* (1842) 4 N. J. Eq. 234; *Gilbert v. Morris Canal & Bkg. Co.* (1850) 8 N. J. Eq. 495; *Thompson v. Paterson & H. River R. Co.* (1853) 9 N. J. Eq. 526; *Bechtel v. Carslake* (1858) 11 N. J. Eq. 500; *Allen v. Monmouth County* (1860) 13 N. J. Eq. 68; *Higbee v. Camden & A. R. Co.* (1868) 19 N. J. Eq. 276; *Ross v. Butler* (1868) 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gas-light Co.* (1869) 20 N. J. Eq. 201; *Atty. Gen. v. Steward* (1869) 20 N. J. Eq. 415; *Duncan v. Hayes* (1871) 22 N. J. Eq. 25.

**New York.**—*Gardner v. Newburgh* (1816) 2 Johns. Ch. 162, 7 Am. Dec. 526; *Van Bergen v. Van Bergen* (1816) 2 Johns. Ch. 270; *Belknap v. Belknap* (1817) 2 Johns. Ch. 463, 7 Am. Dec. 548; *Van Bergen v. Van Bergen* (1818) 3 Johns. Ch. 282, 8 Am. Dec. 511; *Corning v. Lowerre* (1822) 6 Johns. Ch. 439; *Watertown v. Cowen* (1834) 4 Paige, 510, 27 Am. Dec. 80; *Atty. Gen. v. Cohoes Co.* (1836) 6 Paige, 133, 29 Am. Dec. 755; *Mohawk Bridge Co. v. Utica & S. R. Co.* (1837) 6 Paige, 554; *Hudson v. Thorne* (1838) 7 Paige, 261; *Rochester v. Curtiss* (1840) Clarke, Ch. 336; *Catlin v. Valentine* (1842) 9

Paige, 575; *Davis v. New York* (1856) 14 N. Y. 506, 67 Am. Dec. 186; *People v. Vanderbilt* (1863) 26 N. Y. 287; *Milhau v. Sharp* (1863) 27 N. Y. 611, 84 Am. Dec. 314; *New York C. & H. R. R. Co. v. Rochester* (1891) 127 N. Y. 591, 28 N. E. 416; *Altschul v. Ludwig* (1916) 216 N. Y. 459, 111 N. E. 216; *Southern Leasing Co. v. Ludwig*, 217 N. Y. 100, 111 N. E. 470; *Brower v. New York* (1848) 3 Barb. 254; *Peck v. Elder* (1849) 3 Sandf. 126; *Harrison v. Newton* (1851) N. Y. Code Rep. N. S. 207; *People v. Third Ave. R. Co.* (1865) 45 Barb. 63; *Rochester v. Erickson* (1866) 46 Barb. 92; *Davis v. Lambertson* (1868) 56 Barb. 480; *Gilford v. Babies Hospital* (1888) 21 Abb. N. C. 159, 1 N. Y. Supp. 448; *Barnard v. Finkbeiner* (1914) 162 App. Div. 319, 147 N. Y. Supp. 514.

**North Carolina.**—*Atty. Gen. v. Blount* (1826) 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *Barnes v. Calhoun* (1842) 37 N. C. (2 Ired. Eq.) 199; *Atty. Gen. v. Lea* (1844) 38 N. C. (3 Ired. Eq.) 301; *Clark v. Lawrence* (1860) 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241; *Vickers v. Durham* (1903) 132 N. C. 880, 44 S. E. 685; *Cherry v. Williams* (1908) 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 Ann. Cas. 715.

**Ohio.**—*Putnam v. Valentine* (1831) 5 Ohio, 187; *Hickok v. Hine* (1872) 23 Ohio St. 523, 13 Am. Rep. 255; *State ex rel. Crosby v. Dayton & S. E. R. Co.* (1881) 36 Ohio St. 434; *Henry v. Perry Twp.* (1891) 48 Ohio St. 671, 30 N. E. 1122; *Collins v. Cleveland* (1893) 2 Ohio S. & C. P. Dec. 380; *Dayton v. Roberts* (1894) 1 Ohio Dec. 385; *Cline v. Kirkbride* (1901) 22 Ohio C. C. 527; *Youngstown v. Youngstown* (1903) 25 Ohio C. C. 518.

**Oklahoma.**—*Rush Springs v. Bentley* (1919) — Okla. —, 182 Pac. 664.

**Oregon.**—*Parrish v. Stephens* (1853) 1 Or. 74; *Esson v. Wattier* (1898) 25 Or. 7, 34 Pac. 756; *Blagen v. Smith* (1899) 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292; *PHIPPS v. ROGUE RIVER VALLEY CANAL CO.* (reported herewith) ante, 741.

**Pennsylvania.**—*Com. v. Rush* (1850) 14 Pa. 186; *Com. v. Pittsburgh & C. R. Co.* (1854) 24 Pa. 159, 62 Am. Dec.

372; *Rhodes v. Dunbar* (1868) 57 Pa. 274, 98 Am. Dec. 221; *Wier's Appeal* (1873) 74 Pa. 230; *Huddleston v. Killbuck Twp.* (1886) 4 Sadler, 176, 7 Atl. 210; *Harrisburg's Appeal* (1887) 7 Sadler, 322, 10 Atl. 787; *Czarniecki v. Bollman* (1887) 9 Sadler, 32, 11 Atl. 660; *Com. ex rel. Tyrone v. Stevens* (1897) 178 Pa. 543, 36 Atl. 166; *Scranton v. People's Coal Co.* (1917) 256 Pa. 332, 100 Atl. 818; *Prendergast v. Walls* (1917) 257 Pa. 547, 101 Atl. 826; *ECKELS v. WEIBLEY* (reported herewith) ante, 739; *Biddle v. Ash* (1838) 2 Ashm. 211; *Moyamensing Twp. v. Long* (1845) 1 Pars. Sel. Eq. Cas. 143; *Morris v. Remington* (1849) 1 Pars. Sel. Eq. Cas. 387; *Faust v. Passenger R. Co.* (1858) 3 Phila. 164; *Hough v. Doylestown* (1870) 4 Brewst. 833; *Morton v. Chester* (1870) 1 Del. Co. Rep. 459; *Philadelphia v. Thirteenth & F. Streets Pass. R. Co.* (1871) 8 Phila. 648; *Sellers v. Pennsylvania R. Co.* (1875) 10 Phila. 319; *Atty. Gen. v. Lombard & S. Streets Pass. R. Co.* (1875) 10 Phila. 352; *Wilson v. Rand Powder Co.* (1904) 30 Pa. Co. Ct. 130; *Smith v. Bellows* (1910) 20 Pa. Dist. R. 383.

**Rhode Island.**—*Aldrich v. Howard* (1861) 7 R. I. 87, 80 Am. Dec. 636.

**South Carolina.**—*State ex rel. Lyon v. Columbia Water Power Co.* (1909) 82 S. C. 181, 22 L.R.A.(N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 Ann. Cas. 343.

**Tennessee.**—*Philips v. Stocket* (1806) 1 Overt. 200; *Wall v. Cloud* (1842) 3 Humph. 181; *Kirkman v. Handy* (1850) 11 Humph. 406, 54 Am. Dec. 45; *Pierce v. Gibson County* (1901) 107 Tenn. 224, 55 L.R.A. 477, 89 Am. St. Rep. 946, 64 S. W. 33.

**Texas.**—*Jung v. Neraz* (1888) 71 Tex. 396, 9 S. W. 344; *Elliot v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56; *San Antonio v. Hamilton* (1915) — Tex. Civ. App. —, 180 S. W. 160; *Moore v. Coleman* (1916) — Tex. Civ. App. —, 185 S. W. 936, later appeal to same effect in (1917) — Tex. Civ. App. —, 195 S. W. 212.

**Vermont.**—*Lyon v. McLaughlin* (1859) 32 Vt. 423; *Brock v. Connecticut & P. R. Co.* (1862) 35 Vt. 373; *Curtis v. Winslow* (1866) 38 Vt. 690.

**Virginia.**—*Coalter v. Hunter* (1826) 4 Rand. 58, 15 Am. Dec. 726; *Miller v. Trueheart* (1833) 4 Leigh, 569.

**Washington.**—*Densmore v. Evergreen Camp* (1910) 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206.

**West Virginia.**—*Keystone Bridge Co. v. Summers* (1878) 13 W. Va. 476; *Ravenswood v. Fleming* (1883) 22 W. Va. 52, 46 Am. Rep. 485.

**Wisconsin.**—*Walker v. Shepardson* (1853) 2 Wis. 384, 60 Am. Dec. 423; *Barnes v. Racine* (1855) 4 Wis. 454; *Williams v. Smith* (1868) 22 Wis. 594; *Wisconsin River Improv. Co. v. Lyons* (1872) 30 Wis. 61; *Potter v. Menasha* (1872) 30 Wis. 492; *Waupun v. Moore* (1874) 34 Wis. 450, 17 Am. Rep. 446; *Pettibone v. Hamilton* (1876) 40 Wis. 402; *Remington v. Foster* (1877) 42 Wis. 608; *Kimberly & C. Co. v. Hewitt* (1890) 75 Wis. 371, 44 N. W. 303; *Eau Claire v. Matzke* (1893) 86 Wis. 291, 39 Am. St. Rep. 900, 56 N. W. 874; *Marshfield v. Wisconsin Teleph. Co.* (1898) 102 Wis. 604, 44 L.R.A. 565, 78 N. W. 735; *Pfleger v. Groth* (1899) 103 Wis. 104, 79 N. W. 19; *Rogers v. John Week Lumber Co.* (1903) 117 Wis. 5, 93 N. W. 821.

**England.**—*Atty. Gen. v. Nichol* (1809) 16 Ves. Jr. 338, 33 Eng. Reprint, 1012, 10 Revised Rep. 186; *Wynstanley v. Lee* (1818) 2 Swanst. 383, 36 Eng. Reprint, 643; *Ripon v. Hobart* (1834) 3 Myl. & K. 169, 40 Eng. Reprint, 65, 3 L. J. Ch. N. S. 145; *Atty. Gen. v. Forbes* (1836) 2 Myl. & C. 123, 40 Eng. Reprint, 587; *Spencer v. London & B. R. Co.* (1836) 8 Sim. 193, 59 Eng. Reprint, 77, 7 L. J. Ch. N. S. 281; *Haines v. Taylor* (1846) 10 Beav. 75, 50 Eng. Reprint, 511; *Bostock v. North Staffordshire R. Co.* (1852) 5 De G. & S. 584, 64 Eng. Reprint, 1258, 25 L. J. Ch. N. S. 325, 2 Jur. N. S. 248, 4 Week. Rep. 336; *Potts v. Levy* (1854) 2 Drew. 272, 61 Eng. Reprint, 723; *Atty. Gen. v. Oxford, W. & W. R. Co.* (1853) 2 Week. Rep. 330; *Herz v. Union Bank* (1859) 2 Giff. 686, 66 Eng. Reprint, 287, 1 Jur. N. S. 127, 3 Week. Rep. 49; *Atty. Gen. v. Metropolitan Bd. of Works* (1863) 1 Hem. & M. 298, 71 Eng. Reprint, 130, 2 New Reports, 312, 9 L. T. N. S. 139, 11 Week. Rep. 820; 7 A.L.R.—48.

*Luscombe v. Steer* (1867) 17 L. T. N. S. 229, 15 Week. Rep. 1191; *Atty. Gen. v. Lonsdale* (1868) L. R. 7 Eq. 377, 38 L. J. Ch. N. S. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219; *Cook v. Bath* (1868) L. R. 6 Eq. 177; *Atty. Gen. v. Terry* (1874) L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Week. Rep. 395; *Crompton v. Lea* (1874) L. R. 19 Eq. 115, 44 L. J. Ch. N. S. 69, 31 L. T. N. S. 469, 23 Week. Rep. 53, 6 Mor. Min. Rep. 179; *Atty. Gen. v. Shrewsbury (Kingsland Bridge Co.)* (1882) L. R. 21 Ch. Div. 752, 51 L. J. Ch. N. S. 746, 46 L. T. N. S. 687, 30 Week. Rep. 916; *Phillips v. Thomas* (1890) 62 L. T. N. S. 793.

**Canada.**—*Dundas v. Hamilton & M. R. Co.* (1871) 18 Grant, Ch. 311.

**Scotland.**—*Burntisland Whale Fishing Co. v. Trotter* (1831) 5 Wils. & S. 649; *Swinton v. Pedie* (1837) 15 Sc. Sess. Cas. 1st series, 775.

But if the complainant's right is doubtful, or the thing which it is sought to restrain is not a nuisance *per se* and will not necessarily become a nuisance, but may or may not become such, depending on the use, manner of operation, or other circumstances, equity will not interfere.

**United States.**—*Missouri v. Illinois* (1901) 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Ramsay v. Riddle* (1806) 1 Cranch, C. C. 399, Fed. Cas. No. 11,544; *Spooner v. McConnell* (1838) 1 McLean, 337, Fed. Cas. No. 13,245; *Works v. Junction R. Co.* (1853) 5 McLean, 425, Fed. Cas. No. 18,046; *Silliman v. Hudson River Bridge Co.* (1859) 4 Blatchf. 395, Fed. Cas. No. 12,852; *Woodman v. Kilbourn Mfg. Co.* (1867) 1 Biss. 546, 1 Abb. U. S. 158, Fed. Cas. No. 17,978; *Flint v. Russell* (1879) 5 Dill. 151, Fed. Cas. No. 4,876; *United States v. North Bloomfield Gravel Min. Co.* (1892) 53 Fed. 625; *Lake Erie & W. R. Co. v. Fremont* (1899) 34 C. C. A. 625, 92 Fed. 721; *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission* (1899) 92 Fed. 801; *Otaheite Gold & S. Min. & Mill. Co. v. Dean* (1900) 102 Fed. 929, 20 Mor. Min. Rep. 688.

**Alabama.**—*Ray v. Lynes* (1846) 10 Ala. 63; *St. James Church v. Arrington* (1860) 36 Ala. 546, 76 Am. Dec. 332; *Kingsbury v. Flowers* (1880) 65

Ala. 479, 39 Am. Rep. 14; Ogletree v. McQuaggs (1880) 67 Ala. 580, 42 Am. Rep. 112; Rouse v. Martin (1883) 75 Ala. 510, 51 Am. Rep. 463.

**Arkansas.**—Swain v. Morris (1910) 93 Ark. 362; 125 S. W. 432, 20 Ann. Cas. 930; Cooper v. Whissen (1910) 95 Ark. 545, 130 S. W. 703.

**California.**—Middleton v. Franklin (1853) 3 Cal. 238; Hoke v. Perdue (1881) 62 Cal. 545.

**Florida.**—Thebaut v. Canova (1867) 11 Fla. 143; Garnett v. Jacksonville, St. A. & H. R. R. Co. (1884) 20 Fla. 889.

**Georgia.**—Mygatt v. Goetchins (1856) 20 Ga. 350; Harrison v. Brooks (1856) 20 Ga. 537; Cunningham v. Rice (1859) 28 Ga. 30; Rounsaville v. Kohlheim (1882) 68 Ga. 668, 45 Am. Rep. 505; Bacon v. Walker (1886) 77 Ga. 336; Richmond Cotton Oil Co. v. Castellaw (1910) 134 Ga. 472, 67 S. E. 1126; Harper v. Nashville (1911) 136 Ga. 141, 70 S. E. 1102.

**Illinois.**—Dunning v. Aurora (1866) 40 Ill. 481; Lake View v. Letz (1867) 44 Ill. 81; Thornton v. Roll (1886) 118 Ill. 350, 8 N. E. 145; Chicago General R. Co. v. Chicago, B. & Q. R. Co. (1899) 181 Ill. 605, 54 N. E. 1026; Iliff v. School Directors (1892) 45 Ill. App. 419; Sheldon v. Weeks (1893) 51 Ill. App. 314; Flood v. Consumers Co. (1903) 105 Ill. App. 559.

**Indiana.**—Laughlin v. Lamasco City (1855) 6 Ind. 223; Greencastle v. Hazelett (1864) 23 Ind. 186; Begein v. Anderson (1867) 28 Ind. 79; Keiser v. Lovett (1882) 85 Ind. 240, 44 Am. Rep. 10; Bowen v. Mauzy (1888) 117 Ind. 258, 19 N. E. 526; Dalton v. Cleveland, C. C. & St. L. R. Co. (1895) 144 Ind. 121, 43 N. E. 130; Windfall Mfg. Co. v. Patterson (1896) 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674.

**Iowa.**—Shiras v. Olinger (1879) 50 Iowa, 571, 32 Am. Rep. 138; Reynolds v. Union Sav. Bank (1912) 155 Iowa, 519, 49 L.R.A. (N.S.) 194, 136 N. W. 529.

**Kansas.**—Hutchinson v. Delano (1891) 46 Kan. 345, 26 Pac. 740.

**Kentucky.**—Hahn v. Thornberry (1870) 7 Bush, 403; Pfingst v. Senn (1893) 94 Ky. 556, 21 L.R.A. 569, 23

S. W. 358; Albany Christian Church v. Wilborn (1902) 112 Ky. 507, 66 S. W. 285; Louisville Athletic Club v. Nolan (1909) 134 Ky. 220, 23 L.R.A. (N.S.) 1019, 119 S. W. 800; Richmond v. House (1917) 177 Ky. 814, 198 S. W. 218; Edelen v. Barber (1886) 8 Ky. L. Rep. 268; Miley v. A'Hearn (1892) 13 Ky. L. Rep. 834, 18 S. W. 529; Davis v. Adkins (1896) 18 Ky. L. Rep. 73, 35 S. W. 271; Beckham v. Brown (1897) 19 Ky. L. Rep. 519, 40 S. W. 684; Marrs v. Fiddler (1902) 24 Ky. L. Rep. 722, 69 S. W. 953; Alexander v. Tebeau (1903) 24 Ky. L. Rep. 1305, 71 S. W. 427; Hyden v. Terry (1908) 32 Ky. L. Rep. 1198, 108 S. W. 241.

**Louisiana.**—Musgrove v. Catholic Church (1855) 10 La. Ann. 431; New Orleans v. Wardens (1856) 11 La. Ann. 245; Bell v. Riggs (1886) 38 La. Ann. 555; Hill v. Battalion Washington Artillery (1918) 143 La. 533, 78 So. 844; LeBourgeois v. New Orleans (1919) 145 La. —, 82 So. 268.

**Maryland.**—Adams v. Michael (1873) 38 Md. 123, 17 Am. Rep. 516; King v. Hamill (1903) 97 Md. 103, 54 Atl. 625; Gallagher v. Flury (1904) 99 Md. 181, 57 Atl. 672; Warren Mfg. Co. v. Baltimore (1913) 119 Md. 188, 86 Atl. 502; Pope v. Clark (1913) 122 Md. 1, 89 Atl. 387.

**Massachusetts.**—District Attorney v. Lynn & B. R. Co. (1860) 16 Gray, 243; Atty. Gen. v. Metropolitan R. Co. (1878) 125 Mass. 515, 28 Am. Rep. 264.

**Michigan.**—Siegel v. Wayne Circuit Judge (1909) 155 Mich. 459, 119 N. W. 645.

**Mississippi.**—Gwin v. Melmoth (1844) Freem. Ch. 505; McCutchen v. Blanton (1881) 59 Miss. 116.

**Missouri.**—Welton v. Martin (1842) 7 Mo. 307; Julia Bldg. Asso. v. Bell Teleph. Co. (1885) 88 Mo. 253, 57 Am. Rep. 398; Van De Vere v. Kansas City (1891) 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; McDonough v. Robbens (1894) 60 Mo. App. 156; Holke v. Herman (1900) 87 Mo. App. 125.

**Nebraska.**—Lowe v. Prospect Hill Cemetery Asso. (1899) 58 Neb. 94, 46 L.R.A. 787, 78 N. W. 488; Braasch v.

Cemetery Asso. (1903) 69 Neb. 300, 95 N. W. 646, 5 Ann. Cas. 132.

New Hampshire.—Burnham v. Kempton (1862) 44 N. H. 78; Manchester v. Smith (1887) 64 N. H. 380, 10 Atl. 700.

New Jersey.—Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co. (1830) 1 N. J. Eq. 157, 21 Am. Dec. 41; Vanwinkle v. Curtis (1836) 3 N. J. Eq. 422; Higgins v. Princeton (1850) 8 N. J. Eq. 309; Rogers v. Danforth (1853) 9 N. J. Eq. 289; Butler v. Rogers (1853) 9 N. J. Eq. 487; Thompson ex rel. Bergen v. Paterson (1854) 9 N. J. Eq. 624; Wolcott v. Melick (1856) 11 N. J. Eq. 204, 66 Am. Dec. 790; Hinchman v. Paterson Horse R. Co. (1864) 17 N. J. Eq. 75, 86 Am. Dec. 252; Cleveland v. Citizens Gaslight Co. (1869) 20 N. J. Eq. 201; Atty. Gen. v. Steward (1869) 20 N. J. Eq. 415; Duncan v. Hayes (1871) 22 N. J. Eq. 25; McNeal v. Assiscunk Creek Meadow Co. (1883) 37 N. J. Eq. 204; Newark Aqueduct Board v. Passaic (1889) 45 N. J. Eq. 393, 18 Atl. 106, affirmed in (1890) 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55; Board of Health v. North American Home (1910) 77 N. J. Eq. 464, 78 Atl. 677; Northfield v. Atlantic County (1915) 85 N. J. Eq. 47, 95 Atl. 745; Bourgeois v. Miller (1918) 89 N. J. Eq. 285, 104 Atl. 383.

New York.—Rochester v. Curtiss (1840) Clarke, Ch. 336; Mohawk Bridge Co. v. Utica & S. R. Co. (1837) 6 Paige, 554; Morgan v. Binghamton (1836) 102 N. Y. 500, 7 N. E. 424; Drake v. Hudson River R. Co. (1849) 7 Barb. 508; Harrison v. Newton (1851) N. Y. Code Rep. N. S. 207; Phoenix v. Emigration Comrs. (1855) 1 Abb. Pr. 466, affirmed in (1855) 12 How. Pr. 1; Rochester v. Erickson (1866) 46 Barb. 92; Stilwell v. Buffalo Riding Academy (1888) 21 Abb. N. C. 472, 4 N. Y. Supp. 414; Depierris v. Mattern (1890) 10 N. Y. Supp. 626; Morton v. St. Patrick's Roman Catholic Church (1907) 56 Misc. 71, 105 N. Y. Supp. 1100; Heaton v. Packer (1909) 131 App. Div. 812, 116 N. Y. Supp. 46; Sherman v. Livingston (1910) 128 N. Y. Supp. 581.

North Carolina.—Barnes v. Calhoun (1842) 37 N. C. (2 Ired. Eq.) 199; Atty. Gen. v. Lea (1844) 38 N. C. (3 Ired. Eq.) 301; Simpson v. Justice (1851) 43 N. C. (8 Ired. Eq.) 115; Wilder v. Strickland (1856) 55 N. C. (2 Jones, Eq.) 386; Ellison v. Washington (1859) 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430; Clark v. Lawrence (1860) 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241; Frizzle v. Patrick (1863) 59 N. C. (6 Jones, Eq.) 354; Dorsey v. Allen (1881) 85 N. C. 358, 39 Am. Rep. 704; Walton v. Mills (1882) 86 N. C. 280; Burwell v. Vance County (1885) 93 N. C. 73, 58 Am. Rep. 454; Vickers v. Durham (1903) 132 N. C. 880, 44 S. E. 685; Hickory v. Southern R. Co. (1906) 143 N. C. 451, 55 S. E. 840; Cherry v. Williams (1908) 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 Ann. Cas. 715; Little v. Lenoir (1909) 151 N. C. 415, 66 S. E. 337; Berger v. Smith (1912) 160 N. C. 205, 75 S. E. 1098; Hanes v. Carolina Cadillac Co. (1918) 176 N. C. 350, 97 S. E. 162.

Ohio.—Hutchinson v. Thompson (1839) 9 Ohio, 52; State ex rel. Woolery v. Brenner (1916) 6 Ohio App. 209, affirmed in (1917) 96 Ohio St. 598, 118 N. E. 1087; Erkenbrecher v. Este (1871) 1 Cin. Sup. Ct. Rep. 368; Fisher v. Lakeside Park Hotel & Amusement Co. (1897) 4 Ohio N. P. 329.

Oklahoma.—West v. Ponca City Mill. Co. (1904) 14 Okla. 646, 79 Pac. 100, 2 Ann. Cas. 249; Clinton Cemetery Asso. v. McAttee (1910) 27 Okla. 160, 31 L.R.A.(N.S.) 945, 111 Pac. 392.

Oregon.—Watts v. Foster (1885) 12 Or. 247, 7 Pac. 24; Esson v. Wattier (1893) 25 Or. 7, 34 Pac. 756; Blair v. Boswell (1900) 37 Or. 168, 61 Pac. 341.

Pennsylvania.—Bell v. Ohio & P. R. Co. (1855) 25 Pa. 161, 64 Am. Dec. 687; Rhodes v. Dunbar (1868) 57 Pa. 274, 98 Am. Dec. 221; Philadelphia's Appeal (1875) 78 Pa. 33; Dilworth's Appeal (1879) 91 Pa. 247; Daw v. Enterprise Powder Mfg. Co. (1894) 160 Pa. 479, 28 Atl. 841; Biddle v. Ash (1838) 2 Ashm. 211; Carpenter v. Cummings (1856) 2 Phila. 74; Hough v. Doylestown (1870) 4 Brewst. 333; Sellers v. Pennsylvania R. Co. (1875)

10 Phila. 319; *Smith v. Bellows* (1910) 20 Pa. Dist. R. 383.

**Rhode Island.**—*O'Reilly v. Perkins* (1901) 22 R. I. 364, 48 Atl. 6.

**Tennessee.**—*Kirkman v. Handy* (1850) 11 Humph. 406, 54 Am. Dec. 45; *Lytton v. Steward* (1876) 2 Tenn. Ch. 586.

**Texas.**—*Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56; *Robinson v. Dale* (1910) 62 Tex. Civ. App. 277, 131 S. W. 308; *Moore v. Coleman* (1917) — Tex. Civ. App. —, 195 S. W. 212; *Strieber v. Ward* (1917) — Tex. Civ. App. —, 196 S. W. 720.

**Vermont.**—*Curtis v. Winslow* (1866) 38 Vt. 690.

**Virginia.**—*Talley v. Tyree* (1843) 2 Rob. 500.

**Washington.**—*Winsor v. Hanson* (1905) 40 Wash. 423, 82 Pac. 710; *Rea v. Tacoma Mausoleum Asso.* (1918) 103 Wash. 429, 1 A.L.R. 541, 174 Pac. 961.

**West Virginia.**—*Chambers v. Cramer* (1901) 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691; *Pope Bros. v. Bridge-water Gas Co.* (1902) 52 W. Va. 252, 43 S. E. 87.

**Wisconsin.**—*Sheboygan v. Sheboygan & F. du L. R. Co.* (1867) 21 Wis. 667; *State v. Eau Claire* (1876) 40 Wis. 533; *Janesville v. Carpenter* (1890) 77 Wis. 288, 3 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Priewe v. Fitzsimons & C. Co.* (1903) 117 Wis. 497, 94 N. W. 317.

**England.**—*Baines v. Baker* (1752) 1 Amb. 158, 27 Eng. Reprint, 105; *Anonymous* (1752) 3 Atk. 750, 26 Eng. Reprint, 1230; *Atty. Gen. v. Nichol* (1809) 16 Ves. Jr. 338, 33 Eng. Reprint, 1012, 10 Revised Rep. 186; *Wynstanley v. Lee* (1818) 2 Swanst. 332, 36 Eng. Reprint, 643; *Ripon v. Hobart* (1834) 3 Myl. & K. 169, 40 Eng. Reprint, 65; *Haines v. Taylor* (1846) 10 Beav. 75, 50 Eng. Reprint, 511; *Elwell v. Crowther* (1862) 31 Beav. 163, 54 Eng. Reprint, 1100; *Biddulph v. St. George's Parish* (1863) 3 De G. J. & S. 492, 46 Eng. Reprint, 726, 33 L. J. Ch. N. S. 411, 9 Jur. N. S. 953, 8 L. T. N. S. 558, 11 Week. Rep. 789; *Atty. Gen. v. Kingston-upon-Thames* (1865) 11 Jur. N. S. 596, 12 L. T. N. S. 665, 13 Week. Rep. 888; *Luscombe v. Steer*

(1867) 17 L. T. N. S. 229, 15 Week. Rep. 1191; *Harrison v. Good* (1871) L. R. 11 Eq. 338, 40 L. J. Ch. N. S. 294, 24 L. T. N. S. 263, 19 Week. Rep. 346; *Fletcher v. Bealey* (1885) L. R. 23 Ch. Div. 688, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745.

**Canada.**—*McBean v. Wyllie* (1902) 14 Manitoba, L. R. 135; *British Canadian Securities v. Victoria* (1911) 16 B. C. 441.

The same principle governs the question as to the interference of equity, whether the threatened nuisance is private or public. *Atty. Gen. v. Sheffield Gas Consumers' Co.* (1853) 3 De G. M. & G. 304, 22 L. J. Ch. N. S. 811, 17 Jur. 677, 1 Week. Rep. 185, 19 Eng. Rul. Cas. 273; *Atty. Gen. v. Manchester* [1893] 2 Ch. (Eng.) 87, 62 L. J. Ch. N. S. 459, 3 Reports, 427, 68 L. T. N. S. 608, 41 Week. Rep. 459, 57 J. P. 343.

The power of equity to enjoin the doing of acts threatening irreparable injury to property rights, or constituting a public nuisance, is inherent, and cannot be devested because the performance of such acts may be a violation of the criminal law. *State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk* (1916) 269 Mo. 389, 190 S. W. 877 (injunction sought against the illegal transportation of intoxicating liquor).

There must be proof of imminent danger, to justify an injunction against the threatened nuisance. *Fletcher v. Bealey* (1885) L. R. 23 Ch. Div. (Eng.) 688, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745.

The complainant must establish the prospective nuisance with clearness and reasonable certainty; the danger apprehended must appear to be imminent, and, in the natural course of events, clearly impending, and the injuries in their nature and character irreparable; and it is not sufficient to make out a doubtful or possible case of danger. *Rochester v. Erickson* (1866) 46 Barb. (N. Y.) 92 (restraining construction of a wall which would obstruct a river); *Hough v. Doylestown* (1870) 4 Brewst. (Pa.) 333 (refusing to enjoin, at the instance of a mill owner, the diversion of water

from a stream by a municipality); *Windfall Mfg. Co. v. Patterson* (1896) 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674 (denying injunction to restrain the drilling of a gas well 152 feet from the complainant's residence).

The court will not act upon speculative proof, or such as furnishes ground only for conjecture. *Berger v. Smith* (1912) 160 N. C. 205, 75 S. E. 1098 (refusing to enjoin erection of saw-mill).

A showing of probable or contingent injury is insufficient: the injury must be inevitable and undoubted. *McCutchen v. Blanton* (1881) 59 Miss. 116.

The court, while continuing the injunction, may direct an issue, to determine whether the proposed structure will constitute a nuisance. *Miller v. Trueheart* (1833) 4 Leigh (Va.) 569 (where a milldam, which had been washed away, had constituted a nuisance, and the question was whether the proposed remedy, if the dam were rebuilt, would obviate the nuisance).

#### *b. Degree of certainty.*

See also *infra*, I. f.

Generally, the court ought not to interfere, where the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized. *Butler v. Rogers* (1853) 9 N. J. Eq. 489 (refusing to enjoin construction of a blacksmith shop).

To authorize an injunction, it must be established by satisfactory evidence that the threatened or apprehended injury will probably result. *Braasch v. Cemetery Asso.* (1903) 69 Neb. 300, 95 N. W. 646, 5 Ann. Cas. 182.

The complainant must make out a "strong case of probability" that the apprehended mischief will, in fact, arise. *Atty. Gen. v. Manchester* [1893] 2 Ch. (Eng.) 87, 62 L. J. Ch. N. S. 459, 3 Reports, 427, 68 L. T. N. S. 608, 41 Week. Rep. 459, 57 J. P. 343.

There must be an "extreme probability" of irreparable injury, to justify the granting of an injunction to restrain an alleged threatened nuisance.

*Spooner v. McConnell* (1838) 1 McLean, 337, Fed. Cas. No. 13,245.

The complainant must establish with a "high degree of probability" that a nuisance will result. *Atty. Gen. v. Manchester* (Eng.) *supra*.

There must be a "practical certainty" that a nuisance will result to justify equitable interference. *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission* (1899) 92 Fed. 801.

The proposed enterprise must "inevitably" prove a nuisance, to justify equitable interference. *Sherman v. Livingston* (1910) 128 N. Y. Supp. 581; *Heaton v. Packer* (1909) 131 App. Div. 812, 116 N. Y. Supp. 46; *Harrison v. Brooks* (1856) 20 Ga. 537.

It must appear that the business which it sought to enjoin will, under the circumstances, "necessarily" be a nuisance. *Alexander v. Tebeau* (1903) 24 Ky. L. Rep. 1305, 71 S. W. 427; *Wolcott v. Melick* (1856) 11 N. J. Eq. 204, 66 Am. Dec. 790.

"We fully agree," said the court in *Missouri v. Illinois* (1900) 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, "with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of facts as will manifest the danger to be real and immediate."

A bare possibility of injury will not warrant an injunction against an alleged threatened nuisance. *Lytton v. Steward* (1876) 2 Tenn. Ch. 586.

But, on the other hand, equity will not refuse to enjoin a threatened nuisance because there is a "bare possibility" that the evil may be avoided. In *Ripon v. Hobart* (1834) 3 Myl. & K. 169, 40 Eng. Reprint, 65, the court said: "Proceeding upon practical views of human affairs, the law will



guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming." The court, however, in this instance, refused to grant an injunction against the erection and use of a steam engine for drainage purposes, sought on the ground that by the use of the engine instead of windmills, which had previously been used, the water would be pumped in such quantities and so continuously as to injure the banks of a stream which the complainants were bound to keep in repair.

And it was said in *Mohawk Bridge Co. v. Utica & S. R. Co.* (1837) 6 Paige (N. Y.) 554, that if the magnitude of the injury to be guarded against is great, and the risk so imminent that no prudent person would think of incurring it, the court will not refuse its aid for the protection of the complainant's rights by injunction, on the ground that there is a bare possibility that the anticipated injury from the noxious erection may not happen. To the same effect is *Phoenix v. Emigration Comrs.* (1855) 1 Abb. Pr. (N. Y.) 466, which is affirmed in (1855) 12 How. Pr. 1.

Absolute certainty of injury unless an injunction is issued to restrain a threatened nuisance need not be shown to warrant the granting of the injunction: there must be a reasonable probability. *Nelson v. Swedish E. Lutheran Cemetery Asso.* (1910) 111 Minn. 149, 34 L.R.A. (N.S.) 565, 126 N. W. 723, 127 N. W. 626, 20 Ann. Cas. 790 (suit to enjoin establishment of cemetery); *Miley v. A'Hearn* (1892) 13 Ky. L. Rep. 834, 18 S. W. 529; *Atty. Gen. v. Manchester* (Eng.) *supra*.

To warrant the granting of an injunction to restrain a threatened nuisance on the ground of deterioration in the value of property, a strong-

er case must be made out than in cases of threatened injuries to health. *Phoenix v. Emigration Comrs.* (N. Y.) *supra*.

And while perhaps proof that the nuisance is inevitable, or will necessarily ensue, may be properly demanded when nothing more than discomfort is anticipated, a reasonable certainty that the nuisance will result unless the injunction is granted is sufficient when danger to health or life is threatened. *Holke v. Herman* (1900) 87 Me. App. 125 (where an injunction was sought to restrain the establishment of a pond near the complainant's residence).

So, in *Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56, it was held that the complaint need not allege facts showing that a nuisance must "inevitably" result from the establishment of a proposed cemetery; but that such facts must be alleged as show "with cogency, clearness, and reasonable certainty" that the acts threatened, if done, would create a nuisance, and that the complainant would suffer irreparable injury therefrom.

And it was held in *Elliott v. Ferguson* (Tex.) *supra*, that an instruction that "the burden of proof is on plaintiffs to show beyond a reasonable doubt that the use of the grounds for cemetery purposes will probably result in poisoning the water in their wells and springs, or in contaminating the atmosphere of their homes," was erroneous as imposing too great a degree of certainty on the complainants.

It was held in *Moore v. Coleman* (1917) — Tex. Civ. App. —, 195 S. W. 212, that while the evils anticipated must be shown to be such as are imminent and certain to occur, to warrant the granting of an injunction to restrain an improvement such as a cotton gin, yet it is not proper so to instruct the jury.

#### *c. Public inconvenience and comparative injury.*

The general question whether the court, in determining the right to an injunction against a nuisance, will regard the public convenience, or compare the amount of injury to the plain-

tiff from the nuisance with the injury to defendant from the injunction, if one is granted, is beyond the scope of this annotation, as it is not peculiar to anticipated or threatened nuisances as distinguished from existing nuisances; though the courts are perhaps somewhat more apt to be influenced by these considerations in a case involving a threatened or anticipated nuisance than in a case of an actually existing nuisance. In either case, of course, these considerations weigh more heavily upon an application for an interlocutory injunction, than upon an application for a final injunction.

The court is less disposed to interfere where the apprehended mischief is from such establishments and erections as have a tendency to promote the public convenience. *Harrison v. Brooks* (1856) 20 Ga. 537 (livery stable); *Bacon v. Walker* (1886) 77 Ga. 336 (jail); *Barnes v. Calhoun* (1842) 37 N. C. (2 Ired. Eq.) 199 (mill).

This doctrine is approved in a number of cases in North Carolina involving the restraint of mills. Thus, it was held in *Wilder v. Strickland* (1856) 55 N. C. (2 Jones, Eq.) 386, that the establishment of a mill, which is a convenience and necessity to the public, will not be enjoined on the ground that complainants will sustain injury by overflow of their lands, where the injury is comparatively slight.

And in *Atty. Gen. v. Lea* (1844) 38 N. C. (3 Ired. Eq.) 301, in refusing to enjoin the erection of a mill, the court said: "When the mischief arising from the erection of a mill, which is a public convenience, does not extend to the neighborhood, but is confined to a particular family, it cannot, as a general rule, under this head, be held a nuisance, to be redressed by abatement or injunction. In the case before us, it does not appear from the evidence that the erection of the mill pond will endanger the health of the neighborhood, or of the relator's family. . . . We cannot, therefore, say we are satisfied that effects so injurious to the health of the neighbor-

hood as to render it a nuisance will result from the erection of this pond. But it appears to us this is a case of private nuisance, if a nuisance at all, in the erection of a mill, which will be a public convenience. And there is nothing to show us that there is so great a disproportion between the private suffering and the public convenience, as would authorize the court to interfere. The legislature considers public mills as public conveniences, and encourages their erection even by taking from another so much of his land upon just compensation as may be necessary, unless the mill when erected will be a public nuisance. . . . In this case the whole of the land on which the mill and pond will be belongs to the defendants, they have a right to use it, as in their discretion may seem right, provided in doing so, they do not injure the public or private individuals, and when the use they make of it is to the public convenience, and the injurious effect confined to a private individual, the interest of the latter must give way to that of the many, unless he can make it manifestly appear that so great a difference exists between his injury and the public convenience as bears no comparison, and that the erection will be followed by irreparable mischief, in which case the court will interfere by injunction."

And the rebuilding of a mill which would be a public convenience and would not injure the health of the neighborhood, although it would that of the complainant and his family, it was held in *Atty. Gen. ex rel. Eason v. Perkins* (1831) 17 N. C. (2 Dev. Eq.) 38, would not be enjoined, in view of statutory provisions encouraging the building of mills by restraining successive actions for private injury, requiring a minimum of \$10 damage annually to sustain an action, and authorizing the court to order the building on lands of another unless the mill would create a nuisance to the neighborhood. The above conclusion was reached especially in view of the fact that the complainant had purchased his property after the original mill was in operation.

It was said in *Berger v. Smith* (1912) 160 N. C. 205, 75 S. E. 1098, that if the proposed structure will be beneficial to the public, the court will not stop its erection, if it is not a nuisance per se, unless the private injury is greater in proportion than the public benefit. In this case an injunction was refused to restrain the erection of a sawmill.

The court may balance the inconvenience likely to be incurred by the respective parties, in case of a threatened nuisance, and grant or withhold the injunction according to a sound discretion; and the injunction should not issue when the benefit to one party is but small, while it would operate oppressively and to the annoyance and injury of the other party, unless the wrong is so wanton and unprovoked as to deprive the defendant of equitable consideration. This rule is especially true where the alleged threatened nuisance, while highly beneficial to one party, may possibly not be prejudicial to the other. *Hough v. Doylestown* (1870) 4 Brewst. (Pa.) 333 (refusing to enjoin diversion of water by a municipality for domestic uses, at the instance of a mill owner).

In *Dorsey v. Allen* (1881) 85 N. C. 358, 39 Am. Rep. 704, the court, in refusing to grant a restraining order to prevent the erection of a planing mill and gin on a lot adjacent to that of complainant's residence, took into consideration the benefit to the community from the projected enterprise as compared with the detriment the complainant might sustain, and stated that when the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will not interfere.

Although equity will not usually grant preventive relief in cases of public nuisances, where it is questionable whether a nuisance will result, it has been said that even in these doubtful cases, an injunction will sometimes be granted, to continue until a trial at law, where its denial would be productive of great public inconvenience. *State v. Mobile* (1837)

5 Port. (Ala.) 279, 30 Am. Dec. 564. See also *Williamson v. Carnan* (1829) 1 Gill & J. (Md.) 184.

That the right of navigation in a canal is of little value to the public compared to the great value to a municipality of an obstruction which it proposes to place across the canal will not prevent equity from enjoining the obstruction at the suit of the state. *State ex rel. Lyon v. Columbia Water Power Co.* (1909) 82 S. C. 181, 22 L.R.A. (N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 Ann. Cas. 343.

#### *d. Substantial and irreparable injury.*

The general rule with respect to equitable interference in cases involving nuisances, that the complainant must show an injury that is irreparable, or one which cannot be adequately compensated by damages in an action at law, and that he must establish a case of serious mischief, and not mere trifling discomfort (20 R. C. L. § 92), has been applied, or at least approved, in many cases where the nuisance was merely prospective, among which the following are cited by way of illustration:

**California.**—*Randall v. Freed* (1908) 154 Cal. 299, 97 Pac. 669.

**Connecticut.**—*Bigelow v. Hartford Bridge Co.* (1842) 14 Conn. 565, 36 Am. Dec. 502 (suit to enjoin rebuilding of causeway, on the ground of injury by overflow of the plaintiff's land).

**Delaware.**—*Gray v. Baynard* (1883) 5 Del. Ch. 499 (encroachment on highway).

**Missouri.**—*Welton v. Martin* (1842) 7 Mo. 307 (alleged interference with the plaintiff's mill and dam by the proposed erection of another dam).

**New Jersey.**—*Quackenbush v. Van Riper* (1835) 3 N. J. Eq. 350, 29 Am. Dec. 716 (refusing to enjoin erection of a dam which it was claimed would injure the complainant because of overflow); *Vanwinkle v. Curtis* (1836) 3 N. J. Eq. 422 (refusing to enjoin diversion of part of the water of a stream which flowed through a corner of complainant's land and was not used by him); *Morris & E. R. Co. v. Prudden* (1869) 20 N. J. Eq. 530;

**Duncan v. Hayes** (1871) 22 N. J. Eq. 25; Atty. Gen. ex rel. Gloucester City v. Brown (1878) 24 N. J. Eq. 89 (refusing an injunction to restrain obstruction of an unused highway); **Hagerty v. Lee** (1889) 45 N. J. Eq. 255, 17 Atl. 826 (obstruction of light and air); **Raritan Twp. v. Port Reading R. Co.** (1891) 49 N. J. Eq. 11, 23 Atl. 127 (obstruction of highway by railroad abutments); **Northfield v. Atlantic County** (1913) 85 N. J. Eq. 47, 95 Atl. 745 (tuberculosis hospital); **Bourgeois v. Miller** (1918) — N. J. Eq. —, 104 Atl. 383.

**North Carolina.**—**Wilder v. Strickland** (1856) 55 N. C. (2 Jones, Eq.) 386 (mill).

**Pennsylvania.**—**Rhodes v. Dunbar** (1868) 57 Pa. 274, 98 Am. Dec. 221 (planing mill); **Philadelphia's Appeal** (1875) 78 Pa. 33 (encroachment on highway); **Hough v. Doylestown** (1870) 4 Brewst. 333 (refusing to enjoin diversion of water by a municipality for domestic uses, at the instance of a mill owner).

**South Carolina.**—**Lining v. Geddes** (1826) 6 S. C. Eq. (1 M'Cord) 304, 16 Am. Dec. 606 (denying an injunction to restrain the obstruction of a private way by the building of a fence or the cutting of a ditch across it).

**Texas.**—**Dunn v. Austin** (1889) 77 Tex. 139, 11 S. W. 1125 (cemetery).

**Vermont.**—**Curtis v. Winslow** (1866) 38 Vt. 690 (barn).

**Washington.**—**Rea v. Tacoma Mausoleum Asso.** (1918) 103 Wash. 429, 1 A.L.R. 541, 174 Pac. 961 (mausoleum).

**West Virginia.**—**Chambers v. Cramer** (1901) 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691.

**Wisconsin.**—**Janesville v. Carpenter** (1890) 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128.

**England.**—**Atty. Gen. v. Nichol** (1809) 16 Ves. Jr. 338, 33 Eng. Reprint, 1012 (wall interfering with light); **Butt v. Imperial Gas Co.** (1866) L. R. 2 Ch. 158, 16 L. T. N. S. 820, 15 Week. Rep. 92; **Atty. Gen. v. Cambridge Consumers Gas Co.** (1868) L. R. 4 Ch. 71 (gas pipes in street); **Harrison v. Good** (1871) L. R. 11 Eq. 338, 40 L. J. Ch. N. S. 294, 24 L. T. N. S. 263, 19 Week. Rep. 346 (school); **Fletcher v.**

**Bealey** (1885) L. R. 28 Ch. Div. 688; **Arnott v. Whithy**, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745; **Urban Dist. Council** (1908) 73 J. P. 64 (blocking access to house).

**Canada.**—**McBean v. Wyllie** (1902) 14 Manitoba L. R. 135 (warehouse).

To justify equitable interference there must be a strong case of pressing necessity, with threatened, substantial, and serious damages. **Morris & E. R. Co. v. Prudden** (N. J.) and **Welton v. Martin** (Mo.) *supra*.

It was held in **Randall v. Freed** (1908) 154 Cal. 299, 97 Pac. 669, that threatened repeated trespasses, accompanied by offensive and insulting language, would not be enjoined, even if the same constituted a nuisance, in the absence of a showing that there was no prompt and adequate remedy at law.

In holding that an injunction against the rebuilding of a causeway was not justified on the ground that trifling inconvenience or unsubstantial injury might result to the complainant through the overflow of his land, the court in **Bigelow v. Hartford Bridge Co.** (1842) 14 Conn. 565, 36 Am. Dec. 502, said: "The proof in the case relieves us from the necessity of examining minutely the principles and authorities applicable to bills for injunction founded on apprehended injuries. . . . Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial, and not merely a technical, or inconsequential, injury. There must not only be a violation of the plaintiff's rights, but such a violation as is, or will be, attended with actual or serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would deem it proper to interpose by the summary, peculiar, and extraordinary remedy of injunction."

To warrant the issuance of an injunction to restrain an obstruction or encroachment on a public street or highway, the obstruction or encroachment must not only be clearly illegal,

must also be of such a character as to materially and substantially interrupt or impede the public use of the same as a street or highway. *Gray v. Baynard* (1883) 5 Del. Ch. 499; *Philadelphia's Appeal* (1875) 78 Pa. 33.

In *Janesville v. Carpenter* (1890) 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128, it was held that a complaint for an injunction to enjoin the erection of a building over a river did not state a cause of action which alleged merely that the building would cause the water to set back on complainant's premises "to some extent."

The rule that mere depreciation in the value of adjoining property because of the alleged threatened nuisance is not of itself sufficient to justify an injunction is illustrated by the following cases:

**United States.**—*Parker v. Winnipiseogee Lake Cotton & Woollen Co.* (1862) 2 Black, 545, 17 L. ed. 333.

**California.**—*Siskiyou Lumber & Mercantile Co. v. Rostel* (1898) 121 Cal. 511, 53 Pac. 1118.

**Missouri.**—*Van De Vere v. Kansas City* (1891) 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695.

**New Jersey.**—*Morris & E. R. Co. v. Prudden* (1869) 20 N. J. Eq. 530; *Duncan v. Hayes* (1871) 22 N. J. Eq. 25; *Northfield v. Atlantic County* (1913) 85 N. J. Eq. 47, 95 Atl. 745; *Bourgeois v. Miller* (1918) — N. J. Eq. —, 104 Atl. 383.

**Pennsylvania.**—*Rhodes v. Dunbar* (1868) 57 Pa. 274, 98 Am. Dec. 221.

**Texas.**—*Dunn v. Austin* (1889) 77 Tex. 139, 11 S. W. 1125; *Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56.

**Vermont.**—*Curtis v. Winslow* (1866) 38 Vt. 690.

**Washington.**—*Rea v. Tacoma Mausoleum Asso.* (1918) 103 Wash. 429, 1 A.L.R. 541, 174 Pac. 961.

**England.**—*Atty. Gen. v. Nichol* (1809) 16 Ves. Jr. 338, 33 Eng. Reprint, 1012, 10 Revised Rep. 186; *Butt v. Imperial Gas Co.* (1866) L. R. 2 Ch. 158, 16 L. T. N. S. 820, 15 Week. Rep. 92; *Harrison v. Good* (1871) L. R. 11

Eq. 338, 40 L. J. Ch. N. S. 294, 24 L. T. N. S. 263, 19 Week. Rep. 346.

That a planing and sawmill on a lot adjacent to a boarding house will injure the prestige of the house, making it less desirable for the better class of boarders, and thus lessen profits, is not a ground for restraining its erection and operation. *Duncan v. Hayes* (1871) 22 N. J. Eq. 25.

And that a valuable residence property will be greatly depreciated by the establishment of a school on an adjoining lot is not a ground for restraining the establishment of the school as a nuisance. *Harrison v. Good* (Eng.) supra.

So, the fact that the value of complainant's residence will be lessened by a barn about 10 feet from it which the defendant is erecting will not, of itself, be sufficient to enjoin the erection of the barn. *Curtis v. Winslow* (Vt.) supra.

That a proposed building will obstruct the view from the highway of a sign maintained by the complainant to advertise his business will not warrant an injunction against the proposed erection. *Butt v. Imperial Gas Co.* (1866) L. R. 2 Ch. (Eng.) 158, 16 L. T. N. S. 820, 15 Week. Rep. 92.

That the proposed structure will increase the risk to the complainant from fire, and consequently raise his insurance rates, will not warrant a granting of an injunction. *Siskiyou Lumber & Mercantile Co. v. Rostel* (Cal.) supra; *Duncan v. Hayes* (N. J.) and *Rhodes v. Dunbar* (Pa.) supra; *Chambers v. Cramer* (1901) 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691; *McBean v. Wyllie* (1902) 14 Manitoba L. R. 135.

Mere apprehension of danger from fire was held in *Rhodes v. Dunbar* (Pa.) supra, not sufficient reason for enjoining the building of a planing mill, even though a former building of the same kind in the same place had been destroyed by fire.

*e. Necessity that acts contemplated will create a nuisance per se.*

#### 1. In general.

There are expressions in many of the cases to the effect that an injunc-

tion will not be granted to restrain a threatened nuisance unless the act or thing which it is sought to restrain will constitute a nuisance per se. *St. Louis v. Knapp, S. & Co.* (1881) 2 McCrary, 516, 6 Fed. 221, reversed on other grounds in (1882) 104 U. S. 658, 26 L. ed. 883; *Cooper v. Whissen* (1910) 95 Ark. 545, 130 S. W. 703; *Matts v. Fiddler* (1902) 24 Ky. L. Rep. 722, 69 N. W. 953; *King v. Hamill* (1903) 97 Md. 103, 54 Atl. 625; *Sherman v. Livingston* (1910) 128 N. Y. Supp. 581. However, it is frequently not clear as to just what meaning the court attaches to the expression "nuisance per se." The general rule appears to be that stated in *Flood v. Consumers Co.* (1903) 105 Ill. App. 559, that ordinarily an injunction will be granted where the act or thing threatened is a nuisance per se, or necessarily will become a nuisance.

And in *Bowen v. Mauzy* (1889) 117 Ind. 258, 19 N. E. 526, the court said that in a proper case an injunction will lie to prevent the use of property for a business which is a nuisance per se, and even a business not a nuisance per se, if threatened and intended to be conducted in an improper manner, so as to constitute a nuisance.

It was said also in *Sutton v. Findlay Cemetery Asso.* (1915) 270 Ill. 11, L.R.A.1916B, 1135, 110 N. E. 315, Ann. Cas. 1917B, 559, in holding that an injunction should be granted to restrain the under-drainage of a cemetery into a stream flowing through the complainant's premises, where the evidence left no substantial doubt that injurious contamination would result: "Defendant insists that as a cemetery is not a nuisance per se, but may or may not be a nuisance, according to circumstances, its character as such should have been first established by a judgment in an action at law, before a court of equity would interfere by injunction to restrain or abate it. That this was formerly the rule is undoubtedly true; but that rule has, in more modern times, not been strictly adhered to. In cases where, although the thing sought to be restrained is not a nuisance per se, the right to that relief is so clear as to be free from

substantial doubt, the relief will be granted without first resorting to an action at law to declare the thing a nuisance."

So, in *Seigle v. Bromley* (1912) 22 Colo. App. 189, 124 Pac. 191, an action to enjoin the establishment of a hog ranch near the plaintiff's dwelling, where the evidence showed that the defendant contemplated the feeding of garbage, offal, and dead animals, the court said that the question whether a place so operated was a nuisance per se was not involved, as the trial court had judicially determined that a business so conducted would be such a nuisance as should be enjoined.

## 2. Erection of structures not nuisances per se.

The rule that equity will not interfere in advance of the creation of a nuisance where the apprehended injury is doubtful or contingent is especially applicable where the anticipated injury arises from the use to which a proposed structure is to be put, and not from the structure itself. In such cases, if the structure itself will not be a nuisance, and is of such a nature that it may be put to a lawful use which would not constitute a nuisance, the courts have generally declined to interfere with its erection on the ground that the contemplated use will necessarily be a nuisance.

**Arkansas.**—*Swain v. Morris* (1910) 93 Ark. 362, 125 S. W. 432, 20 Ann. Cas. 930.

**Georgia.**—*Richmond Cotton Oil Co. v. Castellaw* (1910) 134 Ga. 472, 67 S. E. 1126; *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178.

**Indiana.**—*Keiser v. Lovett* (1882) 85 Ind. 240, 44 Am. Rep. 10; *Deweese v. Hutton* (1895) 144 Ind. 114, 43 N. E. 13.

**Maryland.**—*King v. Hamill* (1903) 97 Md. 103, 54 Atl. 625.

**Michigan.**—*Siegel v. Wayne Circuit Court* (1909) 155 Mich. 459, 119 N. W. 645.

**New York.**—*De Pierris v. Mattern* (1890) 10 N. Y. Supp. 626; *Sherman v. Livingston* (1910) 128 N. Y. Supp. 581.

**New Jersey.**—*Duncan v. Hayes* (1871) 22 N. J. Eq. 25.

**North Carolina.**—*Cherry v. Williams* (1908) 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 Ann. Cas. 715.

**Pennsylvania.**—*Czarniecki v. Bowlman* (1887) 9 Sadler, 32, 11 Atl. 660.

In *Czarniecki v. Bowlman* (Pa.) *supra*, the court, while holding that the business of boiling bones and carcasses of horses and other animals in a thickly settled neighborhood would be enjoined, held that the erection of buildings in which the complainant claimed such business was to be conducted would not be enjoined, as the buildings themselves were not a nuisance.

And in *Cherry v. Williams* (N. C.) *supra*, a suit to enjoin the construction of a tuberculosis sanatorium in a thickly populated residence section of a city, the court, while holding that all use of the building for the purposes indicated should be restrained until the final hearing of the case, stated that the restraining order might be so modified, if the defendant desired, as to permit him to proceed with the construction of the building at his own risk.

The erection of a building not in itself a nuisance, it was held in *De Pierris v. Mattern* (N. Y.) *supra*, would not be enjoined on allegations by the complainant, on information and belief, that the business to be carried on by the defendant in the structure when completed was that of building and repairing wagons and operating a blacksmith and paint shop. The court said that the possibility or probability that the property might be used when the building was completed in a manner detrimental to the complainant's rights was no ground for granting an injunction in the first instance, the building itself not being a nuisance.

And in *Siegel v. Wayne Circuit Court* (Mich.) *supra*, the court, in holding that an injunction should not be granted to restrain the erection of an automobile garage in a locality which was changing from a residential to a business section, stated that it

was obvious that the erection of a building which could be used for lawful purposes not affecting the complainants' rights ought not to be enjoined because of the possibility that after completion it might be used in such a way as to constitute a nuisance.

The doctrine that an injunction will not lie to prevent the erection of a structure which is not, in itself, a nuisance, on the ground that its contemplated use will render it a nuisance, is supported by the case of *Deweese v. Hutton* (Ind.) *supra*. And the court intimated that even though the structure could not be put to any other use than such as would render it a nuisance, its erection would not be enjoined if the building itself would not be a nuisance. In this case an injunction was denied which was sought by the owner of a lot adjacent to a railway right of way, to enjoin the railway company from building on its right of way a coal chute which it was alleged would interfere with the owner's rights in the enjoyment of his property. The court said that no issue was made as to the uses to which the structure might be put, other than coaling purposes, and it had no means of knowing that the company could not use it for other and legitimate purposes; but that it did not decide that an injunction should be granted to prevent the erection of a building, not of itself a nuisance, though the owner could make no other use of the building than that which would constitute a nuisance; but that, on the contrary, it was impressed with a view that a structure not in itself a nuisance might be erected without interference from the courts, if the owner would invest with the chance of a denial of his right to conduct within it a particular business which might be declared a nuisance, or the further chance that he might not find a use for it which would not prove a nuisance.

It was said in *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178, that generally equity will not enjoin the construction of a building not in itself a nuisance, but the person erecting the building will proceed at his

peril, the whole subject being one for the jury on the trial.

So, in *Duncan v. Hayes* (1871) 22 N. J. Eq. 25, the court said that where the building the erection of which it is sought to restrain is itself not a nuisance, the erection will generally not be enjoined, but the defendants will be permitted to continue it at the risk of not being permitted to use it so as to cause a nuisance.

On the other hand, in *Cleveland v. Citizens Gaslight Co.* (1869) 20 N. J. Eq. 201, the court stated that it was usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection; that the works, if erected, might tempt the owner to use them, and that it seemed like trifling to permit one to continue with a building which he could never be permitted to use.

And a court of equity will interfere if a work is in progress which, though not a nuisance in itself, "must manifestly" end in operations which, when carried into effect, will present that species of nuisance in respect to which the court would give relief. *Haines v. Taylor* (1846) 10 Beav. 75, 50 Eng. Reprint, 511.

So, in *Silliman v. Hudson River Bridge Co.* (1877) 4 Blatchf. 74, Fed. Cas. No. 12,851, in granting a preliminary injunction to restrain the erection of a bridge, sought on the ground that the bridge would constitute an obstruction to navigation, the court stated that the work contemplated should be promptly enjoined, if there was any reasonable ground for believing that it might finally be held an obstruction, and hence subject to abatement, as the expense and loss to the defendants might otherwise be ruinous; that a refusal to grant the injunction was an encouragement to continue with the work, and might greatly embarrass the determination on the final hearing.

Equity should not stay the completion of a building externally finished where it is not clear that its use will be a nuisance, and all the injury that the complainant would suffer from its erection would be sustained in its ex-

isting condition, while to grant the injunction would result in injury to the defendant. *Harrison v. Newton* (1851) N. Y. Code Rep. N. S. 207.

#### *f. Pleadings.*

The complaint in a suit to restrain an alleged threatened nuisance which is not a nuisance per se must state such facts as will enable the court to determine whether the apprehension of irreparable injury is well founded; general allegations that such injury will result are insufficient; facts, and not opinions or conclusions, must be stated.

**United States.**—*St. Louis v. Knapp S. & Co. Co.* (1881) 2 McCrary, 516, 6 Fed. 221, reversed on the question of the sufficiency of the particular allegations in (1882) 104 U. S. 658, 26 L. ed. 883.

**Alabama.**—*Kingsbury v. Flowers* (1880) 65 Ala. 479, 39 Am. Rep. 14.

**California.**—*Branch Turnp. Co. v. Yuba County* (1859) 13 Cal. 190; *Payne v. McKinley* (1880) 54 Cal. 532.

**Florida.**—*Thebaut v. Canova* (1866) 11 Fla. 143; *Garnett v. Jacksonville, St. A. & H. R. Co.* (1884) 20 Fla. 889.

**Georgia.**—*Coast Line R. Co. v. Cohen* (1878) 50 Ga. 451; *Burrus v. Columbus* (1898) 105 Ga. 42, 31 S. E. 124.

**Illinois.**—*Flood v. Consumers Co.* (1903) 105 Ill. App. 559.

**Indiana.**—*Bowen v. Mauzy* (1889) 117 Ind. 258, 19 N. E. 526.

**Maryland.**—*Roman v. Strauss* (1856) 10 Md. 89; *Adams v. Michael* (1873) 38 Md. 123, 17 Am. Rep. 516; *Davis v. Baltimore & O. R. Co.* (1905) 102 Md. 371, 62 Atl. 572.

**Missouri.**—*Holke v. Herman* (1900) 87 Mo. App. 125.

**Oklahoma.**—*Clinton Cemetery Asso. v. McAttee* (1910) 27 Okla. 160, 31 L.R.A.(N.S.) 945, 111 Pac. 392.

**Texas.**—*Dunn v. Austin* (1899) 77 Tex. 139, 11 S. W. 1125; *Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56.

"The bill must set forth such a state of facts as leaves no room for doubt upon the question of nuisance, for if there is any doubt upon that point the benefit will be given to the defendant."



*Garnett v. Jacksonville, St. A. & H. R. Co.* (1884) 20 Fla. 389.

The petition must allege such facts as show "with cogency, clearness, and reasonable certainty that the act threatened, if done, will bring into existence a nuisance, and that the complainant will suffer irreparable injury thereby." *Elliott v. Ferguson (Tex.) supra*.

It was held in *St. Louis v. Knapp, S. & Co. Co.* (1882) 104 U. S. 658, 26 L. ed. 883, reversing (1881) 2 McCrary, 516, 6 Fed. 221, that allegations in a complaint for an injunction against the driving of piles and constructing of runways in a navigable river, that the proposed construction would cause a diversion of the river from its natural course, and create in front of the complainant's wharf a deposit of mud and sediment, rendering it impossible for vessels to approach the wharf, was a sufficiently certain statement of the essential facts as against a demurrer, and was not a mere expression of an opinion or apprehension on the part of complainant.

To justify the granting of an injunction against the laying of street railway tracks in a street, at the instance of a lot owner, on the ground of special damage, facts must be set forth to show how and to what extent there will be injury, a general allegation merely that the railroad will injure the lot being insufficient. *Coast Line R. Co. v. Cohen* (1873) 50 Ga. 451.

## II. Illustrations.

### a. Amusements.

The application of the rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress is illustrated by the following cases involving amusements of various kinds: *Weis v. Superior Ct.* (1916) 30 Cal. App. 730, 159 Pac. 464 (indecent exposure exhibition); *St. John v. North Utica* (1910) 157 Ill. App. 504 (carnival and street fair); *Com. ex rel. Pratt v. McGovern* (1903) 116 Ky. 212, 66 L.R.A. 280, 75 S. W. 261 (prize fight); *HAMILTON CORP. v. JULIAN* (reported herewith)

*ante*, 746 (bowling alley and motion picture theater); *Altschul v. Ludwig* (1916) 216 N. Y. 459, 111 N. E. 216 (theater violating building code); *Phillips v. Thomas* (1890) 62 L. T. N. S. (Eng.) 793 (public fair or exhibition).

But it was held in *Pfingst v. Senn* (1893) 94 Ky. 556, 21 L.R.A. 569, 23 S. W. 358, that an injunction would not be granted to restrain the prospective use of premises as an open-air pleasure resort and beer garden, as a nuisance, since such use of the place would not necessarily constitute a nuisance, although it had been a nuisance as conducted by other parties.

And it was held in *Alexander v. Tebeau* (1903) 24 Ky. L. Rep. 1805, 71 S. W. 427, that the court would not enjoin the opening of a baseball park on land adjoining the complainant's dwelling, on the ground that the park would be so operated as to constitute a nuisance.

In a suit by a private citizen to enjoin a prize fight as a nuisance, evidence merely that he lives on the same street and within a square of the building in which the prize fight is to be held is insufficient to warrant the granting of the injunction on the ground of special injury. *Louisville Athletic Club v. Nolan* (1909) 134 Ky. 220, 23 L.R.A. (N.S.) 1019, 119 S. W. 800.

### b. Blacksmith shops.

The application of the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, is illustrated by the following cases involving blacksmith shops: *Ray v. Lynes* (1846) 10 Ala. 63; *Bowen v. Mauzy* (1889) 117 Ind. 258, 19 N. E. 526; *Marrs v. Fiddler* (1902) 24 Ky. L. Rep. 722, 69 S. W. 953; *Rogers v. Danforth* (1853) 9 N. J. Eq. 289; *Butler v. Rogers* (1853) 9 N. J. Eq. 487; *Chambers v. Cramer* (1901) 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691.

It was held in *Marrs v. Fiddler* (1902) 24 Ky. L. Rep. 722, 69 S. W. 953, that, since a blacksmith shop was not a nuisance per se, its erection near the residence of complainant

would not be enjoined. The court said it had never, so far as it knew, been held that a blacksmith shop was a nuisance per se, and that, unless it could so hold, it was well settled that a court of equity would not enjoin its erection.

In *Bowen v. Mauzy* (1889) 117 Ind. 258, 19 N. E. 526, an action to enjoin the establishment of a blacksmith shop on a lot adjoining that of the complainant, and 28 feet from the residence of the complainant, it was held that the complaint was subject to demurrer, which alleged merely the proximity of the proposed shop to the plaintiff's residence, that its erection and maintenance would destroy the free use of his property and interfere with its comfortable enjoyment, that the gases and smoke from the forges would be offensive and injurious, as would also the noise, boisterous language, and filth, but which contained no allegations as to the manner in which the proposed shop was to be constructed, or that the business could not be conducted in such a way as not to be detrimental to the complainant, or that the defendant was threatening or intending to conduct the business in an improper way. The court regarded the allegations as to injury as mere conclusions, not admitted by the demurrer; and stated that in order to restrain one from beginning the operation of a business in itself legitimate, it should be made to appear that the person about to enter into the business threatened and intended to conduct it in a manner that would constitute a nuisance. It was said also that the business of blacksmithing was a lawful business, and not in itself a nuisance, but became so only when conducted in an improper way; and that the presumptions were that one entering into it would conduct the business in a proper way, so that it would not constitute a nuisance or injure and annoy adjoining property owners.

That a blacksmith shop may be so inartificially or carelessly constructed as to be peculiarly liable to take fire, and thus unnecessarily endanger surrounding buildings, will not be as-

sumed, so as to warrant an injunction to prevent its erection. *Ray v. Lynes* (1846) 10 Ala. 63.

But in a suit to enjoin the erection of a blacksmith shop within 75 feet of the complainant's residence, the trial court in *Whitaker v. Hudson* (1880) 65 Ga. 43, granted an injunction restraining the erection of the shop until the final hearing on the merits. It was held that this ruling would not be reversed on appeal, the court saying that while a blacksmith shop was not a nuisance per se, yet there might be circumstances in which it could be shown that it was in fact a nuisance; that the granting of the injunction showed that the evidence in the opinion of the trial court preponderated in favor of the complainant; but that, had the injunction been refused, the judgment would not have been reversed.

#### *c. Cemeteries.*

The following cases involving cemeteries illustrate applications of the rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress:

**Alabama.**—*Bellevue Cemetery Co. v. McEvers* (1910) 168 Ala. 535, 53 So. 272.

**Illinois.**—*Barrett v. Mt. Greenwood Cemetery Asso.* (1896) 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891 (drainage of cemetery); *Sutton v. Findlay Cemetery Asso.* (1915) 270 Ill. 11, L.R.A.1916B, 1135, 110 N. E. 315, Ann. Cas. 1917B, 559 (same).

**Iowa.**—*Payne v. Wayland* (1906) 131 Iowa, 659, 109 N. W. 203.

**Minnesota.**—*Nelson v. Swedish E. Lutheran Cemetery Asso.* (1910) 111 Minn. 149, 34 L.R.A.(N.S.) 565, 126 N. W. 723, 127 N. W. 626, 20 Ann. Cas. 790.

**Nebraska.**—*Lowe v. Prospect Hill Cemetery Asso.* (1899) 58 Neb. 94, 46 L.R.A. 237, 78 N. W. 488.

**North Carolina.**—*Clark v. Lawrence* (1860) 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241 (rule approved).

**Ohio.**—*Henry v. Perry Twp.* (1891) 48 Ohio St. 671, 30 N. E. 1122.

**Texas.**—*Jung v. Neraz* (1888) 71

Tex. 396, 9 S. W. 344; *Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56.

**Wisconsin.**—*Pfleger v. Groth* (1899) 103 Wis. 104, 79 N. W. 19 (case controlled by statute).

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving cemeteries, of which the following are illustrative:

**Alabama.**—*Kingsbury v. Flowers* (1880) 65 Ala. 479, 39 Am. Rep. 14 (private cemetery).

**Georgia.**—*Harper v. Nashville* (1911) 136 Ga. 141, 70 S. E. 1102.

**Illinois.**—*Lake View v. Letz* (1867) 44 Ill. 81.

**Indiana.**—*Greencastle v. Hazelett* (1864) 23 Ind. 186; *Begein v. Anderson* (1867) 28 Ind. 79.

**Louisiana.**—*Musgrove v. St. Louis's Church* (1855) 10 La. Ann. 431; *New Orleans v. St. Louis's Church* (1856) 11 La. Ann. 244.

**Nebraska.**—*Braasch v. Cemetery Asso.* (1903) 69 Neb. 300, 95 N. W. 646, 5 Ann. Cas. 132.

**New York.**—*Morton v. St. Patrick's R. C. Church Soc.* (1906) 56 Misc. 71, 105 N. Y. Supp. 1100.

**North Carolina.**—*Ellison v. Washington* (1859) 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430; *Clark v. Lawrence* (1860) 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241.

**Oklahoma.**—*Clinton Cemetery Asso. v. McAttee* (1910) 27 Okla. 160, 31 L.R.A.(N.S.) 945, 111 Pac. 392.

**Texas.**—*Elliott v. Ferguson* (1904) 37 Tex. Civ. App. 40, 83 S. W. 56.

**Washington.**—*Rea v. Tacoma Mausoleum Asso.* (1918) 103 Wash. 429, 1 A.L.R. 541, 174 Pac. 961 (mausoleum).

Under the rule above indicated, an injunction was denied, in *Begein v. Anderson* (1867) 28 Ind. 79, where a municipality sought to restrain the establishment of a cemetery one fourth of a mile outside the city limits.

In a suit to enjoin the establishment of a cemetery, it was held in *Clinton Cemetery Asso. v. McAttee* (1910) 27

Okla. 160, 31 L.R.A.(N.S.) 945, 111 Pac. 392, that a complaint was subject to demurrer which alleged that the 30 acres of land upon which it was proposed to establish the cemetery was on the opposite side of a highway from the complainant's residence, that the cemetery grounds were more elevated and drained toward the residence, cistern, and well of complainant, and that unless the defendants were restrained they would proceed to complete the laying out and establishment of the cemetery. The court quoted authority to the effect that to authorize an injunction where the thing sought to be enjoined is not a nuisance per se, there must be clear and convincing proof of probable injury; in other words, it must clearly appear with reasonable certainty that the anticipated injuries will probably occur. And apparently the court regarded the petition as insufficient, in that it failed to show with this degree of certainty that injury would occur to the complainant from the establishment of the cemetery.

And in *Kingsbury v. Flowers* (1880) 65 Ala. 479, 39 Am. Rep. 14, an injunction was denied to restrain future interment in a private cemetery on the ground that special circumstances were not averred from which the court could be satisfied that such future burial would most probably result in a nuisance, from which the complainant would suffer special injury irreparable by the ordinary remedies at law. The complaint, which was held subject to demurrer, alleged that the nearest grave was 182 feet from the well on complainant's lot, that the burial ground was more elevated than the lot of complainant, there being a fall of from 4 to 5 feet from the surface of the graves to the surface of the well; but it was not averred that there had been any injury to the complainant from the former burials.

To warrant the granting of an injunction to restrain the establishment of a cemetery near the complainant's house, it is not sufficient to allege in general terms probable injury to the health of the plaintiff or his family by the pollution of the air and water, or

other injuries; but facts must be stated from which the court can clearly see that such injuries will most probably result. *Clinton Cemetery Asso. v. McAttee (Okla.) supra.*

Allegations in a complaint in a suit to restrain the establishment of a cemetery that "noisome odors and vapors would arise and pollute and fill with stench and poison the air surrounding" complainants' homes are mere conclusions, and insufficient to show a nuisance, in the absence of an allegation as to the contemplated mode of sepulture. *Elliott v. Ferguson (1904) 37 Tex. Civ. App. 40, 83 S. W. 56.*

In a suit to restrain the establishment of a cemetery, an allegation in the petition that the cemetery land is higher than the land of the complainant, and descends toward the same, is insufficient, without a further allegation by which it will appear that the complainant's lands are in such close proximity to the cemetery as to make it reasonably certain that injury will accrue to them by reason of the alleged threatened nuisance. *Ibid.*

And the mere fact that property is rendered less valuable by the proposed establishment of a cemetery near it is not a ground for an injunction to restrain the establishment of the cemetery. *Dunn v. Austin (1889) 77 Tex. 139, 11 S. W. 1125; Elliott v. Ferguson (Tex.) supra.*

The erection within a few feet of a dwelling house of a mausoleum for the burial of the dead, it was held in *Rea v. Tacoma Mausoleum Asso. (1918) 103 Wash. 429, 1 A.L.R. 541, 174 Pac. 961*, cannot be enjoined as a nuisance, although its presence will cause the inmates of the dwelling unpleasant thoughts and seriously affect the value of the property, if there will be no fumes or drainage to affect the physical senses or health of those in the neighborhood.

But in *Bellevue Cemetery Co. v. McEvers (1910) 168 Ala. 535, 53 So. 272*, it was held that a complaint to enjoin the establishment of a cemetery was not subject to demurrer, where it alleged that the land proposed for a cemetery adjoined the residence of the complainant, that it was higher than

complainant's land, that a great part of it was of a boggy, swampy, and quagmire nature, that complainant's land was of a porous and gravelly nature, that subterranean streams flowed through the proposed cemetery lands into the well of complainant, and that the burial of bodies on such land, for these reasons, would pollute the subterranean stream flowing into complainant's well, and render it unfit for use.

And to warrant the granting of an injunction to restrain the use of land for a cemetery, it is not necessary for the complainant to show to a moral certainty that contamination would necessarily follow from the use of the land as a cemetery; it is sufficient if he shows a reasonable probability thereof. *Nelson v. Swedish E. Lutheran Cemetery Asso. (1911) 111 Minn. 149, 34 L.R.A. (N.S.) 565, 126 N. W. 723, 127 N. W. 626, 20 Ann. Cas. 790.*

The establishment of a cemetery will be enjoined where the evidence is clear that the proposed interment of dead bodies therein would probably result in contaminating the water of complainant's well and those of others in the vicinity, with disease germs, and thus endanger the health and lives of complainants and their families. *Lowe v. Prospect Hill Cemetery Asso. (1899) 58 Neb. 94, 46 L.R.A. 237, 78 N. W. 488.*

Conceding that the evidence left it doubtful whether a proposed cemetery would constitute a nuisance, the court in *Palmer v. Hickory Grove Cemetery (1903) 34 App. Div. 600, 82 N. Y. Supp. 973*, later appeal in *(1905) 106 App. Div. 618, 95 N. Y. Supp. 1150*, held that nevertheless, in an action to enjoin its establishment, the complainants were entitled, in view of the injury they would receive from the depreciation of their property, to inquire into the sufficiency of the cemetery corporation's compliance with the Membership Corporation Law, under which it claimed the right to work the injury apprehended.

Under a statute prohibiting the establishment of a cemetery nearer than 200 yards from a dwelling house, without the consent of the owner, it was

held in *Henry v. Parry Twp.* (1891) 48 Ohio St. 671, 30 N. E. 1122, that an owner of a dwelling house within the limits prescribed might enjoin the establishment of a cemetery in violation of the statute.

*d. Cotton gins.*

The rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, is illustrated by its application in the following cases involving cotton gins: *Rouse v. Martin* (1883) 75 Ala. 510, 51 Am. Rep. 463; *Swaim v. Morris* (1910) 98 Ark. 362, 125 S. W. 432, 20 Ann. Cas. 930; *Dorsey v. Allen* (1881) 85 N. C. 358, 39 Am. Rep. 704; *Robinson v. Dale* (1910) 62 Tex. Civ. App. 277, 131 S. W. 308; *Moore v. Coleman* (1917) — Tex. Civ. App. —, 196 S. W. 212 (rule recognized, but injunction granted); *Strieber v. Ward* (1917) — Tex. Civ. App. —, 196 S. W. 720.

In a suit to restrain the erection of a cotton gin, the court in *Moore v. Coleman* (1917) — Tex. Civ. App. —, 196 S. W. 212, stated that in cases of this nature an injunction should not issue unless it is shown that the evils anticipated from the construction and operation of the gin are imminent and certain to occur; and that it is not sufficient that they may probably occur. The injunction, however, was granted in this case, there being evidence which the court said was sufficient to warrant the jury in finding that the construction and operation of the gin would certainly result in at least some of the evils complained of, so as to constitute a nuisance.

An injunction to prevent the erection of a cotton gin was denied in *Strieber v. Ward* (1917) — Tex. Civ. App. —, 196 S. W. 720, where it appeared that the proposed location was in a mill and factory district in which there were only three residences about 200 feet therefrom, belonging to the complainants, and the proposed gin was of the most modern and improved pattern, with appliances for minimizing dust and noise.

So, in *Robinson v. Dale* (1910) 62

*Tex. Civ. App.* 277, 131 S. W. 308, it was held that the evidence was insufficient to sustain a judgment enjoining the erection of a cotton gin 72 feet from the residence of one of the complainants, and at distances varying from 125 to 318 feet from the residences of the other complainants, where the proposed gin contained features designed to minimize, if not entirely obviate, vibration and the escape of smoke, dust, lint, etc.

*e. Dams, diversion of watercourses.*

The application of the rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress in cases involving dams is illustrated by the following authorities:

*Alabama.* — *Rosser v. Randolph* (1838) 7 Port. 238, 31 Am. Dec. 712.

*Georgia.* — *Norwood v. Dickey* (1855) 18 Ga. 528; *De Vaughn v. Minor* (1886) 77 Ga. 809, 1 S. E. 433.

*Maryland.* — *Lamborn v. Covington Co.* (1848) 2 Md. Ch. 409.

*Michigan.* — *White v. Forbes* (1843) Walk. Ch. 112; *Stone v. Roscommon Lumber Co.* (1886) 59 Mich. 24, 26 N. W. 216.

*Mississippi.* — *Whitfield v. Rogers* (1853) 26 Miss. 84, 59 Am. Dec. 244.

*New Jersey.* — *Quackenbush v. Van Riper* (1835) 3 N. J. Eq. 350, 29 Am. Dec. 716.

*North Carolina.* — *Atty. Gen. v. Blount* (1826) 11 N. C. (4 Hawks) 334, 15 Am. Dec. 526.

*Tennessee.* — *Philips v. Stocket* (1806) 1 Overt. 200.

*Virginia.* — *Miller v. Trueheart* (1833) 4 Leigh, 569.

*Wisconsin.* — *Wisconsin River Improv. Co. v. Lyons* (1872) 30 Wis. 61; *Potter v. Menasha* (1872) 30 Wis. 492.

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving dams:

*United States.* — *Spooner v. McConnell* (1838) 1 McLean, 337, Fed. Cas. No. 13,245; *Woodman v. Kilbourn Mfg.*

Co. (1867) 1 Biss. 546, Fed. Cas. No. 17,978.

Alabama.—Ogletree v. McQuaggs (1880) 67 Ala. 580, 42 Am. Rep. 112.

Maryland.—Warren Mfg. Co. v. Baltimore (1913) 119 Md. 188, 86 Atl. 502.

Missouri.—Welton v. Martin (1842) 7 Mo. 307.

New Jersey.—McNeal v. Assiscunk Creek Meadow Co. (1883) 37 N. J. Eq. 204.

North Carolina.—Frizzle v. Patrick (1863) 59 N. C. (6 Jones, Eq.) 354.

Oregon.—Esson v. Wattier (1893) 25 Or. 7, 34 Pac. 756; Blair v. Boswell (1900) 37 Or. 168, 61 Pac. 341.

Virginia.—Talley v. Tyree (1843) 2 Rob. 500.

Wisconsin.—State v. Eau Claire (1876) 40 Wis. 533.

The construction of a dam and sluiceway across a creek, for the purpose of securing land against overflow from tides, under legislative sanction, will not be enjoined where the evidence leaves a doubt whether such construction will increase the danger to the health of those living in the community. *McNeal v. Assiscunk Creek Meadow Co.* (1883) 37 N. J. Eq. 204.

It was held in *Vanwinkle v. Curtis* (1836) 3 N. J. Eq. 422, that an injunction would not lie to restrain the diversion of part of the water of a stream which ran through a corner of the complainant's farm, a quarter of a mile from his dwelling, where it appeared that the stream flowed through low, marshy, swampy ground, and had never been applied to any practical use, since there was not such great, immediate, or permanent injury threatened as would authorize the remedy by injunction.

The courts have refused to enjoin the construction of a dam in a navigable river, authorized by the legislature, on the ground that the dam could not be so built but that it would obstruct navigation. *Woodman v. Kilbourn Mfg. Co.* (1867) 1 Biss. 546, Fed. Cas. No. 17,978; *State v. Eau Claire* (1876) 40 Wis. 533.

#### *f. Garages and automobile supply stations.*

The following cases illustrate the

rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, as applied to public garages and automobile supply stations: *Siegel v. Wayne Circuit Judge* (1909) 155 Mich. 459, 119 N. W. 645; *Bourgeois v. Miller* (1918) — N. J. Eq. —, 104 Atl. 383; *Sherman v. Livingston* (1910) 128 N. Y. Supp. 581; *Hanes v. Carolina Cadillac Co.* (1918) 176 N. C. 350, 97 S. E. 162 (auto supply station).

It was held in *Sherman v. Livingston* (1910) 128 N. Y. Supp. 581, that the establishment of a public automobile garage on the opposite side of the street from complainant's residence, and about 70 feet therefrom, would not be enjoined, where it appeared that the residence was a brick, slate-roofed building, that the garage was a substantial fireproof structure of brick and concrete, and it did not appear that the defendant proposed to store gasoline in quantities,—especially where the evidence failed to establish the alleged strictly residential character of the district.

And it was held in *Siegel v. Wayne Circuit Judge* (Mich.) *supra*, that adjacent property owners were not entitled to an injunction to restrain the erection of an automobile garage, where the lot on which it was proposed to erect the garage was subject to no restrictions as to its use, and the locality was one which was changing from a strictly residential to a business section.

The establishment of a public supply station for automobiles in a residential section, it was held in *Hanes v. Carolina Cadillac Co.* (N. C.) *supra*, will not be enjoined, since such a business is not a nuisance *per se*, and equity will not interfere if the injury apprehended is merely eventual or contingent. In this instance, however, the defendant's storage of gasoline was limited by the court to 1,500 gallons at one time.

And in *Bourgeois v. Miller* (1918) — N. J. Eq. —, 104 Atl. 383, it was held that an injunction would not be granted to restrain the erection of a

public garage in a residential and closely built up section of a city, within 20 feet of the hotel of one of the complainants and within 68 feet of a hotel owned by another complainant, although the building was capable of holding from 70 to 100 automobiles, and was equipped with two 500-gallon gasoline tanks, the court taking the position that the probability of a nuisance because of noise, odors, and fumes was not shown with sufficient certainty to justify an injunction, and that the same was true with reference to danger from an explosion under the present improved methods in the storage and handling of gasoline.

But the establishment of a public automobile garage in an exclusively residential section of a city, near large churches and schools, was enjoined in *Prendergast v. Walls* (1917) 257 Pa. 547, 101 Atl. 826, the court finding that the noises, odors, and other disagreeable features of the garage would seriously interfere with the enjoyment of the complainant's residences, would endanger the safety of children attending the schools, interfere with services in the churches, and increase danger of fire because of the storage of gasoline.

And it was held in *Wright v. Lyons* (1916) 224 Mass. 167, 112 N. E. 876, that a petition to restrain the erection of a public garage on premises adjoining those of the complainant in a city was not subject to demurrer, where it was alleged that the defendant had filed a petition for a permit to erect the garage, and for a license to keep and sell 500 gallons of gasoline in an underground tank on his premises, and that a nuisance would result because of the noise, confusion, and distasteful odors and the storage of the gasoline.

And where the defendant was proceeding to erect a private garage within 9 feet of the complainant's dwelling, when his permit from the city authorities provided that a garage must not be erected within 20 feet of a residence, it was held that the trial court had not abused its discretion in granting a temporary injunction to restrain the construction of the garage until

the final hearing. *Trauernicht v. Richter* (1918) 141 Minn. 496, 169 N. W. 701.

*g. Gas and oil.*

The rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, as applied to nuisances relating to gas and oil wells and gas works, is illustrated by the following cases: *Windfall Mfg. Co. v. Patterson* (1896) 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674 (gas well); *Cleveland v. Citizens Gaslight Co.* (1869) 20 N. J. Eq. 201 (gas works); *Smith v. Bellows* (1910) 20 Pa. Dist. R. 383 (oil well near refinery); *Pope Bros. v. Bridgewater Gas Co.* (1902) 52 W. Va. 252, 43 S. E. 87 (oil well); *Haines v. Taylor* (1846) 10 Beav. 75, 50 Eng. Reprint, 511 (gas works).

It has been held that an injunction will not issue to prevent the drilling of a gas well 152 feet from a dwelling, on account of the noise, stench, pollution of the air, and danger from fire and explosions, or of overflow of water or oil from the well, where it is not shown that a gas well could not be so managed and maintained in that proximity to a dwelling house as to render it of not more than slight, or barely possible, danger or annoyance to those living in the house. *Windfall Mfg. Co. v. Patterson* (Ind.) *supra*.

And the construction of gas works in a residential section, the gas tank being 180 feet from the complainants' houses, and the other manufacturing works being from 300 to 400 feet from such houses, it was held in *Cleveland v. Citizens Gaslight Co.* (1869) 20 N. J. Eq. 201, would not be enjoined, except the use of the lime process in purifying the gas, which the court was convinced would be a nuisance. However, the court expressed great doubt as to whether the proposed process of purifying the gas by oxid of iron, and the proposed means of obviating offensive gases and smoke, would be efficient to prevent a nuisance. The defendants were permitted to continue the erection of the buildings at their

own risk, being enjoined only from using the lime process, as above indicated, and from manufacturing gas in any way that would produce any annoyance to persons dwelling in complainants' houses by smoke, gases, other effluvia or odors.

The mere possibility that it might become necessary to open a completed gas well, for the purpose of making repairs, before a gas well on adjoining premises could be completed, and that a conflagration would result if the opening was made while the boiler used in drilling, and located 77 feet from the completed well, was in operation, was held in *Pope Bros. v. Bridge-water Gas Co.* (1902) 52 W. Va. 252, 43 S. E. 87, insufficient to warrant the granting of an injunction to restrain the operation of the boiler in that proximity to the completed well, where it was not shown that there had ever been a refusal, or intention to refuse, to put out the fire at any time that it might become necessary to open the completed well.

But the drilling of an oil and gas well within 100 feet of the complainant's residence, and within 25 feet of his barn, was enjoined in *Cline v. Kirkbride* (1901) 12 Ohio C. D. 517, on the ground that such a well, because of its close proximity to the plaintiff's premises, would be a nuisance. And the court said that the fact that an ordinance prohibited the drilling of gas or oil wells within 200 feet of a dwelling furnished an additional reason for granting the injunction.

And the prospective storage of 20,000 gallons of gasoline by a laundry company in underground tanks within 11 feet of complainant's residence, in a purely residential district of a city, it was held in *Whittemore v. Baxter Laundry Co.* (1914) 181 Mich. 564, 52 L.R.A. (N.S.) 930, 148 N. W. 437, Ann. Cas. 1916C, 818, would be enjoined, although every precaution had been used in the construction of the tanks.

It was held in *Hendrickson v. Standard Oil Co.* (1915) 126 Md. 577, 95 Atl. 153, that a cause of action for preventive relief was stated by allegations in a complaint that the defendant had recently purchased land adjacent

to that of the plaintiff, who was informed and believed that the defendant intended to construct in immediate proximity to the plaintiff's houses a tank in which would be stored vast quantities of highly inflammable and explosive oils, whereby the value of the plaintiff's property would be destroyed.

#### *h. Hospitals and pesthouses.*

The rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress is illustrated by its application in the following cases involving hospitals and pesthouses: *Stotler v. Rochelle* (1910) 83 Kan. 86, 29 L.R.A. (N.S.) 49, 109 Pac. 788 (cancer hospital); *Baltimore v. Fairfield Improv. Co.* (1898) 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081 (pesthouse for leprosy); *Barth v. Christian Psychopathic Hospital Asso.* (1917) 196 Mich. 642, 163 N. W. 62 (insane hospital); *Gilford v. Babies' Hospital* (1888) 21 Abb. N. C. 159, 1 N. Y. Supp. 448; *Cherry v. Williams* (1808) 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 566, 15 Ann. Cas. 715 (tuberculosis sanatorium); *Youngstown v. Youngstown* (1903) 25 Ohio C. C. 518 (pesthouse).

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving hospitals. *Le Bourgeois v. New Orleans* (1919) 145 La. —, 82 So. 268 (tuberculosis hospital); *Board of Health v. North American Home* (1910) 77 N. J. Eq. 464, 78 Atl. 677 (same); *Northfield v. Atlantic County* (1915) 85 N. J. Eq. 47, 85 Atl. 745 (same); *Heaton v. Packer* (1909) 131 App. Div. 812, 116 N. Y. Supp. 46 (insane hospital); *State ex rel. Woolery v. Brenner* (1916) 6 Ohio App. 209, affirmed in (1917) 96 Ohio St. 598, 118 N. E. 1087 (tuberculosis hospital); *Baines v. Baker* (1752) 1 Amb. 158, 27 Eng. Reprint, 105 (smallpox hospital); *Anonymous* (1752) 3 Atk. 750, 26 Eng. Reprint, 1230 (building for smallpox



inoculation); *Atty. Gen. v. Manchester* [1893] 2 Ch. (Eng.) 87, 62 L. J. Ch. N. S. 459, 3 Reports, 427, 68 L. T. N. S. 608, 41 Week. Rep. 459, 57 J. P. 343.

The establishment of a hospital for the care of infants, including any who might develop, after admission, contagious disease, was enjoined in *Gilford v. Babies' Hospital* (1898) 21 Abb. N. C. 159, 1 N. Y. Supp. 448, at the instance of the owner of an adjoining dwelling, where the locality was one wholly devoted to private residences, and there appeared reasonable probability of the spread of contagious disease.

And the erection of an additional building for a pesthouse 50 feet from a highway, on the opposite side of which was a public school, was enjoined in *Youngstown v. Youngstown* (1903) 25 Ohio C. C. 518, although the original buildings used for a pesthouse, which were established 300 feet from the highway before the schoolhouse was erected, the court refused to abate as a nuisance.

The erection and maintenance of an insane asylum on land adjoining a city, in a residential district, in "close proximity" to complainants' residences, was held, in *Barth v. Christian Psychopathic Hospital Asso.* (1917) 196 Mich. 642, 163 N. W. 62, to constitute such a threatened nuisance as would be enjoined.

And the establishment of a cancer hospital in a residence district in a city, within 78 feet of the complainant's dwelling, was enjoined in *Stotler v. Rochelle* (1910) 83 Kan. 86, 29 L.R.A.(N.S.) 49, 108 Pac. 788, on the ground that the fear of infection, for which there was reasonable ground under the circumstances, would interfere with the reasonable enjoyment of adjoining property for residential purposes, however carefully the hospital might be conducted.

The placing by a city of a woman afflicted with leprosy in an advanced stage on a 20-acre tract in a residential district near the city, in charge of a laborer and his wife, who were unskilled people, with no authority to restrain their charge from wandering about, and who had several small chil-

dren in the family, was enjoined in *Baltimore v. Fairfield Improv. Co.* (1898) 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081, because of the danger of dissemination of the disease and the consequent serious injury to residents of the neighborhood.

But the erection of a hospital for treatment of pulmonary tuberculosis the court refused to enjoin in *Northfield v. Atlantic County* (1915) 85 N. J. Eq. 47, 95 Atl. 745, where it appeared that the proposed site was in a sparsely settled municipality, that the hospital grounds extended at least 250 feet in all directions from the building, and that the nearest residence was 900 feet distant from the proposed building.

And the establishment of a tuberculosis hospital 600 feet from complainant's residence, in a sparsely settled residential district of a city, will not be enjoined on the ground that the hospital may be so operated as to constitute a nuisance. *Le Bourgeois v. New Orleans* (1919) 145 La. —, 82 So. 268.

So, an injunction to restrain the establishment of a temporary smallpox hospital was denied in *Atty. Gen. v. Manchester* (Eng.) *supra*, where it appeared that the proposed site was in a sparsely inhabited district, there being only fifteen houses within a half-mile radius, that the nearest house was 256 yards away, that there was no other available site which could be acquired within a reasonable time, and that there was an epidemic of smallpox; although the hospital would be within 200 yards of a frequented highway, and about 90 yards from a much used portion of a cemetery.

A complaint to enjoin the use of buildings under erection for an insane asylum was held subject to demurrer in *Heaton v. Packer* (1909) 131 App. Div. 812, 116 N. Y. Supp. 46, where it was alleged that the complainants owned and occupied land in a high class residential district, adjoining land on which the defendants were erecting an insane hospital, that the value of complainants' property would be depreciated and the residential

character of the neighborhood destroyed, and that various dangerous and disagreeable things would result, among which were that it would be dangerous for women and children to go upon the streets adjacent to the hospital, and that the health of the residents would be impaired.

In *Heaton v. Packer* (N. Y.) *supra*, it was contended that the various things which the complaint alleged would happen in case the hospital should be established were admitted by the demurrer. In reply to this, the court said: "The difficulty with applying this rule is that from the nature of the allegations they are not allegations of existing facts, but only allegations of what will transpire in the future. Where allegations of this character are made, it cannot be that the demurrer admits that the things will actually occur as alleged; but it is left open for the court to say whether or not, from the nature of things, they probably and necessarily will happen. In our view the demurrer does not admit that all the disagreeable and dangerous things set forth in plaintiffs' complaint will actually arise. Nor does it appear to us that they will necessarily arise from the use to which the defendants propose to put their property. It follows, therefore, that the plaintiffs have failed to state a cause of action entitling them to an injunction."

#### *1. Mills, factories, and warehouses.*

The rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, is illustrated by its application in the following cases involving mills and factories;

**California.**—*Middleton v. Franklin* (1853) 3 Cal. 238 (flour mill under auction sale).

**Florida.**—*Thebaut v. Canova* (1866) 11 Fla. 143 (steam mill).

**Georgia.**—*Mygatt v. Goetchins* (1856) 20 Ga. 350 (steam sash and blind factory); *Cunningham v. Rice* (1859) 28 Ga. 80 (flour mill).

**Louisiana.**—*Bell v. Riggs* (1886) 38

La. Ann. 555 (steam engine in cistern maker's establishment).

**Maryland.**—*Adams v. Michael* (1873) 38 Md. 123, 17 Am. Rep. 516 (felt-roofing factory).

**New Jersey.**—*Wolcott v. Melick* (1856) 11 N. J. Eq. 204, 66 Am. Dec. 790 (agricultural implement factory); *Duncan v. Hayes* (1871) 22 N. J. Eq. 25 (planing and saw mill).

**North Carolina.**—*Barnes v. Calhoun* (1842) 37 N. C. (2 Ired. Eq.) 199 (mill); *Atty. Gen. v. Lea* (1844) 38 N. C. (3 Ired. Eq.) 301 (mill); *Wilder v. Strickland* (1856) 55 N. C. (2 Jones, Eq.) 386 (mill); *Dorsey v. Allen* (1881) 85 N. C. 358, 39 Am. Rep. 704 (planing mill and cotton gin); *Berger v. Smith* (1912) 160 N. C. 205, 75 S. E. 1098 (sawmill).

**Pennsylvania.**—*Rhodes v. Dunbar* (1868) 57 Pa. 274, 98 Am. Dec. 221 (planing mill); *Carpenter v. Cummings* (1856) 2 Phila. 74 (steam boiler).

As regards manufacturing concerns, it has been stated that there must be a very strong case, marked by very peculiar features, to justify a court of equity in interfering by injunction on the ground that the proposed factory will be a nuisance to an adjoining dwelling house. *Wolcott v. Melick* (1856) 11 N. J. Eq. 204, 66 Am. Dec. 790. In this case the court refused to enjoin the erection of a factory for the making of agricultural implements in a section of the city which was sparsely settled, where the nearest dwelling house was 132 feet from the proposed factory.

In *Adams v. Michael* (Md.) *supra*, a suit to enjoin the erection of a factory for the manufacture of felt-roofing in the "immediate vicinity" of the complainant's dwelling, it was held that allegations that, owing to the dirt, odor, smoke, and appurtenances of such factory, together with the inflammable nature of the material used in the manufacture of felt-roofing, the property of the complainant would be utterly destroyed as dwellings, and irreparable injury result, were too indefinite and general to enable the court to determine whether the nuisance would be of the nature and char-

acter supposed, so as to warrant the issuance of an injunction.

And in a suit by a paper manufacturer to enjoin the threatened pollution of a stream by alkali works, it was held in *Fletcher v. Bealey* (1885) L. R. 28 Ch. Div. (Eng.) 688, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745, that, although pure water was essential to the complainant, and the defendant was depositing on leased land a mile and a half up the stream, higher than the stream and close to it, refuse from the alkali works, and although from this refuse a very noxious liquid would in course of time flow, and, if it entered the stream, would greatly injure the complainant, an injunction would not be granted to restrain the deposit of such refuse, since it did not appear but that the flow of this liquid into the river might be prevented, or that some means of rendering it innocuous might be discovered before any injury resulted.

The erection of a planing and saw mill, to be driven by steam, with chips and shavings of pine boards as fuel, on a lot adjacent to that of the complainant's dwelling and boarding house, it was held in *Duncan v. Hayes* (N. J.) *supra*, would not be enjoined, where the chimney of the proposed mill was 50 feet high and 200 feet from the dwelling of complainant, as it was not certain that a nuisance would result from the operation of the mill.

And in *Dorsey v. Allen* (1881) 85 N. C. 358, 39 Am. Rep. 704, the court refused to enjoin the erection of a planing mill and cotton gin on a lot adjacent to that of complainant's residence, in view of the benefit to the community from the projected enterprise as compared with the detriment which the complainant might sustain.

But in a suit to enjoin the erection of a planing mill, it was held that the complaint was sufficient which alleged that the mill was to be located in a residence portion of the city, within 90 feet of the complainant's dwelling, that its operation would necessarily create a great amount of steam, dust, dirt, smoke, and noise, which would penetrate the complainant's house,

making it necessary to keep his windows and doors closed at all times, and rendering his home unfit for habitation. *Rogers v. John Week Lumber Co.* (1903) 117 Wis. 5, 93 N. W. 821.

And it was held in *Ross v. Butler* (1868) 19 N. J. Eq. 294, 97 Am. Dec. 654, that an injunction would lie to restrain a threatened nuisance in the operation of a pottery in which pine wood would be burnt, producing large volumes of dense smoke loaded with cinders, which would fall on the dwellings of the complainants located at distances of from 40 to 200 feet from the proposed pottery, even though the smoke would not be emitted more than twelve hours every two weeks, and then mostly at night, and although the locality was in the neighborhood of wharves, coal and lumber yards, and, although thickly settled, was not one in which wealthy and luxurious inhabitants resided, but was occupied by business men and mechanics of moderate means, some of whom used their houses and lots for business purposes.

It was held also in *Cunningham v. Rome R. Co.* (1859) 27 Ga. 499, that a complaint to enjoin the erection of a flouring mill within 7 or 8 feet of the track stated a cause of action, where it was alleged that the railway company had acquired by purchase a right of way through the land in question, and that the proposed mill would interfere in the repair and construction of the railroad.

An owner of a city lot adjoining a railroad right of way was held in *McBean v. Wyllie* (1902) 14 Manitoba L. R. 132, not entitled to enjoin the construction of a warehouse on the right of way in front of and about 10 feet from the lot line, although the complainant's view of the river on the other side of the right of way would thereby be obstructed.

#### *J. Powder magazines.*

The construction of a powder magazine within half a mile of a borough, in a neighborhood not thickly settled, but rapidly filling with residences, within 95 feet of a turnpike road and 510 feet of a dwelling, was enjoined in *Wier's Appeal* (1873) 74 Pa. 230.

But in *Dilworth's Appeal* (1879) 91

Pa. 247, an injunction to restrain the erection of a powder magazine in a sparsely settled region where there was as little danger to persons as in any site that could be chosen, although a nearly abandoned highway was near, was refused.

And it was held in *Daw v. Enterprise Powder Mfg. Co.* (1894) 160 Pa. 479, 28 Atl. 841, that a preliminary injunction to enjoin the completion of a building for the storage of blasting powder in a borough, and the storage therein of powder, should not be granted, where there was evidence that blasting powder was not a high explosive, that the building was of stone and iron, that the powder stored therein was to be packed in cartridges and placed in fireproof cases, and that there were other similar storehouses in the borough.

#### *k. Privies.*

The rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress is illustrated by its application in the following cases involving privies: *De Give v. Seltzer* (1879) 64 Ga. 423; *Wahle v. Reinbach* (1875) 76 Ill. 322; *Radican v. Buckley* (1894) 138 Ind. 582, 38 N. E. 53; *Miley v. A'Hearn* (1892) 13 Ky. L. Rep. 834, 18 S. W. 529.

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving privies, of which the following are illustrative: *Edelen v. Barber* (1886) 8 Ky. L. Rep. 268; *Davis v. Adkins* (1896) 18 Ky. L. Rep. 73, 35 S. W. 271 (school privy); *Iliff v. School Directors* (1892) 45 Ill. App. 419 (school privy); *Biddulph v. St. George's Parish* (1863) 3 De G. J. & S. 492, 46 Eng. Reprint, 726, 33 L. J. Ch. N. S. 411, 9 Jur. N. S. 953, 8 L. T. N. S. 558, 11 Week. Rep. 739 (public urinal near residences); *British Canadian Securities v. Victoria* (1911) 16 B. C. 441 (comfort station).

In *Miley v. A'Hearn* (Ky.) *supra*, an

injunction was granted to restrain the erection of a privy on a lot adjoining that of complainant, within 10 feet of her well, and within 13 feet of her dining room and bedroom.

And it was held in *Radican v. Buckley* (1894) 138 Ind. 582, 38 N. E. 53, that an injunction should be granted to restrain the erection of a privy on a lot adjoining that of complainant, within 3½ feet of his dining room and kitchen, and almost in front of the main entrance to his house.

But allegations in a petition to enjoin the erection of a schoolhouse and outbuildings, including a privy, that complainant's spring, about 150 feet distant, will be injured by the flowing into it of surface and underground waters from the school site, are too indefinite, in that they do not show clearly that such damages would inevitably result as to warrant the granting of an injunction. *Davis v. Adkins* (1896) 18 Ky. L. Rep. 73, 35 S. W. 271.

And one who would not otherwise have the right to enjoin the construction of a privy 30 feet from his dwelling does not obtain such right by reason of a town ordinance prohibiting the building or use of a privy within 30 feet of a dwelling without permission of the trustees, and authorizing abatement of the privy as a nuisance on complaint of any citizen. *Edelen v. Barber* (Ky.) *supra*.

#### *l. Sewage and garbage.*

The application of the rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress, to cases involving sewage, is illustrated by the following authorities: *Missouri v. Illinois* (1900) 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 381; *Dwight v. Hayes* (1894) 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *New York C. & H. R. Co. v. Rochester* (1891) 127 N. Y. 591, 28 N. E. 416; *PHIPPS v. ROGUE RIVER VALLEY CANAL CO.* (reported herewith) ante, 741; *Rush Springs v. Bentley* (1919) — Okla. —, 182 Pac. 664; *Morton v. Chester* (1870) 2 Del. Co. Rep. (Pa.) 459; *Pierce v. Gibson County* (1901) 107 Tenn.

224, 55 L.R.A. 477, 89 Am. St. Rep. 946, 64 S. W. 33; Atty. Gen. v. Metropolitan Bd. of Works (1863) 1 Hem. & M. 298, 71 Eng. Reprint, 130, 2 New Reports, 312, 9 L. T. N. S. 139, 11 Week. Rep. 820.

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving sewage, illustrated by the following:

**United States.**—Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission (1899) 92 Fed. 801 (prison threatening contamination of public water supply).

**Kansas.**—Hutchinson v. Delano (1891) 46 Kan. 345, 26 Pac. 740.

**Maryland.**—Pope v. Clark (1913) 122 Md. 1, 89 Atl. 387.

**New Jersey.**—Newark Aqueduct Board (1889) 45 N. J. Eq. 393, 18 Atl. 106, affirmed in (1890) 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55.

**New York.**—Morgan v. Binghamton (1886) 102 N. Y. 500, 7 N. E. 424.

**North Carolina.**—Vickers v. Durham (1903) 132 N. C. 880, 44 S. E. 685; Little v. Lenoir (1909) 151 N. C. 415, 66 S. E. 337 (rule recognized).

**Tennessee.**—Lytton v. Steward (1876) 2 Tenn. Ch. 586.

**England.**—Atty. Gen. v. Kingston-upon-Thames (1865) 11 Jur. N. S. 596, 12 L. T. N. S. 665, 13 Week. Rep. 888.

It was held in *Pierce v. Gibson County* (1901) 107 Tenn. 224, 55 L.R.A. 477, 89 Am. St. Rep. 946, 64 S. W. 33, that the intended discharge of water-closets through a sewer onto the complainant's land, to his injury, might be enjoined, although, when the bill was filed, the building in which the closets were to be located was not finished, and the closets had not yet been built.

And the condemnation of a right of way for an open irrigation ditch to take the water from a sewage-polluted stream will be enjoined if its use will result in a foul and noisome condition of the ditch, inimical to health at times of low water, although

the intention is to take the water from the stream only at times of flood, when the sewage is rendered innocuous by the volume of the water. *PHIPPS v. ROGUE RIVER VALLEY CANAL CO.* (reported herewith) ante, 741.

It was held in *Quitman v. Underwood* (1918) 148 Ga. 152, 96 S. E. 178, that an injunction to restrain the completion of a garbage crematory was authorized, although the plant had proceeded to within two days of completion and was being erected under a guaranty that the plant, when completed, would consume the garbage of the city without offensive odors, where it appeared that the plant was situated about 300 yards from the business center of the city, that the complainants lived within 100 yards of the crematory, that there were other available vacant lots in a more remote section of the city, away from the business and residential section, and that the hauling of the garbage past the residences of the complainants would cause flies, noxious fumes, and poisonous gases, annoying them, endangering their health, and depreciating the value of their property.

And it was held in *San Antonio v. Hamilton* (1915) — Tex. Civ. App. —, 180 S. W. 160, that the trial court had not abused its discretion in granting a temporary injunction to restrain the establishment of a garbage incinerator plant in a city within four blocks of the complainants' residences, where the evidence tended to show that the operation of the plant would endanger the health and comfort of the complainants, although the garbage was to be transported to the plant in covered wagons, and the contract with the incinerator company required that the plant should operate in a clean, sanitary, and odorless manner, the city not being obliged to accept it unless it so operated.

In *Rush Springs v. Bentley* (1919) — Okla. —, 182 Pac. 664, the court enjoined the erection in a municipality of a sewer basin and septic tank within about 500 feet of the complainants' residences, where the evidence was sufficient to sustain a finding that the contemplated works would emit odors

which would be very obnoxious to the complainants and others living in the vicinity.

In *Sayre v. Newark* (1899) 58 N. J. Eq. 136, 42 Atl. 1068, the discharge by a municipality of sewage into a stream was enjoined on the ground that a nuisance would thereby be created from which the complainant would sustain special injury. The decision was reversed, however, in (1900) 60 N. J. Eq. 361, 48 L.R.A. 722, 83 Am. St. Rep. 629, 45 Atl. 895, on the ground that the city was acting under legislative authority, and that the consequential damages sustained were without redress,—a point not within the scope of this note.

But an injunction was refused to restrain the erection of a prison near a creek, at the instance of a lower riparian owner which furnished water to a city, on the ground that contamination would result, where it appeared that the prison buildings were  $\frac{1}{2}$  of a mile from the creek, that there was no sewer or stream connection between the prison and the creek, and that the intervening land was to be cultivated. *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission* (1899) 92 Fed. 801.

And in *Hutchinson v. Delano* (1891) 46 Kan. 345, 26 Pac. 740, an injunction was denied to prevent the emptying by a municipality of sewage into a creek which flowed through the complainants' premises, where there was no present injury, although injury might result to the complainant if, as was contemplated, at some future time the sewer system was extended so that the sewage of the entire city was emptied into the creek.

*m. Slaughterhouses, stockyards, and similar establishments.*

The rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress has been applied in cases involving slaughterhouses, stockyards, and similar establishments, illustrated by the following authorities: *Seigle v. Bromley* (1912) 22 Colo. App. 189, 124 Pac. 191 (hog ranch); *Atty. Gen. v. Steward* (1869) 20 N. J. Eq. 415, perpetual in-

junction granted in (1871) 21 N. J. Eq. 340 (slaughterhouse and stock pens); *Catlin v. Valentine* (1842) 9 Paige (N. Y.) 575, 38 Am. Dec. 567 (slaughterhouse); *Peck v. Elder* (1849) 3 Sandf. (N. Y.) 126 (fat-melting establishment); *Czarniecki v. Bollman* (1887) 9 Sadler (Pa.) 32, 11 Atl. 660 (bone-boiling establishment); *ECKELS v. WEIBLEY* (reported herewith) ante, 739 (barn and cattle yard); *Sellers v. Pennsylvania R. Co.* (1875) 10 Phila. (Pa.) 319 (slaughterhouse; rule approved); *Burntisland Whale Fishing Co. v. Trotter* (1831) 5 Wils. & S. (Scot.) 649 (establishment to boil whale blubber); *Swinton v. Pedie* (1837) 15 Sc. Sess. Cas. 1st series, 775 (slaughterhouse).

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving slaughterhouses, stock pens, and dairies, of which the following are illustrative: *Richmond v. House* (1917) 177 Ky. 814, 198 S. W. 218 (stockyards); *Beckham v. Brown* (1897) 19 Ky. L. Rep. 519, 40 S. W. 684 (slaughterhouse); *McDonough v. Robbins* (1894) 60 Mo. App. 156 (dairy in residential section); *Atty. Gen. v. Steward* (1869) 20 N. J. Eq. 415, perpetual injunction granted in (1871) 21 N. J. Eq. 340 (slaughterhouse and stock pens); *Sellers v. Pennsylvania R. Co.* (1875) 10 Phila. (Pa.) 319 (same).

In an action to enjoin the establishment of a hog ranch near the plaintiff's residence, where the evidence showed that the defendant contemplated the feeding of garbage, offal, and dead animals, and was then conducting a similar ranch in that vicinity, it was held that an injunction was properly issued against conducting the ranch in such a manner as would be offensive or dangerous to the health of the plaintiff and of the public, although the defendant's testimony was that he proposed to sterilize the garbage, the efficiency of this method to prevent a nuisance being doubtful.

*Seigle v. Bromley* (1912) 22 Colo. App. 189, 124 Pac. 191.

And in *Swinton v. Pedie* (1837) 15 Sc. Sess. Cas. 1st series, 775, the court refused to permit the experiment to be tried, as to whether an extensive slaughterhouse proposed by the defendant in the suburbs of a city, near a large school and residences, could be operated without being a nuisance, although the defendant claimed that by new processes the proposed establishment could be so conducted as to avoid offensive sights and smells or other objectionable features.

But in a suit to enjoin the establishment of a dairy in an alleged residential section of a city, it was held that the petition was subject to demurrer where it alleged merely the proximity of the complainants' property to the proposed dairy, that the operation of the dairy, by reason of noxious odors and gases necessarily engendered and the unbearable stench, would poison the air in the neighborhood and render complainants' dwellings uninhabitable, that there were no sewers adjacent to the proposed dairy site, nor could sewer connections be made therewith, and that the operation of a dairy without such connection would cause contagious sickness and death. *McDonough v. Robbins* (1894) 60 Mo. App. 156. These allegations were regarded as opinions, and as failing to set forth such facts as to enable the court to determine that injurious consequences would necessarily follow so as to constitute a nuisance.

And the court in *Atty. Gen. v. Steward* (1869) 20 N. J. Eq. 415, refused to enjoin the erection of buildings intended for use as a slaughterhouse, with pens for keeping hogs, except that it restrained the defendants from permitting the blood of the hogs slaughtered on the premises to flow into an adjacent creek, since a nuisance would probably thereby result, where the proposed slaughterhouse was 700 feet from the nearest dwelling of any of the complainants, although one of them owned a building lot within 250 feet of the proposed structure, and the extent of the slaughtering business was 500 hogs

per week, which the defendants claimed they would keep in clean pens only a "few hours" before they were slaughtered. The injunction granted in this case was made perpetual in (1871) 21 N. J. Eq. 340.

#### *n. Stables.*

The rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress has been applied in cases involving livery stables, illustrated by the following: *Coker v. Birge* (1851) 9 Ga. 425, 54 Am. Dec. 347, subsequent decision to same effect (1851) 10 Ga. 336; *Caskey v. Edwards* (1908) 128 Mo. App. 237, 107 S. W. 37; *Collins v. Cleveland* (1893) 2 Ohio S. & C. P. Dec. 380; *Aldrich v. Howard* (1861) 7 R. I. 87, 80 Am. Dec. 636.

On the other hand, the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in a number of cases involving stables, of which the following are illustrative:

*United States.—Flint v. Russell* (1879) 5 Dill. 151, Fed. Cas. No. 4,876 (livery stable).

*Alabama.—St. James Church v. Arrington* (1860) 36 Ala. 546, 76 Am. Dec. 332 (private stable near church).

*Georgia.—Harrison v. Brooks* (1856) 20 Ga. 537 (livery stable); *Rounsaville v. Kohlheim* (1882) 63 Ga. 668, 45 Am. Rep. 505 (private stable).

*Illinois.—Sheldon v. Weeks* (1893) 51 Ill. App. 314 ("carriage repository and boarding stable").

*Indiana.—Keiser v. Lovett* (1882) 85 Ind. 240, 44 Am. Rep. 10 (horse stall).

*Iowa.—Shiras v. Olinger* (1879) 50 Iowa, 571, 32 Am. Rep. 138 (livery stable).

*Kentucky.—Albany Christian Church v. Wilborn* (1902) 112 Ky. 507, 66 S. W. 285 (private stable near church); *Hyden v. Terry* (1908) 32 Ky. L. Rep. 1193, 108 S. W. 241.

*Louisiana.—Hill v. Battalion Washington Artillery* (1918) 143 La. 533,

78 So. 844 (stable for horses of military organization).

**Maryland.**—*King v. Hamill* (1903) 97 Md. 103, 54 Atl. 625 (private stable); *Gallagher v. Flury* (1904) 99 Md. 181, 57 Atl. 672 (same).

**New York.**—*Stilwell v. Buffalo Riding Academy* (1888) 21 Abb. N. C. 472, 4 N. Y. Supp. 414 (livery stable).

**Tennessee.**—*Kirkman v. Handy* (1850) 11 Humph. 406, 54 Am. Dec. 45 (livery stable).

**Vermont.**—*Curtis v. Winslow* (1866) 38 Vt. 690 (barn 10 feet from residence).

An injunction may be granted against the threatened establishment of a barn and yard for conducting a horse and cattle business in a residence section of a borough which will be a nuisance to neighboring property, although nothing has yet been done which would support an action at law, or which has injured the complainant. *BOOKER v. WEBLEY* (reported herewith) ante, 789.

It was held in *Coker v. Birge* (1851) 9 Ga. 425, 54 Am. Dec. 347, that a prospective nuisance such as warranted equitable interference was made out by allegations in a bill to enjoin the erection of a livery stable that the defendant had begun building the stable, with a plank floor, on a lot adjoining complainant's hotel, and about 65 feet therefrom; that the complainant's property is chiefly valuable for hotel purposes; that the erection of the stable would result in the loss of health to complainant's family and of patronage to the hotel, in consequence of the unhealthy effluvia, swarms of flies, and interminable stamping of horses, from the stable. These sworn allegations, the court said, must be considered as facts for the purposes of granting the injunction, and the injuries could not be said to be improbable or unreasonable. On a subsequent appeal (1851) 10 Ga. 336, it was held error to dissolve the injunction on the filing of the answer, in which the defendant set out that he had removed the plank floor from the stable and intended to take precautionary measures to prevent injury to the complainant by the sprinkling of

lime water, keeping the stalls neat and clean, etc. The court stated that the ad interim injunction should have been continued to the final hearing, and if the jury were of the opinion that the stable was not a nuisance of itself, but might be kept in such a manner as to make it unobjectionable, they would no doubt by their verdict require that the defendant should give bond, or in some other manner provide adequate protection to the complainant.

And it was held in *Aldrich v. Howard* (1861) 7 R. I. 87, 80 Am. Dec. 636, that a complaint, in a suit to enjoin the construction of a livery stable, was not subject to demurrer, which alleged that the proposed stable was to be erected within 28 inches of the complainant's dwelling house, within 6 inches of a block of stores owned by him, and within 42 feet of his hotel, and that, by the establishment of the stable, the complainant would suffer irreparable damage by reason of the odors, filth, flies, and noises, and other nuisances proceeding from the stable.

But where the allegations of the complaint in a suit to enjoin the erecting of a livery stable on a lot adjacent to the complainant's dwelling, in a residential district, that the proposed stable would be a nuisance, were denied in the answer under oath, the court in *Flint v. Russell* (1879) 5 Dill. 151, Fed. Cas. No. 4,876, held that a preliminary injunction should not be granted, since such a structure was not a nuisance per se, and whether or not it would become a nuisance would depend on circumstances thereafter to be ascertained.

And in *Kirkman v. Handy* (1850) 11 Humph. (Tenn.) 406, 54 Am. Dec. 45, an injunction was refused to restrain the completion and use of a building in a residential part of a city for a livery stable on a lot adjoining that of complainant, within a foot or two of complainant's residence, and fronting on the same street; the court being of the opinion that the nuisance was contingent, depending on the manner of use of the stable.

So, an injunction was denied in *Keiser v. Lovett* (1882) 85 Ind. 240,



44 Am. Rep. 10, to restrain the erection of a building on a lot adjoining that of the complainant, to be used as a wood and buggy shed, with a horse stall about 25 feet from the complainant's well, and about 28 feet from his residence.

And an injunction was denied in *Harrison v. Brooks* (1856) 20 Ga. 537, to restrain the erection of a livery stable on a lot on the opposite side of the street from the plaintiff's hotel, and about 80 feet therefrom, where the stable was to be separated from the street by a carriage house built in front of the stable.

It was held also in *Hyden v. Terry* (1908) 32 Ky. L. Rep. 1198, 108 S. W. 241, that an injunction would not be granted to restrain the erection of a stable across the street from the residence of the complainant, and 42 feet distant therefrom, since whether the stable would become a nuisance depended on the condition in which it was kept.

And it was held in *Gallagher v. Flury* (1904) 99 Md. 181, 57 Atl. 672, that the erection of a private stable 18 feet from the complainant's residence would not be enjoined, where the proposed structure was to be covered with corrugated iron as a safeguard against fire, and was to be connected with a city sewer.

In *Shiras v. Olinger* (1859) 50 Iowa, 571, 32 Am. Rep. 138, it was held that an injunction would not be issued to restrain the rebuilding of a livery stable, which had been burned, although, as previously constructed, the stable was a nuisance to the complainant, since it abutted upon an alley adjacent to his premises, with doors opening upon the alley within 40 feet of his house; and that, since it did not appear but that, by an alteration of the structure and method of its use a nuisance might be avoided, an injunction should be issued to restrain only such use as would be substantially similar to that which had theretofore been made of the premises, and which the court found was a nuisance.

In *Rounsaville v. Kohlheim* (1880) 68 Ga. 668, 45 Am. Rep. 505, the court, in holding that an injunction was

properly refused to restrain the erection of a private stable on a lot adjoining that of the complainant, recognized the possibility that a private stable may be so located and improperly kept as to become an actionable nuisance, but stated that "the mere probability that it will become so is insufficient to deprive the owner of a lot of the right to erect a stable for his own use, although it may be on the line of his lot, and quite near the dwelling of an adjacent owner. It is true that he who thus builds must at his peril guard against such construction as that its ordinary use would disturb adjacent owners by the noises produced, or manage it in such way as to permit offensive stenches to emanate therefrom, and float over his neighbor's premises, to his serious annoyance and discomfort."

*o. Undertaking establishments.*

It was held in *Saier v. Joy* (1917) 198 Mich. 295, L.R.A.1918A, 825, 164 N. W. 507, that the opening of a morgue and undertaking establishment in a residence district, to the depreciation of the value of neighboring property, may be enjoined as a nuisance.

And in *Densmore v. Evergreen Camp* (1900) 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206, it was held that the maintenance of an undertaking establishment in the residence part of the city within a few feet of the neighboring residences may be enjoined by their owners as a nuisance, in view of the depressing effect such business would probably have upon them, and the escape of noxious odors and gases from the chemicals used. And it was also held that it was immaterial that the owner of the business intended to occupy the upper stories of the building as a residence.

*p. Miscellaneous.*

The rule that a court of equity may grant an injunction to restrain a nuisance which must inevitably result from acts threatened or in progress has been applied in various cases in-

volving prospective nuisances of a miscellaneous nature.

**United States.**—*St. Louis v. Knapp, S. & Co. Co.* (1882) 104 U. S. 658, 26 L. ed. 883, reversing (1881) 2 McCrary, 516, 6 Fed. 221 (obstruction of wharf); *Silliman v. Hudson River Bridge Co.* (1857) 4 Blatchf. 74, Fed. Cas. No. 12,851, subsequent proceedings (1859) 4 Blatchf. 395, Fed. Cas. No. 18,852 (bridge across navigable stream); *Illinois & St. L. R. & Canal Co. v. St. Louis* (1872) 2 Dill. 70, Fed. Cas. No. 7,007 (grain elevator on public wharf; rule recognized); *Grand Trunk R. Co. v. A. Backus, Jr., & Sons* (1891) 46 Fed. 211 (wharf).

**Alabama.**—*State v. Mobile* (1837) 5 Port. 279, 80 Am. Dec. 564 (buildings in street); *Walker v. Allen* (1882) 72 Ala. 456 (boom); *Columbus & W. R. Co. v. Witherow* (1886) 82 Ala. 190, 3 So. 23 (railroad embankment in street).

**California.**—*Cowell v. Martin* (1872) 43 Cal. 605 (wharf).

**District of Columbia.**—*Carr v. Washington & O. D. R. Co.* (1916) 44 App. D. C. 533, Ann. Cas. 1918D, 818 (enjoining granting of liquor licenses).

**Florida.**—*Lutterloh v. Cedar Keys* (1875) 15 Fla. 306 (market house, public pound, and jail in street).

**Georgia.**—*Columbus v. Jaques* (1860) 30 Ga. 506 (market house in street).

**Illinois.**—*Green v. Oakes* (1855) 17 Ill. 249 (obstruction of highway); *Craig v. People* (1868) 47 Ill. 487 (closing of highway); *Snell v. Bureah* (1887) 128 Ill. 151, 13 N. E. 856 (obstruction of highway); *Newell v. Sass* (1892) 142 Ill. 104, 31 N. E. 176 (closing of alley); *Smith v. McDowell* (1893) 148 Ill. 51, 22 L.R.A. 893, 35 N. E. 141 (obstruction of highway); *Field v. Barling* (1894) 149 Ill. 556, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850 (obstruction of light and air); *Griswold v. Brega* (1896) 160 Ill. 490, 52 Am. St. Rep. 350, 43 N. E. 864 (wooden building within fire limits); *Flood v. Consumers Co.* (1903) 105 Ill. App. 559 (ice house; rule recognized); *Rohrbach v. Cavallini* (1918) 210 Ill.

App. 182 (building violating fire regulations).

**Indiana.**—*Pence v. Garrison* (1883) 93 Ind. 345 (unauthorized use of drainage ditch); *First Nat. Bank v. Sarlls* (1891) 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434 (rebuilding in violation of fire regulations); *Kaufman v. Stein* (1893) 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333 (building violating fire ordinances); *Lake Erie & W. R. Co. v. Young* (1893) 135 Ind. 426, 41 Am. St. Rep. 430, 35 N. E. 177 (overflow from filling of embankment).

**Kentucky.**—*Louisville & T. Turnp. Road Co. v. Anderson* (1901) 110 Ky. 138, 61 S. W. 13 (toll gate); *Gibson v. Black* (1888) 10 Ky. L. Rep. 373, 9 S. W. 379 (weighing scales near hotel); *Alexander v. Tebeau* (1903) 24 Ky. L. Rep. 1305, 71 S. W. 427 (obstruction of alley).

**Louisiana.**—*Fuselier v. Spalding* (1847) 2 La. Ann. 773 (brick kiln).

**Maine.**—*Houlton v. Titcomb* (1906) 102 Me. 272, 10 L.R.A.(N.S.) 580, 120 Am. St. Rep. 492, 66 Atl. 733 (wooden building within fire limits).

**Maryland.**—*Roman v. Strauss* (1856) 10 Md. 89 (obstruction of alley); *Hamilton v. Whitridge* (1857) 11 Md. 128, 69 Am. Dec. 184 (bawdyhouse); *Davis v. Baltimore & O. R. Co.* (1905) 102 Md. 371, 62 Atl. 572 (railroad siding near residence).

**Massachusetts.**—*Cadigan v. Brown* (1876) 120 Mass. 493 (obstruction of private way); *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* (1882) 133 Mass. 361 (drainage of public pond).

**Minnesota.**—*Wilder v. De Cou* (1879) 26 Minn. 10, 1 N. W. 48 (obstruction of street).

**Missouri.**—*Glaessner v. Anheuser-Busch Brewing Asso.* (1890) 100 Mo. 508, 13 S. W. 707 (private railway switch in street near store); *Holke v. Herman* (1900) 87 Mo. App. 125 (pond near residence).

**Nebraska.**—*Bangs v. Dworak* (1906) 75 Neb. 714, 5 L.R.A.(N.S.) 493, 106 N. W. 780, 13 Ann. Cas. 202 (wooden building within fire limits); *Letherman v. Hauser* (1906) 77 Neb. 731, 110 N. W. 745 (obstruction of highway).

**New Jersey.**—*Robeson v. Pittenger*

(1838) 2 N. J. Eq. 57, 32 Am. Dec. 412 (obstruction of light and air); *Gilbert v. Morris Canal & Bkg. Co.* (1850) 8 N. J. Eq. 495 (obstruction of water-course; rule approved); *Thompson v. Paterson & H. River & R. Co.* (1853) 9 N. J. Eq. 526 (bridge obstructing navigation); *Bechtel v. Carslake* (1858) 11 N. J. Eq. 500 (obstruction of private alley, injunction denied); *Higbee v. Camden & A. R. Co.* (1868) 19 N. J. Eq. 276 (railroad depot).

**New York.**—*Gardner v. Newburgh* (1816) 2 Johns. Ch. 162, 7 Am. Dec. 526 (diversion of stream); *Belknap v. Belknap* (1817) 2 Johns. Ch. 463, 7 Am. Dec. 548 (drainage of pond affecting mills); *Corning v. Lowerre* (1822) 6 Johns. Ch. 439 (obstruction of street); *Watertown v. Cowen* (1834) 4 Paige, 510, 27 Am. Dec. 80 (building in public square); *Atty. Gen. v. Cohoes Co.* (1836) 6 Paige, 133, 29 Am. Dec. 755 (diversion of water from canal); *Milhaw v. Sharp* (1863) 27 N. Y. 611, 84 Am. Dec. 314 (railway in street); *People v. Vanderbilt* (1863) 26 N. Y. 287 (pier); *Brower v. New York* (1848) 3 Barb. 254 (immigrant depot); *People v. Third Ave. R. Co.* (1865) 45 Barb. 63 (railroad in street); *Rochester v. Erickson* (1866) 46 Barb. 92 (wall obstructing river).

**Ohio.**—*Hickok v. Hine* (1872) 23 Ohio St. 523, 13 Am. Rep. 255 (bridge obstructing navigation); *State ex rel. Crosby v. Dayton & S. E. R. Co.* (1881) 36 Ohio St. 434 (obstruction of highway by railroad); *Dayton v. Roberts* (1894) 1 Ohio Dec. 385 (obstruction of stream).

**Oregon.**—*Parrish v. Stephens* (1858) 1 Or. 74 (obstruction of public levee); *Blagen v. Smith* (1899) 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292 (house of prostitution).

**Pennsylvania.**—*Com. v. Rush* (1850) 14 Pa. 186 (obstruction of public square); *Com. v. Pittsburgh & C. R. Co.* (1854) 24 Pa. 159, 62 Am. Dec. 372 (obstruction of canal); *Huddleston v. Killbuck Twp.* (1886) 4 Sadler, 176 (weigh scales on highway); *Harrisburg's Appeal* (1887) 7 Sadler, 322, 10 Atl. 787 (market in public square); *Com. ex rel. Tyrone v. Stevens* (1897) 178 Pa. 543, 36 Atl. 166 (wall obstruct-

ing stream); *Moyamensing Twp. v. Long* (1845) 1 Pars. Sel. Eq. Cas. 143 (encroachment on street); *Philadelphia v. Thirteenth & F. Streets Pass. R. Co.* (1871) 8 Phila. 648 (railway in street); *Atty. Gen. v. Lombard & S. Street Pass. R. Co.* (1875) 10 Phila. 352 (railway in street).

**South Carolina.**—*State ex rel. Lyon v. Columbia Water Power Co.* (1909) 82 S. C. 181, 22 L.R.A. (N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 Ann. Cas. 343 (obstruction of public navigable canal).

**Tennessee.**—*Wall v. Cloud* (1842) 3 Humph. 181 (diversion of water from mill).

**Vermont.**—*Lyon v. McLaughlin* (1859) 32 Vt. 423 (flume); *Brock v. Connecticut & P. R. Co.* (1862) 35 Vt. 378 (planting of trees).

**Virginia.**—*Coalter v. Hunter* (1826) 4 Rand. 58, 15 Am. Dec. 726 (diversion of stream).

**West Virginia.**—*Keystone Bridge Co. v. Summers* (1878) 13 W. Va. 476 (obstruction of highway); *Ravenswood v. Fleming* (1883) 22 W. Va. 52, 46 Am. Rep. 485 (wharf).

**Wisconsin.**—*Walker v. Shepardson* (1853) 2 Wis. 384, 60 Am. Dec. 423 (obstruction of navigable stream); *Barnes v. Racine* (1855) 4 Wis. 454 (obstruction of navigable stream); *Williams v. Smith* (1868) 22 Wis. 594 (building on public square); *Pettibone v. Hamilton* (1876) 40 Wis. 402 (obstruction of public way); *Kimberly & C. Co. v. Hewitt* (1890) 75 Wis. 371, 44 N. W. 303 (diversion of water from water power); *Marshfield v. Wisconsin Teleph. Co.* (1898) 102 Wis. 604, 44 L.R.A. 565, 78 N. W. 735 (unauthorized placing of telephone poles in street).

**England.**—*Atty. Gen. v. Forbes* (1836) 2 Myl. & C. 123, 40 Eng. Reprint, 123 (interference with public bridge); *Spencer v. London & B. R. Co.* (1836) 8 Sim. 193, 59 Eng. Reprint, 77 (obstruction of street); *Bostock v. North Staffordshire R. Co.* (1852) 5 De G. & S. 584, 64 Eng. Reprint, 1253, 25 L. J. Ch. N. S. 325, 2 Jur. N. S. 248, 4 Week. Rep. 336 (regatta); *Potts v. Levy* (1854) 2 Drew. 272, 61 Eng. Reprint, 723 (wall obstructing light);

**Herz v. Union Bank** (1859) 2 Giff. 686, 66 Eng. Reprint, 287, 1 Jur. N. S. 127, 3 Week. Rep. 49 (wall interfering with air and light); **Cook v. Bath Corp.** (1868) L. R. 6 Eq. 177 (obstruction of passageway); **Atty. Gen. v. Lonsdale** (1868) L. R. 7 Eq. 877, 88 L. J. Ch. 335, 20 L. T. N. S. 64, 17 Week. Rep. 219 (obstruction of navigable river); **Atty. Gen. v. Terry** (1874) L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Week. Rep. 395 (obstruction of navigable stream); **Crompton v. Lea** (1874) L. R. 19 Eq. 115, 44 L. J. Ch. N. S. 69, 31 L. T. N. S. 469, 23 Week. Rep. 53, 6 Mor. Min. Rep. 179 (flooding of mine); **Atty. Gen. v. Shrewsbury** (1882) 21 Ch. Div. 752, 51 L. J. Ch. N. S. 746, 46 L. T. N. S. 687, 30 Week. Rep. 916 (interference with highway); **Atty. Gen. v. Oxford, W. & W. R. Co.** (1853) 2 Week. Rep. 330 (opening unsafe railway line).

**Canada.**—**Dundas v. Hamilton & M. R. Co.** (1871) 18 Grant, Ch. 311 (bridge obstructing canal).

And the rule that a court of equity will not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation, use, or other future circumstances, has been applied in cases involving various kinds of nuisances.

**United States.**—**Lake Erie & W. R. Co. v. Fremont** (1899) 34 C. C. A. 625, 92 Fed. 721 (embankment); **Works v. Junction R. Co.** (1853) 5 McLean, 425, Fed. Cas. No. 18,046 (bridge obstructing navigation); **Silliman v. Hudson River Bridge Co.** (1859) 4 Blatchf. 395, Fed. Cas. No. 12,852 (same); **United States v. North Bloomfield Gravel Min. Co.** (1892) 53 Fed. 625 (mining operations interfering with navigation); **Otaheite Gold & Silver Min. & Mill. Co. v. Dean** (1900) 102 Fed. 929, 20 Mor. Min. Rep. 688 (tailings from ore mill).

**Arkansas.**—**Cooper v. Whissen** (1910) 95 Ark. 545, 180 S. W. 703 (wagon yard).

**California.**—**Hoke v. Perdue** (1881) 62 Cal. 545 (levee).

**Florida.**—**Garnett v. Jacksonville, St. A. & H. R. R. Co.** (1884) 20 Fla. 339 (railway in street).

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**Georgia.**—**Bacon v. Walker** (1886) 77 Ga. 336 (jail).

**Illinois.**—**Thornton v. Roll** (1886) 118 Ill. 350, 8 N. E. 145 (excavation in embankment); **Chicago General R. Co. v. Chicago, B. & Q. R. Co.** (1899) 181 Ill. 605, 54 N. E. 1026; **Flood v. Consumers Co.** (1903) 105 Ill. App. 559 (ice house).

**Indiana.**—**Laughlin v. Lamasco City** (1865) 6 Ind. 223 (wharf); **Dalton v. Cleveland, C. C. & St. L. R. Co.** (1895) 144 Ind. 121, 43 N. E. 130 (coal chute on railway).

**Iowa.**—**Reynolds v. Union Sav. Bank** (1912) 155 Iowa, 519, 49 L.R.A. (N.S.) 194, 136 N. W. 529 (discharge of water from roof into alley).

**Massachusetts.**—**District Attorney v. Lynn & B. R. Co.** (1860) 16 Gray, 243 (railway track on turnpike road); **Atty. Gen. v. Metropolitan R. Co.** (1878) 125 Mass. 515, 28 Am. Rep. 264 (railway in street).

**Mississippi.**—**Gwin v. Melmoth** (1844) Freem. Ch. 505 (chimney); **McCutchen v. Blanton** (1881) 59 Miss. 116 (Johnson grass seed).

**Missouri.**—**Julia Bldg. Assn. v. Bell Teleph. Co.** (1885) 88 Mo. 258, 57 Am. Rep. 398 (telephone poles); **Van De Vere v. Kansas City** (1891) 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695 (fire-engine house); **Holke v. Herman** (1900) 87 Mo. App. 125 (pond near residence).

**New Jersey.**—**Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co.** (1830) 1 N. J. Eq. 157, 21 Am. Dec. 41 (diversion of stream); **Vanwinkle v. Curtis** (1836) 3 N. J. Eq. 422 (same); **Higgins v. Princeton** (1850) 8 N. J. Eq. 309 (market house); **Thompson ex rel. Bergen v. Paterson** (1854) 9 N. J. Eq. 624 (poorhouse); **Hinchman v. Paterson Horse R. Co.** (1864) 17 N. J. Eq. 75, 86 Am. Dec. 252 (railroad in street).

**New York.**—**Rochester v. Curtiss** (1840) Clarke, Ch. 336 (wall obstructing river); **Mohawk Bridge Co. v. Utica & S. R. Co.** (1887) 6 Paige, 554 (railroad bridge); **Drake v. Hudson River R. Co.** (1849) 7 Barb. 508 (railroad in street); **Phoenix v. Emigration Comrs.** (1855) 1 Abb. Pr. 466, affirmed in (1895) 12 How. Pr. 1 (Cas-

tle Garden immigration station); *Rochester v. Erickson* (1866) 46 Barb. 92 (wall obstructing river; rule approved); *De Pierris v. Mattern* (1890) 10 N. Y. Supp. 626 (wagon and paint shop).

**North Carolina.**—*Simpson v. Justice* (1851) 43 N. C. (8 Ired. Eq.) 115 (turpentine distillery 100 yards from dwelling); *Walton v. Mills* (1882) 86 N. C. 280 (diversion of water for gold mining); *Burwell v. Vance County* (1885) 83 N. C. 73, 53 Am. Rep. 454 (jail); *Hickory v. Southern R. Co.* (1906) 143 N. C. 451, 55 S. E. 840 (freight depot).

**Ohio.**—*Hutchinson v. Thompson* (1839) 9 Ohio, 52 (obstruction of river); *Erkenbrecher v. Este* (1871) 1 Cin. Sup. Ct. Rep. 368 (obstruction of canal).

**Oklahoma.**—*West v. Ponca City Mill. Co.* (1904) 14 Okla. 646, 79 Pac. 100, 2 Ann. Cas. 249 (wooden building violating ordinance).

**Oregon.**—*Waltz v. Foster* (1885) 12 Or. 247, 7 Pac. 24 (obstruction of highway).

**Pennsylvania.**—*Bell v. Ohio & P. R. Co.* (1855) 25 Pa. 161, 64 Am. Dec. 687 (use of common by railroad); *Philadelphia's Appeal* (1875) 78 Pa. 33 (encroachment on highway); *Biddle v. Ash* (1888) 2 Ashm. 211 (building in street); *Hough v. Doylestown* (1870) 4 Brewst. 333 (diversion of water by municipality injurious to mill owner).

**Rhode Island.**—*O'Reilly v. Perkins* (1901) 22 R. I. 364, 48 Atl. 6 (brewery).

**Washington.**—*Winsor v. Hanson* (1905) 40 Wash. 428, 82 Pac. 710 (obstruction of stream).

**Wisconsin.**—*Sheboygan v. Sheboygan & F. du L. R. Co.* (1867) 21 Wis. 668 (obstruction of stream); *Janesville v. Carpenter* (1890) 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128 (building over river); *Priewe v. Fitzsimons & C. Co.* (1903) 117 Wis. 497, 94 N. W. 317 (drainage of lake).

**England.**—*Atty. Gen. v. Nichol* (1809) 16 Ves. Jr. 338, 38 Eng. Reprint, 1012, 10 Revised Rep. 186 (obstruction of light); *Wynstanley v. Lee*

(1818) 2 Swanst. 332, 36 Eng. Reprint, 648 (same); *Ripon v. Hobart* (1834) 3 Myl. & K. 169, 40 Eng. Reprint, 65 (steam engine for drainage purposes); *Luscombe v. Steer* (1867) 17 L. T. N. S. 229, 15 Week. Rep. 1191 (brick kiln); *Harrison v. Good* (1871) L. R. 11 Eq. 338, 40 L. J. Ch. N. S. 294, 24 L. T. N. S. 263, 19 Week. Rep. 346 (school); *Fletcher v. Bealey* (1885) L. R. 23 Ch. Div. 688, 54 L. J. Ch. N. S. 424, 52 L. T. N. S. 541, 33 Week. Rep. 745 (pollution of stream from alkali works).

The possibility that the manner in which a jail is kept near private residences will render it a nuisance is insufficient to warrant the granting of an injunction against its erection, at the instance of the owners of the residences. *Bacon v. Walker* (1886) 77 Ga. 386.

A brewery not being a nuisance per se, a complaint, in a suit to enjoin its erection, is subject to demurrer, which does not set out the location of the complainant's residence with reference to the proposed structure with sufficient definiteness to show that the annoyances threatened would be appreciable, and which fails to allege any threat, or any facts from which a threat can be inferred, on the part of the defendant, so to conduct the brewery as to render it harmful to the complainants from the manner of its operation. The mere allegation that the brewery "would necessarily become a nuisance" is mere conjecture. *O'Reilly v. Perkins* (1901) 22 R. I. 364, 48 Atl. 6.

It was held in *Janesville v. Carpenter* (1890) 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128, that an injunction would not be granted to restrain the erection of a building on piles in the bed of a river on defendant's land, which would damage no one, merely because others might follow the defendant's example, and a row of similar buildings might be erected, which might give rise to danger from fire and flood and to the public health.

The planting of willow trees on a railroad right of way, within 3 feet of the line, was enjoined in *Brock v. Connecticut & P. R. Co.* (1862) 35 Vt. 373,

in a suit brought by the owner of the adjoining land, where it appeared that the trees were planted with the expectation of nailing boards to them when grown, and thus making a fence along the right of way, that there was no necessity for this particular kind of fence, and that the trees when grown would cause injury to the complainant's land by the spreading of the roots and tops.

It was held in *Davis v. Baltimore & O. R. Co.* (1905) 102 Md. 371, 62 Atl. 572, that an injunction would not be granted to restrain the construction of a railroad siding near complainant's residence, where the proximity of the railroad to the residence was not shown except that the track was to be constructed along a county highway on which the complainant's property abutted, and was to pass in front of said property, and it did not appear whether the railroad would be used frequently or otherwise; allegations being too indefinite which are merely to the effect that the construction and operation of the siding would greatly depreciate the complainant's property by reason of the noise and danger incident to the operation of cars and engines passing immediately in front of her residence, and would result in danger to her when driving on the highway.

A court of equity will not enjoin the construction by a city of a fire-engine house in a residential section, at the instance of an adjoining property owner, on the ground that by improper use the structure may become a nuisance, even though the building could be placed within a block or two of the proposed site, among shops and small stores. *Van De Vere v. Kansas City* (1891) 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695.

In a suit to enjoin the construction of a pond on a lot adjacent to the complainant's residence, it was held in *Holke v. Herman* (1900) 87 Mo. App. 125, that the complaint was insufficient which alleged that the water in the pond would be only 12 feet from the complainant's residence, that it would become stagnant, would breed disease, detract from the beauty and comfort of the complainant's home, would be

a nuisance injurious to the health of complainant's family, and render his dwelling unfit for habitation, where there was no allegation as to the sources of the water in the pond, or as to the condition and uses of the defendant's premises. But after judgment granting an injunction the court declined to dismiss the petition, but reversed the judgment and remanded the cause with directions permitting the plaintiff to amend, since the evidence showed that the pond must be fed from impure sources, that no stream or spring emptied into it, and that it had no outlet; so that the proposed establishment of a nuisance injurious to health appeared with sufficient probability.

That a city market house 100 feet from a residence, and on the opposite side of the street therefrom, will render the latter less "eligible" as a dwelling house, will not authorize the granting of an injunction to restrain the erection of the market. *Higgins v. Princeton* (1850) 8 N. J. Eq. 309.

Swearing and the use of obscene language which would constitute a nuisance may be enjoined, if indulgence therein by the defendant is probable, even though he has not threatened to continue them. *Barnard v. Finkbeiner* (1914) 162 App. Div. 319, 147 N. Y. Supp. 514.

It was held in *Houlton v. Titcomb* (1906) 102 Me. 272, 10 L.R.A. (N.S.) 580, 120 Am. St. Rep. 492, 66 Atl. 733, that the erection within the fire limits of a wooden building, contrary to a municipal ordinance, might be enjoined, where the statute made such act a nuisance.

When the right to the use of a highway is admitted, or easy of ascertainment, an injunction will be granted to restrain its obstruction, in favor of adjacent owners, where such obstruction works a special injury to them; but where the right to the use of the highway has not been established at law, or is not clear nor easy of ascertainment, but is contested by the answer and proofs, an injunction will not be granted. *Walt v. Foster* (1885) 12 Or. 247, 7 Pac. 24.

R. E. H.

L. F. SCHOFIELD, Appt.,

v.

SCHOOL DISTRICT NO. 113, Labette County.

*Kansas Supreme Court — October 11, 1919.*

(105 Kan. 343, 184 Pac. 480.)

**School — power of board to drill well.**

1. Under the statute authorizing a school board to provide the necessary appendages for a schoolhouse, it may bind the district to pay for the drilling of a well in the school yard for the purpose of supplying drinking water, even although no suitable water is found, and the well is, on that account, entirely useless.

[See note on this question beginning on page 791.]

**Well — contract to drill — construction.**

2. Language to the effect that a contractor agrees to drill a "water well," guaranteeing first-class work and a well produced by a machine of a specified make, payment to be made at the completion of the well, does not imply that he undertakes that water shall be found suitable for the use intended.

**— when contract performed.**

3. A well drilled under such a contract must be deemed to be completed, in such sense as to entitle the contractor to his pay, when it is made to

appear that water of the kind sought cannot be found at a reasonable depth, and this condition must be regarded as established, so far as he is concerned, when the other party directs a discontinuance of the work.

**School — power of district to contract.**

4. The power of a school district to contract is only such as is conferred by statute expressly or by fair implication, and persons dealing with it are chargeable with notice of this limitation.

[See 24 R. C. L. 601 et seq.]

Headnotes 1-3 by MASON, J.

**APPEAL** by plaintiff from a judgment of the District Court for Labette County sustaining a demurrer to the evidence in an action brought to recover the balance alleged to be due under a contract for the drilling of a well. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John Madden, John Madden, Jr., and C. E. Cooper for appellant.

Messrs. W. D. Atkinson and John T. Pearson for appellee.

Mason, J., delivered the opinion of the court:

L. F. Schofield entered into a written contract with the board of school district No. 113 of Labette county to drill a well in the school yard; the purpose being to provide a supply of drinking water. No water suitable for the purpose was found, and by direction of the board the drilling was abandoned at the depth of 293½ feet. The price

agreed upon for the work was \$1.25 a foot. The contractor, who had received \$100, brought an action against the district for the balance of the agreed price of \$1.25 a foot, also asking a further recovery on account of extra work, and delay occasioned by the fault of the board. A demurrer to his evidence was sustained, and he appeals.

The grounds on which the defendant's liability is contested, assuming the plaintiff's evidence to be true, are (1) that a school district has legal authority to pay for constructing a well only on the theory that it is a necessary appendage to

the schoolhouse, and that a well which produces no water fit to drink is useless, and cannot be regarded as covered by that term; and (2) that the language of the contract made the plaintiff a guarantor that a supply of drinking water would be produced.

The power of a school district to contract is, of course, only such as is conferred by statute, expressly or by fair implication; and persons dealing with it are charged with notice of this limitation. 35 Cyc. 949, 951. The district board is authorized to "provide the necessary appendages for the schoolhouse during the time a school is taught therein." Gen. Stat. 1915, § 8976. This court has held that the word "appendage," as used in the statute, should be construed broadly, so as to include a well on the school premises; its necessity in a particular case being a question of fact. *Hemme v. School Dist.* 30 Kan. 377, 1 Pac. 104.

The defendant, however, argues that a well which produces no water fit for drinking purposes, being absolutely useless, cannot fairly be considered an appendage to a schoolhouse, and certainly not as a necessary appendage. The argument has plausibility, but proceeds upon a quite literal interpretation, which we think would result in confining the discretion of the school board within too narrow limits. The evidence shows that a cistern holding rainwater had formerly supplied drinking water for the school, but was not considered sanitary. This obviously justified the officers of the district in making reasonable efforts to procure a more satisfactory supply.

They could not be sure that sinking a well would answer the purpose, but they might naturally and reasonably suppose the chances were all in favor of it. The only way to find out was to make the attempt. We cannot say that as a matter of law they had no

right to risk the money of the district in drilling the well, unless they were sure it would meet the purpose for which it was intended. We think the authority to provide a well implied the authority to bind the district for the amount expended in an endeavor to construct one, following reasonable and usual methods, notwithstanding it resulted in a complete failure so far as practical results were concerned. Although in a particular case it might be possible to find a contractor who would carry the risk himself, this would presumably involve a considerable increase in the price, and the question as to whether that plan should be followed would be one calling for the exercise of sound business judgment. We conclude that the board had authority to make the contract, and the district was liable upon it if the contractor duly performed his part.

The material part of the contract read as follows: "For and in consideration of one dollar and twenty-five cents (\$1.25) per foot, first party [Schofield] agrees to drill one water well on school yard east of schoolhouse. First party agrees to furnish dry pipe suitable for casing out all surface water. Dry pipe to be 6½ inch, I. D. First party guarantees first-class work and a stra well. In case of objectionable water other than surface water, second parties [the district board] agree to furnish all necessary casing for completion of well. Payment for said well to be cashed on completion of said well."

The evidence tended to show that at a depth of 24 feet surface water was found, which was not suitable for drinking, and was cased out in accordance with the contract and the wish of the members of the board. At about 80 feet salt water was struck, and the board, after a delay to give opportunity for analysis, caused the plaintiff to proceed with the drilling, which was finally stopped by order of the director at 293½ feet, no usable water having been reached.



No explanation is offered of the combination of letters "stra" appearing in the contract. It may have been intended for "star," for the plaintiff testified that he used a Star drill machine. At all events, no force is attached to it by either party. The defendant argues that an undertaking on the part of the plaintiff that water should be produced is fairly implied from the agreement to drill a "water well," and from the stipulation that payment was to be made on its "completion." The expression "water well" might naturally be employed to distinguish the contemplated op-

**Well—contract to drill—construction.**

eration from an effort to reach oil or gas. "The use of the term 'well' . . . is not conclusive that a producing well was intended." *Federal Betterment Co. v. Blaes*, 75 Kan. 69, 73, 88 Pac. 556. Contracts for the digging or drilling of a well often provide that payment shall depend upon the obtaining of water; but to be given that effect such a purpose ought to be made to appear by express statement or very clear implication, especially where the contractor does not choose the site. "If the agreement is executed without provision that a specific flow of water shall be obtained, . . . then the labor and materials must be paid for as per contract, be the flow of water little or much." *Omaha Consol. Vinegar Co. v. Burns*, 49 Neb. 229, 233, 68 N. W. 493. See also *Gregory v. United States*, 33 Ct. Cl. 434; *Chapin v. L. Candee & Co.* 14 Misc. 453, 35 N. Y. Supp. 1018. Contra, *Jarrard v. Hill*, 14 Ky. L. Rep. 575. Even a guaranty that water shall be produced has been held not to mean that the water shall be suitable for the purpose in view. *American Well-Works v. Rivers (C. C.)* 36 Fed. 880; *Blum v. Brown*, 11 Tex. Civ. App. 463, 33 S. W. 145; *Electric Lighting Co. v. Elder Bros.* 115 Ala. 138, 21 So. 983. In a situation having some features similar to those here presented, this language has been used:

"Defendant founds his argument upon his construction of the word 'well,' that plaintiffs agreed to drill a 'well,' that a 'well' is a hole in the ground, containing water other than surface water; that when plaintiffs agreed to drill a 'well' they contracted to furnish an article meeting that definition; and that, if they did not produce a hole in the ground containing water other than surface water, they did not drill a 'well,' and cannot recover. . . . The defendant himself selected the site for the proposed well. Nothing was said about plaintiffs undertaking to reach water. All that can be gleaned from the conversations of the parties is that plaintiffs were to dig a well. From this contract, and the circumstances, to construe an undertaking on the part of the plaintiffs to reach water or receive no pay seems to us to do great violence to language, and to the ordinary transactions of sane men. . . . When plaintiffs went to dig a well, when they took a site selected by defendants, when no guaranty of reaching water was made, when no price was fixed for performing the services or reaching water, can a court for a moment regard it as within the contemplation of the parties, as shown from their words or their acts, that they used the word 'well' as meaning a hole in the ground, containing water other than surface water? We think not. *Bouvier's Law Dictionary* defines a 'well' as 'a hole dug in the ground in order to obtain water.' This is, to our mind, the only practical view. The object of a well is to obtain water. The well may be unsuccessful. The object of a mining shaft is to develop a mine that will pay—an object not always attained. Under the circumstances of the case, we cannot construe the word 'well' as defendant insists." *Littrell v. Wilcox*, 11 Mont. 83, 84, 27 Pac. 396.

The provisions of the contract relative to casing out water unfit for use serve to show that only water suitable for drinking was sought, but in our judgment do not

further affect the question under consideration. They indicate that the finding of undesirable water at different depths was anticipated, and the purpose of their insertion was obviously to determine upon whom should fall the cost of the additional material thereby made necessary.

Even under a contract to prosecute the work of boring a well until the other party should be satisfied, or until water was found, it has been said that no obligation was created to go beyond a reasonable

depth. *Bohrer v. Stumpff*, 31 Ill. App. 139. Here we think the well contracted for must be regarded as completed, when it became apparent that good water could not be obtained within a reasonable depth—a condition established, so far as the plaintiff was concerned, by the order of the director to discontinue the drilling.

The judgment is reversed, and the cause is remanded for further proceedings.

All the Justices concur.

### ANNOTATION.

#### Extent of power of school district to provide for the comfort and convenience of teachers and pupils.

- I. In general, 791.
- II. Need of articles purchased, 792.
- III. Necessity for authorization by electors or others, 793.
- IV. Purchases on credit, 794.
- V. Particular terms and applications:
  - a. Appendages, 795.
  - b. Apparatus and furniture, 795.
  - c. Appliances, 796.

V.—continued.

- d. Heating plants, 797.
- e. Musical instruments and music charts, 797.
- f. School premises and playgrounds, 798.
- g. Wells, 798.
- h. Miscellaneous, 799.

#### I. In general.

The power to erect, lease, or repair school buildings is not within the scope of this annotation; nor does it include the right of school authorities to purchase textbooks for general use.

School authorities are generally empowered by the statutes in the several states to provide such apparatus and equipment for the public schools and to furnish such accommodations and facilities for carrying on the work of the schools as are reasonably necessary and useful for the comfort and convenience of teachers and pupils; but the extent of their powers in this respect depends in any particular case on the specific provisions of the controlling statute.

**Arkansas.**—*First Nat. Bank v. Whisenhunt* (1910) 94 Ark. 583, 127 S. W. 968; *A. H. Andrews Co. v. Delight Special School Dist* (1910) 95 Ark. 26, 128 S. W. 361.

**California.**—*Morgan v. Board of Education* (1902) 186 Cal. 245, 68 Pac. 708.

**Illinois.**—*Clark v. School Directors* (1875) 78 Ill. 474; *People v. Rea* (1900) 185 Ill. 633, 57 N. E. 778; *Reiger v. Board of Education* (1919) 287 Ill. 590, 122 N. E. 838.

**Indiana.**—*Johnson School Twp. v. Citizens Bank* (1882) 81 Ind. 515; *State ex rel. Bode v. Sherman* (1883) 90 Ind. 123; *Reeve School Twp. v. Dodson* (1884) 98 Ind. 497; *Bloomington School Twp. v. National School Furnishing Co.* (1886) 107 Ind. 43, 7 N. E. 760; *Jefferson School Twp. v. Litton* (1888) 116 Ind. 467, 19 N. E. 323; *Oppenheimer v. Greencastle School Twp.* (1904) 164 Ind. 99, 72 N. E. 1100; *Litten v. Wright School Twp.* (1890) 1 Ind. App. 92, 27 N. E. 329; *Noble School Furniture Co. v. Washington School Twp.* (1891) 4 Ind. App. 270, 29 N. E. 935; *First Nat. Bank v. Adams School Twp.* (1896) 17 Ind. App. 375, 46 N. E. 832; *Bannister v. Adams School Twp.* (1897) 17 Ind. App. 701, 46 N. E. 1154; *First Nat. Bank v. Osborne* (1897) 18 Ind. App. 442, 48 N. E. 256; *W. P. Myers Pub. Co. v. White*

River School Twp. (1901) 28 Ind. App. 91, 62 N. E. 66.

Iowa.—Taylor v. Wayne (1868) 25 Iowa, 447; Taylor v. Otter Creek (1868) 26 Iowa, 281; Manning v. Van Buren (1869) 28 Iowa, 332; Bellmeyer v. Independent Dist. (1876) 44 Iowa, 564; Independent Dist. v. Kelley (1881) 55 Iowa, 568, 8 N. W. 426; McShane v. Independent Dist. (1888) 76 Iowa, 333, 41 N. W. 33; Yaggy v. Monroe (1890) 80 Iowa, 121, 45 N. W. 553; Bogaard v. Independent Dist. (1895) 93 Iowa, 269, 61 N. W. 859; Weir Furnace Co. v. Independent School Dist. (1896) 99 Iowa, 115, 68 N. W. 584; Hanna v. Wright (1902) 116 Iowa, 275, 89 N. W. 1108; Johnson v. Cedar (1902) 117 Iowa, 319, 90 N. W. 713.

Kansas.—School Dist. v. Perkins (1879) 21 Kan. 536, 30 Am. Rep. 447; School Dist. v. Swayze (1883) 29 Kan. 211; Hemme v. School Dist. (1883) 30 Kan. 377, 1 Pac. 104.

Kentucky. — Keenon v. Adams (1917) 176 Ky. 618, 196 S. W. 173.

Massachusetts.—McKenna v. Kimball (1888) 145 Mass. 555, 14 N. E. 789; Day v. Greenfield (1919) — Mass. —, 124 N. E. 481.

Michigan.—Gibson v. School Dist. (1877) 36 Mich. 404; McLaren v. Akron (1882) 48 Mich. 189, 12 N. W. 43; Creager v. Wright School Dist. (1886) 62 Mich. 101, 28 N. W. 794; Knabe v. Board of Education (1887) 67 Mich. 262, 34 N. W. 568; Western Pub. House v. School Dist. (1892) 94 Mich. 262, 53 N. W. 1103.

Mississippi. — Thompson v. Lamar County Agri. High School (1918) 117 Miss. 621, 78 So. 547.

Missouri.—Johnson v. School Dist. (1878) 67 Mo. 319; Skinner v. K. Stationery Co. v. Board of Education (1914) 182 Mo. App. 541, 165 S. W. 835.

New Jersey.—State, Chamberlain, Prosecutor, v. Board of Education (1895) 57 N. J. L. 605, 31 Atl. 1033, reversed in (1896) 58 N. J. L. 347, 33 Atl. 923; Kraft v. Board of Education (1902) 67 N. J. L. 512, 51 Atl. 483; Scola v. Board of Education (1908) 77 N. J. L. 73, 71 Atl. 299.

New York. — Rauscher v. Cronk (1888) 21 N. Y. S. R. 529, 3 N. Y. Supp. 470; Smith v. Coman (1900) 47 App. Div. 116, 62 N. Y. Supp. 106.

North Carolina.—Buncombe County v. Malone (1919) — N. C. —, 101 S. E. 552.

Ohio.—Board of Education v. Andrews (1894) 51 Ohio St. 199, 37 N. E. 260; State ex rel. Prosecuting Atty. v. Treasurer (1887) 2 Ohio C. C. 363, 1 Ohio C. D. 532; State ex rel. Dunn v. Freed (1895) 10 Ohio C. C. 294, 6 Ohio C. D. 550; First Nat. Bank v. Board of Education (1897) 15 Ohio C. C. 561, 8 Ohio C. D. 283; Neubauer v. Union Twp. (1898) 8 Ohio S. & C. P. Dec. 349; Parker v. Board of Education (1884) 12 Ohio L. J. 186.

Pennsylvania. — Board of Public Education v. Ransley (1904) 209 Pa. 51, 53 Atl. 122; Board of Education v. Shoyer (1903) 13 Pa. Dist. R. 170.

Texas.—McGee v. Franklin Pub. Co. (1897) 15 Tex. Civ. App. 216, 39 S. W. 335.

Virginia. — Com. v. School Bd. (1909) 109 Va. 346, 63 S. E. 1081.

Washington.—State ex rel. School Dist. v. Superior Ct. (1912) 69 Wash. 189, 124 Pac. 484; Sorenson v. Perkins (1913) 72 Wash. 16, 129 Pac. 577.

West Virginia.—Honaker v. Board of Education (1896) 42 W. Va. 170, 32 L.R.A. 413, 57 Am. St. Rep. 847, 24 S. E. 544.

Wisconsin.—Kane v. School Dist. (1881) 52 Wis. 502, 9 N. W. 769.

Wyoming.—School Dist. v. Western Tube Co. (1904) 13 Wyo. 304, 80 Pac. 155.

The authority of the township trustee to purchase school supplies will not be extended, nor his powers enlarged, by intendment, or by a strained construction of the statute. First Nat. Bank v. Adams School Twp. (1896) 17 Ind. App. 375, 46 N. E. 832.

## II. Need of articles purchased.

School authorities can bind the school district or school township in the purchase only of such school apparatus and equipment as are reasonably necessary and useful. State ex rel. Cohen v. Hawes (1887) 112 Ind. 323, 14 N. E. 87; Oppenheimer v. Greencastle School Twp. (1904) 164 Ind. 99, 72 N. E. 1100; Litten v. Wright School Twp. (1890) 1 Ind. App. 92, 27 N. E. 329 (denying recovery for purchase price of tellurians); Noble School Furniture Co. v. Washington School

Twp. (1891) 4 Ind. App. 270, 29 N. E. 985; *First Nat. Bank v. Adams School Twp.* (1896) 17 Ind. App. 375, 46 N. E. 832; *First Nat. Bank v. Osborne* (1897) 18 Ind. App. 442, 48 N. E. 256; *Gibson v. School Dist.* (1877) 36 Mich. 404; *Honaker v. Board of Education* (1896) 42 W. Va. 170, 32 L.R.A. 413, 57 Am. St. Rep. 847, 24 S. E. 544.

While, under the Indiana statute, township trustees are authorized to provide suitable equipment for schools, the duty must be discharged with discretion and economy, and they have no power to purchase anything except needful and appropriate articles. Therefore, to recover the value of a heating apparatus sold to the township trustees for school purposes, a complaint is insufficient if it does not show the necessity for procuring that kind of a heater, or any other kind, for the use of the schools. *Oppenheimer v. Greencastle School Twp.* (1904) 164 Ind. 99, 72 N. E. 1100.

However, the case of *Johnson School Twp. v. Citizens Bank* (1882) 81 Ind. 515, supports the proposition that, under the Indiana statute authorizing the township trustee to buy school furniture, he is the judge as to whether the furniture is needed, and, in the absence of fraud, may bind the township by contracts for such furniture.

### III. *Necessity for authorization by electors or others.*

Under the statutes of some states, the purchase of charts, maps, and other school apparatus must be authorized by the electors of the school district to render it liable therefor. *First Nat. Bank v. Whisenhunt* (1910) 94 Ark. 583, 127 S. W. 968 (charts); *Taylor v. Wayne* (1868) 25 Iowa, 447 (maps and other apparatus); *Taylor v. Otter Creek* (1868) 26 Iowa, 281, (same); *Manning v. Van Buren* (1869) 28 Iowa, 332 (same); *School Dist. v. Perkins* (1879) 21 Kan. 536, 30 Am. Rep. 447 (stereoscope; see this case under V. a, *infra*); *Western Pub. House v. School Dist.* (1892) 94 Mich. 262, 53 N. W. 1108 (charts for anatomical study); *Kane v. School Dist.* (1881) 52 Wis. 502, 9 N. W. 459.

In *Manning v. Van Buren* (1869) 28 Iowa, 332, it was held that school di-

rectors had no authority to purchase maps, globes, and other school apparatus, without the previous authorization of the electors of the district, where the statute empowered the electors, when assembled in district township meeting, to vote a tax for certain purposes, among others, "for the payment of any debts contracted for the erection of schoolhouses, and for procuring district libraries and apparatus for the schools."

Also in *Taylor v. Otter Creek* (1868) 26 Iowa, 281, it was held that school directors could not purchase maps, charts, globes, and other school apparatus without the authorization of the electors of the district.

And that a school board had no authority to purchase maps, unless the authority so to do was conferred by the electors of the district, was conceded in *Taylor v. Wayne* (1868) 25 Iowa, 447, where the question involved was as to ratification of the purchase by use of the maps.

It was held in *Jefferson School Twp. v. Litton* (1888) 116 Ind. 467, 19 N. E. 323, that a statute, providing that whenever it was necessary for a township trustee to incur, on behalf of the township, any debt the aggregate amount of which was in excess of the fund on hand to which such debt was chargeable, and of the fund to be derived from the tax assessed against the township for the year in which the debt was incurred, the trustee should first procure an order from the board of county commissioners authorizing him to contract the indebtedness, limited the power of township trustees to incur debts on behalf of school townships in the purchase of school apparatus.

And where a contract was made with school directors for the sale of school charts, and the statute provided that before expenditures could be made for maps, charts, etc., the approval of the state superintendent must be secured and the expenditure authorized by the electors of the school district, but this approval and authorization were not secured, it was held that the contract was void. *First*

Nat. Bank v. Whisenhunt (1910) 94 Ark. 583, 127 S. W. 968.

But the purchase of school desks by the school directors of the district, without an authorization to do so by the electors at their annual meeting, was held authorized in *A. H. Andrews Co. v. Delight Special School Dist.* (1910) 95 Ark. 26, 128 S. W. 361, under statutes providing that the directors shall "have charge of the school affairs and school educational interests," and shall make the necessary arrangements to have the school carried on, that the clerk of the school board shall keep an account of the expenditures made by the board, the items to include expenditures for "houses, fences, stove, wood, maps, charts, blackboards, dictionary, and other necessities for a school," and authorizing the directors to draw warrants for the payment of teachers' wages, "or for any lawful purpose."

And it was held in *Myers Pub. Co. v. White River School Twp.* (1901) 28 Ind. App. 91, 62 N. E. 66, that the school trustees could purchase music charts without the matter first being considered by the county board of education, although the statute provided that "said board shall consider the general wants and needs of the schools and school property of which they have charge, and all matters relating to the purchase of school furniture, books, maps, charts," etc. The determination of the board the court regarded as only advisory. See this case also under *V. e. infra*.

#### *IV. Purchases on credit.*

The general question of the power of school districts to make purchases on credit and to contract debts is, of course, beyond the scope of the note.

A contract for the purchase of school apparatus, consisting of a set of stereoscopic views, for a sum payable in six months, with interest, was held unauthorized and void in *Clark v. School Directors* (1875) 78 Ill. 474, under a statute authorizing the school directors to appropriate to the purchase of libraries and apparatus, any surplus funds after all necessary school expenses were paid, where it did not appear that at the time the

contract was made there were any surplus funds. The court said that the wording of the statute seemed to be a limitation of the power to make purchases of this kind to the circumstances named, and to be an implied denial of any power to purchase generally on credit.

And in the absence of a showing that at the time the contract was made there were unappropriated contingent funds on hand, the purchase by a school district, on credit, of an anatomical chart for the study of the effect on the human body of alcoholic drinks and narcotics, was held not authorized in *Yaggy v. Monroe* (1890) 80 Iowa, 121, 45 N. W. 553, although it was required by statute that the effect of alcoholic drinks, stimulants, and narcotics on the human system should be included in the branches of study to be taught, where the statute also provided that the board of directors might use any unappropriated contingent fund in the treasury to purchase charts and apparatus for the use of the schools, but should contract no debt for this purpose. See, however, *Bellmeyer v. Independent Dist.* (1876) 44 Iowa, 564, where, although the contract of purchase provided for payment at a future date, the court indulged the presumption that a school board had not exceeded its powers in purchasing an organ when there was no unappropriated contingent fund on hand, it not appearing whether or not there was such an unappropriated fund.

But, under the Code adopted in 1897, the purchase by a school board of an atlas for use in the school, even if there was no contingent fund on hand at the time the order was given, was held authorized in *Hanna v. Wright* (1902) 116 Iowa, 275, 89 N. W. 1108, the statute providing that school townships might purchase dictionaries, library books, maps, charts, and apparatus for the use of the schools, to a specified amount, and should provide by levy of contingent fund therefor.

And following *Hanna v. Wright* (Iowa) *supra*, the court in *Johnson v. Cedar* (1902) 117 Iowa, 319, 90 N. W.

713, held that a school township had power to contract for school supplies, although it had no contingent fund on hand at the time the contract was executed.

See also *Jefferson School Twp. v. Litton* (Ind.) under III. *supra*, and *School Dist. v. Western Tube Co.* (Wyo.) under V. d, *infra*.

#### *V. Particular terms and applications.*

##### *a. Appendages.*

It was held in *Gibson v. School Dist.* (1877) 36 Mich. 404, that the term "necessary appendage" in a statute, making it the duty of a school director to provide the necessary appendages for the schoolhouse and keep the same in good condition and repair, did not include a set of "national business multiplication charts," consisting of charts or cards containing the multiplication table, practical forms of business contracts, and brief mention of prominent historical events, which proved to be of no practical use or value as a means of instruction.

And a stereoscope is not an "appendage" which a district school board can supply without a vote of the electors of the district, under a statute authorizing the district board to provide the "necessary appendages for the schoolhouse" during the time the school is in session, where other statutory provision is made for the purchase of blackboards, maps, and apparatus, after the school district meeting has voted a tax for supplying the school with these conveniences. *School Dist. v. Perkins* (1879) 21 Kan. 536, 30 Am. Rep. 447.

But the term "appendages" in a statute authorizing school districts to furnish schoolhouses with the necessary fuel and appendages, and providing that the district board shall supply the necessary appendages for the schoolhouse during the time school is taught therein, may include a mathematical chart to be hung upon the walls of the schoolhouse. *School Dist. v. Swayze* (1883) 29 Kan. 211.

And a well on school premises may be a necessary appendage within the meaning of a statute providing that the district board shall provide the

necessary appendages for the schoolhouse during the time the school is taught therein. It was, therefore, held to be error in *Hemme v. School Dist.* (1883) 30 Kan. 377, 1 Pac. 104, to instruct the jury that a well is not a necessary appendage to a schoolhouse, the question whether or not it is such an appendage being one for the jury in the particular case.

So, under a statute authorizing a school board to provide the necessary appendages for a schoolhouse, it may bind the district to pay for the drilling of a well in the school yard for the purpose of supplying drinking water, although no suitable water is found, and the well is on that account entirely useless. *Schofield v. School Dist.* (reported herewith) ante, 788.

A line fence to separate school premises from those adjoining was held a "necessary appendage" in *Craeger v. Wright School Dist.* (1886) 62 Mich. 101, 28 N. W. 794, under a statute authorizing the school director "to provide the necessary appendages for the schoolhouse," and keep the same in repair. The court said that the word "appendage," as used in school statutes, did not mean simply the school apparatus to be used inside the building, but should be construed in a broad sense to include fuel, fences, and necessary outhouses.

The term "appendage" in a statute authorizing a school board to provide the "necessary appendages" for a schoolhouse should be construed in a broad and comprehensive sense. *Hemme v. School Dist.* (Kan.) *supra*.

##### *b. Apparatus and furniture.*

The question as to what constituted "apparatus," which, under the Ohio statutes, a board of education was authorized to purchase in a limited amount in any one year, and what was "school furniture," which the board might purchase without such limitation, has arisen in several cases. The statutes authorized boards of education to make appropriations from the contingent fund, to a certain amount, for the purchase of books, other than schoolbooks, as they might deem suitable for the use of scholars and teachers, and for the purchase of phil-

osophical or other "apparatus" for the demonstration of such branches of education as might be taught in the schools; also to build, repair, and "furnish the necessary schoolhouses," and make all other necessary provisions for the schools.

It was held in *First Nat. Bank v. Board of Education* (1897) 15 Ohio C. C. 561, 8 Ohio C. D. 283, that "Yaggy geographical cabinets," consisting of maps on a spring roller, with a cylinder to protect them when not in use, were furnishings and not apparatus under the above statutes.

So, reading charts for use in schools were held in *State ex rel. Prosecuting Atty. v. Treasurer* (1887) 2 Ohio C. C. 363, 1 Ohio C. D. 532, to be articles which the board of education was authorized to "furnish," and not to be "apparatus."

But under these statutes, it was held in *State ex rel. Dunn v. Freed* (1895) 10 Ohio C. C. 294, 6 Ohio C. D. 550, that "Kenedy's mathematical blocks," for the demonstration of lessons in arithmetic, were apparatus, which the board of education could purchase only in a limited amount, and not articles which the board could "furnish" without statutory limitation of expenditure.

And the mechanism known as "Andrews's tellurian globes," consisting of globes so arranged as, when operated, to explain the movements of the earth and heavenly bodies with respect to each other, was held in *Board of Education v. Andrews* (1894) 51 Ohio St. 199, 37 N. E. 260, to be an apparatus, under the above statutes.

The term "furniture," as used in the statute authorizing school trustees to purchase furniture for a schoolhouse, was held in *McGee v. Franklin Pub. Co.* (1897) 15 Tex. Civ. App. 216, 39 S. W. 335, not to include a "normal series grammar chart." The court said that the term "furniture," as used in the statute, was evidently intended to embrace only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that might be used in instructing the scholars.

It was held in *Com. v. School Bd.* (1909) 109 Va. 346, 63 S. E. 1081, that a grant of power conferred by the state legislature on the state board of education, "to select" school furniture for the public schools of the state, was not taken away by implication by the enactment, two days later, of a statute empowering city school boards "to provide" school furniture, as the statutes might be so construed that effect could be given to both.

The purchase by a school director of new seats for a schoolhouse was held authorized in *McLaren v. Akron* (1882) 48 Mich. 189, 12 N. W. 43, by a resolution passed at the annual school meeting "to fit up the schoolhouse for the winter term."

It was held in *Rex v. Easton* [1913] 2 K. B. (Eng.) 60, 82 L. J. K. B. N. S. 618, 108 L. T. N. S. 471, 77 J. P. 177, 29 Times L. R. 200, 57 Sol. Jo. 225, 11 L. G. R. 279, that when persons other than a local educational authority provide a new school under statutory provision, the local educational authority has power to provide and pay for the furniture required to equip it as a public elementary school, by reason of the obligation imposed on it by statute to "maintain and keep efficient all public elementary schools within their area, which are necessary."

See also *Johnson School Twp. v. Citizens Bank* (Ind.) under II. *supra*, and *State, Chamberlain, Prosecutor, v. Board of Education*, (N. J.) under V. f, *infra*.

#### *c. Appliances.*

Charts were held to be appliances which a school board was authorized to purchase, in *Honaker v. Board of Education* (1896) 42 W. Va. 170, 32 L.R.A. 413, 57 Am. St. Rep. 847, 24 S. E. 544, under a statute authorizing the board of education of every district to purchase schoolhouses and grounds, and to provide such furniture, fixtures, and "appliances" for the schoolhouses as the comfort and convenience of the scholars require. The court stated, however, that "the appliance must be something like a blackboard, map, or dictionary, in that one or two may be enough for the use of the whole school, and can be used

by the teacher in giving instruction to the pupils. . . . But there are still other necessary restrictions. It must not be a school book in disguise. . . . They must not only be genuine appliances, but they must be shown to be suitable and reasonably necessary for the use of the public schools, for the board has no authority to buy any appliance which is not suitable and necessary; for example, an appliance or apparatus suitable to some branch of learning not required to be taught."

But the purchase of "reading circle books" by a township trustee, for use of the schools of the township, was held unauthorized in *First Nat. Bank v. Adams School Twp.* (1896) 17 Ind. App. 375, 46 N. E. 832, under a statute giving the trustees "charge of the educational affairs" of the township, empowering them to employ teachers, establish and locate schools, and provide suitable furniture and apparatus," and other articles and educational appliances necessary for the thorough organization and efficient management of said schools." This case was followed without discussion, on similar facts, in *Bannister v. Adams School Twp.* (1897) 17 Ind. App. 701, 46 N. E. 1154. See also *First Nat. Bank v. Osborne* (1897) 18 Ind. App. 442, 48 N. E. 256, where it was sought to hold the trustee liable for the purchase price of "reading circle books," purchased for the schools.

#### *d. Heating plants.*

It was held in *Scola v. Board of Education* (1908) 77 N. J. L. 73, 71 Atl. 299, that under the Public School Act of 1903 a board of education had the power to build a central heating plant, from which heat should be distributed through pipes to a group of schoolhouses, situated in the vicinity of, but not adjoining, the central plant.

And in the absence of a statute prohibiting a school district from incurring a debt in excess of the revenue or taxes for the current year, and of a statute authorizing the building of schoolhouses only out of funds provided for that purpose, it was held in *School Dist. v. Western Tube Co.* (1904) 13 Wyo. 304, 80 Pac. 155, that

a school district which was authorized by special legislative authority to construct a school building at a cost of \$25,000, and which had issued bonds to this amount, and spent the proceeds in the construction of the building, could incur an indebtedness for a heating plant for the building at an expense of \$2,650, it not appearing that this was an unreasonable or extravagant expenditure. The power to incur the indebtedness, it was said, was incident to the power to provide the heating apparatus.

See also *Oppenheimer v. Greencastle School Twp.* (Ind.) under II. *supra*.

#### *e. Musical instruments and music charts.*

The purchase by a board of trustees of a piano for use in a high school was held authorized in *Knabe v. Board of Education* (1887) 67 Mich. 262, 34 N. W. 568, under statutes authorizing the board of trustees to prescribe the course of study to be pursued, to classify and grade pupils and cause them to be taught in such schools or departments as they might deem expedient, and to audit and order the payment of all accounts of the director for incidental or other expenses incurred by him in the discharge of his duties.

And implied power on the part of school authorities to purchase musical instruments, such as an organ, was held to exist in *Bellmeyer v. Independent Dist.* (1876) 44 Iowa, 565, under statutes providing for examinations of teachers in certain branches of learning, as reading, writing, arithmetic, etc., and providing that each district township at its annual meeting should have power to determine what additional branches should be taught in the schools, and that the board of directors might use any unappropriated contingent fund in the treasury to purchase records, dictionaries, maps, charts, and apparatus for the use of the schools in their district.

So, the purchase by township trustees of music charts for use in the schools was held authorized in *Myers Pub. Co. v. White River School Twp.* (1901) 28 Ind. App. 91, 62 N. E. 66, under a statute giving trustees charge of the educational affairs of the town-



ship, and authorizing them to provide suitable apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of the schools, although music was not one of the branches required to be taught, where a statute authorized the school trustees to provide for the teaching of certain studies such as reading, writing, and arithmetic, and "such other branches of learning" as the advancement of the pupils might require and the trustees might from time to time direct, and this statute had been construed as authorizing the school trustees to provide for the teaching of music in the schools. See this case also under III. *supra*.

*f. School premises and playgrounds.*

The purchase of land by a board of education for playgrounds and athletic sports, one and one-half blocks from a schoolhouse site, and not contiguous thereto, was held authorized in *Reiger v. Board of Education* (1919) 287 Ill. 590, 122 N. E. 838, under a statute authorizing boards of education "to buy or lease sites for schoolhouses with the necessary grounds." The contention, which was overruled, was that the power conferred by the statute to acquire "necessary grounds" could only be exercised in connection with the purchase or lease of "sites for schoolhouses," and that the "necessary grounds" must be connected with and contiguous to such sites.

And under the Washington statutes, school districts may acquire land for athletic and playground purposes by purchase (*Sorenson v. Perkins* (1915) 72 Wash. 16, 129 Pac. 577); or by condemnation proceedings (*State ex rel. School Dist. v. Superior Ct.* (1912) 69 Wash. 189, 124 Pac. 484).

The grading and fencing of a school lot, the furnishing of a supply of drinking water, and the equipping of the schoolhouse with school furniture are all a legitimate part of the construction of a schoolhouse and the proper equipment of school property, and within a statute empowering a school district to issue bonds for the purpose of purchasing land and build-

ing a schoolhouse. *State, Chamberlain, Prosecutor, v. Board of Education* (1895) 57 N. J. L. 605, 31 Atl. 1033. On error, in (1896) 58 N. J. L. 347, 33 Atl. 923, the judgment was reversed, but was modified as to the above proposition only to the extent of holding that bonds could not be issued for ordinary movable furniture of a school which was not fixed to the building. The court of appeals took the position that the fencing, grading, and furnishing of water were a part of the construction of the schoolhouse, as was also "any furniture which may be constructed with, and permanently affixed to, the building, such as slates and blackboards built in the walls."

As to line fence for school premises as an "appendage," see *Creager v. Wright School Dist.* (Mich.) under V. a, *supra*.

A statute giving the school committee of a town, unless the town otherwise directs, general charge and superintendence of the schoolhouses therein, and providing that they shall keep such schoolhouses in good order and provide fuel and all other things necessary for the comfort of the pupils, gives the committee, unless the town otherwise directs, the right to occupy and care for the school grounds, so far as is reasonably necessary for the safe and convenient use of the building, and the health and comfort of the scholars. *Day v. Greenfield* (1919) — *Mass.* —, 124 N. E. 481; *McKenna v. Kimball* (1888) 145 *Mass.* 555, 14 N. E. 789 (school committee may order the cutting of a tree on the schoolhouse lot).

*g. Wells.*

That school boards may cause the drilling of wells on school premises under statutory authority to provide the necessary appendages for a schoolhouse, see *Hemme v. School Dist.* (Kan.) under V. a, *supra*, and *Schofield v. School Dist.* (reported herewith) ante, 788. See also *State, Chamberlain, Prosecutor, v. Board of Education* (N. J.) under V. f, *supra*.

It is held in *Neubauer v. Union Twp.* (1898) 8 Ohio S. & C. P. Dec. 349, that a school board may authorize the local school director to make a con-

tract for the sinking of a well, and that a contract entered into for this purpose with the director is binding on the board.

#### *A. Miscellaneous.*

The expenditure of money by the directors of an independent school district to secure the establishment of a public highway by the schoolhouse, there being no highway located by it, was held authorized in *Independent Dist. v. Kelley* (1881) 55 Iowa, 568, 8 N. W. 426, and *McShane v. Independent Dist.* (1888) 76 Iowa, 383, 41 N. W. 83.

And the power of an independent school district to incur expenditure for the purpose of opening a highway to the school is not limited to cases where the schoolhouse is not on a highway, nor to cases where a private right to pupils to pass is refused, under a statute authorizing the school board to obtain such highway as it deemed necessary, after a vote of the electors. *Bogaard v. Independent Dist.* (1895) 93 Iowa, 269, 61 N. W. 859.

It was held in *Thompson v. Lamar County Agri. High School* (1918) 117 Miss. 621, 78 So. 547, that trustees of an agricultural high school had no power to contract an indebtedness for boarding students, under a statute providing that the trustees should have control of the property, elect and fix salaries of teachers, and "shall have full power to do all things necessary for the successful operation" of the school. The boarding of pupils, it was said, was not a public purpose, nor one for which the funds of the institution could be used.

A contract imposing on a school trustee the duty of providing suitable and convenient privies for the school does not preclude him from consulting the taxpayers of the school district, and accepting their decision in respect to the location of a privy and the material out of which it should be built, so as to render void a con-

tract entered into for the building of a privy pursuant to the decision at the school meeting. *Rauscher v. Cronk* (1888) 21 N. Y. S. R. 529, 3 N. Y. Supp. 470.

The court was of the opinion in *Buncombe County v. Malone* (1919) — N. C. —, 101 S. E. 552, that power conferred on municipal authorities "to raise the means and erect a new building for school purposes included the right to procure and pay for the ordinary school equipment. This conclusion was not, however, indispensable to the result reached in the case.

The creation of a department of supplies in a municipality, with the power to purchase "all articles of personal property required in the conduct of the business of the city," was held in *Board of Public Education v. Ransley* (1904) 209 Pa. 51, 58 Atl. 122, not to affect the power of the board of education to order school supplies. To the same effect is *Board of Education v. Shoyer* (1903) 18 Pa. Dist. R. 170.

A school board has no power to purchase pencils, copybooks, and other writing material for free distribution and use by the pupils under statutory authority to build, repair, and furnish schoolhouses, purchase sites therefor, "and make all other provisions necessary for the convenience and prosperity of the schools," and to determine the amount of money necessary to be levied for the purchase of sites, the erection and furnishing of schoolhouses, "and for other school expenses." *Parker v. Board of Education* (1884) 12 Ohio L. J. 186.

And a statute providing that each board of education shall establish a sufficient number of schools "to provide for the free education of the youth of school age within its district" does not authorize the board to purchase books and writing materials for free distribution and use by the pupils, in order to comply with the requirement for "free education." *Ibid.*  
R. E. H.

JOHN LOCHORE and Wife, Appts.,  
v.

CITY OF SEATTLE, Respt.

*Washington Supreme Court (In Banc) — September 11, 1917.*

(98 Wash. 265, 167 Pac. 918.)

**Highway — original grade — nonabutting property — injury — liability.**

There is no exemption from liability for injury to nonabutting property by bringing a highway to an original grade, which is due to negligence in the performance of the work.

[See note on this question beginning on page 806.]

(Ellis, Ch. J., and Main, J., dissent.)

APPEAL by plaintiffs from a judgment of the Superior Court for King County (Ralston, J.) in favor of defendant in an action brought to recover damages for injury to plaintiffs' property alleged to have been caused by defendant's negligence in the original grading of a street. *Reversed.* The facts are stated in the opinion of the court.

Messrs. Saunders & Nelson, for appellants:

Defendant is not exempt from liability for the injury to plaintiffs' property.

Schuss v. Chehalis, 82 Wash. 595, 144 Pac. 916; Millan v. Chariton, 145 Iowa, 648, 124 N. W. 766; Kneebbs v. Sioux City, 156 Iowa, 607, 137 N. W. 944; Northern P. R. Co. v. Douglas County, 145 Wis. 288, 130 N. W. 246; Holt v. Somerville, 127 Mass. 408; I Lewis, Em. Dom. p. 230; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; Damkoehler v. Milwaukee, 124 Wis. 144, 101 N. W. 706, 17 Am. Neg. Rep. 745.

Messrs. Hugh M. Caldwell and James A. Dougan, for respondent:

Consequential damages suffered by reason of an original grade are not the subject of recovery.

Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428; Schuss v. Chehalis, 82 Wash. 595, 144 Pac. 916; Best v. Chehalis, 82 Wash. 601, 144 Pac. 918; Spokane v. Ladies Benev. Soc. 83 Wash. 382, 145 Pac. 443, Ann. Cas. 1916E, 367; Hollenbeck v. Seattle, 88 Wash. 322, 153 Pac. 18; Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859; Stern v. Spokane, 73 Wash. 118, 46 L.R.A.(N.S.) 620, 131 Pac. 476; Cass v. Dicks, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; Noyes v. Cosselman, 29 Wash. 835, 92 Am. St. Rep. 937, 70 Pac. 61;

Miller v. Eastern R. & Lumber Co. 84 Wash. 31, 146 Pac. 171; Adams v. Oklahoma City, 20 Okla. 519, 95 Pac. 975; Mangum v. Todd, 42 Okla. 343, L.R.A.1915A, 882, 141 Pac. 266; Leiper v. Denver, 36 Colo. 110, 7 L.R.A.(N.S.) 108, 118 Am. St. Rep. 101, 85 Pac. 849, 10 Ann. Cas. 847; Gernert v. Louisville, 155 Ky. 589, 51 L.R.A.(N.S.) 363, 159 S. W. 1163; Erlanger v. Cody, 158 Ky. 625, 166 S. W. 202; Red v. Little Rock R. & Electric Co. 121 Ark. 71, 180 S. W. 220; Butler v. Kokomo, 62 Ind. App. 519, 113 N. E. 391; Walters v. Marshalltown, 145 Iowa, 457, 26 L.R.A.(N.S.) 199, 120 N. W. 1046; McCabe v. New York, 213 N. Y. 468, 107 N. E. 1049; Dorsey v. Henderson, 148 N. C. 423, 62 S. E. 547; Hoyle v. Hickory, 164 N. C. 79, 80 S. E. 254; Smith v. Washington, 20 How. 135, 15 L. ed. 858; Northern Transp. Co. v. Chicago, 99 U. S. 639, 25 L. ed. 337.

Morris, J., delivered the opinion of the court:

Appeal from a judgment entered upon the sustaining of a challenge to the sufficiency of the testimony in an action brought to recover damages for injuries claimed to have been sustained in the original grading of a street. The pertinent facts may be briefly stated as follows: Appellants are the owners of three lots abutting upon the west side of

Arrowsmith avenue, Seattle. Arrowsmith avenue is parallel to and one block west of Rainier boulevard, and on a hillside above the boulevard. In January, 1914, the city graded and improved Rainier boulevard according to certain plans and specifications which it had adopted and which required a deep cut in that portion of the boulevard east of and opposite to plaintiffs' lots. The soil stratification along Rainier boulevard at the point of the cut is blue clay overlaid by a foot or two of vegetable mold. Soon after the cut was made and this clay bank exposed it began to disintegrate and slough off gradually, continuing until it involved all of the block between Rainier boulevard and Arrowsmith avenue, and then extended across Arrowsmith avenue until it seriously involved appellants' property. The extent of this slide is not material, as the only question involved is whether or not appellants can recover.

The second amended complaint upon which the case was tried alleged that the grade to which Rainier boulevard was cut was unreasonable and unnecessary; that the work was done in a careless manner and under defective plans; that the city knew at the time of the grading that the result would be injurious to plaintiffs' property, and that no provision was made for taking care of the exposed clay bank, or to protect it from the natural effect of the surface water, or in providing necessary drainage for such water, or for furnishing lateral support to the property lying to the west of the boulevard. As before stated, there is no question of the sufficiency of the evidence as to the character or extent of the injury suffered by appellants; the only question here involved being whether or not the case falls within what is known as the original-grade doctrine. In support of the allegation of negligence appellants' testimony was to the effect that the stability of a clay bank such as was left exposed in the cut depends upon the

amount of the water to which the bank is exposed; that the nature of the clay soil in that region is such that it absorbs water very readily, and that the effect of such absorption or of permitting surface water to come in contact with the clay bank is to immediately start disintegration, causing a sliding of the exposed bank; that in turn the new bank becomes saturated and a like effect occurs until, as the engineer testifying for appellants puts it, "you reach another line or suitable equilibrium." As further explanatory of the situation we quote from the testimony of the engineer: "When that cut was made in the clay, the bank of clay was exposed and that immediately started the traveling action, because the clay on the surface that was exposed, when the sun hit it, cracked, just as you have seen cracks in clay in many places. The next rainy season came along and these cracks filled with water, and those little masses of clay sprawled off until they fell at the foot of the slope, and as the next layer would break, it would go through the same process, until it has worked back up to and beyond Lochore's property at the present time. . . . If you can conceive of a tier of blocks standing one after the other, each one supported by the block below, if you take out the block below, that would permit the next one to fall, and when that fell, it would permit the next and so on until you reached the top of the slope; . . . as the support from the clay is undermined and allowed to flow out, that brings down the next mass above it on the uphill side."

The lower court, in making the ruling complained of, was of the opinion that when it appeared that this was an original grade the case was controlled by *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916, and *Best v. Chehalis*, 82 Wash. 601, 144 Pac. 918, and other like cases therein cited in which we have held that a city is not liable to abutting property owners for the removal of

lateral support in making an original grade of a dedicated street where the grading is done wholly within the limits of the street. This rule has become the settled law of this state. Without referring to the cases it may be said the reason for the rule is found in variant expressions of the controlling principle that the right to make an original grade is implied in the grant of dedication, and that the abutting property owner holds subject to this right whenever the city may see fit to exercise it. In so far as our cases hold to this rule it will be noted that in each case damages were sought because of the removal of lateral support or the doing of some other act wholly within the limits of the street without evidence of negligence in the prosecution of the work. This appears in all the cases from the first announcement of the rule in *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843, down to the *Schuss and Best Cases*. In the last two cases, notwithstanding allegations in the complaint to the contrary, it was expressly found that there was no evidence of any negligent act on the part of the city. Stated otherwise, we have held that in such cases the city was performing a legal act in a proper manner, and that damages flowing from such act would fall within the rule of *damnum absque injuria*. This case presents a different phase. The complaint alleged, and we have quoted sufficient of the testimony to indicate that there was proof from which the jury might find, that the city was negligent in leaving this clay bank exposed and unprotected, knowing or being charged with knowledge of the natural result of the disintegration of the bank and the consequent sliding of the soil behind it and to which it acted as a support. Save for the original-grade feature this case is analogous to *Johanson v. Seattle*, 80 Wash. 527, 141 Pac. 1032, where like injury occurred from like cause save that in the *Johanson Case*, following *Farnandis v. Great Northern R. Co.*

41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18, we held that if the damage was the proximate result of the regrade it was immaterial whether or not it was the result of negligence in the doing of the work, but that the liability was founded upon the constitutional inhibition against damaging private property for public use without just compensation. The lateral support rule announced in these two cases as not dependent upon negligence, but as founded upon the constitutional provision requiring compensation for private property damaged by public use, was first announced in *Parke v. Seattle*, 5 Wash. 1, 20 L.R.A. 68, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, where, prior to the adoption of the Constitution, it was held that a municipality was liable for negligence in depriving an abutting owner of his lateral support in regrading its streets. This case was followed by *Brown v. Seattle*, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214, where it was held that the dedication of a street to public use does not authorize a municipality to raise or lower the surface of a street to any extent it may deem proper without, under the constitutional provision, subjecting itself to damages for injury to an abutting owner. Next came *Smith v. Seattle*, 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057, where a right of action was recognized in a property owner whose lot was from 130 to 175 feet distant from the street to recover damages for the negligent removal of his lateral support in regrading a street. Another late case is *Jorguson v. Seattle*, 80 Wash. 126, 141 Pac. 334, where it was sought to recover damages caused by the sliding of the soil of the lots upon one street, growing out of the regrading of another. The action was defeated because of the failure of the property owner to show any damages sustained within thirty days prior to the filing of his claim and up to the date of trial. In speaking of the constitutional inhi-

bition against the taking of private property for public use without just compensation, it was said: "The above-mentioned provision of the Constitution was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of a public work. It was never intended to apply to damages resulting to private property from the negligent or wrongful use of public property. As to such damages, tortious in their very inception, the injured person is remitted to his remedy on the case, as in other cases of tortious taking or injury. For example: Suppose, in the prosecution of an improvement, the city unnecessarily and negligently temporarily obstructs the ingress, or egress, or the access of light and air to private property neither taken nor in any manner required in the prosecution of the work. It is obvious that this would be an invasion of a property right, but not a taking or damaging within the meaning of the constitutional limitation upon the power of eminent domain. It would be a tort, pure and simple, for which an action for damages would lie independently of the constitutional limitation. Again, suppose the city, in improving a street or a city park, set off a blast which cast stones upon private property, littering the lawn or injuring the buildings. This would be also a simple tort, and nothing else, for which an action would lie and be protected by the due process clause of the Constitution, even were § 16 of article 1 eliminated from that instrument. Of course, in the broad sense, the Constitution, by the due process clause, protects every property right from tortious invasion, but that clause must not be confounded with the clause above mentioned, which is intended only as a limitation upon the otherwise unlimited sovereign power of eminent domain, not as extending an additional guaranty as against negligence or tortious wrongs or ordinary breaches of contract by municipal corporations."

It may be said that much of the above is dicta. It is quoted, however, as illustrative of the doctrine that a city is liable for its negligence or tort in prosecuting public work, and that it cannot protect itself from negligence by a plea that the damages were caused in the exercise of its sovereign capacity. In *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859, one of the cases holding to the rule of nonliability in original grades, there was a charge of negligence in the collection of surface water upon the abutting lots. This claim is disposed of by holding that the city is not liable in damages for injuries to private property by the collection of surface water, as it is an injury resulting from the proper exercise of a legal power. In considering this question of negligence, however, it was said: "There remains to be considered the question of negligence. It must be conceded that a municipal corporation, like an individual, is liable for injuries resulting from the negligent exercise of legitimate powers."

The opinion then proceeds to state that there was no evidence that the city in that case did not furnish adequate drainage for the district, or evidence tending to show there was any improper or negligent construction. The case of *Hinckley v. Seattle*, 74 Wash. 101, 46 L.R.A. (N.S.) 727, 132 Pac. 855, Ann. Cas. 1915A, 580, presents somewhat apposite principles as to the determinative rule, though the case differs from the *Johanson Case* and the case at bar in that an injury was caused to a property owner a block down the hillside by the sliding of the earth upon his lot, due to the sinking of the street above pushing the lot abutting upon the street down upon his property. In the *Jorguson*, *Johanson*, and *Hinckley Cases* the damages grew out of the regrading of the streets, but in none of those cases is it held that this fact in any wise determines or controls the right of action. In the *Schuss Case*, the *Jorguson* and *Johanson Cases* are referred to as regrade cases, but it

was not intended, we take it, by this observation to mean that no element of damages recoverable in a regrade case would be recoverable in an original-grade case. The intent of such observation is made clear in the succeeding sentence, where it was said: "There being no evidence of an encroachment upon the respondent's property or of negligence in the prosecution of the work, the city is immune from liability,"—thus leaving undetermined whether or not a city would be exempt from liability in an original-grade case where there was evidence of an encroachment or of negligence in the doing of the work. Summing up these and various other cases from our own state it is apparent that this court has sought to distinguish between cases where the invasion of a property right was a taking or damaging within the meaning of the constitutional limitation upon the power of eminent domain, irrespective of negligence, and cases of injury to private property in the wrongful use or negligent improvement of public property. In the one case the remedy arises out of the constitutional limitation; in the other it exists irrespective of that limitation. Dillon in his *Municipal Corporations*, vol. 2, § 987, in his opening statement of the rule of nonliability for consequential damages when a municipality, in grading its streets, is acting within its powers and jurisdiction, confines the rule to cases where there has been "no want of reasonable care or want of reasonable skill in the exercise of the power." Cooley, J., in *Pontiac v. Carter*, 32 Mich. 164, in holding that a city was not liable to abutting property owners for damages in grading streets, irrespective of whether damages are consequential to an original or regrade, concludes his opinion by asserting that while the city is exempt from all damages resulting from the doing in a proper manner of that which it has a right to do, it is not exempt from damages caused by negligence or trespass. In the

note to *Hickman v. Kansas City*, 23 L.R.A. 658, the annotator, in citing the rule that damages arising from the first grade or improvement of city streets are not recoverable by abutting owners, says such rule only applies in the absence of negligence, citing, among other cases which sustain the exception, *Wallace v. Muscatine*, 4 G. Greene, 373, 61 Am. Dec. 131; *Gardner v. Scranton*, 11 Pa. Co. Ct. 574; *Broadwell v. Kansas*, 75 Mo. 213, 42 Am. Rep. 406; *Ellis v. Iowa City*, 29 Iowa, 229. See also *Stein v. La Fayette*, 6 Ind. App. 414, 33 N. E. 912; *Kemp v. Des Moines*, 125 Iowa, 640, 101 N. W. 474; *Damkoehler v. Milwaukee*, 124 Wis. 144, 101 N. W. 706, 17 Am. Neg. Rep. 745.

Our conclusion is that a city is liable in the original construction and grading of its streets where there is sufficient proof that injury is suffered from any negligent act of the city in the performance of the work.

Highway—  
original grade—  
nonabutting  
property—  
injury—liability.

The judgment is reversed, and the cause remanded for new trial.

Holcomb, Mount, Fullerton, Parker, and Webster, JJ., concur.

Chadwick, J., concurring:

I concur in the result, but I believe the cases discussed by the court have no application to the facts of this case as revealed by the testimony. With the exception of the *Hinckley Case*, 74 Wash. 101, 46 L.R.A.(N.S.) 727, 132 Pac. 855, Ann. Cas. 1915A, 580, they are cases where damages had resulted to abutting lots. The appellants in this case do not come within the law defining the rights of an abutting owner, nor is the city privileged to claim the benefit of establishing an original grade. The rights and liabilities of appellants as "abutting owners" and of the city were all absorbed in the grading and improvement of Arrowsmith avenue, the street abutting their property.

The damages in this case are recoverable under the general rules of

law just as appellants would have been entitled to recover if the city had operated a quarry 300 feet away and had negligently blasted débris upon their property. The grading which ultimately resulted in damage to appellants' property was done on a street 300 feet away. By gradual waste and recession, or "traveling" as suggested by one witness, the slide finally invaded and undermined appellants' lots. The testimony shows that the character of the property was such that the city knew, or ought to have known, that its plan was defective in that it did not provide any method or means of counteracting the natural gravitation of the peculiar clay strata through which the cut was made. It is for this reason, and not because appellants are to be treated as abutting owners who have suffered from the negligent construction of the street, that I concur in the judgment of the court.

**Main, J., dissenting:**

I am unable to distinguish this case from the case of *Schuss v. Chelalis*, 82 Wash. 595, 144 Pac. 916, and the earlier holdings of this court there cited and reviewed. In the *Schuss Case* damages were sought against the city for the original grade of a street by which the lateral support from the plaintiffs' lots was removed. As the opinion states: "The formation of the lots is soapstone or shale rock, overlaid with gumbo and black soil."

In grading the street, the city made a vertical cut of about 6½ feet at or near the line of the plaintiffs' lots, but wholly within the limits of the street. There was no evidence that the city encroached upon plaintiffs' property or that it was negligent in carrying on the work, "other than the admitted fact that it removed the lateral support in the manner stated." It was there held

that, "there being no evidence of an encroachment upon the respondents' [plaintiffs'] property or of negligence in the prosecution of the work, the city is immune from liability."

In the present case, "the soil stratification along Rainier boulevard at the point of the cut is blue clay overlaid by a foot or two of vegetable mold."

The cut there referred to was made wholly within the limits of the street, as in the *Schuss Case*, and there is no evidence of negligence in the prosecution of the work by the city. The majority opinion, if I understand it correctly, attempts to make negligence of the prosecution of the work on the original grade of a street and the removal of lateral support dependent upon the character of the soil of the adjacent property. In other words, if the soil is of such character that, when the cut is exposed to the elements, it is reasonably probable that a slide will occur, then the city is negligent in the prosecution of the work. On the other hand, if the soil of the adjacent property is not such that there is a reasonable probability that it will slide when the cut is exposed to the elements, then there is not negligence in the prosecution of the work. This distinction is not recognized in the *Schuss Case*, which, it seems to me, is parallel upon the facts, nor in any of the earlier holdings. If the *Schuss Case* and the cases upon which it is based do not correctly state the law, they should be modified or overruled. To make a distinction where no substantial distinction exists tends to make the law confusing and uncertain.

For the reasons stated, I dissent.

EWIS, Ch. J., concurs with Main, J.

Petition for rehearing denied.



## ANNOTATION.

### Liability of municipality for injury to lateral support in grading street.

- I. Introductory, 806.
- II. Rule that municipality is liable, 806.
- III. Rule that municipality is not liable, 807.
- IV. Effect of negligence, 809.

#### *I. Introductory.*

The liability of a municipality for injury to lateral support in grading a street has been variously treated by the courts. By some, injury to lateral support is regarded merely as an element of damages, such as interference with access by changing grade. In this view the liability is dependent upon the view adopted upon the general question of liability of a municipality for changing the grade of a street. By other courts injury to lateral support by changing the grade of a street is not regarded as a mere element of damages, but is, as in the case of adjoining private owners, treated as a substantive cause of action. In the latter view, the liability extends only to the land in its natural condition, and not as burdened with buildings. This rule, which applies as between individuals as to the right to lateral support, has been stated to be applicable to cases in which a municipality is a party. *Talcott Bros. v. Des Moines* (1906) 134 Iowa, 113, 12 L.R.A.(N.S.) 696, 120 Am. St. Rep. 419, 109 N. W. 311. But see holding in this case *infra*. And see cases cited in subd. II.

It seems clear that if the municipality is negligent in removing lateral support it is liable therefor, and this is the theory of the cases that have passed on this question, as appears from subd. IV. *infra*.

#### *II. Rule that municipality is liable.*

It is the view of a number of cases that a municipality which has interfered with the lateral support of an abutting owner in grading a street is liable therefor. *Hartshorn v. Worcester County* (1873) 113 Mass. 111; *Dyer v. St. Paul* (1881) 27 Minn. 457, 8 N. W. 272; *Nichols v. Duluth* (1889)

40 Minn. 389, 12 Am. St. Rep. 743, 32 N. W. 84; *Stearns v. Richmond* (1892) 88 Va. 992, 29 Am. St. Rep. 758, 14 S. E. 847; *Parke v. Seattle* (1892) 5 Wash. 1, 20 L.R.A. 68, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, approved in *Brown v. Seattle* (1892) 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214, and *Smith v. Seattle* (1898) 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057. But see subsequent Washington cases which limit the liability to change from established grade to another. *Damkoehler v. Milwaukee* (1905) 124 Wis. 144, 101 N. W. 706, 17 Am. Neg. Rep. 745.

It was not denied in *Schroeder v. Joliet* (1901) 189 Ill. 48, 52 L.R.A. 634, 59 N. E. 550, that a municipality which cut down a street and removed the lateral support from abutting property was liable therefor. The only question raised in that case was as to the measure of damages.

See *Henderson v. McClain* (1897) 102 Ky. 402, 39 L.R.A. 349, 43 S. W. 700, *infra*, III.

Liability has been limited in some cases to injury to lateral support in making a change of grade as distinguished from an original grade. *Cassassa v. Seattle* (1911) 66 Wash. 146, 119 Pac. 13, same case on second appeal in (1913) 75 Wash. 367, 134 Pac. 1080. The municipality, intending to cut down the grade of the street, condemned land on either side of the street for the purpose of making a slope which was thought sufficient to prevent sliding. The slope was insufficient, and the municipality was held liable for the removal of lateral support to the remaining parts of the lots.

That there is a liability for the removal of lateral support in changing grades is the theory upon which *Farnandis v. Seattle* (1917) 95 Wash. 587, 164 Pac. 225, proceeds.

The removal of lateral support of the soil of premises bordering on the limits of a highway in making highway improvements, to the extent of

causing a part of the land to subside and fall, so as to injure the premises so affected, has been held an actual appropriation of the soil to the extent of such injury, and amounts to a taking of it for public purposes. *Damkoehler v. Milwaukee* (1905) (Wis.) *supra*.

The cost of a retaining wall, made necessary upon the lowering of the grade of a street, was held to be a proper element of damages in *Hill v. Oakmont* (1911) 47 Pa. Super. Ct. 261.

The fact that a retaining wall was necessary to protect property abutting upon a street which had been cut down by the municipality was one of the elements of damages considered in *Richardson v. Webster City* (1900) 111 Iowa, 427, 82 N. W. 920, but nothing is said upon the question of lateral support. It seems to have been conceded that the city acted without any ordinance authorizing it. See *Talcott Bros. v. Des Moines* (1906) 134 Iowa, 113, 12 L.R.A. (N.S.) 696, 120 Am. St. Rep. 419, 109 N. W. 311, *infra*, III.

The cost of erecting a retaining wall along the front of property to supply lateral support thereto which was removed in grading a street cannot be assessed upon the property, since the municipality may not divest the landowner of what he is entitled to enjoy as a natural right, and then tax upon him the cost of replacing what has thus been taken away. *Armstrong v. St. Paul* (1883) 30 Minn. 299, 15 N. W. 174.

In some cases in which the city is stated to be negligent, the only negligence consisted in doing the work under conditions which made it apparent that a slide would result. In *Parke v. Seattle* (1882) 5 Wash. 1, 20 L.R.A. 68, 34 Am. St. Rep. 839, 31 Pac. 310, 32 Pac. 82, it is held that knowledge by the city of the character of soil and of its certainty to cave so as to materially injure the beneficial use of abutting land makes it negligence for the city to go on with the work without providing means to resist the threatened calamity. See the reported case (*LOCHORE v. SEATTLE*, ante, 800).

An action by an abutting landowner against the city for removal of lateral

support is not necessarily based upon negligence. *Johanson v. Seattle* (1914) 80 Wash. 527, 141 Pac. 1032.

Some cases, in applying the rule as to liability for removal of lateral support as it exists between individuals, hold that there is no liability for damages to buildings on abutting property from the removal of lateral support, where the work is done with due care. *Quincy v. Jones* (1875) 76 Ill. 231, 20 Am. Rep. 243. That the right to lateral support does not extend to cases in which there are buildings increasing the downward and lateral pressure is recognized in *Stearns v. Richmond* (1892) 88 Va. 992, 29 Am. St. Rep. 758, 14 S. E. 847, but it is there held that when "land upon which there are buildings slides or subsides by reason of such digging, and the buildings are in consequence damaged also, and their weight in no way contributed to the result, then the damage done to the buildings may be taken into consideration in estimating the damages."

Abutting landowners cannot, by the erection of buildings, acquire a prescriptive right to lateral support as against a municipality. *Mitchell v. Rome* (1873) 49 Ga. 19, 15 Am. Rep. 669; *Quincy v. Jones* (1875) 76 Ill. 231, 20 Am. Rep. 243.

### *III. Rule that municipality is not liable.*

According to other cases there is no liability for removal of lateral support in grading a street. These decisions are based upon different theories.

The view is taken in some cases that where the legislature has granted authority to municipalities to grade streets without providing for the payment of consequential damages, a municipality which is acting regularly in grading a street is not liable for the damages to an abutting owner which result from digging away a bank in the side of the street which is a natural support of the abutting owner's land, a portion of which, as a result thereof, falls into the street. *Radcliff v. Brooklyn* (1850) 4 N. Y. 195, 53 Am. Dec. 357; *Cheever v. Shedd* (1876) 13 Blatchf. 253, Fed. Cas. No. 2,634.

In New York, an abutting owner is

entitled to lateral support, or compensation for its destruction, as against a municipality which is constructing a subway. *Re Rapid Transit R. Comrs.* (1909) 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366. Citing this case as authority, the court in the subsequent case of *Lincoln Safe Deposit Co. v. New York* (1913) 210 N. Y. 34, L.R.A.1915F, 1009, 103 N. E. 768, states that an abutting owner has the right to lateral support "except as to excavations made for street purposes." This rule was applied in *Susswein v. Bradley Contracting Co.* (1918) 184 App. Div. 852, 172 N. Y. Supp. 652, where the lateral support of an abutting owner was injured in the construction of a subway. The court in the *Susswein* Case states the rule very broadly, saying that "it is now . . . the established law of this state that, regardless of who owns the fee of a public street, an abutting owner thereon has an easement for lateral support of which he cannot be deprived without just compensation, and that when the fee is acquired for public street purposes it is held by the municipality not in absolute ownership, but in trust for the use of the people of the state, and subject to such easements for lateral support as well as to easements of light, air, and access, and that such damages cannot be considered and an award made therefor in the ordinary proceeding for acquiring the land for public street purposes."

In *New York Steam Co. v. Foundation Co.* (1909) 195 N. Y. 43, 21 L.R.A. (N.S.) 470, 87 N. E. 765, an action by a steam heating company for injuries to one of its steam pipe lines by a contractor in constructing a vault in the street in which the pipe line was located, it is stated that the rights of the parties are not controlled by the common-law doctrine of lateral support; that that doctrine is limited to adjacent lands under private ownership, except that while it requires the adjacent landowner to preserve the lateral support to a public highway, it does not require the municipality owning the highway to preserve the lateral support to the adjacent land.

In Iowa, a municipality takes title in fee to the streets by authority of statute, and it is held that title thus secured by a municipal corporation to a strip of land for street purposes includes the right to bring it to grade, and therefore, injury done to abutting property by so doing in removing the lateral support is not a taking entitling the owner to further compensation, even though it results in the slipping of the abutting property into the street. *Talcott Bros. v. Des Moines* (1906) 134 Iowa, 113, 12 L.R.A. (N.S.) 696, 120 Am. St. Rep. 419, 109 N. W. 311. On this theory, in *Austin v. Detroit, Y. & A. A. R. Co.* (1903) 134 Mich. 149, 96 N. W. 35, 2 Ann. Cas. 530, an abutting landowner was held not entitled to recover for the lowering of the grade of the highway by a railroad company so as to subject his fence and land to the danger of sliding into the highway.

In *Taylor v. St. Louis* (1851) 14 Mo. 20, 55 Am. Dec. 89, where the court refused to allow damages to an abutting owner for removal of lateral support in grading an alley, the court, after stating that the alley was laid out by the plaintiffs themselves, continues that the probability "of its being graded when the public interest required it must have been calculated on when the buildings were erected. To grade a street or alley already dedicated to public use is not an exercise of the eminent domain so as to require compensation. It is not appropriating private property to public use, but simply an exercise of power over what is already public property. The damage resulting by causing the plaintiffs to rebuild or prop up their falling walls is consequential, and as it is a consequence of the exercise of a power granted by the state to municipal corporations for public purposes, and the power has not been abused, but skilfully and discreetly exercised, the city authorities are not responsible."

In *Buskirk v. Strickland* (1882) 47 Mich. 389, 11 N. W. 210, street commissioners of a municipality who entered upon a street which had been dedicated as a public street, but

which, so far as appears, had not been accepted by the municipality, not for the purpose of opening the land as a street, but for the purpose of procuring gravel for use in other parts of the village, were held liable for injury to lateral support of adjoining property.

Some cases, in denying liability for removal of lateral support in grading a street, confine the rule to an original grade. *Schuss v. Chehalis* (1914) 82 Wash. 595, 144 Pac. 916; *Best v. Chehalis* (1914) 82 Wash. 601, 144 Pac. 918; *Hollenbeck v. Seattle* (1915) 88 Wash. 322, 153 Pac. 418. In *Schuss v. Chehalis* (Wash.) *supra*, it is stated to have "become the settled law in this state that there can be no recovery for the removal of lateral support by a city in making an original grade, where the grading is done wholly within the limits of the street, in the absence of evidence tending to show that the city was negligent in the prosecution of the work. This rule is grounded upon the principle that, in dedicating a street, the dedicator impliedly grants the right to grade it so as to make it usable and so as to make the surrounding property accessible." It was alleged in this case that the municipality was negligent, but there was no evidence that it was negligent in carrying on the work, other than the admitted fact that it removed the lateral support from the premises in question. The decision in *Marks v. Seattle* (1915) 88 Wash. 61, 152 Pac. 706, proceeds upon the theory that there is a liability for removal of lateral support in changing the grade of a street, but that decision is taken up largely with other questions. Compare with the reported case (*LOCHORE v. SEATTLE*, ante, 800). The *LOCHORE CASE* was followed in *Allbin v. Seattle* (1917) 98 Wash. 275, 167 Pac. 922, where the lot for the injury to which damages were sought to be recovered abutted upon the street that was being graded, and was not separated by intervening land, as was the fact in the reported case.

As stated by Main, J., dissenting, it is difficult to distinguish *LOCHORE v. SEATTLE*, ante, 800, from the case

of *Schuss v. Chehalis* (1914) 82 Wash. 595, 144 Pac. 916. It is clear that the majority opinion in the reported case (*LOCHORE v. SEATTLE*) is based upon negligence of the municipality in doing the work; but as to what that negligence consisted of is not clear beyond the fact that the bank was left exposed and unprotected.

So far as removal of lateral support is regarded merely as an element of damages, from a change of street grade, it is apparent that cases which pass upon the general question of liability for a change of grade have a direct bearing upon the question herein annotated. The present note, however, has been confined to cases dealing expressly with the removal of lateral support. Of interest in this connection is the case of *Henderson v. McClain* (1897) 102 Ky. 402, 39 L.R.A. 349, 43 S. W. 700, where a municipality which, in grading a street, excavated in front of and adjoining a lot to such an extent as to ruin the fence and inclosure, wholly destroying the access to and use of the street, and leaving the surface of the lot from 8 to 10 feet above the street and sidewalk, so that to protect the lot from constant caving which would finally destroy a house situated thereon a wall was necessary along the whole front, was held liable in damages under a Constitution requiring compensation for property taken, injured, or destroyed. There is no discussion, however, of the interference with the lateral support.

#### IV. *Effect of negligence.*

If the city has been negligent in grading the street, it is liable for injury to lateral support. In *Keating v. Cincinnati* (1882) 38 Ohio St. 141, 43 Am. Rep. 421, a municipality which cut down the grade of a street so that the plaintiff's lot, which was separated from the street by an intervening lot, was injured by the slipping of the earth, caused by the removal of the lateral support, was held liable. It was claimed on behalf of the municipality that, as the plaintiff's lot did not abut on the street improved, and as the damages resulted from the

removal of the lateral support to the abutting property, the city was not liable. In answer to this contention the court states that "the fact that the property of others intervened between the lot of the plaintiff and the avenue can make no difference. The liability would be the same whether the several parcels were owned by one or by different owners. The liability of the city did not depend upon the character of the ownership of the damaged property, but upon the extent to which its wrongful act was the cause of the damages. In regard to the buildings and improvements, it may be said that there is nothing in their character or in the circumstances to indicate that the slide in the lands would not have occurred as it did if they had not been there. The additional weight which they imposed cannot reasonably be supposed to have contributed materially to the giving away of the soil." The petition in this case charged that the municipality illegally and wrongfully caused the grade to be cut down, and the court states that the evidence in the case would have warranted the jury in finding that the city failed to exercise care and skill in making the grade in question. This case was followed in *Columbus v. Jaeger* (1896) 55 Ohio St. 644, 48 N. E. 1011.

See the reported case (*LOCHORE v. SEATTLE*, ante, 800). As stated above, it is not clear what the negligence of the municipality consisted of in the reported case. If there is no

liability for removal of lateral support in grading a street, it is difficult to see how the mere removal of such support can constitute negligence which does render the municipality liable.

In *Meares v. Wilmington* (1848) 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412, where the municipality did not use ordinary skill and caution in doing the work, it was held liable for cutting down the grade of a street to the depth of 4 or 5 feet, by which the earth of an abutting lot was caused to fall, bearing with it certain walls, and rendering it necessary to the owner to be at expense in reconstructing the wall, and either to grade down the lot to the level of the street, or construct additional walls and steps, to render it as valuable as before the digging.

A municipality which "maliciously and without cause, etc., dug up and destroyed . . . street, pavements, ways, etc., to the depth of 5 feet, took and removed the stone, earth, and gravel, etc., by reason of which the walls of his [plaintiff's] house were injured, his cellar destroyed, and himself and family deprived of the use of his house," was held liable to the plaintiff in *Goodloe v. Cincinnati* (1831) 4 Ohio, 500, 22 Am. Dec. 764. The doctrine of lateral support is not referred to, however. A municipality was held liable under similar conditions in *Smith v. Cincinnati* (1831) 4 Ohio, 514, where the declaration did not charge the municipality with having acted maliciously. W. A. E.

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FRANK SCHELLER, Admr., etc., of Marie Scheller, Deceased, et al.,  
Appts.,  
v.

TACOMA RAILWAY & POWER COMPANY, Respt.

*Washington Supreme Court (Dept. No. 1) — September 24, 1919.*

(— Wash. —, 184 Pac. 344.)

Covenant — maintenance of railroad — term.

1. A covenant to build and maintain a railroad in consideration of a grant of a right of way and other property does not require operation in perpetuity, but is satisfied by operation for twenty-five years.

[See note on this question beginning on page 817.]

(— Wash. —, 184 Pac. 344.)

— to maintain railroad — running with land.

2. An agreement by a railroad company, in consideration of a grant of a right of way and other property connected therewith, to build and operate a railroad from the property to a city, is a covenant running with the remaining land of the grantor.

[See 7 R. C. L. 1109.]

Action — for breach of covenant — successors of covenantee.

3. Persons acquiring through foreclosure sale the remaining land of one who has granted a right of way to a railroad company, upon conditions running with the land that a railroad shall be maintained and operated thereon, are the proper parties to maintain an action for damages for breach of the covenant.

[See 7 R. C. L. 1193.]

(Holcomb, Ch. J., dissents.)

APPEAL by plaintiffs from a judgment of the Superior Court for Pierce County (Card, J.) in favor of defendant in an action brought to recover damages for breach of a covenant to maintain a railroad. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Guy E. Kelly and Thomas MacMahon, for appellants:

This covenant to maintain the railroad complies with all the requirements of a covenant running with the land.

Withers v. Wabash R. Co. 122 Mo. App. 282, 99 S. W. 34; Whalen v. Baltimore & O. R. Co. 108 Md. 11, 17 L.R.A.(N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390.

Even if the covenant technically did not run with the land, it would be enforceable against the defendant, since the defendant had notice of it.

Maurer v. Friedman, 125 App. Div. 754, 110 N. Y. Supp. 320.

Mr. F. D. Oakley, for respondent:

The conditions in the contract must be construed as a condition subsequent, and not as a covenant running with the land.

Mills v. Seattle & M. R. Co. 10 Wash. 520, 39 Pac. 246; Mouat v. Seattle, L. S. & E. R. Co. 16 Wash. 84, 47 Pac. 233; Mead v. Ballard, 7 Wall. 290, 19 L. ed. 190; School Dist. v. Wallowa County, 71 Or. 337, 142 Pac. 320; Sherman v. Jefferson, 274 Ill. 294, 113 N. E. 624; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997.

A breach of a condition subsequent can be taken advantage of only by the grantor, his heirs, or devisees; his grantees, whether before or after the breach, acquire no right to enforce a forfeiture, or to recover damages therefor.

Ruch v. Rock Island, 97 U. S. 693, 24 L. ed. 1101; School Dist. v. Wallowa County, 71 Or. 337, 142 Pac. 320; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997; Golconda Northern R. Co. v. Gulf

Lines Connecting R. Co. 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833; Kakeldy v. Columbia & P. S. R. Co. 37 Wash. 675, 80 Pac. 205; 13 Cyc. 692; 2 Washb. Real Prop. 6th ed. §§ 954-957.

The contract does not impose the duty to operate the railway in perpetuity, or during any specified period, and all the terms thereof were substantially complied with by the operation of the railroad for a period of twenty-five years.

Mead v. Ballard, 7 Wall. 290, 19 L. ed. 190; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997; Whalen v. Baltimore & O. R. Co. 112 Md. 187, 76 Atl. 166; Newton v. Mahoning County, 100 U. S. 562, 25 L. ed. 712; Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 140 Fed. 706; Lucas v. New York, N. H. & H. R. Co. 64 C. C. A. 638, 130 Fed. 438.

If the contract should be construed as imposing an obligation upon the respondent to operate the road in perpetuity as originally located, it is void as against public policy.

Day v. Tacoma R. & Power Co. 80 Wash. 161, L.R.A.1915B, 547, 141 Pac. 347; Ford v. Oregon Electric R. Co. 60 Or. 278, 36 L.R.A.(N.S.) 358, 117 Pac. 809, Ann. Cas. 1914A, 280; Florida C. & P. R. Co. v. State, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Mackintosh, J., delivered the opinion of the court:

Respondent's predecessor was incorporated for the purpose of

building and operating an electric railroad line between Tacoma and Steilacoom. One Whyte at the time was owner of section 22, which was situated near the line of the proposed railroad. Whyte platted a portion of the southwest quarter of that section, and, by written agreement with the railroad company, agreed to convey to it the E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , E.  $\frac{1}{4}$  of E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , blocks 7, 8, 15, 16, together with a strip of land 30 feet wide through the S. E.  $\frac{1}{4}$  of the section upon which the railroad had been located. The agreement between Whyte and the railroad company provided that Whyte should give a warranty deed to it and its assigns, which deed was to be deposited in escrow "to be delivered to the said party of the second part upon the performance by the said party of the second part of the following covenants and conditions, that is to say:

"The said party of the second part is to pay to the said parties of the first part the sum of \$1, amount expressed in said deed as the consideration thereof, and shall on or before the 30th day of January, 1891, build, equip, and operate a narrow-gauge railroad between its point of beginning at, in, or near the city limits of the city of Tacoma, Pierce county, state of Washington, along, through, over, and by that certain lot, piece, or parcel of land belonging to the said party of the first part, particularly described as follows:

"A strip of land thirty (30) feet in width through the southeast one quarter of section No. twenty-two (22) in township No. twenty (20) north of range two (2) east of Willamette M., said strip being fifteen (15) feet on either side of the center line of the railroad track of the said party of the second part as the same is now located, and shall be hereafter constructed through said tract, which said last described tract of land the said parties of the first part for the consideration of \$1, the re-

ceipt whereof is hereby acknowledged, do hereby grant and convey unto the said party of the second part, its successors and assigns forever, in fee simple for the use and purpose of a right of way for said railroad, forever, disclaiming any and all interest in and to said tract, provided, however, that said party of the second part shall use said described tract for the purpose of said right of way and other railroad purposes, and from thence to such a point at or near section 29 in township 20, north of range 2, E. W. M. (or further, if considered practicable or desirable), as the said party of the second part may determine, and shall at all times maintain and operate said narrow-gauge railroad, either by itself or assigns, between its terminal points, and shall establish and maintain a station at such point upon or near the land last hereinabove described as shall be determined on, on the line of said railroad, and as shall be most advantageous to the parties hereto, and shall stop the trains of said railroad at such stations on all trips either coming or going between said terminal points, for the accommodation of the parties of the first part herein and any and all passengers who may desire or seek transportation from said station by said route or line of railroad.

"And it is stipulated, understood, and agreed by and between the parties to this contract that as soon as said line of railroad is established, completed, and equipped along and upon said last described lands, said Pacific National Bank, who holds said deed in escrow, shall and may then deliver as the act and deed of the parties of the first part the said deed to the party of the second part herein for its own use and benefit, and for the benefit of its assigns.

"And it is understood and agreed between the parties hereto that the party of the second part is to have the immediate possession and control of said premises from and after the execution of said contract, and

(— Wash. —, 184 Pac. 344.)

should said party of the second part fail to build and equip said railroad and to build and maintain such station as herein provided, then the said Pacific National Bank, who holds said deed in escrow, shall deliver said deed back to said parties of the first part, their heirs or assigns, and this agreement shall thereupon be void and of no effect."

The railroad company constructed the road, obtained the deed, and took possession of the property, selling and disposing of that portion thereof not used by it for its right of way. At the time of platting, Whyte mortgaged all of the S. W.  $\frac{1}{4}$  of the section except the E.  $\frac{1}{4}$  of E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , to the Mason Mortgage Company, which sold the mortgage to the ancestor of the plaintiffs, who purchased the mortgage, relying upon the value of the property as the same was enhanced by the railroad and transportation facilities; the property not then or now being worth the purchase price, except as the same should be connected with Tacoma by adequate transportation facilities. Thereafter the respondent in this action purchased all the property and franchises of the Tacoma & Steilacoom Railway Company, and operated the road for twenty-five years or more. The appellants' ancestor was compelled to and did foreclose the mortgage and bought in the property at the mortgage sale, and died, devising the property to the appellants. Thereafter the respondent discontinued the operation of the railroad at this point, and tore up and abandoned the same, and the appellants brought this action at law, seeking to recover damages from the respondent for its failure to comply with the agreements in its contract, upon the theory that these agreements constituted covenants running with the land, and that the abandonment of the railroad constituted a breach of such covenants which entitled the appellants to maintain an action for damages. A demurrer was sus-

tained to the complaint, and the action was dismissed, upon which this appeal was taken.

It is to be borne in mind that this is not an action seeking to enjoin the railroad company from abandoning the line, such as was the case of *Day v. Tacoma R. & Power Co.* 80 Wash. 161, L.R.A.1915B, 547, 141 Pac. 347, which relates to the same situation, and to which case reference is made for the facts relative to the abandonment; that being an action where the property owners were attempting to obtain equitable relief by way of injunction. Nor is this an action in equity seeking to recover the property granted to the railroad company upon a breach of the conditions accompanying the grant. The appellants argue that the agreement between Whyte and the railroad company created covenants running with the land, and that therefore they, being now the owners of the land, can recover for the breach of such covenants. The respondent argues that the agreement merely created conditions subsequent, for a breach of which the proper parties in interest would be confined to a forfeiture of the property granted, and that the appellants, not being the grantor nor his heirs, are strangers to and have no right under the contract to enforce such forfeiture or recover damages. This phase of the case involves one of the most complicated questions in the law. From the time of *Spencer's Case*, reported in 5 Coke, 16, 77 Eng. Reprint 72, till the present day, the courts have been engaged in painstaking and irreconcilable expositions of the subject, until, as was said by this court in *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.* 102 Wash. 608, 173 Pac. 508: "Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land. . . . At any rate, the contract appears to be such a covenant regu-



lating or restricting the use of the land as will be enforced in equity, when the party acquiring title took with notice, whether it is technically a covenant running with the land or not."

The law not looking with favor upon forfeitures, the courts have been inclined, in cases difficult of solution, to resolve the doubt in a disputed agreement as creating a covenant running with the land rather than as a condition subsequent. *Union Stockyards Co. v. Nashville Packing Co.* 72 C. C. A. 195, 140 Fed. 701. The following cases, including the *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, just cited, would incline

**Covenant—to maintain railroad—running with land.**

us to the view that the agreement between Whyte and the railroad company gave rise to covenants running with the land: *Withers v. Wabash R. Co.* 122 Mo. App. 282, 99 S. W. 34; *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 65; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 Am. Rep. 623; *Whalen v. Baltimore & O. R. Co.* 108 Md. 11, 17 L.R.A.(N.S.) 180, 129 Am. St. Rep. 423, 69 Atl. 390; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Ford v. Oregon Electric R. Co.* 60 Or. 278, 36 L.R.A.(N.S.) 358, 117 Pac. 809, Ann. Cas. 1914A, 280.

The case of *Mills v. Seattle & M. R. Co.* 10 Wash. 520, 39 Pac. 246, holding that the agreement there under consideration was a condition subsequent, is based upon the fact that the grantee was in that case insisting upon such a construction; the court saying.

"It is a proposition too well understood to require argument or citation, that courts do not favor forfeitures, and that for that reason they go very far in construing the provisions of a deed poll against the grantor, to the end that the estate granted may not be defeated, since the almost universal effect of sustaining a stipulation in such an

instrument as a condition subsequent is to work great hardship upon the grantee. But whenever the terms of the instrument are plain and unambiguous, there is no hesitation in enforcing the actual contract made by the parties.

"Where, however, the rare instance occurs, as it does here, that the grantee is found insisting upon the construction of a condition subsequent, and that forfeiture shall take place, all consideration for him and all idea of hardship to him is eliminated, and the court is free to act without such consideration. The appellant here has all along been urging the theory of a condition subsequent, and has by its answer offered to pay the just value of the land taken by it, and damages to land of the respondent not taken."

*Mouat v. Seattle, L. S. & E. R. Co.* 16 Wash. 84, 47 Pac. 233, was dealing with a stipulation in a deed which, on its face, was apparently intended as a condition subsequent. The same is true of the case of *Sherman v. Jefferson*, 274 Ill. 294, 118 N. E. 624; and *Fowler v. Coates*, 201 N. Y. 257, 94 N. E. 997.

On the assumption, then, that Whyte's contract with the railroad company created a covenant running with the land, it would follow that the plaintiffs in this action were the proper parties, and that an action

**Action—for breach of covenant—successors of covenantor.**

for damages for breach of those covenants would be maintainable by them, if not defeated by other principles of law; which brings us to the consideration of the next point presented by the respondent, viz.: That the contract did not impose upon the railroad company the duty of operating the railroad in perpetuity or during any specified period; that the terms of the contract were substantially complied with by the railroad having been

**Covenant—maintenance of railroad—term.**

operated for a period of twenty-five years. With this statement the law seems to agree with practical unanimity. *Mead v.*

Ballard, 7 Wall. 290, 19 L. ed. 190, was an action brought in ejectment to recover land conveyed upon the understanding that an institution of learning "shall be permanently located upon said lands," which institution was located with the intention that there should be its permanent situation. The buildings were thereafter destroyed by fire, and the institution subsequently erected upon another piece of land. The Supreme Court of the United States in that case said:

"The thing to be done was the location of the institute. Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers of the institution were to determine, in good faith, the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract.

"Counsel for the plaintiff attach to the word 'permanent,' in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties.

"We are of opinion that the testimony shows, in any view that can be taken of it, that the condition was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs."

The Supreme Court of the United

States, in *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710, was considering a case where the county seat of one of the counties of Ohio "was permanently established in the town of Canfield," the citizens of that town having furnished the land for the purpose of having the county buildings erected thereon. The court held, although the contract provided for a permanent establishment (it will be noticed that the contract before us merely provided for construction and maintenance, and nowhere is the word "permanent" or its equivalent used), that the contract should not be construed so as to compel the county seat to remain forever upon the land granted, and that the grantor must be presumed to have known that the legislature had power to remove the county seat at pleasure and that he must be held to have had in view the possibility of such change when he made his grant. So here, when Whyte made his grant he realized that he was dealing with a public service corporation, and its duties to and control by the public were matters which must be held to have entered into his contract.

The leading case on this subject is *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846, being a case where the city of Marshall, Texas, gave to the railroad company \$300,000 in bonds and 66 acres of land for shops and depot; the company in consideration of this action agreeing to "permanently establish its eastern terminus and Texas offices at the city of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The city performed its agreements, and the company, on its part, made Marshall its eastern terminus, and built depots and shops, and established its principal offices there. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The Supreme Court

held that the contract on the part of the railway was satisfied and performed when the city had been made the terminus, stores and shops set up, and kept going eight years, until the interests of the public and of the railroad demanded the removal of some or all of those subjects of the contract to another place; that the contract, under the circumstances, had been complied with; and that the public interest was served by abandoning and removing the property.

*Whalen v. Baltimore & O. R. Co.* 112 Md. 187, 76 Atl. 166, had been once before the court as an action in equity to compel the railroad company to specifically perform its agreement which it had made with the plaintiff's predecessors, to construct and operate and maintain a sidetrack. *Whalen v. Baltimore & O. R. Co.* 108 Md. 11, 17 L.R.A. (N.S.) 180, 69 Atl. 390, 129 Am. St. Rep. 423. The sidetrack was maintained for a period of fifty-nine years, and then abandoned. The supreme court of Maryland having dismissed the equity action, the plaintiffs began an action in law for damages for breach of contract. The court held that the word "maintained," as used in such agreement, did not require the railroad company to continue the sidetrack permanently; that the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the railroad was not liable in damages for its breach: "Considering the language used in the covenant before us, it is to be observed that, while it distinctly provides for the construction and maintenance of the turnout and siding, . . . it is entirely silent as to the duration of the maintenance of those structures or that service. We cannot yield our assent to the contention of the appellant that the word 'maintain' ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates.

There is plainly no specific or positive provision in the covenant touching the duration of the time during which the covenanted acts are to be done or privileges furnished." [112 Md. 197.]

Judge Taft, in *Jones v. Newport News & M. Valley Co.* 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736, held that an agreement by a railroad company and one owning land adjacent to its track to establish and maintain switch connections could not be the basis of a recovery of damages upon the railroad's discontinuing the service, the court saying that to hold otherwise would "forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road."

*Texas & P. R. Co. v. Scott*, 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726, dealt with a contract between Scott and the railroad company, whereby Scott contracted to give a right of way over his land if the company would establish a depot thereon. The railroad was built, and the depot established and maintained for thirty-six years, when it was abandoned for reasons connected with the best interests of the public and the company. The court held that the contract did not bind the railroad company to keep up a depot forever, but that its maintenance until such time as the best interests of the public and the corporation required abandonment was a substantial compliance with the contract.

In *Lucas v. New York, N. H. & H. R. Co.* 64 C. C. A. 638, 130 Fed. 438, the defendant had contracted with the plaintiff, in consideration of his dedicating a strip of land for the purpose of constructing a roadway, that it would make, when it changed its passenger station, a suitable entrance way into its station grounds and continue the roadway eastward. This the railroad did, but very shortly thereafter the roadway and entrance were discontinued. It was held that defendant

did not bind itself to maintain a permanent entrance and road, and, having maintained the same until the city had changed the grade, it was not liable for breach of its covenant.

In *Union Stockyards Co. v. Nashville Packing Co.* 72 C. C. A. 195, 140 Fed. 701, the plaintiff conveyed land to the defendant upon a contract by which the defendant agreed to build and maintain a packing house of specified capacity, the contract providing no time during which the agreement should endure, the deed reciting that it was made "upon condition of the due performance of the contract by the grantee." The packing house was built, but its operation subsequently abandoned.

"Another feature of the transaction which seems to us of much significance is that no time was fixed during which the obligation to maintain and operate the packing house should endure. It seems to be hardly reasonable to suppose that the parties could have understood that

this covenant should continue to operate perpetually. Indeed, one can hardly withstand the conviction that the covenant was expected by the parties to have some limitation in respect of time, and, if so, it might be a question whether any other limitation is more natural or probable than that it should abide such contingencies of the business as could not, in the natural course of things, be avoided, as, for instance, could not, with prudent management, be carried on without loss. Of course, we are not now undertaking to lay down a particular definition of the contingencies which might terminate the obligation."

These cases would seem to be squarely in point on the question before us, and to determine it in respondent's favor. This being true, the demurrer was properly sustained.

Fullerton, Tolman, Main, and Mitchell, JJ., concur.

Holcomb, Ch. J., dissents.

## ANNOTATION.

### Period covered by covenant or condition subsequent for maintenance of railroad.

#### I. Introductory, 817.

#### II. Period construed as terminable by railroad company:

- a. Rule stated, 817.
- b. Application of rule:
  1. Location and maintenance of depot, 818.
  2. Location and maintenance of shop or office, 820.

#### 1. Introductory.

No attempt has been made to include within the scope of this note a discussion of the distinction between "covenant" and "condition subsequent," or the determination of the question as to when a covenant for the maintenance of a railroad runs with the land. The note is limited to the cases wherein the courts have construed the period of performance of a covenant or condition subsequent for

#### II. b—continued.

3. Location and maintenance of right of way, 820.

4. Location and maintenance of spur or siding, 820.

#### III. Period construed as not terminable by railroad company:

- a. Generally, 821.
- b. Period coextensive with use of granted land, 822.

the maintenance of a railroad or its appurtenances.

#### II. Period construed as terminable by railroad company.

#### a. Rule stated.

The majority of jurisdictions seem to hold that, in the absence of a specified term of years or of express and suitable words showing an intention that performance shall be perpetual, a covenant or condition subsequent for

the maintenance of a railroad or its appurtenances is sufficiently complied with by a performance covering a term of years, varying in the cases which have so held from five to sixty years.

**United States.**—*Texas & P. R. Co. v. Marshall* (1889) 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Jones v. Newport News & M. Valley Co.* (1895) 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; *Texas & P. R. Co. v. Scott* (1896) 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726, s. c. on subsequent appeal (1899) 36 C. C. A. 282, 94 Fed. 340; *Lucas v. New York, N. H. & H. R. Co.* (1904) 64 C. C. A. 638, 130 Fed. 436; *Bryan v. Louisville & N. R. Co.* (1917) 157 C. C. A. 98, 244 Fed. 650, writ of error dismissed in (1918) 246 U. S. 651, 62 L. ed. 921, 38 Sup. Ct. Rep. 334.

**Arkansas.**—*Little Rock & Ft. S. R. Co. v. Birnie* (1894) 59 Ark. 66, 26 S. W. 528.

**Indiana.**—*Jeffersonville, M. & I. R. Co. v. Barbour* (1883) 89 Ind. 375, distinguishing *Indianapolis, P. & C. R. Co. v. Hood* (1879) 66 Ind. 580.

**Maryland.**—*Maryland & P. R. Co. v. Silver* (1909) 110 Md. 510, 73 Atl. 297; *Whalen v. Baltimore & O. R. Co.* (1910) 112 Md. 187, 76 Atl. 166.

**Tennessee.**—*Oldham v. Southern R. Co.* (1912) 2 Tenn. C. C. A. 644.

**Washington.**—See the reported case (*SCHELLER v. TACOMA R. & POWER CO.* ante, 810).

**Canada.**—*Jessup v. Grand Trunk R. Co.* (1881) 7 Ont. App. Rep. 128; *Notawasga Twp. v. Hamilton & N. W. R. Co.* (1888) 16 Ont. App. Rep. 52. Compare *Clouse v. Canada Southern R. Co.* (1883) 4 Ont. Rep. 28.

#### *b. Application of rule.*

##### *1. Location and maintenance of depot.*

In *Lucas v. New York, N. H. & H. R. Co.* (1904) 64 C. C. A. 638, 130 Fed. 438, an action to recover damages for an alleged breach of contract, it appeared that the plaintiff, being the owner of a strip of land adjacent to the land of the defendant, entered into a contract with the latter, dedicating the land for the purposes of a railroad depot, in consideration that the railroad company would "maintain suitable entrance way to its station

grounds." The defendant, in accordance with this condition, maintained the required entrance way for a period of seven years, when, on the changing of the grade of a village street from which the driveway entered, the company abandoned the entrance and opened a new one. The court held that the condition in the contract could not be construed to require a performance forever, but that a compliance with its terms for a period of seven years was a sufficient performance within the intent of the agreement.

In *Little Rock & Ft. S. R. Co. v. Birnie* (1894) 59 Ark. 66, 26 S. W. 528, the court held that it was a question for the jury whether the maintenance by the defendant railway company of a depot for a period of eleven years was a sufficient compliance with an agreement contained in a grant of certain lots, whereby, in consideration of the deeding to it of land, the railroad company covenanted to erect and maintain thereon a depot. The court said: "Eleven years, falling within this era of the city's growth, would seem to be a sufficient period in which to obtain all the benefits constituting the inducement to the plaintiffs' donation. It was a period during which the business of the city moved away from the vicinity of lots 1 and 2, and if there was anything peculiar in the situation of that property, making a longer time necessary to the enjoyment of all the advantages or benefits contemplated by the condition of the grant, as construed by the court, it was incumbent upon the plaintiffs to show it."

Where it appeared that a railroad company, in accordance with a contract with an owner of land, maintained a depot for a period of thirty-six years, in consideration of a right of way granted to it, the court held, conceding that the contract was valid, that the plaintiff could not recover for a subsequent removal of the depot, saying: "It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such an agreement is made subject to

the general exigencies of business, the public interests, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station, and its maintenance to the full extent expected or claimed for thirty-six years, is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here." *Texas & P. R. Co. v. Scott* (1896) 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726, s. c. on subsequent appeal (1899) 36 C. C. A. 282, 94 Fed. 840.

In *Jeffersonville, M. & I. R. Co. v. Barbour* (1883) 89 Ind. 375, wherein it appeared that a deed conveying land for railroad purposes contained a condition subsequent to the effect that the land was to be used for depot purposes, and in case of a failure so to use it the ground would revert to the grantors, the court held that the erection and maintenance of a depot on the land for a period of thirty years was a substantial compliance with the terms of the deed, in the absence of words suitable to express an intention that the lot should be occupied by the railroad for all time.

But in *Indianapolis, P. & C. R. Co. v. Hood* (1879) 66 Ind. 580, where it appeared that, by the express terms of a deed conveying land to a railroad company, the latter took the lands conveyed subject to a condition subsequent that it would "permanently" locate thereon a depot, the court held that the removal of the depot, after it had been maintained on the land for a period of eighteen years, was a breach of the condition. That case was distinguished by the court in *Jeffersonville, M. & I. R. Co. v. Barbour* (Ind.) *supra*.

In *Maryland & P. R. Co. v. Silver* (1909) 110 Md. 510, 73 Atl. 297, it appeared that a deed of land conveyed to a railroad company contained the following conditions: "The said railroad company shall at once make and maintain on said land herein conveyed a passenger and freight station, where

all local trains shall stop when flagged by those properly in charge thereof, the passenger trains to receive and deliver passengers and the freight trains to receive and deliver freight." The court held that the covenant was fairly complied with by the erection and maintenance of the station for a period of years, and until the exigencies of the business, the convenience of the public, and the welfare of the railroad demanded its removal, saying: "The reason for the rule being that, as the number and location of a railroad's depots and public stations must depend upon the conditions of population and amount of business at the different places along its line, and as changes take place in these conditions from time to time, the determination of such questions is appropriately committed to the directors or managers of the railroad company."

In *Oldham v. Southern R. Co.* (1912) 2 Tenn. C. C. A. 644, wherein it appeared that a condition in a deed conveying lands to a railroad company provided for the maintenance thereon of a depot, the court held that the terms of the condition could not be so construed as to require a perpetual maintenance of the station, but where it appeared that the depot was maintained as required for a period of years, and then removed to a near-by location, it was held to be a substantial performance of the agreement.

In *Jessup v. Grand Trunk R. Co.* (1882) 7 Ont. App. Rep. 128, reversing 28 Grant, Ch. (U. C.) 583, wherein it appeared that the plaintiff agreed to convey certain lands in consideration of the maintenance thereon of a railroad station, and pursuant to this agreement the defendant erected and maintained a depot on the land for a period of ten years, the court held that the performance for ten years, in the absence of express words in the covenant requiring perpetual maintenance of the station, was a sufficient compliance with the terms of the agreement.

And in *Nottawasga Twp. v. Hamilton & N. W. R. Co.* (1888) 16 Ont. App. Rep. 52, wherein it appeared that in consideration of a money bonus the de-

fendant railroad company agreed to establish and maintain certain depots at particular locations in the plaintiff township, and pursuant to this agreement the depots were erected and maintained for a period of seven years, at the end of which time, the company changed its mode of maintaining the stations, shortening the hours for the transaction of business therein, the court held, in an action to compel specific performance, that the company, by a performance for a period of seven years, had substantially complied with the terms of the condition, and that the word "establish" therein could not be construed to mean the continuance of the stations forever.

Compare *Clouse v. Canada Southern R. Co.* (1883) 4 Ont. Rep. 28, wherein the court held that, while a performance for a term of years is a sufficient compliance with a condition in a grant of lands to a railroad to maintain a depot thereon, the rule was otherwise where the condition in a grant of lands to a railroad required the erection and maintenance of farm crossings, for, under the statute (Can. Consol. Stat. chap. 66, § 13), farm crossings when once made must be maintained by the railroad company, independently of the contract; distinguishing *Jessup v. Grand Trunk R. Co.* (Ont.) *supra*.

*2. Location and maintenance of shop or office.*

In the leading case of *Texas & P. R. Co. v. Marshall* (1889) 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846, it appeared that the plaintiff city entered into a contract with the defendant railroad corporation, whereby, in consideration of a donation, the latter agreed to "permanently" locate and construct at said city its main machine shops and car works. In accordance with this agreement, the railroad company did erect and maintain its shops and offices in the city for a period of eight years, when it removed various parts of its shops and offices to another place. The court held that the defendant had substantially complied with the terms of the contract by maintaining the required shops in the city for a period of eight years,

and until the interests of the railroad company and the public demanded their removal to another place; that the word permanent, as used, did not mean forever, or lasting forever.

*3. Location and maintenance of right of way.*

In the reported case (*SCHELLER v. TACOMA R. & POWER Co.* ante, 810), the court holds that the operation of a railroad covering a period of twenty-five years, in accordance with a condition imposed in a deed granting a right of way, was a sufficient and substantial compliance with the terms of the condition, as the agreement did not impose on the railroad company the duty of maintaining its railroad forever, or for a specified number of years.

In *Bryan v. Louisville & N. R. Co.* (1917) 157 C. C. A. 98, 244 Fed. 650, writ of error dismissed in (1918) 246 U. S. 651, 62 L. ed. 921, 38 Sup. Ct. Rep. 334, wherein it appeared that in consideration of the purchase by the plaintiff of land, and the development thereof as a fruit orchard, the defendant railroad company covenanted and agreed to maintain and operate its line of railroad through the land, the court held that the maintenance of the railroad line as agreed for a period of forty years was a sufficient and substantial compliance with the terms of the covenant, and the same could not be construed to embrace a period requiring the maintenance of the road forever.

*4. Location and maintenance of spur or siding.*

In *Whalen v. Baltimore & O. R. Co.* (1910) 112 Md. 187, 76 Atl. 166, it appeared that the defendant railroad company covenanted to construct and maintain a "turnout and siding" at the plaintiff's location and in pursuance of this agreement the siding and turnout were maintained for a period of sixty years, whereupon, because of the exigencies of its business, the company discontinued the use of the siding. The court held that as the covenant was silent as to the duration of the maintenance of the structures, it could not be held that the word "main-

tain" meant to maintain forever, and the performance for sixty years was a substantial and satisfactory compliance with the terms of the contract, saying: "In our opinion such a covenant as that, when it contains no stipulation for maintaining the structures or stopping the trains, either in perpetuity or during a specified period, should, in view of the well-known scope and purpose of a public service corporation like a railway company, be presumed to have been made subject to the exigencies of the company's further development and needs. . . . When, in a case like the present one, after the company has maintained the structures and stopping place agreed on for more than fifty-nine years, it becomes necessary or desirable for the promotion of better public service to so alter the location of its roadbed as to no longer pass the place mentioned in the covenant, and the change is made in good faith, we think the previous maintenance of the structures and stopping place should be regarded as a substantial performance of the covenant, and be held sufficient to discharge the company from further liability thereunder."

And in *Jones v. Newport News & M. Valley Co.* (1895) 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736, wherein it appeared that the defendant railroad company agreed to maintain a spur line to the plaintiff's coal tippie, the latter to build the tippie and a trestle thereto, the plaintiff contended, in an action to recover for the abandonment of the switch, that, nothing having been said as to the time during which it was to be maintained, the implication was that it was to be maintained forever. The court held that it could not imply, in a contract for a private switch connection, a term that it should be perpetual, quoting and following the opinion of the court in *Texas & P. R. Co. v. Marshall* (1890) 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846, supra.

### *III. Period construed as not terminable by railroad company.*

#### *a. Generally.*

In a few jurisdictions the courts hold that, in the absence of a specified

term of years, a covenant or condition subsequent for the maintenance of a railroad imports a continuous and perpetual period of performance, limited, at the most, by the demands of the public welfare, or the exigencies of the administration of the railroad. *Atlanta & W. P. R. Co. v. Camp* (1907) 130 Ga. 1, 15 L.R.A.(N.S.) 594, 124 Am. St. Rep. 151, 60 S. E. 177, 14 Ann. Cas. 439; *Harper v. Virginian R. Co.* (1915) 76 W. Va. 788, 86 S. E. 919, Ann. Cas. 1918D, 1081; *Stevens v. Galveston, H. & S. A. R. Co.* (1914) — Tex. Civ. App. —, 169 S. W. 644, reversed in (1919) — Tex. —, 212 S. W. 639; *Houston & T. C. R. Co. v. Ennis* (1918) — Tex. Civ. App. —, 201 S. W. 256. See also *Tyler v. St. Louis Southwestern R. Co.* (1905) — Tex. Civ. App. —, 87 S. W. 238.

Thus, in *Houston & T. C. R. Co. v. Ennis* (1918) — Tex. Civ. App. —, 201 S. W. 256, an action by a city to restrain the removal therefrom by the defendant of its offices, shops, and roundhouse, it appeared that, in consideration of certain grants of land and money bonuses, the defendant covenanted with the city that its shops and offices would be maintained therein. This agreement was observed for a period of twenty years, when the defendant threatened to remove its offices, shops, and roundhouse. The court held that the covenant, although not stating specifically that the buildings should be maintained forever, imported a continued contract, and, having been observed for over twenty years, the defendant could not now terminate it without some legal excuse, as, for example, that the defendant could not perform the duties owing to the public consistently with the proper discharge of the agreement.

In *Stevens v. Galveston, H. & S. A. R. Co.* (1914) — Tex. Civ. App. —, 169 S. W. 644, reversed in (1919) — Tex. —, 212 S. W. 639, wherein it appeared that lands were conveyed subject to the condition that a railroad depot would be maintained thereon, and it appeared further that the defendant company had erected and maintained a depot, pursuant to the agreement, for a period of about thirty years, and had then removed the depot from the



the amount of a policy of insurance on his life, where the murder was committed by the party who is the sole distributee of such insured person.

[See note on this question beginning on page 828.]

— murder of insured — recovery.

2. The beneficiary in a policy of life insurance, who murders the insured, will be denied the right to recover thereon upon grounds of public policy.

[See 14 R. C. L. 1228.]

— right of murderer's assignee.

3. Where the beneficiary in a policy of life insurance murders the insured, and subsequently assigns his interest in the policy to another, such assignee will acquire no better right than his assignor, and will not be entitled to recover upon the policy.

— recovery by personal representative.

4. Where the beneficiary in a life insurance policy murders the insured, the doctrine of public policy will extend no further than to denying to such

beneficiary the right to recover. The liability of the insurance company to pay the fund is not thereby extinguished, and ordinarily a recovery will be allowed upon such policy in the name of the personal representative of the insured for the benefit of his estate.

[See 14 R. C. L. 1228.]

Descent — to murderer of ancestor.

5. Under our law prohibiting the forfeiture of estates upon conviction of crime, the estate of one who is murdered will pass by devolution to the person designated by law to take the same, notwithstanding such person may have been guilty of murder in taking the life of the one from whom he inherits.

[See 9 R. C. L. 47.]

**ERROR** to the Circuit Court for Cabell County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Fitzpatrick, Campbell, Brown, & Davis, for plaintiff in error:

Susie Pickens, the beneficiary in the policy, having killed her husband, the assured, forfeits all rights under the policy upon the life of her husband.

4 Cooley, Briefs on Ins. 3153; 7 Cooley, Briefs Supp. 3153; Vance, Ins. 392; *Filmore v. Metropolitan L. Ins. Co.* 82 Ohio St. 208, 28 L.R.A. (N.S.) 675, 137 Am. St. Rep. 778, 92 N. E. 26; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *McAlister v. Fair*, 3 L.R.A. (N.S.) 726, note; *McDonald v. Mutual L. Ins. Co.* 178 Iowa, 863, 160 N. W. 289; *Metropolitan L. Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836; 14 R. C. L. § 409; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Equitable Life Assur. Soc. v. Weightman*, — Okla. —, L.R.A.1917B, 1210, 160 Pac. 629.

Since the beneficiary cannot herself maintain this suit, neither can Johnston, the administrator of Frank Pickens, deceased, maintain it, because, as sole distributee under the Statute of Descents, she would receive the proceeds of a judgment in his favor.

*McDonald v. Mutual L. Ins. Co.* 178

Iowa, 863, 160 N. W. 289; 4 Cooley, Briefs on Ins. 3153; Vance, Ins. 392; *McAlister v. Fair*, 72 Kan. 533, 3 L.R.A. (N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973.

Daugherty and Shields, the assignees of the beneficiary, stand in the same position as their assignor, as to any rights under the policy.

*Equitable Life Assur. Soc. v. Weightman*, L.R.A.1917B, 1210, note; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

Messrs. Daugherty & Riggs for defendant in error.

Nitz, J., delivered the opinion of the court:

The defendant, for the consideration of certain premiums to be regularly paid, issued a policy of insurance by which it agreed to pay to one Frank Pickens the face value of the policy in case he was living at the end of twenty years from the date of issue, or to pay to his beneficiary, Susie Pickens, his wife, an equal sum in case of his death before the expiration of said twenty

(— W. Va. —, 100 S. E. 885.)

years. The premiums were regularly paid until the time of Pickens's death. Some years after the issuance of the policy the insured was murdered by his wife, the beneficiary therein. She was convicted of the crime and sentenced to the penitentiary for life. Shortly after the commission of the murder she assigned all of her right under the policy to D. B. Daugherty and H. W. Shields. Pickens left no children surviving him, and owed no debts at the time of his death. The defendant company declined to pay the policy, either to the beneficiary, or to her assignees, or to the administrator of the estate of Pickens, and this suit was brought by the administrator to recover thereon. The court of common pleas rendered a judgment in favor of the defendant, and upon a writ of error to that judgment the circuit court of Cabell county reversed the same and rendered judgment for the plaintiff for the amount of the policy, to review which this writ of error is prosecuted.

That Susie Pickens, the beneficiary, has no right to recover upon this policy of insurance, can scarcely be doubted. The liability of the company became fixed by the death of the insured, and this was brought about by the felonious act of the beneficiary. It would be monstrous for the courts to lend their aid to anyone for the purpose of enriching himself by the commission of murder, and to entertain suit on behalf of the beneficiary to recover upon this policy of insurance would be doing that very thing. It is against the policy of our law to reward one for the commission of crime, and whenever the effect of the enforcement of a right which one would otherwise have would be to give him an advantage by reason of his felonious act, the courts will decline to entertain it. This is well established by the authorities. *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup.

Ct. Rep. 877; Cooley, Briefs on Ins. 3158; 14 R. C. L. p. 1228, title Insurance, § 409, and authorities there cited. Nor can the assignees of the beneficiary stand on any higher ground than the beneficiary herself. <sup>—right of murderer's assignee.</sup>

At the time she made the assignment to them she had nothing to transfer. She had voluntarily placed herself in a status which disqualified her to be beneficiary under the policy. Consequently, the assignment to Daugherty and Shields was ineffectual to transfer any interest in the fund.

This denial of the right of the beneficiary or her assignees to recover under such circumstances is not, however, based upon lack of liability of the insurer to pay. The policy of insurance is not avoided for such cause by its express terms, and there is no reason why such an exception should be read into it when the interest of other parties is affected. This doctrine of public policy will not be carried by the <sup>—recovery by personal representative.</sup> courts any further

than is necessary to prevent resort to them for the purpose of effecting a fraudulent purpose. It is not for the purpose of relieving the insurance company from liability, and if there is any person without fault who has a right to the benefit of the policy the same will be enforced. In other words, there is no condition in the policy avoiding it in case of the murder of the insured, and the liability of the company is just the same where death is the result of murder as where it is produced by any other cause. The only difference is that in case the murderer is the beneficiary named in the policy he is denied recovery, not because the company is not liable, but because he has placed himself in such a position that he cannot invoke the aid of the courts. But does the fact that the beneficiary named in the policy cannot recover discharge the company from liability in all cases? It is very generally held that, where the specific beneficiary named in a

Insurance—  
murder of  
insured—  
recovery.

policy of life insurance dies, the policy of insurance nevertheless remains in force, and recovery may be had thereon by the personal representatives of the insured upon his death for the benefit of his estate. What is the effect when the beneficiary, by some act of his, puts himself in a position where he cannot invoke the aid of the courts to enforce his claim? He forfeits his right to claim the money to which he would otherwise be entitled. The rule of public policy, as before stated, will not be extended further than is necessary to prevent a felon from reaping benefit from his crime, and it may be said that when by this rule the murderer, who is the beneficiary, is deprived of his right to recover, the doctrine is extended as far as is warranted. This would leave in the hands of the insurer a fund or estate created by the insured. The insurance company is not entitled to it, and the party that the insured desired to have it cannot take it. He forfeited his right to it. What, then, is the result? Naturally, it becomes the property of the estate of the insured, very much in the same way as an estate which is left by will to a particular devisee or legatee passes by Laws of Descents and Distributions upon the failure of such legatee, and it has been held that, where a legatee in a will murders the testator, the legacy provided for him in the will will pass to the heirs of the testator under the Statutes of Descents and Distributions. *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188. And it is likewise very uniformly held, and it occurs to us upon sound reason, that, where the beneficiary in a policy of life insurance is denied the right of recovery upon grounds of public policy, a trust results in favor of the estate of the insured, and ordinarily the personal representative of the insured can maintain a suit to recover the fund for the benefit of that estate. *Schmidt v. Northern Life Asso.* 112 Iowa, 41,

51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Cleaver v. Mutual Reserve Fund Life Asso.* [1892] 1 Q. B. 147, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180, 61 L. J. Q. B. N. S. 128; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; *Supreme Lodge, K. L. H. v. Menkhausen*, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; *Sharpless v. Grand Lodge, A. O. U. W.* 135 Minn. 35, L.R.A.1917B, 670, 159 N. W. 1086; *McDonald v. Mutual L. Ins. Co.* 178 Iowa, 863, 160 N. W. 289; *Equitable Life Assur. Soc. v. Weightman*, L.R.A.1917B, 1210, — Okla. —, 160 Pac. 629.

In this case, however, the defendant insists that the personal representative should not be allowed to recover, for the reason that such recovery would be for the benefit of the murderess. The insured had no children, and his widow, under the Law of Descents and Distributions, is the sole distributee of his personal estate. The fact that the courts will not, on grounds of public policy, permit her to bring suit to recover this fund, does not bar her from taking the estate of her deceased husband. Under our law there is no longer corruption of blood or forfeiture of estates upon conviction of crime, and there is no exception in our Statutes of Descents and Distributions precluding one from inheriting in a case like this. The laws governing the devolution of property are an expression of the public policy of the state, contained in its Constitution and legislative acts, and the courts are not justified in attaching to these acts exceptions or limitations which have not been placed thereon by the lawmaking bodies. It therefore follows that if the personal representative of the insured in this case is permitted to recover this fund, the beneficiary will accomplish by indirection that which she could not do directly. That the property of one who has been murdered will devolve upon

Descent—to  
murderer of  
ancestor.

the murderer, where such is the course of distribution provided by law, seems to be well settled in most of the American states. *McAlister v. Fair*, 3 L.R.A.(N.S.) 726, and note (72 Kan. 533, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973); *Shellenberger v. Ransom*, 25 L.R.A. 564, and note (41 Neb. 631, 59 N. W. 935); *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151, 2 Ann. Cas. 657; *Carpenter's Appeal*, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 765, 32 Atl. 637; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540; *Deem v. Millikin*, 6 Ohio C. C. 357, 3 Ohio C. D. 491, affirmed on appeal in 53 Ohio St. 668, 44 N. E. 1134.

Will the courts, then, allow themselves to be used for the purpose of bringing into existence an estate which will, by operation of law, devolve on one who, because of his conduct, is not entitled to it? The administrator has no interest in the subject-matter. It is agreed here that the insured left no debts, and it follows that every dollar of the fund recovered by the administrator in his representative capacity must go to the murderess. The suit is simply in his name for the benefit of the one who feloniously caused the insured's death. The case of *McDonald v. Mutual L. Ins. Co.* 178 Iowa, 863, 160 N. W. 289, is very much like this case in its facts. In that case the administrator of the insured brought the suit to recover on the policy of insurance. It appeared that the sole distributees of the insured's estate were her father and mother, and that they had assisted in a criminal operation which produced her death. The court held that the administrator, if such facts were shown, would not be entitled to recover, for it would be for the benefit of those who are, by the public policy of the law, denied such right. The theory relied upon to defeat recovery is substantially the same as that asserted in the cases of

*Dickinson v. Stuart Colliery Co.* 71 W. Va. 325, 43 L.R.A.(N.S.) 335, 76 S. E. 654, and *Swope v. Keystone Coal & Coke Co.* 78 W. Va. 517, L.R.A.1917A, 1128, 89 S. E. 284. In these cases the basis of recovery was the wrongful employment of plaintiffs' decedents, they being of an age which made their employment in mines a violation of the law. The liability of the defendant was sustained by the court in each case, but recovery was denied to the administrator, not because the defendant was not liable, but for the sole reason that the father, who in each case would have been sole distributee of any recovery, procured the employment of the minor. His act in securing his minor child to be employed in violation of law created a situation which rendered necessary the denial of a recovery, because the party who would receive it had forfeited his right thereto. There was no fault on the part of the one killed, and recovery would have been allowed, but for the fact that the person who would take the fund as sole distributee had united with the defendant in the commission of the wrongful act, and the court denied him the right to take advantage of his own wrong.

The principle invoked here is the same as the principle involved there. In some of the cases we have above cited, permitting a recovery by the administrator of the insured where the beneficiary had caused the death, it was suggested that part of the fund might go to the beneficiary under the Law of Descents and Distributions, but that was held not to defeat recovery. That may be true where only part of the fund goes to the guilty party. It may be that the courts would not allow the innocent to be deprived of the property to which they are entitled, for the sole reason that to enforce their rights would also confer a benefit upon a guilty party. However, that question does not arise here, and we express no opinion thereon. We are

of opinion, however, that where the guilty party would take the whole of the recovery in case one is allowed, the policy of our law as effectually denies recovery as it would were the suit brought in

Insurance—  
murderer as  
sole distributee.

the name of the guilty party himself.

It follows from what we have said that the judgment of the Circuit Court will be reversed, and the judgment of the Court of Common Pleas affirmed.

### ANNOTATION.

**Right of executor or administrator of insured's estate to recover proceeds of policy where the beneficiary's criminal act caused, or contributed to, insured's death.**

- I. General rule, 828.
- II. Rule where beneficiary is sole heir, 830.
- III. By-laws or policy provisions covering contingency, 831.

#### *I. General rule.*

Subject to the limitations stated in the following subdivisions, it is generally held in cases involving both ordinary policies and benefit certificates, that, although the beneficiary's right to recover under the insurance contract is forfeited by reason of the felonious killing of the insured by the beneficiary, the insurer is not thereby relieved of liability, but is liable to pay the proceeds of the contract to the insured's estate.

**Illinois.**—*Supreme Lodge, K. L. H. v. Menkhausen* (1904) 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567.

**Iowa.**—*Schmidt v. Northern Life Assn.* (1900) 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

**Minnesota.**—*Sharpless v. Grand Lodge, A. O. U. W.* (1916) 135 Minn. 35, L.R.A.1917B, 670, 159 N. W. 1086.

**North Carolina.**—*Anderson v. Life Ins. Co.* (1910) 152 N. C. 1, 67 S. E. 53.

**Oklahoma.**—*Equitable Life Assur. Soc. v. Weightman* (1916) — Okla. —, L.R.A.1917B, 210, 160 Pac. 629.

**Texas.**—*Murchison v. Murchison* (1918) — Tex. Civ. App. —, 203 S. W. 423.

**Virginia.**—*New York L. Ins. Co. v. Davis* (1899) 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475.

**West Virginia.**—*JOHNSTON v. METRO-*

*POLITAN L. INS. Co.* (reported herewith) ante, 823.

**England.**—*Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180.

**Canada.**—*Standard Life Assur. Co. v. Trudeau* (1900) Rap. Jud. Quebec 9 B. R. 499.

In *Supreme Lodge, K. L. H. v. Menkhausen* (Ill.) supra, an action by the children of insured as his heirs, it was held that public policy did not forbid a recovery against a benefit association by the heirs of the insured, who was murdered by her husband, the beneficiary. The court said: "The beneficiary named in a benefit certificate, who feloniously takes the life of the insured, cannot recover from the fraternal beneficiary society, and it is now urged that public policy also requires us to hold that in such a case there can be no recovery by any person whomsoever against such a society, and that under such circumstances not only is the certificate void, but the obligation of the society to pay to anyone whomsoever is canceled and rendered absolutely inoperative. The cases relied upon by appellant are of two classes: First, where the insured was murdered by the beneficiary, and suit was brought by the criminal, or someone claiming through him; and, second, where the insured was executed in pursuance of the sentence of a court of competent jurisdiction, for a crime committed by him or her. Neither class of cases is in point here. The only reason in favor of appellant's contention that seems to us of weight

is found in the fact that the beneficiary might be incited to commit murder by the fact that, if unable to collect the benefit himself, it would be payable to some other person or persons in whose welfare he was interested. Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential. But even were it otherwise, if the rule suggested by appellant were established, it is perceived that the society would then profit by the murder, and incentive be created for the destruction of the life of the insured that the interest of the insurer might be advanced. The contract between the society and the insured contained no provision absolving the society from liability in the event that she was murdered by the beneficiary, and public policy does not require us to read such a condition into the agreement. If it did, it would also require us to hold that the beneficiary could not recover on the policy if the insured was murdered by another, acting independently of and against the desire of the beneficiary, because it is within the realm of possibility that such other, without the connivance or knowledge of the beneficiary, might commit the crime solely for the purpose of enriching the latter. If societies of the character of appellant desire to be protected from such contingency, that object must be accomplished by a condition to that effect written into their contracts, failing which the law will not absolve them from liability. *Cleaver v. Mutual Reserve Fund Life Assn. (Eng.)* and *Schmidt v. Northern Life Assn. (Iowa)* supra. In the absence of a contract to that effect, public policy will not permit the society to appropriate unto itself the fund which it has agreed to pay, merely because the life of the insured has been unlawfully taken."

It was argued in the *Menkhausen Case (Ill.)* supra, that the certificate was payable to the husband alone as beneficiary, and that no recovery could be had thereon except by him, or those

claiming through him, and that, as he could not recover on the certificate, no one could. The court, however, refused to sustain this view and, as above stated, held that the insurer was not relieved from liability, but was liable to the insured's heirs.

And in *Sharpless v. Grand Lodge, A. O. U. W.* (1916) 135 Minn. 35, L.R.A.1917B, 670, 159 N. W. 1086, an action by the brother and only heir of the insured, except the latter's wife, the beneficiary, it was held, that although by murdering the insured the beneficiary under a benefit certificate had forfeited the right to the proceeds of the contract, this did not relieve the insurer from liability to others; that the plaintiff, who would have taken on the death of the beneficiary, was entitled to recover the benefit.

And in *Schmidt v. Northern Life Assn.* (1900) 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, an action by administrator of insured, it was held that liability on a benefit certificate was not defeated because the beneficiary's (wife's) rights were forfeited, she having feloniously caused the death of the insured; but that the certificate might be enforced by the latter's administrator for the benefit of his estate, on the ground of a resulting trust in favor of the estate, by the forfeiture of the rights of the beneficiaries named.

And in *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. (Eng.) 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180, it was held that the executors of an insured, holding a policy payable to his wife, might maintain an action on the policy notwithstanding the fact that he was murdered by the wife, the view being taken that under the circumstances the insurance money formed a part of the general estate of the insured, and that, as between his legal representatives and the insured, no question of public policy arose to afford a defense.

In *Anderson v. Life Ins. Co.* (1910) 152 N. C. 1, 67 S. E. 53, the personal representative of the insured was held entitled, as against the personal representative of the beneficiary, to the

proceeds of a policy taken out by the insured, who was murdered by the beneficiary, who then committed suicide. The court said: "The authorities are also to the effect that, in cases like the present, where the contract is made between the insured and the company for another's benefit, that is, a valid contract of that character, a felony of the kind indicated on the part of the beneficiary will not relieve the company of all liability on the policy, but recovery can be had usually by the representative of the insured, and for the benefit of the latter's estate. *Vance, Ins. 392, 393; Cooley, Briefs on Ins. 3153; Schmidt v. Northern Life Assn. (Iowa) supra; Supreme Lodge, K. L. H. v. Menckhausen (1904) 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; New York L. Ins. Co. v. Davis (1899) 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; Shea v. Massachusetts Ben. Assn. (1894) 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Tyler v. Odd Fellows' Mut. Relief Assn. (1887) 145 Mass. 184, 13 N. E. 360; Cleaver v. Mutual Reserve Fund Life Assn. (Eng.) supra. This latter ruling would very likely not obtain in an ordinary life policy, where a valid contract of insurance had been made and purported to be between the company and the beneficiary, and such beneficiary was, and continued to be throughout, the owner of the policy and of all interest in it. Such a position, however, is not presented here in any aspect of it, as the company recognizes its liability on the policy, and the question is on the right to the fund as between the representative of the insured and of the beneficiary. On that question, and under the authorities cited, there is no error in the ruling of the court below, awarding the fund to the representative of the insured, and the judgment to that effect is affirmed."*

And in *Welch v. Travelers' Ins. Co. (1919) 178 N. Y. Supp. 748*, where a policy was taken by the insured, payable to a named beneficiary if he survived the insured, "otherwise to the estate of the insured," it was held that the policy did not become forfeited by reason of the murder of the insured

by the beneficiary, but that it should be paid to the insured's legal representative.

And in *Standard Life Assur. Co. v. Trudeau (1900) Rap. Jud. Quebec 9 B. R. 499*, the evidence was held to show that the policies sued on were entered into between the insurer and the insured, and not between the company and the insured's wife, the beneficiary, and it was held that the insurer was not relieved from liability by reason of the murder of the insured by his wife, but that the company was liable to the insured's heirs.

In *Equitable Life Assur. Soc. v. Weightman (1916) — Okla. —, L.R.A. 1917B, 1210, 160 Pac. 629*, the court denied that a husband and wife owned a policy upon their lives, which provided for the payment of a sum to the survivor, as joint tenants, and held that there was a separate policy on the life of each for the separate benefit of each, and where the wife murdered the husband it was held that as the contract named no alternative payee, in the absence of a statute providing an alternative beneficiary, a resulting trust arose in favor of the husband's estate, and that his personal representative was entitled to the fund.

In *New York L. Ins. Co. v. Davis (1899) 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475*, the murder of one holding a policy payable to his estate, by an assignee of the policy, whose claim was valid only for a reimbursement of premiums paid, was held to forfeit only the assignee's part of the insurance, and the insured's estate was held entitled to recover the residue.

## II. Rule where beneficiary is sole heir.

It will be observed that in the reported case (*JOHNSTON v. METROPOLITAN L. INS. Co. ante, 823*) the general rule is recognized that permits a recovery by the insured's executor or administrator, where the guilty party would not be entitled to the benefit, but that it is held that the policy of the law forbids a recovery where the guilty party would take the whole property.

In accord with this decision is *McDonald v. Mutual L. Ins. Co. (1916)*

178 Iowa, 863, 160 N. W. 289, an action on a policy by the administrator of the insured, who died from a criminal operation, holding that no recovery could be had where it appeared that the insured's parents, who had aided in procuring the operation, were her sole heirs.

In *Murchison v. Murchison* (1918) — Tex. Civ. App. —, 203 S. W. 423, affirming a judgment sustaining a demurrer to an action by the father, brothers, and sisters of the insured, against the beneficiary and the insurer, to recover a judgment on a policy of accident insurance, it was conceded by both parties that the insurer's liability would not be canceled because of the fact that the beneficiary obviously killed the insured; and it was held that the proceeds of the policy were in the nature of personal property, and that, the beneficiary having deprived herself of the right to take as beneficiary, and the insured having died intestate, the policy became payable to the insured's estate, and that the wife did not forfeit her rights under the Statute of Distribution, even though she did feloniously take her husband's life for the purpose of collecting the insurance money.

### III. *By-laws or policy provisions covering contingency.*

The determination of the question under consideration in some cases is governed by provisions of the by-laws, or policies.

In *Grand Circle, W. W. v. Rausch* (1913) 24 Colo. App. 304, 134 Pac. 141, it was held that a by-law of a beneficial association, providing that if the insured should be murdered by the beneficiary the benefit should revert to the society, was valid, and that a recovery by the insured's heirs was precluded where she had been murdered by her husband, the beneficiary.

In *Geer v. Supreme Tribe, B. H.* (1917) 195 Mo. App. 336, 190 S. W. 72, one by-law of a benefit association provided that if the death of the insured should be caused by a beneficiary the certificate should be forfeited to the society, and should not be paid to the beneficiary or his heirs,

or the heirs or personal representatives of the insured; another by-law provided that no benefit should be paid if the insured was killed by any of the beneficiaries; and a third by-law provided that in the event of the death of a beneficiary prior to the death of the insured, without his having disposed of the benefit, it should be paid to the insured's personal representative for the benefit of his heirs. It appeared that the beneficiary, the insured's husband, after inflicting mortal injuries upon her, committed suicide and died shortly before she did. It was contended in an action by the insured's administrator that the first two by-laws, in view of the third, were ambiguous, and should be construed most favorably to the insured; that the husband never became the beneficiary, since he died shortly before the insured, and that when the latter died, the designated beneficiary being dead, the insured's heirs became the beneficiaries; as a corollary the plaintiff claimed that the first by-law applied only when the designated beneficiary survived the insured, and thereby became a beneficiary in fact. The court stated that this was a very technical construction of the by-law, and that if followed to its necessary conclusion an insured could never be killed by anyone who was more than a contingent beneficiary when the mortal blow was struck, as lightning or some other quick agency might end the slayer's life before that of his victim. It was held, however, that there was no conflict in the by-laws, that they were written for different purposes, that the last related to policies which were valid obligations after the insured's death, and that the first two related to a different subject, that is, the forfeiture of the policies and the acts and conditions which would make the policy void, and had to do with dead policies incapable of enforcement by anyone.

In *Robinson v. Metropolitan L. Ins. Co.* (1918) 69 Pa. Super. Ct. 274, where an industrial life policy provided for the payment of a certain sum to the insured upon his attaining a stated age, and, in case of death be-



fore reaching that age, for the payment of a like sum to the beneficiary, personal representative, or any person appearing to be equitably entitled to it, it was held, upon its appearing that the beneficiary murdered the insured, that the fact that the beneficiary named was disqualified from deriving any benefit under the contract did not discharge the insurer, and that the insured's administrator was entitled to recover. The court said: "If the person to whom payment was to have been made had previously died, or was incompetent to be a beneficiary, the company is not thereby absolved from payment. Public policy excuses it from performance according to the terms of the contract so far as the named beneficiary is concerned, but the application of this doctrine cannot be carried to the extent that

one is released from the performance of a contract where the full consideration has been received and nothing is left to be done except to pay the money agreed on, where, justly and equitably, payment should be made to the estate of the person who paid the consideration. The condition on which payment was to be made has arisen; the first beneficiary has ceased to exist, legally speaking; the defendant has not paid any other person to whom payment could have been made, and denies liability to pay to anyone. On such a state of facts the fund should be paid to the estate of the decedent. It is not reasonable that the felonious act of the beneficiary should discharge the obligation of the insurer and nothing in the contract requires us to hold it exempted." J. T. W.

### NELL E. CONKLING

v.

S. SILVER et al., Appts.

*Iowa Supreme Court—November 15, 1919.*

(Conklin v. Silver, — Iowa, —, 174 N. W. 573.)

**Landlord and tenant — lease for rag business — deprivation of beneficial use.**

1. The forbidding by public authorities of further use of a building leased for the rag and junk metal business for the storage of rags in the building does not destroy the beneficial use of the leased property so as to justify the lessee in abandoning the premises.

[See note on this question beginning on page 836.]

**Evidence — burden of proof — defense of deprivation of beneficial use of premises.**

2. The burden of establishing the defense of deprivation of beneficial use of premises in an action for rent due and unpaid is upon the one pleading it.

**Landlord and tenant — validity of lease — contract for forbidden act.**

3. A contract leasing property in a city upon which to conduct a junk, metal, and rag business is not rendered void by the subsequent adoption of a statute which prevents the storage of rags in the class of buildings leased.

[See 16 R. C. L. 742.]

**Contract — presumption as to lawful intent.**

4. If a contract is fairly susceptible of an interpretation or construction which is lawful, it will be conclusively presumed that such was the intention of the parties rather than an agreement for something that is unlawful.

[See 6 R. C. L. 839.]

**Landlord and tenant — effect of change of law on lease.**

5. A lease which is lawful when made does not become unlawful by a subsequent change in the law, although the change may in some cases annul the contract obligation.

[See 16 R. C. L. 742.]

(Conklin v. Silver, — Iowa, —, 174 N. W. 573.)

**Evidence — purpose of lease.**

6. Upon the question of destruction of the beneficial use of leased property by passage of a statute forbidding the storage of rags upon it, evidence is not admissible of what the lessee told the lessor when negotiating the lease as to the purpose for which the premises were desired.

**— evidence of expenditures in fitting up property.**

7. In an action for rent alleged to be due and unpaid, where the defense is deprivation of the beneficial use of the building, evidence is not admissible as to expenditures by the lessee in fitting up the building.

**APPEAL** by defendants from a judgment of the District Court for Polk County (De Graff, J.) in favor of plaintiff in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. James C. Hume, for appellants:

All contracts are void which provide for doing a thing which is illegal.

Hearst v. East Tennessee Brewing Co. 121 Tenn. 69, 19 L.R.A. (N.S.) 964, 130 Am. St. Rep. 753, 113 S. W. 364; White v. Buss, 3 Cush. 448; Reynolds v. Nichols, 12 Iowa, 398; Pike v. King, 16 Iowa, 49; Allison v. Hess, 28 Iowa, 390; Gilman v. Des Moines Valley R. Co. 40 Iowa, 203; Dillon v. Allen, 46 Iowa, 301, 26 Am. Rep. 145; Nelson v. Harrison County, 126 Iowa, 436, 102 N. W. 197; Allen v. Hawks, 13 Pick. 79; Re Pittock, 2 Sawy. 416, Fed. Cas. No. 11,189; Riley v. Jordan, 122 Mass. 231; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 608; Mound v. Barker, 71 Vt. 253, 76 Am. St. Rep. 767, 44 Atl. 846.

All contracts, legal when made, which become illegal by reason of subsequent statutory enactment, are non-enforceable.

2 Am. & Eng. Enc. Law, 149; 2 Parsons, Contr. pp. 673, 674; Hammon, Contr. p. 345; 9 Cyc. 576; Clark, Contr. 507; Cordes v. Miller, 39 Mich. 581, 33 Am. Rep. 430; Hearst v. East Tennessee Brewing Co. 121 Tenn. 69, 19 L.R.A. (N.S.) 964, 130 Am. St. Rep. 753, 113 S. W. 364.

If any material provision of an "entire" or "inseverable" contract becomes illegal, the whole contract thereupon becomes illegal and nonenforceable.

Bamberger Bros. v. Burrows, 145 Iowa, 441, 124 N. W. 333.

An entire, or inseparable, contract, partly illegal is wholly illegal.

Fryer v. Harker, 142 Iowa, 708, 23 L.R.A. (N.S.) 477, 121 N. W. 526; Livingston v. Chicago & N. W. R. Co. 142 Iowa, 404, 120 N. W. 1040; 9 Cyc. 566; Braitch v. Guelick, 37 Iowa, 212; Gipps Brewing Co. v. DeFrance, 91 Iowa, 108, 28 L.R.A. 386, 51 Am. St. Rep. 329, 91 N. W. 1087; Bishop v. Pal-  
7 A.L.R.—53.

mer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; American Mercantile Exch. v. Blunt, 102 Me. 128, 10 L.R.A. (N.S.) 414, 120 Am. St. Rep. 463, 66 Atl. 212, 10 Ann. Cas. 1022; Hooper v. Mueller, 158 Mich. 595, 133 Am. St. Rep. 399, 123 N. W. 24.

In order to ascertain the meaning of a written contract and the intent of the parties, statements, negotiations, and acts of the parties relating to the subject-matter of the contract may be proven by oral testimony, provided they are not inconsistent with the express terms of the written instrument.

1 Lewis's Greenl. Ev. § 282; 17 Cyc. 638; Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220; Rush v. Carpenter, 54 Iowa, 132, 6 N. W. 172; Thompson v. Locke, 65 Iowa, 429, 21 N. W. 762; Meader v. Allen, 110 Iowa, 588, 81 N. W. 799.

Mr. John L. Gillespie, for appellee:

By the terms of the lease, the plaintiff leased to the defendants the lot, and the tenant remained liable for the rent even though the buildings on the lot became destroyed or became unfit for use or occupancy.

David v. Ryan, 47 Iowa, 642; Re Bradley, 225 Fed. 307.

If a tenant's use of leased property is by statute restricted, the tenant is still liable for rent if the property can still be used for other purposes.

Lawrence v. White, 131 Ga. 840, 19 L.R.A. (N.S.) 967, 63 S. E. 631, 15 Ann. Cas. 1097; Hayton v. Seattle Brewing & Malting Co. 66 Wash. 248, 37 L.R.A. (N.S.) 432, 119 Pac. 739; Hecht v. Acme Coal Co. 19 Wyo. 18, 34 L.R.A. (N.S.) 773, 113 Pac. 788, 117 Pac. 182, Ann. Cas. 1913E, 253; 84 Cyc. 1148.

Weaver, J., delivered the opinion of the court:

The plaintiff is the owner of lot 6, block 2, in Scott & Dean's addi-

tion to the city of Des Moines. On a portion of the lot, and as a part of said property, is a frame building constructed and formerly occupied as a dwelling. This is the only building on the lot, and is within the fire limits established by the city. On May 22, 1917, plaintiff, by an agent, let the property by written lease to the defendants for the term of one year from June 1, 1917. By the terms of the lease the lessor was to make certain specified changes and repairs in the building to fit it for the lessees' use, and the lessees on their part undertook "to only use the premises for iron, metal, and rag business," and to pay a rental of \$60 on the 1st day of each month. The lessees further bound themselves "not to engage in or permit any unlawful business on the premises, nor to permit the premises to be occupied for any business deemed extrahazardous on account of fire." The lessees took possession of the leased premises, and paid all the monthly instalments of rent up to and including the month of October, 1917, when they abandoned the premises and notified the lessor of their surrender or offer to surrender the lease because of matters hereinafter related. From the date last mentioned lessees have paid no rent, and plaintiff in this action demands a recovery of the unpaid monthly instalments for the rental year.

The reason for defendants' abandonment of the lease and the ground upon which they deny liability in this action is as follows: On July 4, 1917, and when the lessees had been in possession about one month, a statute enacted by the legislature (chap. 184, 37th G. A.) became effective, providing that "the depository or storing of inflammable junk, such as old rags, rope, cordage, rubber, bones and paper by dealers in such articles within the fire limits of any city, unless it be in a building of fireproof construction, is a public nuisance and may be abated and punished as such," and the defendants say that, the leased premises being within the fire limits of

the city and the building not being of fireproof construction, the effect of said statute is to prohibit and destroy their rag business, for which the property was leased; that the principal business of the lessees there carried on was the buying, assorting, baling, storing, and shipping of rags, and that the statute which makes such business unlawful, and exposes the defendants to criminal prosecution, deprives them of any substantial or beneficial use of the property, thus releasing them from further obligation to pay rent.

I. Although the defendants as witnesses emphasize the use to which they put the leased premises as "the rag business," the testimony shows they also dealt largely in junk metals. It is shown that the upper story of the building was very largely, if not entirely, given over to the handling and sorting of rags, which were thrown down chutes made for that purpose into bins or boxes below, where they were baled for shipment. Upon the lot outside of the house were stored, in large heaps, quantities of old iron and other metals, while brass, lead, copper, and other of the more valuable kinds of junk were stored in the building. There was a spur or side track from one of the railroads, laid to or across the rear of the lot, which facilitated the receipt and shipment of the wares in which the defendants dealt. Altogether, we are satisfied that, while the operation of the statute mentioned served to narrow or restrict to some extent the scope of the business of the lessees, we think the evidence is insufficient to sustain a finding that it deprives them of the beneficial use of the leased property; and, as the defense is an affirmative one, the burden of establishing which is upon the party pleading it, the trial court did not err in refusing to submit it to the verdict of the jury.

Landlord and tenant—lease for rag business—deprivation of beneficial use.

Evidence—burden of proof—defense of deprivation of beneficial use of premises.

In the case of McCullough Realty Co. v. Laemmle Film Service, 181 Iowa, 594, 165 N. W. 33, on which appellant largely relies, the tenant was held released from his obligation to pay rent because by ordinance the city had prohibited the keeping, storing, or handling of motion picture films in the building leased by him, and, as the lease limited the lessee's use of the building to the keeping of a film exchange and theater supplies, the enactment of the ordinance left no beneficial use to him in the property. It was also held that the term "theater supplies" had reference only to supplies incident to the operation of film picture exhibitions, and that the prohibition of the conduct of a film exchange left the right or privilege of handling "theater supplies" in the building a thing without substantial value.

In this case, however, it seems clear that the right to buy, sell, store, and ship junk metals of all kinds, not only in the building, but upon the entire lot, is not in any sense a mere incident of the rag business, and that a loss of the privilege of using the building for the handling of rags does not deprive the lessees of the beneficial enjoyment of the property for the other specified uses. It may possibly render the use less valuable or less profitable, but there is no rule or principle of law which makes that fact a matter of defense or of counterclaim in an action upon the lease.

II. Counsel cite authorities upon the proposition that contracts to do an illegal act are void. The principle referred to is sound, but it can have no application here, for this contract was not unlawful when made, nor was it rendered unlawful by the statute which came into effect a month later.

Landlord and tenant—validity of lease—contract for forbidden act.

It was not then, nor is it now, unlawful to lease property to be used in the "iron,

metal, and rag business." What the new statute does prohibit is, not the

"rag business," but the depositing or storing of old rags by "dealers in such articles" within the city fire limits, except in a fireproof building. There seems to be no legitimate reason for holding that a party may not be engaged in a lawful "rag business," even in a frame building within the fire limits, and he will not offend against the statute until he uses such place for the deposit or storage of rags.

It is an elementary rule that, if a contract is fairly susceptible of an interpretation or construction which is lawful, it will be conclusively presumed that such

Contract—presumption as to lawful intent.

was the intention of the parties, rather than an agreement for something which is unlawful. Tested by this rule, the lease is not open to the objection of illegality, and we need take no time to discuss or consider what would have been the rights or remedies of the respective parties, were the allegation of illegality sustainable.

III. The same principle renders unnecessary any discussion of the severable or inseverable character of the contract. Defendants' contention that it is inseverable may be conceded. It is one lease of one entire piece of property for one entire consideration. The plaintiff thereby leases her property for a stated term, for a stated rental, and for use in a described business, which is not illegal. If the business be of a nature which is affected unfavorably by a subsequently enacted valid police regulation, it is a misfortune which the lessee must bear, so long, at least, as the beneficial use and enjoyment of the leasehold is not wholly destroyed. Even if wholly destroyed, the lessee is released from his obligation, not because the contract is unlawful, but because by an act of legislative power the exercise by the lessee of his contract rights is forbidden.

In other words, Landlord and tenant—effect of change of law on lease.

a lease which is lawful when made does not become unlawful by a subse-

quent change in the law; but the change of law may under some circumstances (such, for example, as this court had to deal with in *McCullough Realty Co. v. Laemmle Film Service*, supra) destroy or annul the contract obligation. This case does not, in our judgment, fall within the exceptional class. See *Shreveport Ice & Brewing Co. v. Mandel Bros.* 128 La. 314, 54 So. 831; *Hecht v. Acme Coal Co.* 19 Wyo. 18, 34 L.R.A. (N.S.) 773, 777, 113 Pac. 788, 117 Pac. 132, Ann. Cas. 1913E, 258.

IV. Error is assigned upon the ruling of the trial court excluding the testimony of the defendants concerning what they said to plaintiff's agent in negotiating for the lease concerning the purpose for which they were leasing the building and the use they proposed to make of the property.

There is no error in this ruling.

Where the written contract is obscure or ambiguous, or contains technical words or terms

*Evidence—purpose of lease.*

not in common use, testimony as to what was said by the parties in negotiation is often admissible to make the situation and the intent of the parties clear to the jury; but there is nothing here to call for such aids. The language of the writing is plain and intelligible, and neither party can be heard to add anything thereto. Nor was there any error in refusing to permit the defendants to show what they had expended in "fixing up the building." This was not

*—evidence of expenditures in sitting up property.*

relevant to any issue on trial, and was a collateral matter, which could only tend to confuse and distract the attention of the jurors from the real question before them.

No reversible error is shown, and the judgment of the District Court is affirmed.

Ladd, Ch. J., and Gaynor, and Stevens, JJ., concur.

## ANNOTATION.

**Lease of property for specified exclusive uses as affected by a partial restriction upon such uses by statute, ordinance, or ruling adopted or made during the term.**

The present annotation is confined to cases involving leases wherein more than one purpose was specifically mentioned, and one or more less than all was subsequently restricted by statute or ordinance. This limitation excludes the analogous but somewhat distinctive class of cases which involve the question whether the specified use is exclusive or is merely permissive so as to allow the leased premises to be used for purposes not specifically mentioned. Also excluded are the cases which turn upon the question whether or not the specific use mentioned is broad enough to include more than one particular but distinctive beneficial use.

The decided weight of authority is to the effect that where the contract does not restrict the use of the leased

premises to a single purpose, it is not invalidated by a subsequent enactment prohibiting the use for less than all of the several purposes specified. *CONKLING v. SILVER* (reported herewith) ante, 832 (lease to carry on iron, metal, and rag business exclusively); *Standard Brewing Co. v. Weil* (1916) 129 Md. 487, L.R.A.1917C, 929, 99 Atl. 661, Ann. Cas. 1918D, 1143 (lease for "saloon and restaurant" purposes only); *Teller v. Boyle* (1890) 132 Pa. 56, 18 Atl. 1069 (property leased for exclusive use as a saloon and dwelling); *Grimsdick v. Sweetman* [1909] 2 K. B. (Eng.) 740, 78 L. J. K. B. N. S. 1162, 101 L. T. N. S. 278, 73 J. P. 450, 25 Times L. R. 750, 53 Sol. Jo. 717 (lease of "all that beerhouse and premises with the bakehouse in the rear formerly called the Epping

Inn, but now The Seymour," and to be used for the enumerated purposes only). And see *Lawrence v. White* (1908) 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 Ann. Cas. 1099, wherein "the Albion Hotel," consisting of "the corridor, office, bar, barber shop, cigar stand, billiard room," etc., was leased, and in which it was held that the use was permissive so that the passage of a statute prohibiting the sale of intoxicating liquors did not, in the absence of a provision in the contract, entitle the lessee to a reduction or proportional abatement of the agreed rental. And see also *Christopher v. Charles Blum Co.* (1919) — Fla. —, 82 So. 765, wherein a building was leased for the purpose of carrying on a "wholesale and retail business, both or either, and other storage purposes," with a proviso that a certain part of the building was to be used "only for a first-class barroom for white people," and in which it was held that the uses specified were permissive, and not restrictive, so that it could not be said either that the lease was terminated and the lessees evicted, or that the lessees were relieved from further payment of rent by the enactment of a statute rendering the operation of barrooms illegal.

As is illustrated by the decision in *Standard Brewing Co. v. Weil* (1916) 129 Md. 487, L.R.A. 1917C, 929, 99 Atl. 661, Ann. Cas. 1918D, 1143, *supra*, this rule proceeds upon the theory that since the leases under consideration are for more than one purpose, the depriving of the lessee of one or more less than all of the specified purposes does not deprive him of the beneficial use of the leased property, he being still entitled to use the premises for the carrying on of the unrestricted part of the purposes specified in the lease. In this connection the court said: "The lessee has not been entirely deprived of the beneficial interest which the lease conferred. The saloon business was not the only use to which the property was agreed to be devoted. It was leased for the double purposes of a saloon and restaurant, and there is no prohibition against its continued use for the latter object.

The specified lines of business were not identical or inseparable. A restaurant is an establishment where meals and refreshments are served, while a saloon, as the term is here used, is a place where intoxicating liquors are sold and consumed. . . . There being, consequently, a serviceable use for which the property is still available consistently with the limitations of the demise, the lessee company is not in a position to assert that it is totally deprived of the benefit of the tenancy. It is further to be observed that while the possibility of a failure to secure a license for a saloon on the rented premises during the whole of the original and renewal terms of the lease might have been reasonably anticipated, no provision is made in the agreement for such a contingency."

And in the reported case (*CONKLING v. SILVER*, ante, 832) where a building was leased for the sole purpose of carrying on the "iron, metal, and rag business" therein, it was held that a statute inhibiting the storing of rags by dealers therein in buildings of the character leased, did not render the lease invalid, since it did not deprive the lessee of the beneficial use or enjoyment of the property because he could still carry on the business of dealing in iron, metal, and rags on the leased premises, and was merely denied the privilege of storing rags thereon, which, although it possibly rendered the use less valuable, did not destroy the beneficial use.

So, in *Grimsdick v. Sweetman* [1909] 2 K. B. (Eng.) 740, 78 L. J. K. B. N. S. 1162, 101 L. T. N. S. 278, 73 J. P. 450, 25 Times L. R. 750, 53 Sol. Jo. 717, where the lease was of a "beerhouse and premises with the bakeshop in the rear," in holding that the lessee's inability to renew his license to conduct the beerhouse as such did not terminate the lease, both Darling, J., and Jelf, J., adopted the principle that a lease is not terminated unless the beneficial use of the premises is more than merely impaired, and applying the same argued that there was no such destruction of the uses specified in the lease as would wholly deprive the lessee of an advantage

therefrom, since he could still live in the house and use the bakeshop even though he could not run a beerhouse.

And for a further discussion of this rule and the principles upon which it is based, see the dissenting opinion of McCulloch, Ch. J., in *Kahn v. Wilhelm* (1915) 118 Ark. 239, 177 S. W. 403, as quoted *infra*.

In a few instances contrary conclusions have been reached, but, as subsequently shown, this, with one possible exception, is not the result of the adoption of conflicting principles of law.

Thus, in *Kahn v. Wilhelm* (Ark.) *supra*, the majority of the court, applying the general principle of law that a contract is invalidated by the subsequent enactment of a police regulation which renders its performance illegal as to one of the parties, held that a lease of premises for use as a "hotel and saloon, and for no other purpose whatever," was terminated by a prohibitory liquor law. This was upon the theory that the building was leased for a single purpose, namely, the operation of a hotel and saloon, and Smith, J., speaking for the majority, said: "The lease does not provide for keeping a hotel or saloon, but for a 'hotel and saloon.' . . . The parties to this lease agreed and covenanted that the property should be used as a hotel and saloon and for no other purpose whatever, and, in construing the lease, we have no right to strike out one of the terms there employed. It is argued that the building could be used for a hotel, even though no saloon was kept there, and that a temperance saloon could be kept, where cigars and nonintoxicating drinks could be bought; and further that the property has other usable value. But we think the answer to this contention is that this is not a general lease, but a special one for the purpose of operating a hotel and saloon. . . . It must be conceded that there are courts of the highest authority which sustain appellant's [contrary] view of the law. But we think the better rule is announced by those courts which hold such contracts to be void, where their performance becomes unlawful." However, as previously noted, a strong

dissent was entered by McCulloch, Ch. J., who argued that the principle of law applied by the majority was inapplicable, that a distinction should be made between leases which restricted the use of the premises to a single use and those which specified more than one use, and that in the present case two uses were specified which were not inseparable. In the course of his dissenting opinion he said: "I find no fault with the court's statement of the principle, as an abstract proposition of law, that 'a contract is invalidated by the subsequent enactment of a police regulation which renders its performance illegal as to one of the parties,' but that principle is not, in my judgment, applicable to the contract now under consideration. Such a construction of the contract should be adopted as will obviate a forfeiture or abrogation, if that construction be fairly within the meaning of the language used. The clause concerning the use of the leased premises was intended merely to permit the use for the purposes named and to restrict the use to that extent. It was manifestly not intended as a covenant to use the premises for those purposes,—certainly not for both purposes,—the operation of a saloon and a hotel. There is nothing in the contract itself nor in the evidence in the case to show that the lessor was interested in that particular use of the premises. Therefore, it would be a very strained construction of the contract to hold that it was a covenant on the part of the lessee to so use the premises. . . . Treating the contract, therefore, as one merely permitting the use of the premises for the operation of a hotel and as a saloon, and restricting the occupancy to those uses, I do not think the principle referred to should be applied. Under that state of the case, it cannot be said that the contract has been subsequently invalidated by operation of law. The contract is still valid notwithstanding the subsequent enactment of the regulation restricting the use of the premises so as to prohibit the operation of a saloon at that place. That part of the contract specifying the use to which the prem-

ises might be put is separable unless the contract be treated as a covenant on the part of the lessee to use the premises for the purposes named. The contract permits the use of the premises as a hotel and as a saloon, and, of course, extends to either one or both of the specified uses. The use of the premises for either one of the specified purposes would be within the letter of the contract. The test is this: Would the lessee be within his contractual rights in using the premises for the operation of a hotel without also operating a saloon? If so, he is not absolved from the obligation of the contract by reason of the fact that the new regulation enacted by the city council renders it unlawful for him to operate a saloon at that place. In order to hold otherwise, it would be necessary to construe the contract as an affirmative undertaking on the part of the lessee to use the premises as a saloon as well as a hotel, but I do not understand the court to go that far,—at any rate, it is not tenable to assume that position."

And in the Kahn Case it was further held that it was immaterial that the lessor was willing that the premises should be used for other purposes than those stated in the lease, the court saying that it could not consider the landlord's present inclination in determining the meaning of his written contract, and that while his permission for a use different from that specified would be essential, it would be a modification of the contract to read into it the landlord's changed purpose.

And a conclusion contrary to that of the majority of the cases was also reached in McCullough Realty Co. v. Laemmle Film Service (1917) 181

Iowa, 594, 165 N. W. 33, it having been held that a lease of premises "for film exchange and film and theater supplies purposes only" was terminated and the obligation to pay rent canceled by the enactment of a valid municipal ordinance which made it unlawful to keep, store, handle, or repair any inflammable motion picture films in buildings of the character of the one leased. But this decision, as is pointed out in the reported case (CONKLING v. SILVER, ante, 832), is clearly distinguishable from cases which fall within and apply the general rule, since in the McCullough Realty Co. Case the conclusion was based on the theory that the term "theater supplies," as used in the lease and under the principle ejusdem generis, had reference only to supplies incident to the operation of film theaters, so that the ordinance left the lessee no beneficial use in the property.

And it seems that the parties to a lease may expressly stipulate that it shall be avoided by enactment of a statute or ordinance which works even a partial restriction on the stipulated use. This supposition finds some support in Hooper v. Mueller (1909) 158 Mich. 595, 183 Am. St. Rep. 399, 123 N. W. 24. In this case a building was rented for hotel and saloon purposes, with a proviso that the lease should be void if the lessors did not furnish bondsmen as required by the Retail Liquor License Law, and it was held that the adoption of local option rendered the performance of the proviso impossible and unlawful so that the lease was avoided and the liability of the lessee for rent terminated.

G. J. C.



MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY et al., Pliffs. in  
Err.,

v.

HANNAH L. ZUBER.

*Oklahoma Supreme Court—October 7, 1919.*

(— Okla. —, 184 Pac. 452.)

**Carrier — open switch — negligence.**

1. The leaving open of a switch leading to a sidetrack at a time when a passenger train may be expected momentarily, without ascertaining the location of the train, is "gross negligence," where the statute defines such negligence to be the want of slight care and diligence.

[See note on this question beginning on page 852.]

**— pass — injury — liability.**

2. When a railroad company gives gratuitously, and a passenger accepts, a pass, the former waives its rights as a common carrier to exact compensation, and if the pass contains a condition to that effect, the latter assumes the risk of ordinary negligence of the company's employees. The arrangement is one which the parties may make, and no public policy is violated thereby; and if the passenger is injured while riding on such a pass gratuitously given, which she has accepted, the company is not liable

therefor, in the absence of gross negligence, fraud, or wilful wrong of itself or its servants.

[See 4 R. C. L. 1159; 5 R. C. L. 9.]

**Appeal — instructions considered together.**

3. Instructions must be considered together, and while an instruction, standing alone, may be subject to criticism, yet if the instructions, when taken in their entirety, fairly submit the issues to the jury, reversible error is not committed.

[See 14 R. C. L. 817.]

Headnotes by PITCHFORD, J.

**ERROR** to the District Court for Washington County (Boone, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Clifford L. Jackson, W. R. Allen, M. D. Green, and Cottingham & Hayes, for plaintiffs in error:

The trial court erred in overruling the demurrers to the evidence and in refusing to direct a verdict for the defendants, because under the provisions of the pass upon which the plaintiff was riding there could be no recovery.

Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Atchison, T. & S. F. R. Co. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620; Smith v. Atchison, T. & S. F. R. Co. 114 C. C. A. 157, 194 Fed. 79.

The railway companies were joint tort-feasors, and the release executed to the Missouri, Kansas, & Texas Railway Company inured to the benefit of the Santa Fe Railway Company.

Grand Trunk R. Co. v. Parks, 106 C. C. A. 186, 183 Fed. 750; Pacific Teleph. & Teleg. Co. v. Parmenter, 95 C. C. A. 382, 170 Fed. 140; Graves v. City & Suburban Teleg. Asso. 132 Fed. 387; Tanana Trading Co. v. North American Trading & Transp. Co. 136 C. C. A. 389, 220 Fed. 783; Hubbard v. St. Louis & M. River R. Co. 173 Mo. 249, 72 S. W. 1073; Wallner v. Chicago Consol. Traction Co. 245 Ill. 148, 91 N. E. 1053; The St. Cuthbert, 157 Fed. 799; Laughlin v. Excelsior Powder Mfg. Co. 153 Mo. App. 508, 134 S. W. 116.

The validity of the release of liabil-

(— Okla. —, 184 Pac. 452.)

ity contained in the pass is to be determined by the acts of Congress and the common law as interpreted by the Federal courts.

Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Atchison, T. & S. F. R. Co. v. Cooper, — Okla. —, 175 Pac. 539; Chicago, R. I. & P. R. Co. v. Hessenflow, — Okla. —, 170 Pac. 1161; Missouri, K. & T. R. Co. v. Ashinger, — Okla. —, L.R.A.1917D, 1180, 162 Pac. 814; Missouri, K. & T. R. Co. v. Lynn, — Okla. —, 161 Pac. 1058; Morris v. West Jersey & S. S. R. Co. 87 N. J. L. 579, 94 Atl. 593.

If the release is valid when executed after the injury, there is no reason why it would not be equally valid when executed prior to the injury.

Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1; Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Kelly v. Malott, 67 C. C. A. 548, 135 Fed. 74.

Messrs. Twyford & Smith and A. H. Meyer, for defendant in error:

The Missouri, Kansas, & Texas Railway Company is not exonerated from damages caused by its gross and wanton negligence, by reason of the terms of the pass upon which the plaintiff below was riding.

Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; The New World v. King, 16 How. 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614; Atchison, T. & S. F. R. Co. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620; Walther v. Southern P. Co. 159 Cal. 769, 37 L.R.A. (N.S.) 235, 116 Pac. 51; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Illinois C. R. Co. v. O'Keefe, 63 Ill. App. 102; Indiana C. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339; Marshall v. Nashville R. & Light Co. 118 Tenn. 254, 9 L.R.A. (N.S.) 1246, 101 S. W. 419, 12 Ann. Cas. 675; Chicago, R. I. & P. R. Co. v. Stone, 34 Okla. 364, L.R.A.1915A, 142, 125 Pac. 1120; Smith v. New York C. R. Co. 29 Barb. 132; Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 282.

The Santa Fe is responsible for the actionable negligence of its employ-

ees, irrespective of whether it may be denominated ordinary, gross, wanton, or otherwise; and it is also liable for any injuries accruing on its railroad lines used by others with its authority, whether the same was caused by its own negligence or that of the persons using the same.

Midland Valley R. Co. v. Toomer, — Okla. —, L.R.A.1917D, 344, 162 Pac. 1127; Springer v. Ford, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953; 34 Cyc. 1089; Lisle v. Anderson, — Okla. —, L.R.A.1917A, 128, 159 Pac. 278; Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep. 135, 11 N. C. C. A. 1087.

Pitchford, J., delivered the opinion of the court:

This case was originally instituted in the district court of Washington county on July 14, 1915, by the defendant in error against the plaintiffs in error. The parties will hereafter be referred to as they appeared in the court below.

The plaintiff was a resident of the city of Sharon, Pennsylvania. The defendant Missouri, Kansas, & Texas Railway Company, hereafter referred to as the "Katy," owns and operates a line of steam railroad, which runs from the city of St. Louis, in the state of Missouri, to the city of Oklahoma City, in the state of Oklahoma, which line of steam railroad runs through the city of Bartlesville, in Washington county, state of Oklahoma. The defendant Atchison, Topeka, & Santa Fe Railway Company, hereafter referred to as the "Santa Fe," owns and operates a line of steam railroad, which runs from the city of Independence, in the state of Kansas, to the city of Tulsa, in the state of Oklahoma, and through the city of Bartlesville, in Washington county, state of Oklahoma. At a point approximately 2 miles north and east of the city of Bartlesville, in Washington county, the line of railway of the Katy runs into and connects with the railway line of the Santa Fe, and for a distance of some 2 or 3 miles from the said point, and to a point which is some 8 or 10 blocks

south and west of the passenger station of the Santa Fe in the city of Bartlesville, the Katy uses the tracks and roadbeds of the Santa Fe. The portion of the line of railway belonging to the defendant Santa Fe between said points, as aforesaid, and all switches and sidetracks connected therewith between said points, belong to the Santa Fe and are under its exclusive control. The Santa Fe had permitted the Katy to move and propel its trains over that portion of its tracks for some time prior to the date of the injury. On the 24th day of August, 1914, the defendant Katy issued and delivered to plaintiff a certain trip pass, entitling the plaintiff to one trip from St. Louis, Missouri, to Oklahoma City, Oklahoma. Thereafter, on the 23d of September, 1914, plaintiff boarded one of the defendant Katy's regular passenger trains at St. Louis, Missouri, en route to Oklahoma City, Oklahoma. On the 24th day of September, at about 10:30 o'clock A. M., the train upon which plaintiff was a passenger reached a point a short distance north and east of the Santa Fe passenger station in Bartlesville, Oklahoma. Said passenger train was moving south and west at a speed of approximately 30 miles per hour, and ran into an open switch, which branched off from the main line of the Santa Fe track and near said point. The passenger train was wrecked and the plaintiff was injured. On the morning of the wreck, a crew or a gang of section men in the employ of the defendants had been working on and repairing the tracks and sidetracks of the Santa Fe at said point, and were engaged in repairing the same at the time said passenger train arrived at the switch.

The Katy filed an answer, alleging that it issued to the plaintiff, as the mother of E. B. Zuber, brakeman in the employ of the Baltimore & Ohio Railway Company, a free pass, entitling plaintiff to free transportation on the lines of the defendant from St. Louis, Missouri, to

Oklahoma City, Oklahoma, and return, and that at the time of the alleged injury to the plaintiff she was being transported on one of defendant's passenger trains under and by virtue of said pass issued to the plaintiff as aforesaid; that said pass was issued to and received by the plaintiff and honored by the defendant under the terms and conditions printed thereon; that the person accepting and using said pass assumed all risk of accident, injury, and damage, whether resulting from the negligence of the servants and agents of the said defendant, or otherwise; and that the plaintiff is now barred from maintaining this action. The answer filed by the Santa Fe was practically the same as that filed by the Katy. The jury in the court below returned a verdict in favor of the plaintiff for \$3,000. The defendants appeal.

The assignments of error are numerous, but the main points relied upon by the defendants for reversal are: First, that the plaintiff, in accepting the pass over the defendant road, having thereby assumed all risk of accident, injury, and damage, whether resulting from the negligence of the servants and agents of the company or otherwise, is not entitled to recover; second, that the court erred in giving instructions Nos. 5, 6, 9, 10, and 13.

The pass upon which the plaintiff was being transported contained the following condition: "This pass is not transferable and must be signed in ink by the holder thereof. The person accepting and using it thereby assumes all risk of accident, injury, and damage whether resulting from the negligence of the servants and agents of the companies, or otherwise. It will be forfeited if presented by any other than the undersigned. I am not prohibited by Federal or state laws from receiving free transportation, and this pass will be lawfully used. . . . Accept it on the above conditions."

This pass was issued to the plaintiff as the dependent mother of a son who was in the employ of the Balti-

more & Ohio Railway Company, and was a character of pass authorized by the acts of Congress relating to interstate commerce, the particular act in question being entitled: "An Act to Create a Commerce Court, and to Amend the Act Entitled 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-seven, as Herebefore Amended, and for Other Purposes," approved June 18, 1910 (36 Stat. at L. 539, chap. 309), which provides (§ 7, page 546, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 359):

"No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families: . . . Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families."

A case in many respects similar to the instant case was decided by this court in *Atchison, T. & S. F. R. Co. v. Smith*, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620. There the plaintiff was riding on a free pass at the time the injury occurred, which was delivered to her in the state of Kansas, of which state she was a citizen, and under whose laws the railroad corporation was organized. The pass was good for the round trip between Wellington, Kansas, situated a short distance north of the Oklahoma state line, to Perry, Oklahoma, situated about 53 or 54 miles south thereof. The injury occurred in Oklahoma, while the plaintiff was on the return trip. On the back of the pass was the following provision signed by the plaintiff: "This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby assumes all risks of accidents and damages to person and baggage, under any circumstances, whether

caused by negligence of agents or otherwise. . . . I accept the above conditions."

There the court held that the plaintiff was not entitled to recover. Justice Kane, in the third paragraph of the syllabus, said: "When a railroad company gives gratuitously and a passenger accepts, a pass, the former waives its rights as a common carrier to exact compensation; and, if the pass contains a <sup>Carrier-pass-</sup><sub>injury-liability.</sub> condition to that

effect, the latter assumes the risks of ordinary negligence of the company's employees. The arrangement is one which the parties may make, and no public policy is violated thereby, and if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of wilful or wanton negligence."

In the case of *Smith v. Atchison, T. & S. F. R. Co.* 114 C. C. A. 157, 194 Fed. 79, the syllabus is as follows:

(1) "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employee, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery does not apply to actions of tort.

(2) "The Oklahoma statute (Comp. Laws 1909, § 428) providing that a carrier of persons without reward must use ordinary diligence for their safe carriage was only applicable in the absence of contract, and did not apply to an employee traveling on a pass, who had signed a waiver of liability for any injuries that might occur, which

waiver was valid both in Oklahoma and in the Federal courts."

In the opinion, it is stated: "The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract? We think not. The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other."

In the case of *Boering v. Chesapeake Beach R. Co.* 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515, the action was brought to recover damages for personal injuries sustained by Mrs. Boering while riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise."

The contention of the plaintiff in that case was that the company was liable in any event for injuries caused by its negligence, because it did not appear that Mrs. Boering knew or assented to the stipulation. The testimony showed that the husband had secured the transportation, and that they had traveled on these passes before, and plaintiff insisted that the exemption from liability for negligence resulted only from a contract therefor; that there could be no contract without knowledge of the terms thereof and assent thereto, and that she neither had knowledge of the stipulation, nor had she assented to its terms; that, therefore, there was no contract between her and the company exempting it from liability for negligence. The court there held that the plaintiff in accepting the free

pass was bound to know the conditions thereof, and that she could not through the intermediary of an agent obtain the privilege—a mere license—and then plead that she did not know upon what conditions it was granted. It was further held that a carrier is not bound, any more than any other owner of property who grants the privilege, to hunt the party to whom the privilege is given, and see that all conditions attached to it are made known; that the duty rested rather upon the one receiving the privilege to ascertain those conditions. While the case just quoted is relied upon by the defendants as strongly tending to support their contention, yet we fail to see wherein there is any similarity between this case and the case at bar.

The case of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, relied upon by defendants, was an action brought by the widow and son of the deceased. The deceased was traveling on a free pass containing the following: "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions."

The facts in that case are as follows: On November 13, 1898, the deceased started on one of the Northern Pacific trains from Hope, Idaho, to Spokane, Washington. Shortly after leaving Hope, Adams, then in the smoking car, went to the dining car for cigars. To reach the dining car he passed through the day coach to the tourist sleeper. After buying the cigars, he left the dining car and went forward. This was the last seen of him. His body was found the next day opposite a curve in the railway track about 6 miles west of Hope. There was no direct testimony as to how he got off the train, whether by an acci-

dental stumble, or being thrown therefrom through the lurching of the train, which was going at a high rate of speed. The road from Hope to the place where the body was found is in Idaho. There was a verdict in favor of the plaintiffs for \$14,000, which was sustained by the circuit court of appeals for the ninth circuit (54 C. C. A. 196, 116 Fed. 324), and thereupon the case was brought to the United States Supreme Court. Justice Brewer, in delivering the opinion, among other things said: "The question, then, is distinctly presented whether a railroad company is liable in damages to a person injured, through the negligence of its employees, who at the time is riding on a pass given as a gratuity, and upon the condition, known to and accepted by him, that it shall not be responsible for such injuries. It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence. The facts of this case certainly do not call for any broader inquiry than this. The specific matters of negligence charged are the placing of a non-vestibuled car in a vestibuled train, and the high rate of speed at which the train passed around the curve at the place of injury. But non-vestibuled cars are in constant use all over the country,—were the only cars in use up to a few years ago,—and further the deceased, having passed over the open platform, knew exactly its condition. As the court charged the jury, 'Mr. Adams must be presumed to have known that it was not vestibuled and to have acted with perfect knowledge of the fact.' The rate of speed was no greater than is common on other trains everywhere in the land, and the train was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negli-

gence; but clearly it was not acting either wilfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risk of such negligence?"

In the case of *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, Mr. Justice Holmes, delivering the opinion, said: "The main question is whether, when the statute permits the issue of a 'free pass' to its employees and their families, it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass, and by § 2 [Hepburn Act] it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception, we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass, but, on the contrary, contemplated the pass as being what it called itself, free."

The contention of the plaintiff in the case just cited was that the

pass, being given to one of the employees of the defendant company, was really not a free pass, but was issued upon consideration of the services of the employee as an incident to the right to issue a free pass to an employee or his family, and conceded that the carrier had the right to impose upon the issuance, acceptance, and use of a free pass the condition that the carrier shall not be liable in damages for personal injury to the recipient in consequence of its ordinary negligence, but that this exemption would not apply to employees. The question of gross negligence was not there raised by the plaintiff, or considered by the court.

It is conceded by the plaintiff in the instant case that if the injury complained of resulted from ordinary negligence on the part of the defendants, she would not be entitled to recover, but that the provision in the pass exempting the defendants from liability was not intended to, nor did it, have the effect of protecting the defendants from injury resulting from gross negligence.

We have seen in the case of *Smith v. Atchison, T. & S. F. R. Co.* 114 C. C. A. 157, 194 Fed. 79, that in an interstate pass the carrier may relieve itself from negligence, except in case of wilful negligence. As to what constitutes gross or wilful negligence, the authorities seem to be divided. Our statutes define the various degrees of negligence. Section 2916, Rev. Laws 1910, gives three degrees of care and of diligence, namely, slight, ordinary, and great; the latter includes the former. Under § 2917, *id.*, slight care or diligence is defined to be such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care or diligence is such as they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as they usually exercise about their own affairs of great importance. Section 2918, *id.*, gives three degrees of

negligence, namely, slight, ordinary, and gross; the latter includes the former. These degrees of negligence are defined by § 2919, *id.*, as follows: "Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence."

If the negligence complained of in the instant case was only ordinary negligence, the defendants would not be liable. Whether or not defendants were guilty of gross negligence was left for the jury to decide under the court's instructions defining the degrees of negligence. They found that the defendants were guilty of gross negligence. Whether or not acts surrounding a particular injury would constitute ordinary or gross negligence would depend upon all the circumstances surrounding the accident. We can conceive of many instances where the negligence would only be ordinary, and, on the other hand, we can conceive of cases where the negligence would be gross. As long as the English language is spoken, we shall hear acts constituting negligence denominated as defined by our statutes. Defendants cite many respectable authorities seeming to hold that the negligence contemplated in the issuance of passes means any negligence, and that it is impossible to define negligence as being ordinary, gross, or wilful, and that when it is said the carrier is relieved from negligence, it clearly means all kinds of negligence. There is some conflict of opinion in the several states of the Union as to what is covered by the stipulation in a free pass exempting the railroad from liability for injury caused by its negligence. There are a number of opinions holding that such a stipulation is valid and binding on the passenger, precluding a recovery for injuries, whether caused by the carrier's negligence or otherwise, and attempting to abolish degrees of negligence. Other courts, while conceding the valid-

ity of such exemptions in case of ordinary negligence hold the carrier responsible in cases of wilful, wanton, or gross negligence, and in Oklahoma it is declared by § 797, Rev. Laws 1910: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or wilful wrong of himself or his servants."

The California statute is identical with the above section. In the case of *Walther v. Southern P. Co.* 159 Cal. 769, 37 L.R.A. (N.S.) 235, 116 Pac. 51, the wreck was caused by the passenger train running into an open switch. The court uses the following language:

"In her complaint she alleged that the accident and consequent death of deceased were caused by the 'gross negligence' of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. . . . We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175 of the Civil Code provides: 'A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants.' Aside from the question of the meaning of the term 'gross negligence' as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168 of the Civil Code, contained in the same chapter, which is entitled 'Common Carriers in General,' declares that 'everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common

carrier of whatever he thus offers to carry.' And, of course, the defendant was, under this definition, a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but, at the time of this accident, at least, it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

"But on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, 3 Am. Neg. Cas. 590. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern P. Co.* 159 Cal. 599, 114 Pac. 982, a mere trespasser on the vehicle. The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code per-



mit such limitations as to certain matters not here involved, but § 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

"This brings us to a consideration of the question of the meaning of the term 'gross negligence,' as used in § 2175 of the Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from 'gross negligence' of the defendant or its servants, within the meaning of the term 'gross negligence,' as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of wilful wrong, and do not include anything in the nature of a mere omission to exercise care without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopted in the year 1872. This Code contained two sections declaring that there are three degrees of care and diligence,—slight, ordinary, and great,—and three degrees of negligence,—slight, ordinary, and gross. Slight care was defined as that 'which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance,' and gross negligence was defined as that 'which consists in the want of slight care and diligence.' Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words 'gross negligence' in § 2175 of the Civil Code, as it is the intention of the legislature at the time of the adoption of the latter section that must control.

"We see no warrant for holding

that the term 'gross negligence' as used therein was intended to mean other than the 'gross negligence' defined in § 17 of the same act 'to establish a Civil Code,' which was simply 'the want of slight care and diligence.' This must necessarily have been the view of this court in *Donlon Bros. v. Southern P. Co.* 151 Cal. 763, 766, 11 L.R.A. (N.S.) 811, 91 Pac. 603, 12 Ann. Cas. 1118, for an examination of the record shows that there could have been no other ground for the expression of opinion 'that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of.' . . . Accepting this definition of gross negligence, it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants."

In the case of *Chicago, R. I. & P. R. Co. v. Stone*, 34 Okla. 364, L.R.A. 1915A, 142, 125 Pac. 1120, the plaintiff at the time of the injury was a trespasser upon a regular passenger train of defendant company. The accident occurred in the west end of the railway yards of Yukon. The train on which he was riding was running at the rate of about 30 miles an hour when approaching the west end of the passing track at Yukon station. On this passing track were some twelve or fifteen cars which in some way not clearly shown were permitted to run down grade to the switch block and onto the main track, and collide with the incoming passenger train, on which the plaintiff was riding. These loose freight cars struck the passenger car, thereby causing the injury complained of. Commissioner Sharp, in delivering the opinion, said: "To leave a string of freight cars on such siding, not under control, and where the same, either by momentum or gravitation, might run down grade to where the siding connected with the main line,

and then upon the said main line, . . . even though in the daytime, and at a time when a regular passenger train was due, would be proof to show such gross and wanton negligence and recklessness as would manifest a disregard of all consequences."

In *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692, the facts were that the train which committed the injury was traveling at a speed of 35 or 40 miles an hour in the crowded city of Chicago, over street crossings upon unguarded tracks, so connected with the public street and so apparently a continuation of the public street as to be regarded by ordinary citizens as to be located in the public street along a portion of the city tracks, where persons are known to be passing and crossing every day, in conceded violation of the city ordinance as to speed and without warning of the approach of the train by the ringing of the bell. It was said by the court: "This conduct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness."

In the case of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, we find the following: "It will be perceived that the question excludes injuries resulting from wilful or wanton acts, but applies only to cases of ordinary negligence."

If the court in the *Adams Case* was not of the opinion that there were degrees in negligence, why use the language quoted? There has been nothing said or indicated by the United States court, since the *Adams Case*, so far as we have been able to find, to the effect that the provision in a free pass, waiving claims against the carrier for negligence, was intended to include every degree of negligence.

In *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260, the first paragraph of the syllabus is as follows: "A passenger, while travel-

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ing in the cars of a railroad, received injuries to his person occasioned by a collision of trains. At the time of the accident, the passenger was traveling under a free pass given him by the company, upon the back of which was this printed indorsement: 'The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable under any circumstances, whether of negligence of their agents, or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket.' In an action on the case against the company to recover damages for the injuries thus received by the passenger, it was held that this agreement did not exempt the company from liability for the gross negligence of its employees, but it did exempt it from liability for any other species or degree of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company."

To the same effect see *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Dec. 613. In *Indiana C. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339, the court said: "Where a person traveling on a railroad receives from the company a free pass, upon which is indorsed a statement that 'it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company,' such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the railroad company in running the trains."

To the same effect see *Philadel-*

phia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; The New World v. King, 16 How. 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614.

The evidence introduced at the trial in the case at bar tended to show that the car upon which plaintiff was riding could not have gotten onto the sidetrack without the switch being open. The section foreman of the Santa Fe had a key to the switch, and the trainmen had a key, and the evidence further tends to show that the foreman of the concrete gang working at the switch on the date of the accident also had a key. The train upon which plaintiff was riding was due at Bartlesville about 11 o'clock A. M. The question whether the action of the defendants, in leaving open the switch at that time, knowing that a passenger train might be expected at that hour, without ascertaining the location of the train, and without having anyone looking after the switch, would be considered gross negligence, was a matter to be submitted to the jury under proper instructions. Under the evidence in the case, we are of the opinion that the jury was justified

—open switch—  
negligence.

in finding the accident resulted from gross negligence on the part of defendants.

We recognize the rule is well established that the right of the carrier to stipulate for exemption from liability for its own negligence in regard to an interstate pass is not a local question, but is a matter for the Federal courts. As we understand, the rule as enunciated in the case of Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606, is as follows: A statute of the state where the injury occurred can be applied until Congress has acted in the matter. In the above case, the plaintiff based his right to recover upon a Nebraska statute, which undertook, among other things, to take away the defense of contributory negligence in cases of that character, when the

negligence of the employer was gross in comparison to that of the employee, but the damages were to be diminished according to the negligence of the employee. The railroad company there contended that in respect to interstate transactions this legislation could not control as the same violated the commerce clause of the Constitution. In delivering the opinion, Chief Justice White uses the following language: "The repugnancy of the statute to the commerce clause of the Constitution was also averred on the ground that 'the plaintiff at the time he received the injuries complained of was engaged as an employee of an interstate railroad engaged in commerce between the states of Missouri, Kansas, and Nebraska,' and the statute of Nebraska 'attempts to regulate and control, as well as create, a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject.' . . . And as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employees, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employees engaged in interstate commerce."

If Congress has ever enacted a statute relative to interstate free passes, defining the degrees of negligence, we have been unable to find the same, nor have we been cited to any by counsel; therefore we see no reason why the Oklahoma statute, that a "common carrier cannot be exonerated by an agreement from liability for gross negligence," etc., would not be applicable to the case at bar. Certainly the decisions of the Federal court, quoted *supra*, clearly seem to contemplate that even in the absence of any state statute the common carrier could not be exonerated by any agreement

as against the gross negligence, fraud, or wilful wrong of itself or its servants.

The defendants complain of instructions Nos. 5, 6, 9, 10, and 13, which are as follows:

(5) "Under the law of this state, gross negligence, as is used in these instructions, is defined as the want of slight care and diligence. It is the doing of some act or thing which a person of ordinary prudence and intelligence would not do under the circumstances, or the failure to do some act or thing which a person of ordinary prudence and intelligence would do under like circumstances. Should such conduct or acts be of such a nature as to amount to a gross want of care and regard for the rights of others, it amounts to wilfulness, and it is not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specially towards the plaintiff, or to have known that she was in such position as to be likely to be injured."

(6) "Slight care and diligence as used in these instructions is such care and diligence as persons of ordinary prudence usually exercise about their own affairs of slight importance."

(9) "You are instructed that the defendants owed to the plaintiff the duty of conveying her from St. Louis, Missouri, to Oklahoma City, Oklahoma, using ordinary care and prudence to so maintain and operate their trains, lines of railroad, and roadbed, switches, and yards, as to make them reasonably safe for travel by the public in general, without regard to whether the plaintiff was riding on a pass or not."

(10) "You are instructed that the acts of Congress relative to interstate commerce authorize and permit carriers to issue free passes to dependent members of the family of employees of railroad companies, and to stipulate in such passes that the person using the same for transportation shall assume all risks of accident, injury, and damage,

whether resulting from the ordinary negligence of the servants and agents of the company issuing the pass, or otherwise; but in this connection, you are instructed that the law does not permit the defendants to contract against injury resulting from the acts of their employees amounting to gross negligence, or a wanton disregard of the rights of others."

(13) "You are therefore instructed that, should you find from the evidence in this case, by a fair preponderance thereof, that the plaintiff was riding upon a passenger train of the Katy Railroad Company on the 24th day of September, 1914, over the railroad line of the defendant Santa Fe Railroad Company, and that the servants, agents, or employees of the defendants, or either of them, were not in the exercise of slight care and diligence to keep the lines and appliances in and about the yard in the city of Bartlesville in a reasonably safe condition for traffic, but were guilty of gross negligence, as defined by these instructions, in opening and permitting to remain open a certain switch, and that said train ran into said open switch and collided with a freight train standing upon said switch or sidetrack, and that thereby plaintiff was injured, it will be your duty to find for the plaintiff, and, if you fail so to find, you will return a verdict for the defendants."

The court may have been in error in giving instruction No. 9, but it is a settled rule in this jurisdiction that instructions Appeal—  
instructions  
considered  
together. must be construed as a whole and together, and it is not necessary that

any particular paragraph thereof contain all the law of the case. It is sufficient if, when taken together and considered as a whole, they fairly present the law of the case, and there is no conflict between the different paragraphs thereof, and while an instruction, standing alone, may be subjected to the criticism of

being indefinite and uncertain, yet, if other instructions fairly submit the material issues to the jury, reversible error is not committed. *Ponca City Ice Co. v. Robertson*, — Okla. —, 169 Pac. 1111; *Lons-*

*dale v. Schlegel*, — Okla. —, 171 Pac. 330; *Newton v. Allen*, — Okla. —, 168 Pac. 1009.

The judgment of the trial court is affirmed.

All the Justices concur.

## ANNOTATION.

### What amounts to gross negligence for which carrier is liable to free passenger.

- I. Introductory, 852.
- II. Acts amounting to gross negligence, 852.
- III. Acts not amounting to gross negligence, 854.

#### I. Introductory.

The question, What amounts to gross negligence for which a carrier will be liable to a free passenger, must be decided by the particular circumstances of each case, since the law furnishes no adequate definition of the term "gross negligence" beyond such generalities as that "gross negligence is the want of slight diligence" and the like. Indeed, it has been said by the Supreme Court of the United States that "if the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned." *The New World v. King* (1853) 16 How. (U. S.) 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614. For this reason no attempt has been made to deduce any general rule from the cases falling within the scope of the present discussion, but the decisions have been classified merely in accordance with the holding of the court as to the presence or absence of gross negligence.

The discussion excludes cases wherein it was apparent that the passenger was a drover or other person accompanying freight, or a mail clerk, express messenger, news agent, etc., since by the weight of authority such persons are considered as passengers for hire.

#### II. Acts amounting to gross negligence.

In each of the following cases the negligence of the carrier was held to be of that degree denominated as gross, subjecting the carrier to liability to a free passenger:

**United States.**—*Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; *The New World v. King* (1853) 16 How. 469, 14 L. ed. 1019, 10 Am. Neg. Cas. 614.

**California.**—*Walther v. Southern P. Co.* (1911) 159 Cal. 769, 37 L.R.A. (N.S.) 235, 116 Pac. 51.

**Illinois.**—*Illinois C. R. Co. v. Read* (1865) 37 Ill. 484, 87 Am. Dec. 260, approved in *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613; *Jacksonville South Eastern R. Co. v. Southworth* (1889) 32 Ill. App. 307, affirmed in (1890) 135 Ill. 250, 25 N. E. 1093; *Illinois C. R. Co. v. O'Keefe* (1896) 63 Ill. App. 102, reversed in (1897) 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48; *Pennsylvania Co. v. Purvis* (1906) 128 Ill. App. 367.

**Massachusetts.**—*Doyle v. Fitchburg R. Co.* (1894) 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770.

**Minnesota.**—*Jacobus v. St. Paul & C. R. Co.* (1873) 20 Minn. 125; *Gil*, 110, 18 Am. Rep. 360.

**Missouri.**—*Bryan v. Missouri P. R. Co.* (1888) 32 Mo. App. 228.

**Oklahoma.**—See *MISSOURI, K. & T. R. Co. v. ZURBER* (reported herewith) ante, 840.

**Wisconsin.**—*Anna v. Milwaukee & N. R. Co.* (1886) 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, 10 Am. Neg. Cas. 546.

**Canada.**—*Ryckman v. Hamilton, G. & B. Electric R. Co.* (1905) 10 Ont. L. Rep. 419, 4 Ann. Cas. 1126.

In *The New World v. King* (U. S.) supra, wherein it appeared that the plaintiff had been scalded by steam and hot water from the explosion of a boiler flue on the defendant's steamboat, on which he was traveling as a free passenger, the court held that the failure of the defendant to exert the skill required for the proper management of the boilers and machinery of the steamboat amounted to gross negligence for the results of which the defendant was liable. In defining gross negligence the court, quoting the supreme court of Maine, said: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define."

In *Philadelphia & R. R. Co. v. Derby* (U. S.) supra, it appeared that the plaintiff had been injured by jumping from one of the defendant's cars to avoid an impending collision with another car approaching on the same track. The plaintiff was a stockholder of the defendant company, and at the time was riding by invitation of the president of the company and paying no fare. The evidence disclosed that the engineer of the colliding locomotive had acted in disobedience of his orders in running the locomotive on the track on which the collision occurred. The court, affirming a verdict for the plaintiff, held that the acts of the defendant's servant constituted gross negligence for which the plaintiff was entitled to recover, although he was not traveling in one of the usual passenger cars.

In *Walther v. Southern P. Co.* (Cal.) supra, the evidence showed that the train on which the deceased had been riding was wrecked by running into a switch which had been left open by a switch foreman in violation of the defendant's rules. The deceased was, at the time, a free passenger, and had agreed not to hold the defendant liable for any injuries suffered by him. It was held, however, that the act of the defendant amounted to gross negligence for which it was liable.

In *Illinois C. R. Co. v. O'Keefe* (1896) 63 Ill. App. 102, it was held that the action of an agent of the defendant company in ordering a train to proceed, on the theory that another train was late, when such was not the case, amounted to gross negligence for which the carrier was liable to the representative of a free passenger killed in the resulting collision. (That case was reversed in (1897) 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, 4 Am. Neg. Rep. 48, on the ground that the deceased, by riding on the front platform of a baggage car without the defendant's consent, did not thereby become a passenger.)

In *Pennsylvania Co. v. Purvis* (1906) 128 Ill. App. 367, it appeared that the plaintiff was injured by a collision between the train on which he was traveling as a free passenger, and a freight train of the defendant which at the time was backing down the track to take up some freight cars which had broken away. The court, affirming a verdict for the plaintiff, despite a contract limiting the carrier's liability for negligence, stated that in its opinion the evidence warranted a finding of gross negligence, although it quoted authorities to the effect that any negligence when the passenger was not at fault was gross negligence.

In *Illinois C. R. Co. v. Read* (1865) 37 Ill. 484, 87 Am. Dec. 260, approved in *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613, the evidence showed that the plaintiff, while traveling as a free passenger on the defendant's train, was injured by the running of the engine of a freight train into the car in which he was riding. At the time of the collision it was dark and foggy and the track was slippery. The court held that the defendant would not be protected by a contract limiting its liability for negligence, saying: "The negligence in this case was found by the jury to have been gross, amounting, as we are inclined to think, to recklessness on the part of the conductor having charge of the train in which appellee was a passenger, consequently the

company are not protected by this special contract." But a judgment for the plaintiff was reversed on the plea of a release of all damages.

In a case where the evidence showed that the track of the defendant railroad was rough and uneven, the ties rotten, and the rails battered, split, and insecurely fastened, the court held that the jury were fully warranted in finding that such a condition was the result of gross negligence, for which the defendant was liable to a free passenger injured by the derailment of a car, regardless of a contract by which the plaintiff agreed to assume all risk of injury. *Jacksonville Southeastern R. Co. v. Southworth* (1889) 32 Ill. App. 307, affirmed in (1890) 135 Ill. 250, 25 N. E. 1093.

In *Doyle v. Fitchburg R. Co.* (1894) 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, it appeared that a train of the defendant had collided with a car in which one Doyle was riding as a free passenger. The collision occurred by reason of the carelessness of the engineer of the colliding train. The court held that the defendant was chargeable with gross negligence and liable for the death of Doyle, although he had agreed to assume the risk of all injury.

In *Jacobus v. St. Paul & C. R. Co.* (1873) 20 Minn. 125, Gil. 110, 18 Am. Rep. 360, the plaintiff, who had been injured while riding on the defendant's train as a free passenger, sought to recover for the injuries incurred, although he had agreed to assume all risk of accident caused by the negligence of the defendant. It appeared that the injury was caused by the breaking of a stick of cross-grained cordwood which was used as the stake of a loaded lumber car in the train, while the train was traveling at a rapid speed. It was held that the facts showed gross negligence, for the results of which the defendant was liable.

In *Bryan v. Missouri P. R. Co.* (1888) 32 Mo. App. 228, the court said that where a free passenger was himself without fault, any negligence of the carrier resulting in his injury would be gross negligence.

In the reported case (*MISSOURI, K. & T. R. Co. v. ZUBER*, ante, 840) it is held that the leaving open of a switch at an hour when a passenger train may be expected, without ascertaining the location of the train and without leaving anyone to guard the switch, constitutes gross negligence for which the defendant is liable in damages to a passenger injured while traveling on a gratuitous pass.

In *Annas v. Milwaukee & M. R. Co.* (1886) 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, 10 Am. Neg. Cas. 546, the plaintiff sought to recover damages for the death of her husband, occasioned by the alleged negligence of the defendant railroad. It appeared that the husband was killed while traveling as a free passenger in one of the defendant's trains which, while stalled in a snowstorm, was struck by an engine with a snowplow attached, which had approached without slackening speed. The husband had agreed to assume all risk of injury, but it was held that the evidence was sufficient to show gross negligence for the results of which the defendant was liable.

In *Ryckman v. Hamilton, G. & B. Electric R. Co.* (1905) 10 Ont. L. Rep. 419, 4 Ann. Cas. 1126, the court said that evidence of a head-on collision between the car on which a free passenger was riding, and another car of the defendant company, was *prima facie* evidence of gross negligence for which the carrier was liable.

### *III. Acts not amounting to gross negligence.*

In each of the following cases the act or omission of the carrier was held not to amount to gross negligence, subjecting the carrier to liability to a free passenger: *Northern P. R. Co. v. Adams* (1903) 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; *Smith v. Atchison, T. & S. F. R. Co.* (1912) 114 C. C. A. 157, 194 Fed. 79; *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613; *John v. Northern P. R. Co.* (1910) 42 Mont. 18, 32 L.R.A. (N.S.) 85, 111 Pac. 632; *Welles v. New York C. R. Co.* (1858) 26 Barb. (N. Y.) 641.

In *Northern P. R. Co. v. Adams* (U. S.) *supra*, it was held that the placing of a nonvestibuled car in a vestibuled train was at most but ordinary negligence, so that no liability would ensue for the death of a free passenger who was thrown from the train while going from one car to another, such passenger having agreed to assume the risks of ordinary negligence.

It was held in *Smith v. Atchison, T. & S. F. R. Co.* (1912) 114 C. C. A. 157, 194 Fed. 79, that the derailing of a train, causing injuries to a free passenger thereon, presented a case of ordinary negligence only, and failed to show a wanton breach of duty for which the company would have been liable to a free passenger who had signed a waiver of liability for any injuries caused by the negligence of agents of the carrier, or otherwise.

In *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 80, 28 Am. Rep. 613, an action to recover for injuries sustained by reason of the breaking of a wheel of the car in which the plaintiff was riding, the court said by way of dictum that, assuming that the plaintiff was a passenger on a free ticket containing the usual conditions, he could not re-

cover, since the breaking of the wheel, which had been thoroughly tested, did not amount to gross negligence.

In *John v. Northern P. R. Co.* (1910) 42 Mont. 18, 32 L.R.A. (N.S.) 85, 111 Pac. 632, the court said that proof of the derailment of a train would not, standing alone, be sufficient to show gross negligence so as to charge a carrier with liability to a free passenger injured thereby.

In *Welles v. New York C. R. Co.* (1858) 26 Barb. (N. Y.) 641, it appeared that a free passenger was injured by a collision between the train on which he was riding, and certain cars of a freight train standing on the same track. The court said: "All collisions of trains must be the result of negligence in some degree, perhaps in the scale or degree of gross negligence. But . . . there is nothing in this case to warrant the finding that the defendants were guilty of such gross negligence as is equivalent to fraud, or evidence of fraud or bad faith." And it was held that by reason of a contract by which the passenger had agreed to assume the risk of all injury, the defendants were absolved from liability.

R. E. B.

A. W. JENNINGS, Plff. in Err.,

v.

ANN E. MARSTON.

*Virginia Supreme Court of Appeals—June 14, 1917.*

(121 Va. 79, 92 S. E. 821.)

**Ejectment — tracing title — common source.**

1. A plaintiff in ejectment need not trace title beyond the common source.

[See note on this question beginning on page 860.]

**Estoppel — to dispute common source of title.**

2. The rule that a plaintiff in ejectment need not trace title back of the common source rests upon the principle of estoppel, the defendant not being allowed the inconsistency of claiming both under and against the same title.

[See 9 R. C. L. 846.]

**Ejectment — tracing title beyond common source — conveyance of adjoining tract.**

3. In ejectment arising out of a dispute as to the location of a boundary line between two distinct tracts, one of which a common grantor derived from one source and conveyed to plaintiff, and the other of which he derived from another source and con-



veyed to defendant, the rule of common source of title does not apply to relieve plaintiff from tracing title beyond such common source.

**Estoppel — deed without warranty — acquisition of conflicting title.**

4. A deed without warranty to secure a debt does not estop the grantor from acquiring a conflicting title to a portion of the tract.

[See 10 R. C. L. 677.]

**Ejectment — recovery on strength of title.**

5. A plaintiff in ejectment must recover upon the strength of his own title, which he must connect with the commonwealth or with a common source with that of defendant.

[See 9 R. C. L. 838.]

**Boundary — on pond — marked line on water's edge.**

6. Bounding a grant on a pond does not per se extend title to the center if the boundary of the tract is indicated by an old and marked line following the high-water mark of the pond bed.

[See 4 R. C. L. 96.]

— on non-navigable stream.

7. Owners of land on non-navigable streams are presumed to own to the middle thread of the stream.

[See 4 R. C. L. 85.]

**Deed — boundary on stream — conveyance to middle.**

8. A conveyance by one owning to the middle thread of a stream, by deed calling for the stream as a boundary, is conclusively presumed to convey to the middle unless the presumption is expressly excluded by words in the conveyance.

[See 4 R. C. L. 85.]

**Evidence — presumption — boundary on stream.**

9. The presumption of ownership to the middle of a stream by one whose land bounds thereon is rebuttable, and yields to proof that the edge of the stream is the true boundary line.

[See 4 R. C. L. 86.]

— intention of grantor — presumption.

10. A grantor is not presumed to intend to convey more than he owns.

**ERROR** to the Circuit Court for the City of Williamsburg and County of James City to review a judgment in favor of plaintiff in an action brought to recover possession of certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. S. O. Bland and Henley, Anderson, & Hall, for plaintiff in error:

Plaintiff must recover upon the strength of her own title, and not upon the weakness of her adversary's title.

*Spriggs v. Jamerson*, 115 Va. 250, 78 S. E. 571.

There can be no such thing as tracing title to a common source when the tracts or parcels of land are separate and distinct.

*Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

If the evidence of plaintiff was sufficient to submit the case to the jury, yet jury might have found with defendant, and the court must so find.

*Higgins v. Southern R. Co.* 116 Va. 890, 83 S. E. 380; *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703; *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643; *Honaker v. Shrader*, 115 Va. 318, 79 S. E. 391; *Mitchell v. Williams*, 114 Va. 420, 76 S. E. 949; *Pilkerton v. Roberson*, 110 Va. 186, 65 S. E. 835; *Whealton v. Doughty*, 116 Va. 566, 82 S. E. 94.

The evidence of the defendant conclusively showed ownership to the south line.

*Whealton v. Doughty*, supra; *Dogan v. Seekright*, 4 Hen. & M. 125; *Pasley v. English*, 5 Gratt. 141; *Coles v. Wooding*, 2 Patton & H. (Va.) 196.

The evidence of the defendant, if not conclusive, was presumptive that the Smith line was correct, and on a demurrer to the evidence that presumption must control.

*Smith v. Stanley*, 114 Va. 117, 75 S. E. 742; 15 Cyc. 128; *Lawson*, Presumptive Ev. rule 89, p. 492; *Adams*, Ejectment, 33; *Newell*, Ejectment, § 12, p. 290; *Tyler*, Ejectment, 71.

Defendant showed title to the disputed land by adverse possession.

*Merrill v. Tobin*, 30 Fed. 738; *Eastern R. Co. v. Allen*, 135 Mass. 13; *Williams v. Buchanan*, 23 N. C. (1 Ired. L.) 535, 35 Am. Dec. 760; *Atty. Gen. v. Ellis*, 198 Mass. 91, 15 L.R.A. (N.S.) 1120, 84 N. E. 430; *Illinois Steel Co. v. Bilot*, 109 Wis. 428, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402; 1 R. C. L. 694.

Messrs. Frank Armistead and B. D. Peachy, Jr., for defendant in error:

Defendant Jennings is estopped to deny the title of the Cranstones in the Badkins tract.

Laidley v. Central Land Co. 30 W. Va. 505, 4 S. E. 705.

The southern boundary of the Badkins tract in all of the deeds in the chain of title is given as Cranston's mill pond. The legal construction of this call is the center of Cranston's mill pond or the main thread of the stream, just as if the center or main thread of the stream had been expressly called for in the deed.

Providence Forge Fishing & Hunting Club v. Miller Mfg. Co. 117 Va. 129, 83 S. E. 1047; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Hayes v. Bowman, 1 Rand. (Va.) 417; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 58 N. W. 1189; Mansur v. Blake, 62 Me. 38; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462; Gouverneur v. National Ice Co. 134 N. Y. 363, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865.

Whether the line stopped at the edge of the pond or went to the center or main thread of the stream is a question of law which was in the province of the court to decide.

Patterson v. Overbey, 117 Va. 345, 84 S. E. 647; McCulloch v. Aten, 2 Ohio, 307; Whealton v. Doughty, 116 Va. 566, 82 S. E. 94.

It is immaterial as to legal rights what construction the former owners may have put upon the deed, or what they may have thought was the true line, for no oral disclaimer of title on their part to the land in dispute could affect the plaintiff's interest.

Sutherland v. Emswiler, 111 Va. 507, 69 S. E. 368; McMurray v. Dixon, 105 Va. 605, 54 S. E. 481; Whealton v. Doughty, 112 Va. 649, 72 S. E. 112.

Wild and uncultivated lands, and lands remaining in a state of nature, or covered by water, or upon which the tide ebbs and flows, cannot be made the subject of adversary possession.

Richmond v. Jones, 111 Va. 214, 68 S. E. 181; Koiner v. Rankin, 11 Gratt. 423; Harman v. Ratliff, 93 Va. 253, 24 S. E. 1023; Overton v. Davison, 1 Gratt. 211, 42 Am. Dec. 544; Turpin v. Saunders, 32 Gratt. 37; Taylor v. Burnside, 1 Gratt. 167; Gardner v.

Montague, 108 Va. 192, 60 S. E. 870; Austin v. Minor, 107 Va. 101, 57 S. E. 609.

Kelly, J., delivered the opinion of the court:

This is an action of ejectment brought by Ann E. Marston against A. W. Jennings. We will hereinafter designate these parties, respectively, as plaintiff and defendant, in accordance with their positions in the circuit court. There was a judgment below for the plaintiff upon a demurrer which she interposed to the evidence, and thereupon the defendant brought the case here upon a writ of error.

No effort was made by the plaintiff to trace title to the commonwealth, and the first question presented for our decision is whether the title under which she claims is shown to have been derived, as she contends, from a source common with that of the defendant.

The tract of land described in the declaration is known as the "Badkins tract," and its southern boundary, as called for in all of the deeds in evidence describing the same, is the "Cranston mill pond." This pond or dam has been down for a number of years, and the stream which formerly flowed into and made it now runs through the land once constituting its bed. The land in actual dispute lies between the middle thread of the stream and what was formerly the edge of the pond on the side next to the "Badkins tract." (The plaintiff's ultimate contention, denied by the defendant, is that the deeds under which she claims and which call for the pond as a boundary carry her title to the center of the stream.)

The plaintiff's documentary title, so far as shown, is as follows: (1) Deed of trust (to secure a debt), dated January 20, 1886, from A. H. and Charles Cranston (alleged common grantors) to E. B. Ratcliff, trustee; (2) deed, dated October 6, 1890 (consummating a foreclosure and sale under the trust deed), from H. B. Ratcliff, trustee, to D. W. Marston; (3) deed, dated June 1,

1914, from the heirs at law of D. W. Marston, deceased, to Ann E. Marston, the plaintiff. Each of these deeds conveys the "Badkins tract," and, as stated, describes it as bounded on the south by the mill pond.

Having traced her own title as above, the plaintiff then introduced two deeds in the defendant's chain of title which, with their recitals and certain oral and undisputed evidence, show that the defendant's title was derived from Charles Cranston in his own right and as the survivor of his brother, A. H. Cranston. These two deeds, so far as they are material in this connection, were as follows: (1) Deed dated January 15, 1913, from Charles Cranston and wife to the Cambridge Manufacturing Company for "a certain water grist mill formerly known and called Bush's mill . . . and the mill pond, which, by estimation, is 90 acres of land, be the same more or less, covered with water, and about 35 acres of land, be the same more or less, being a portion of the 100 acres belonging to said mill property." The deed contains no further description of the 90-acre tract, but describes the 35 acres by metes and bounds. (2) Deed dated April 28, 1914, from Cambridge Manufacturing Company to A. W. Jennings, the defendant in this case. This deed conveyed the 90 acres and the 35 acres by substantially the same description as above; and each of the two deeds warranted the title, generally as to the latter, and specially as to the former, tract. It is under the conveyance of the 90 acres that the defendant claims title to the land in controversy.

It will thus be seen that the title of the plaintiff and defendant, respectively, is each derived from the same grantors, Charles and A. H. Cranston; but at this point the question arises, whether conveyances from the same grantor of separate tracts of land, although they be adjoining tracts, necessarily constitute, in contemplation of law, a com-

mon source of title. It is contended by the plaintiff that the terms, "common grantor" and "common source of title," are synonymous and may always be used interchangeably. We do not think this can be maintained as a proposition universally and necessarily true. In most cases the facts are such that the two terms do mean the same thing, and it is possibly for this reason that the question arising in this case is an open one in Virginia, as well as elsewhere generally. The question was raised in *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742, but was not decided because the defendant had asked for an instruction which practically admitted that the common grantor was, in fact, the owner of the identical right or title under which both he and the plaintiff claimed. Looking to the reason of the rule that a plaintiff in ejectment need not trace

Ejectment—  
tracing title—  
common source.

title back of the common source, there is no difficulty in settling the question under discussion. The rule rests upon the principle of estoppel, the defendant

Estoppel—to dis-  
pute common  
source of title.

not being allowed the inconsistency of claiming both under and against the same title. But the inconsistency must be actual and substantial; and when it affirmatively appears, as we shall see it does in this case, that the real dispute is as to the location of a boundary line between two distinct tracts, one of which the common grantor derived from one source and conveyed to the plaintiff, and the other of which he derived from another source and conveyed to the defendant, there is no inconsistency, and, therefore, no estoppel to prevent the defendant from denying that the plaintiff's grantor had title to the land in dispute.

Ejectment—  
tracing title  
beyond common  
source—con-  
veyance of  
adjoining tract.

The oral evidence of the defendant, which was not objected to, shows that Charles and A. H.

Cranston derived their title to the "Badkins tract" from one source, and to the mill pond from another source, and that they had disposed of their interest in the former before they acquired their interest in the latter.

If we assume that the deeds under which the plaintiff claims the "Badkins tract" did extend to the middle thread of the stream, forming the mill pond, the Cranstons were not estopped from subsequently purchasing the land in dispute, and would not have been estopped from purchasing the entire tract, because their deed to Ratcliff, trustee, was made merely

**Estoppel—deed without warranty—acquisition of conflicting title.**

ly for the purpose of securing a debt, contained no warranty of title, and,

to use the language of Baldwin, J., in *Sutton v. Sutton*, 7 Gratt. 234, 56 Am. Dec. 109: "The grantor undertook no responsibility, either as to title or quantity."

The fact that the Cranstons conveyed the mill-pond tract to the Cambridge Manufacturing Company with special warranty is plausibly accounted for by the testimony of Charles Cranston himself, who says that the 90-acre tract was conveyed by special warranty because of an adverse claim which had been asserted thereto by a third party, who does not appear to, at any time, have had any interest in or claim to the "Badkins tract."

The established and familiar general rule is that in an action of

**Ejectment—recovery on strength of title.**

ejectment the plaintiff must recover upon the strength

of his own title, which he must connect with the commonwealth, or with a common source with that of the defendant. There are exceptions to the rule, but this case does not fall within any of them. The defendant, for example, was not a mere trespasser or intruder, but held a deed for the land under which he was exercising the acts of

ownership and possession resulting in this suit.

Having reached the conclusion that the plaintiff failed to make out a prima facie case entitling her to recover, it becomes unnecessary to go at length into a discussion of the further question whether the deed under which she claims the "Badkins tract" should be construed to extend to the edge or the middle of the stream. She claims to the middle, and the defendant claims between the middle and what was formerly the northern edge thereof. That the question of construction does not arise may be demonstrated by supposing that the defendant's deed, instead of covering only a part, had covered all of the "Badkins tract." Either in the case supposed, or in the case as it exists, the plaintiff was bound, in the first instance, to make out her own title under the rule above indicated, and, having failed to do so, her demurrer to the evidence should have been overruled.

We may add, however, that there was evidence tending to show that the former owners of the "Badkins tract" had never, in fact, owned or claimed further than the edge of the pond; and that the southern boundary of that tract was indicated by an old and marked line following the high-water mark of the pond bed. In this

**Boundary—on pond—marked line on water's edge.**

state of the case, it by no means follows, as a matter of law, that the deed to D. W. Marston extended further than the northern edge of the pond. Riparian owners (on non-navigable streams) are presumed to own to the middle thread of the stream; and when they do own to the middle and convey by a deed calling for the stream as a bound-

**—on non-navigable stream.**

**Deed—boundary on stream—conveyance to middle.**

ary, they are conclusively presumed in law to convey to the middle, unless they expressly

exclude that presumption by words in the conveyance. The presumption of ownership to the middle of the stream, however, is a rebuttable presumption, and yields to proof that the edge of the stream is the true boundary line. When this latter fact affirmatively appears, there can be no presumption that a deed call-

**Evidence—  
presumption—  
boundary on  
stream.**

ing for the stream was intended as a conveyance to the middle. A grantor is not presumed to intend to convey more than he owns.

**—intention of  
grantor—  
presumption.**

For the foregoing reasons the judgment of the Circuit Court will be reversed, and this court will enter up judgment for the defendant upon the demurrer to the evidence.

Burks, J., absent.

## ANNOTATION.

### Rule that plaintiff in ejectment need not trace title back of common source.

- I. General rule, 860.
- II. Reason of rule, 866.
- III. Application of rule:
  - a. In general, 867.
  - b. Title claimed by descent or devise, 871.
  - c. Title claimed under judicial sale, 877.
- IV. Affidavit of title from common source under Illinois statute, 881.
- V. Exceptions to rule:
  - a. In general, 883.
  - b. Acquisition of paramount title, 886.

#### I. General rule.

It is a well-established principle in the law of ejectment that, where both parties to an action claim title from the same third person each is estopped to deny the validity of the title of such third person and the one having the better title deraigned from the common source must prevail.

**United States.**—*Remington v. Linthicum* (1840) 14 Pet. 84, 10 L. ed. 364; *Van Rensselaer v. Kearney* (1850) 11 How. 297, 13 L. ed. 703; *Gaines v. New Orleans* (1867) 6 Wall. 642, 18 L. ed. 950; *Union-Consol. Silver Min. Co. v. Taylor* (1879) 100 U. S. 37, 25 L. ed. 541, 5 Mor. Min. Rep. 323; *Robertson v. Pickerell* (1883) 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; *Cox v. Hart* (1892) 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Cooke v. Avery* (1892) 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Mickey v. Stratton* (1879) 5 Sawy. 475, Fed. Cas. No. 9,580; *McDonald v. Hannah* (1894) 8 C. C. A. 426, 15 U. S. App. 348, 59 Fed. 977;

*Brosnan v. White* (1905) 68 C. C. A. 642, 136 Fed. 74; *Fenn v. Louisell* (1908) 87 C. C. A. 670, 160 Fed. 458.

**Alabama.**—*Pollard v. Cocke* (1851) 19 Ala. 188; *Seabury v. Doe* (1853) 22 Ala. 207, 58 Am. Dec. 254; *Gantt v. Doe* (1855) 27 Ala. 582; *Elliott v. Dycke* (1884) 78 Ala. 150; *Pendley v. Madison* (1887) 83 Ala. 484, 3 So. 618; *Ware v. Dewberry* (1887) 84 Ala. 568, 4 So. 404; *Bishop v. Truett* (1888) 85 Ala. 376, 5 So. 154; *Stephenson v. Reeves* (1891) 92 Ala. 582, 8 So. 695; *Feagin v. Jones* (1891) 94 Ala. 597, 10 So. 537; *Matkin v. Marx* (1892) 96 Ala. 501, 11 So. 633; *Florence Bldg. & Invest. Asso. v. Schall* (1895) 107 Ala. 531, 18 So. 108; *New England Mortg. Secur. Co. v. Clayton* (1898) 119 Ala. 361, 24 So. 362; *Leech v. Karthaus* (1904) 141 Ala. 509, 37 So. 696; *Butt v. Mastin* (1905) 143 Ala. 321, 39 So. 217; *Alabama White Marble Co. v. Eureka White Marble Quarries* (1914) 190 Ala. 595, 67 So. 505; *Pero-llo v. Doe* (1916) 197 Ala. 560, 73 So. 197; *Davis v. Brandon* (1917) — Ala. —, 75 So. 908.

**Arkansas.** — *Griesler v. McKennon* (1884) 44 Ark. 517.

**California.** — *Anderson v. Parker* (1856) 6 Cal. 197; *Ellis v. Jeans* (1857) 7 Cal. 409; *Bornheimer v. Baldwin* (1871) 42 Cal. 27; *Irwin v. Towne* (1871) 42 Cal. 326; *Littlefield v. Nichols* (1871) 42 Cal. 372; *Whitman v. Steiger* (1873) 46 Cal. 256; *Spect v. Gregg* (1875) 51 Cal. 198; *Olney v. Sawyer* (1880) 54 Cal. 379; *Rego v. Van Pelt* (1884) 65 Cal. 254, 3 Pac.

867; Frink v. Roe (1886) 70 Cal. 296, 11 Pac. 820; Dondero v. O'Hara (1906) 3 Cal. App. 633, 86 Pac. 985.

**Colorado.**—Bay State Min. & Townsite Co. v. Jackson (1900) 27 Colo. 139, 60 Pac. 573.

**District of Columbia.**—Anderson v. Smith (1883) 2 Mackey, 275; Beale v. Brown (1888) 6 Mackey, 574, affirmed in (1892) 149 U. S. 766, 37 L. ed. 960, 13 Sup. Ct. Rep. 1043; Morris v. Wheat (1897) 11 App. D. C. 201; Reid v. Anderson (1898) 13 App. D. C. 80; Chesapeake Beach R. Co. v. Washington, P. & C. R. Co. (1904) 23 App. D. C. 587; Bursey v. Lyon (1908) 32 App. D. C. 281; Robinson v. Hillman (1911) 36 App. D. C. 576.

**Florida.**—Doyle v. Wade (1887) 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516.

**Georgia.**—McConnell v. Rhodes (1853) 14 Ga. 313; Wood v. McGuire (1855) 17 Ga. 303; Miller v. Surls (1856) 19 Ga. 331, 65 Am. Dec. 592; Roe v. Doe (1869) 38 Ga. 597; Scott v. Singer (1875) 54 Ga. 639; Blalock v. Newhill (1887) 78 Ga. 245, 1 S. E. 383; Brinkley v. Bell (1906) 126 Ga. 480, 55 S. E. 187; Deen v. Williams (1907) 128 Ga. 265, 57 S. E. 427; Gable v. Gable (1908) 130 Ga. 689, 61 S. E. 595; Walker v. Steffes (1913) 139 Ga. 520, 77 S. E. 580.

**Illinois.**—McConnel v. Johnson (1840) 3 Ill. 522; Tilghman v. Little (1851) 13 Ill. 239; McClure v. Engelhardt (1855) 17 Ill. 47; Hall v. Lance (1861) 25 Ill. 277; Holbrook v. Brenner (1863) 31 Ill. 501; Pollock v. Maieson (1866) 41 Ill. 516; Huls v. Buntin (1868) 47 Ill. 396; Hartshorn v. Dawson (1875) 79 Ill. 108; Cairo & St. L. R. Co. v. Parrott (1879) 92 Ill. 194; Roosevelt v. Hungate (1884) 110 Ill. 595; Smith v. Laatsch (1885) 114 Ill. 271, 2 N. E. 59; Chicago, R. I. & P. R. Co. v. Hardt (1891) 138 Ill. 120, 27 N. E. 910; Lake Erie & W. R. Co. v. Whitham (1895) 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; Burns v. Edwards (1895) 163 Ill. 494, 45 N. E. 113; North Chillicothe v. Burr (1900) 185 Ill. 322, 57 N. E. 32; Brown v. Schintz (1903) 203 Ill. 136, 67 N. E. 767; Birge v. Centralia (1905) 218 Ill. 503, 75 N. E. 1035; Worley v.

Crawford (1911) 252 Ill. 378, 96 N. E. 821.

**Indiana.**—Pierson v. Turner (1850) 2 Ind. 123; Wilson v. Peelle (1881) 78 Ind. 384; Boyce v. Graham (1883) 91 Ind. 420; Nitche v. Earle (1889) 117 Ind. 270, 19 N. E. 749; McWhorter v. Heltzell (1890) 124 Ind. 129, 24 N. E. 743.

**Indian Territory.**—Wilhite v. Coombs (1904) 5 Ind. Terr. 354, 82 S. W. 772.

**Iowa.**—Conger v. Converse (1859) 9 Iowa, 554; Byers v. Rodabaugh (1864) 17 Iowa, 53; Morrison v. Wilkerson (1869) 27 Iowa, 374.

**Kentucky.**—Gay v. Moffit (1812) 2 Bibb, 506, 5 Am. Dec. 633; M'Clain v. Gregg (1820) 2 A. K. Marsh. 454; Alsop v. Weir (1885) 7 Ky. L. Rep. 366 (abstract); Luen v. Wilson (1887) 85 Ky. 503, 3 S. W. 911; Ratcliff v. Bellfonte Iron Works Co. (1888) 87 Ky. 559, 10 S. W. 365; Smith v. Bradley (1889) 10 Ky. L. Rep. 1029, 11 S. W. 370; Barnett v. Minnick (1891) 13 Ky. L. Rep. 503, 17 S. W. 334; Davis v. Clinton (1904) 25 Ky. L. Rep. 2021, 79 S. W. 259; Tarvin v. Walker's Creek Coal & Coke Co. (1904) 25 Ky. L. Rep. 2246, 80 S. W. 504; McGuire v. Whitt (1904) 25 Ky. L. Rep. 2275, 80 S. W. 474; Hellard v. Nance (1908) — Ky. L. Rep. —, 114 S. W. 277; Watkins v. Northern Coal & Coke Co. (1909) — Ky. —, 119 S. W. 225; Slone v. Kelley (1911) 143 Ky. 135, 136 S. W. 138; Cryer v. McGuire (1912) 148 Ky. 100, 146 S. W. 402, Ann. Cas. 1913E, 485; Burchett v. Scott (1917) 176 Ky. 669, 197 S. W. 397; Russell v. McIntosh (1918) 179 Ky. 677, 201 S. W. 33.

**Louisiana.**—Bedford v. Urquhart (1835) 8 La. 234, 28 Am. Dec. 137; Cotton v. Stacker (1850) 5 La. Ann. 677; Andrews v. Knox (1855) 10 La. Ann. 604; Weil v. Zodiag (1882) 34 La. Ann. 982; Clemens v. Meyer (1892) 44 La. Ann. 390, 10 So. 797.

**Maryland.**—Funk v. Newcomer (1856) 10 Md. 301; Elwood v. Lannon (1867) 27 Md. 200; Ahern v. White (1873) 39 Md. 409; Jay v. Michael (1895) 82 Md. 1, 33 Atl. 322.

**Michigan.**—Johnstone v. Scott (1863) 11 Mich. 232; Campau v. Campau (1877) 37 Mich. 245; Cronin v.

Gore (1878) 38 Mich. 381; Eames v. McGregor (1880) 43 Mich. 313, 5 N. W. 408; VanDen Brooks v. Correon (1882) 48 Mich. 283, 12 N. W. 206; Drake v. Happ (1892) 92 Mich. 580, 52 N. W. 1023; Killackey v. Killackey (1909) 156 Mich. 127, 120 N. W. 680.

**Minnesota.** — Horning v. Sweet (1880) 27 Minn. 277, 6 N. W. 782; Coleman v. McCormick (1887) 37 Minn. 179, 33 N. W. 556; Mitchell v. Chisholm (1894) 57 Minn. 148, 58 N. W. 873; Thompson v. Ellenz (1894) 58 Minn. 301, 59 N. W. 1023.

**Mississippi.** — Doe ex dem. Huntington v. Pritchard (1848) 11 Smedes & M. 827; Wolfe v. Doe (1849) 13 Smedes & M. 103, 51 Am. Dec. 147; Smith v. Doe (1853) 26 Miss. 291; Hughes v. Wilkinson (1855) 28 Miss. 600; Griffin v. Sheffield (1860) 38 Miss. 359, 77 Am. Dec. 646; Gordon v. Sizer (1863) 39 Miss. 805; Myrick v. Wells (1876) 52 Miss. 149; Wade v. Thompson (1876) 52 Miss. 367; Morgan v. Hazlehurst Lodge (1876) 53 Miss. 665; McCreedy v. Lansdale (1881) 58 Miss. 877; Gillum v. Case (1890) 67 Miss. 588, 7 So. 551; Slack v. Swain (1891) — Miss.—, 8 So. 545; Richards v. Lee (1908) 91 Miss. 657, 45 So. 570; Myers v. Viverett (1915) 110 Miss. 334, 70 So. 449.

**Missouri.** — Mathews v. Lecompte (1857) 24 Mo. 545; Chouquette v. Barada (1862) 33 Mo. 249; Merchants' Bank v. Harrison (1867) 39 Mo. 433, 93 Am. Dec. 285; Brown v. Brown (1870) 45 Mo. 412; Fellows v. Wise (1872) 49 Mo. 350; Fugate v. Pierce (1872) 49 Mo. 441; Union Bank v. Manard (1873) 51 Mo. 548; Holland v. Adair (1874) 55 Mo. 40; Butcher v. Rogers (1875) 60 Mo. 138; Miller v. Hardin (1877) 64 Mo. 545; Cunningham v. Snow (1884) 82 Mo. 587; Charles v. Patch (1885) 87 Mo. 450; Smith v. Lindsey (1886) 89 Mo. 76, 1 S. W. 88; Grandy v. Casey (1887) 93 Mo. 595, 6 S. W. 376; Huff v. Morton (1887) 94 Mo. 405, 7 S. W. 283; Ebersole v. Rankin (1891) 102 Mo. 488, 15 S. W. 422; Finch v. Ullman (1891) 105 Mo. 255, 24 Am. St. Rep. 383, 16 S. W. 863; Sell v. McAnaw (1897) 138 Mo. 267, 39 S. W. 779; Simpson v. Kilpatrick (1898) 148 Mo. 507, 50 S. W.

435; Worley v. Hicks (1901) 161 Mo. 340, 61 S. W. 818; Stevenson v. Black (1902) 168 Mo. 549, 68 S. W. 909; Sloan v. Chitwood (1909) 217 Mo. 462, 116 S. W. 1086; Feller v. Lee (1910) 225 Mo. 319, 124 S. W. 1129; Howell v. Sherwood (1912) 242 Mo. 513, 147 S. W. 810; Akins v. Adams (1914) — Mo. —, 164 S. W. 603; St. Louis v. Wiggins Ferry Co. (1884) 15 Mo. App. 227.

**Nebraska.** — Barton v. Erickson (1883) 14 Neb. 164, 15 N. W. 206; Carson v. Dundas (1894) 39 Neb. 503, 58 N. W. 141; McCarthy v. Birmingham (1902) 2 Neb. (Unof.) 724, 89 N. W. 1003.

**New Jersey.** — Den v. Winans (1833) 14 N. J. L. 1.

**New York.** — Jackson ex dem. Bowne v. Hinman (1813) 10 Johns. 292; Jackson ex dem. Hill v. Streeter (1826) 5 Cow. 529; Jackson ex dem. Livingston v. Walker (1827) 7 Cow. 637; Jackson ex dem. Norris v. Smith (1827) 7 Cow. 717; Jackson ex dem. Witherell v. Jones (1828) 9 Cow. 182; Bowne v. Potter (1837) 17 Wend. 164; Phelan v. Kelly (1841) 25 Wend. 389; Zahn v. Dopp (1892) 19 N. Y. Supp. 863; Second M. E. Church v. Humphrey (1894) 142 N. Y. 137, 36 N. E. 812; Sheridan v. Cardwell (1911) 145 App. Div. 609, 130 N. Y. Supp. 638.

**North Carolina.** — Murphy v. Barnett (1813) 6 N. C. (2 Murph.) 251; Den ex dem. Ives v. Sawyer (1838) 20 N. C. 179 (4 Dev. & B. L. 51); Den ex dem. Love v. Gates (1839) 20 N. C. (4 Dev. & B. L.) 363; Den ex dem. Gilliam v. Bird (1848) 30 N. C. (8 Ired L.) 280, 49 Am. Dec. 379; Copeland v. Sauls (1853) 46 N. C. (1 Jones, L.) 70; Johnson v. Watts (1853) 46 N. C. (1 Jones, L.) 228; Thomas v. Kelly (1854) 46 N. C. (1 Jones, L.) 375; Feimster v. McRorie (1854) 46 N. C. (1 Jones, L.) 547; Newlin v. Osborne (1855) 47 N. C. (2 Jones, L.) 163; Brown v. Smith (1861) 53 N. C. (8 Jones, L.) 331; Doe ex dem. McDougald v. McLean (1863) 60 N. C. (1 Winst. L.) 120; Whissenhunt v. Jones (1878) 78 N. C. 361; Caldwell v. Neely (1879) 81 N. C. 114; Christenbury v. King (1881) 85 N. C. 229; Ryan v. Martin 1884) 91 N. C. 464; Ferebee

v. Hinton (1889) 102 N. C. 99, 8 S. E. 922; Bonds v. Smith (1890) 106 N. C. 553, 11 S. E. 322; Cooper v. Axley (1894) 114 N. C. 643, 19 S. E. 639; Warren v. Williford (1908) 148 N. C. 474, 62 S. E. 697; Person v. Roberts (1912) 159 N. C. 168, 74 S. E. 322; Moore v. Johnson (1913) 162 N. C. 266, 78 S. E. 158; Waldo v. Wilson (1917) 173 N. C. 689, 92 S. E. 692.

**Ohio.**—Doe ex dem. Foster v. Dugan (1837) 8 Ohio, 87, 31 Am. Dec. 432.

**Oklahoma.** — Young v. Chapman (1913) 37 Okla. 19, 130 Pac. 289.

**Oregon.**—Dolph v. Barney (1874) 5 Or. 191.

**Pennsylvania.** — Thompson v. Graham (1872) 9 Phila. 53; Miller v. Wilson (1798) 2 Yeates, 294; Riddle v. Murphy (1821) 7 Serg. & R. 230; Patton v. Goldsborough (1822) 9 Serg. & R. 47; Stewart v. Shoenfelt (1825) 13 Serg. & R. 360; Zeigler v. Hautz (1839) 8 Watts, 380; Turner v. Reynolds (1854) 23 Pa. 199, 12 Mor. Min. Rep. 190; Clark v. Trindle (1866) 52 Pa. 492; Clough v. Welsh (1911) 229 Pa. 386, 78 Atl. 1000.

**South Carolina.**—Hill v. Robertson (1846) 32 S. C. L. (1 Strobb. L.) 1; Pyles v. Reeve (1851) 38 S. C. L. (4 Rich.) 555; Geiger v. Kaigler (1880) 15 S. C. 263; Lyons v. Holmes (1883) 19 S. C. 406; Smythe v. Tolbert (1884) 22 S. C. 133; Izlar v. Haitley (1885) 24 S. C. 382; Rhett v. Jenkins (1886) 25 S. C. 453; Johnson v. Cobb (1888) 29 S. C. 372, 7 S. E. 601; Burnett v. Crawford (1897) 50 S. C. 161, 27 S. E. 645; Cave v. Anderson (1897) 50 S. C. 293, 27 S. E. 693; Levi v. Gardner (1895) 53 S. C. 24, 30 S. E. 617; Kilgore v. Kirkland (1904) 69 S. C. 78, 48 S. E. 44; Carr v. Mouzon (1910) 86 S. C. 461, 68 S. E. 661; Bethea v. Allen (1913) 95 S. C. 479, 79 S. E. 639.

**South Dakota.**—Horswill v. Farnham (1902) 16 S. D. 414, 92 N. W. 1082; Bliss v. Tidrick (1910) 25 S. D. 533, 32 L.R.A.(N.S.) 854, 127 N. W. 852, Ann. Cas. 1912C, 671.

**Tennessee.** — Rochell v. Benson (1838) Meigs, 8; Kerbough v. Vance (1873) 6 Baxt. 110; Royston v. Wear (1859) 3 Head, 8; Wortham v. Cherry (1859) 3 Head, 468; Moss v. Union Bank (1874) 7 Baxt. 216; Bleid-

horn v. Oakdale Iron, Coal & Transp. Co. (1896) — Tenn. —, 43 S. W. 360; Smith v. Turner (1898) — Tenn. —, 48 S. W. 396; Beasley v. Rowly (1898) — Tenn. —, 52 S. W. 322; Hyder v. Butler (1899) 103 Tenn. 289, 52 S. W. 876; Carver v. Maxwell (1902) 110 Tenn. 75, 71 S. W. 752; Rucker v. Hyde (1907) 118 Tenn. 358, 100 S. W. 739; Stockard v. McGary (1908) 120 Tenn. 180, 109 S. W. 507; Wilson v. Wilson (1917) 137 Tenn. 590, 195 S. W. 173.

**Texas.** — Paschal v. Acklin (1863) 27 Tex. 173; Keys v. Mason (1875) 44 Tex. 140; Pearson v. Flanagan (1879) 52 Tex. 266; Stegall v. Huff (1881) 54 Tex. 193; Sellman v. Hardin (1882) 58 Tex. 86; Crabtree v. Whiteselle (1885) 65 Tex. 111; Calder v. Ramsey (1886) 66 Tex. 218, 18 S. W. 502; Howard v. Masterson (1890) 77 Tex. 41, 13 S. W. 635; Lasater v. Van Hook (1890) 77 Tex. 650, 14 S. W. 270; Burns v. Goff (1891) 79 Tex. 286, 14 S. W. 1009; Rice v. St. Louis, A. & T. R. Co. (1894) 87 Tex. 90, 47 Am. St. Rep. 72, 26 S. W. 1047; Dycus v. Hart (1893) 2 Tex. Civ. App. 354, 21 S. W. 299; Starr v. Kennedy (1893) 5 Tex. Civ. App. 502, 27 S. W. 26; Collins v. Davidson (1894) 6 Tex. Civ. App. 73, 24 S. W. 858.

**Vermont.**—Bown v. Bean (1814) 1 D. Chip. 176; Bush v. Whitney (1821) 1 D. Chip. 369; Brooks v. Chaplin (1831) 3 Vt. 281, 23 Am. Dec. 209; Braintree v. Battles (1834) 6 Vt. 395; Ames v. Beckley (1875) 48 Vt. 395.

**Virginia.** — Bolling v. Teel (1882) 76 Va. 487; Atkinson v. Smith (1896) 2 Va. Dec. 373, 24 S. E. 901; Chesterman v. Bolling (1904) 102 Va. 471, 46 S. E. 470; Carter v. Wood (1904) 103 Va. 68, 48 S. E. 553; Marbach v. Holmes (1906) 105 Va. 178, 52 S. E. 828; Casselman v. Bialas (1911) 112 Va. 57, 70 S. E. 479; Johnson v. McCoy (1911) 112 Va. 580, 72 S. E. 123; Virginia Coal & I. Co. v. Ison (1912) 114 Va. 144, 75 S. E. 782; Jennings v. Marston (1917) 121 Va. 79, 92 S. E. 821.

**West Virginia.**—McClung v. Echols (1872) 5 W. Va. 204; Laidley v. Central Land Co. (1887) 30 W. Va. 505, 4 S. E. 705; Low v. Settle (1889) 32 W. Va. 600, 9 S. E. 922; Carrell v.



Mitchell (1892) 37 W. Va. 130, 16 S. E. 453; *Winding Gulf Colliery Co. v. Campbell* (1918) 72 W. Va. 449, 78 S. E. 384; *William James Sons Co. v. Hutchinson* (1914) 73 W. Va. 488, 80 S. E. 768.

**Wisconsin.** — *Sexton v. Rhames* (1860) 13 Wis. 99; *Miller v. Larson* (1864) 17 Wis. 625; *Orton v. Noonan* (1865) 19 Wis. 351; *DuPont v. Davis* (1872) 30 Wis. 170; *Schwallback v. Chicago, M. & St. P. R. Co.* (1887) 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128; *Cutler v. Babcock* (1891) 79 Wis. 484, 48 N. W. 494; *McAvoy v. Franklin* (1911) 146 Wis. 390, 181 N. W. 823.

**Wyoming.** — *Hecht v. Boughton* (1880) 2 Wyo. 385.

The rule is recognized with practical unanimity in the several jurisdictions, and is expressed by the various courts with noticeable similarity of language.

Thus, in *Scott v. Singer* (1875) 54 Ga. 689, in the official syllabus, the rule as applied to the facts of that case was stated as follows: "If both parties in an action of ejectment, or of complaint for land, claim under the same third person, title need not be traced into such third person."

And in *Roe v. Doe* (1869) 38 Ga. 597, the rule was thus laid down by the court: "When both parties derive their title from the same person, plaintiff in ejectment need not show title in such person."

The rule was recognized in the opinion of the court in *Funk v. Newcomer* (1856) 10 Md. 301, wherein it was said: "A party is estopped from denying a title which is recognized in a deed under which he claims."

In *Wade v. Thompson* (1876) 52 Miss. 367, the rule is stated as an exception to the doctrine as to the proof of title, as follows: "In the action of ejectment, if both parties trace title to the same source, it is not necessary for the plaintiff to go further and prove that it is good against all the world. Both litigants tracing their right to a common origin, the inquiry is limited to the ascertainment of which has the elder and better title. . . . When both parties derive ti-

tle from the same person, it is not competent for either, as a general rule, to dispute that title. That principle, when it applies, is an exception to the general rule that the plaintiff must prove a complete title in himself."

"It is a well-established rule of law that, when both the plaintiff and defendant claim the property in controversy under the same person, neither of them can deny the right or title of the person under whom they so claim; and, as between themselves, the one having the elder has the better title, and must prevail. The conclusion thus established between the parties is not strictly and technically an estoppel, but it is in the nature of and has the practical force and effect of an estoppel." *Ryan v. Martin* (1884) 91 N. C. 464.

"It is well established as an inflexible rule that, where both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail." *Christenbury v. King* (1881) 85 N. C. 229.

"It is not necessary to show that the defendant has a complete title to the land; if there is no title paramount to it, it is sufficient to show that under a valid contract he claims to hold and has possession of the property under the common source. If the defendant has a bond for title, or other contract of purchase, or an unregistered deed for the land, and is in possession thereof, this will be sufficient evidence of a claim under the common source. It will be presumed that he claims under such contract. The purpose is to show that he claims the property under the common source, that he admits his relation to it and claims under it, without regard to the sufficiency or perfectness of the title." *Ryan v. Martin* (N. C.) *supra*.

In *Hecht v. Boughton* (1880) 2 Wyo. 385, the general rule was thus expressed: "It is a uniform principle of ejectment that, if both parties claim title from the same source, it is treated for all the purposes of the case that title resided in that source; each

party is estopped from denying it; and so far as respects that source, the controversy is reduced to the inquiry, Which party, plaintiff or defendant, if either, has got title from that source?"

"A plaintiff must generally show title good against the world, while a defendant can ordinarily prevent his recovery by showing a better outstanding title in any person. But it is an old and well-established rule, adopted originally for convenience in the trial of actions of ejectment, that where both parties claim title under the same person, neither will be allowed to deny that such person had title. While a defendant in such cases may set up a title superior to him through whom both claim as the common source, provided he connects himself with it, he is not allowed, as in other cases, to show a better title than that of the plaintiff in a third person. . . . Where the plaintiff shows from the deeds offered, or the admissions in the pleadings, that both claim from a common source, he is required to exhibit a better title in himself, derived from it, than that of the defendant, in order to establish *prima facie* his right of recovery." *Bonds v. Smith* (1890) 106 N. C. 553, 11 S. E. 322.

"The principle deducible from [the] authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies." *Van Rensselaer v. Kearney* (1850) 11 How. (U. S.) 297, 13 L. ed. 703.

"Where the parties in an action of

ejectment claim title from a common source, the plaintiff in the first instance is only required to show title in himself from the common source. . . . It must be understood, however, that this rule applies to cases where the common source of title is either admitted by the defendant or established by the plaintiff's proof, not in cases where the defendant denies that he derives his title from the common source with the plaintiff. If the plaintiff relies upon a chain of title starting at such common source, the burden is upon him to show the title in the alleged common source." *Butt v. Mastin* (1905) 143 Ala. 321, 39 So. 217, quoting *Newell, Ejectment*, 579.

The ruling in *Cox v. Hart* (1892) 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962, *supra*, was approved and followed in *Cooke v. Avery* (1892) 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340, wherein the court said: "Defendants could not question the validity of their grantor's title at the time of the conveyance to them, in a contest with plaintiff, claiming under the same grantor, unless, indeed, they claimed under a paramount title, which they had acquired or connected themselves with."

And in *Robertson v. Pickrell* (1883) 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, it was said: "Nor can the grantee in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is sufficient for his protection, and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance."

In *Winding Gulf Colliery Co. v. Campbell* (1913) 72 W. Va. 449, 78 S. E. 384, the rule was thus stated in the official syllabus: "A well-recognized and established exception to the rule requiring the plaintiff in ejectment to trace his title from the state is the estoppel in law arising out of a common source of title. In such case, the

plaintiff need not trace his title to the state."

In *William James Sons Co. v. Hutchinson* (1914) 73 W. Va. 488, 80 S. E. 768, it was said in the official syllabus: "For a plaintiff in ejectment to rely on a common source of title, it must appear that the defendant's claim of title somewhere connects with a party under whom the plaintiff claims."

In a few cases, the courts seem to have disregarded the rule when the facts, according to the weight of authority, would bring them within its provisions. Thus, in *Henry v. Reichert* (1880) 22 Hun (N. Y.) 394, the defendant was permitted to go back of the common source and show that no title had vested in him. Each party showed a chain of conveyances from one Wright to himself. Of the two deeds executed by Wright, the one under which the plaintiffs claimed was prior in date and registry to that on which the defendant relied. The general rule as to a common source of title was disregarded, and it was held that the defendant need not show title in himself until the plaintiffs had shown some right to disturb his possession. Applying the doctrine in ejectment, of which the general rule under discussion is an exception, that a plaintiff can only recover on the strength of his own title, the court said: "If nothing more had appeared, that state of the proof would have entitled the plaintiffs to recover, for as against the defendant it showed, *prima facie*, that Wright had the title at the date of his conveyance under which the plaintiffs claim. *Cox v. James* (1871) 45 N. Y. 557; 2 Greenl. Ev. § 307. But the defendant was not thereby concluded. The deed from Wright under which the plaintiffs claimed was a mere quitclaim, and it does not appear that the deed to the defendant's grantees was anything more. It was, therefore, competent for the defendant to show, if he could, that Wright had not the title, and that nothing passed by either of the deeds which he executed. *Sparrow v. Kingman* (1847) 1 N. Y. 248; *Averill v. Wilson* (1848) 4 Barb. (N. Y.) 180; *Bigelow v. Finch* (1851) 11 Barb.

(N. Y.) 498. It appeared without dispute that the parties through whom the plaintiffs claimed to have derived title from Wright were never in possession of the premises. . . . If Wright had no title, the plaintiffs had none. They have not even a possessory right, for Wright's possession was not under claim of title until 1867, and his grantees, under whom the plaintiffs claim, and the plaintiffs themselves, have never been in possession."

It is essential to the defendant's case to show that the outstanding title has been acquired by him. *Christenbury v. King* (1881) 85 N. C. 229.

So in *Curtis v. Butts* (1867) 3 Keyes (N. Y.) 626, the defendant was permitted to assail the title of the common source, and the court applied the principle that the plaintiff has to recover on the strength of his own title, and not upon the weakness of his adversary. Both parties claimed by conveyance from one Lowe, and it was held that, as the plaintiff had failed to establish the validity of the title in Lowe, it was proper for the court to give binding instructions for the defendant.

"It is not true that the defendant in ejectment, who claims from a common source of title with the plaintiff, may not in any case defeat the action by showing an outstanding title superior to the plaintiff's." *McCready v. Lansdale* (1881) 58 Miss. 877.

The only exception to the general rule in South Carolina is found in *Lyons v. Holmes* (1883) 19 S. C. 406. In that case both parties traced title to one Sarah Hane, claimed by the plaintiff to be a "free person of color," and by the defendant to be presumptively a slave, and therefore incapable of acquiring or transmitting title. Notwithstanding the application of the general rule in other cases in this state, it was held that the plaintiff must prove the title of the common source, and overcome by sufficient evidence the presumption that she was a slave, and hence incapable of holding title.

## II. Reason of rule.

The rule is one both of convenience

and justice, and is based on the principle that it does not lie in the mouth of one to dispute the title under which he claims. Thus it has been said: "The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And although it debars the truth in the particular case, and therefore is not infrequently characterized as odious and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation, upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." *Van Rensselaer v. Kearney* (1850) 11 How. (U. S.) 297, 13 L. ed. 708, wherein it was further said: "The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it."

Similarly, in *Ryan v. Martin* (1884) 91 N. C. 464, the court said: "This rule of law is founded in justice and convenience, and its purpose is to prevent the necessity on the part of the plaintiff . . . of proving title out of the state, and a good title in the person under whom he claims, when the opposing party claims the same property under the same person. If the defendant has the same source of title as the plaintiff, and no other, wherefore need the plaintiff go beyond that as to the defendant? Such an inquiry would be idle. It is plain that no injustice in such case could be done the defendant; and if the rule were otherwise, it might, and would in many cases, put the plaintiff to great inconvenience and much needless expense."

"The rule is applied on the grounds of convenience, and as a means of promoting the ends of justice." *Reid v. Anderson* (1898) 13 App. D. C. 30.

And see *Howard v. Masterson* (1890) 77 Tex. 41, 13 S. W. 635, wherein the court said: "The rule is just, useful, and convenient."

"The reason underlying the rule forbidding either party in ejectment to deny the common source of title is that one cannot dispute the title by which he claims." *Wilson v. Wilson* (1917) 137 Tenn. 590, 195 S. W. 113.

It "is not based on the idea of an estoppel, but is a rule of practice, which has become a rule of law, adopted by the courts for the purpose of aiding the administration of justice, by dispensing with the necessity of requiring the plaintiff to prove the original grant and mesne conveyances (which, in many cases, it was out of his power to do) upon proof that the defendant claimed under the same person." *Newlin v. Osborne* (1855) 47 N. C. (2 Jones, L.) 163.

"The general rule . . . is not strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back behind the common source, from which he and the defendant derive title, and deducing his title by a chain of mesne conveyances from the state." *Christenbury v. King* (1881) 85 N. C. 229.

"The principle upon which these decisions are based is that the plaintiff is not required to be prepared with proof of the common grantor's title, and that such evidence, if offered, is presented upon an immaterial question, not in issue in the case." *McDonald v. Hannah* (1894) 8 C. C. A. 426, 15 U. S. App. 348, 59 Fed. 977. And see the reported case (*JENNINGS v. MARSTON*, ante, 855.)

### III. Application of rule.

#### a. In general.

It is not necessary for the plaintiff to prove the genuineness of a disputed deed to the common ancestor, where both parties claim title from this common source. Thus, in *Cox v. Hart*

(1892) 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962, wherein an attempt was made to attack the validity of a deed conveying the land to the common ancestor, because of imperfect execution and the suggestion of forgery, the court below charged the jury that "where a common source was shown a party could not go back of the common source to impeach a deed for forgery," and that the defendants, having themselves offered the deed from the administrators of the common ancestor, were concluded on the question of common source, and estopped to deny the genuineness of the deed to the common ancestor, and that it was immaterial whether the deed was genuine." Sustaining that instruction, the court said: "It is not necessary for the plaintiff . . . to prove the genuineness of the alleged deed of April 12, 1854, to De Cordova, the common source. He claimed under De Cordova, by virtue of the marshal's deed conveying all his right, title, and interest in the lands in dispute. The plaintiff introduced the same deed without disclaiming the title conveyed by it, for the purpose, the bill of exceptions distinctly states (and this court must accept that statement as conclusive), of showing title in themselves, as well as good faith in making improvements. So that, upon this branch of the case,—it appearing that the parties claimed under a common source,—the law was clearly for the plaintiff."

In *Byers v. Rodabaugh* (1864) 17 Iowa, 53, the plaintiff claimed title through the defendant, and on the trial introduced evidence tending to show a regular chain of title from the defendant to herself, but did not introduce or offer any evidence to show a title deducible from the government down to the defendant. The defendant asked the court to instruct the jury that, in order for the plaintiff to recover, she must trace her title back to the general government, or show twenty years' peaceable possession, etc. This instruction was refused, and the refusal was assigned as error. In sustaining the decision of the trial court the rule was thus

stated: "It was sufficient for the plaintiff to trace her title back to the chain through which the defendant claimed, or to the point at which the defendant is, by law, estopped from denying the title."

And in *Monette's Succession* (1874) 26 La. Ann. 26, it was held that the defendant could not be heard to attack the validity of a statute by which the plaintiff claimed legitimacy and inheritance, when the defendant himself was made legitimate by the same act.

"A defendant may not defeat the rule of common source by a declaration that he does not claim under it," and if, as a matter of fact, the defendants deraign title from the heirs of a common ancestor, they thereby admit the validity of that title, and they will not be permitted to defeat it by showing an outstanding title in the heirs of the common ancestor, with which they are not in any way connected. *Dycus v. Hart* (1893) 2 Tex. Civ. App. 354, 21 S. W. 299.

In *Gable v. Gable* (1908) 130 Ga. 689, 61 S. E. 595, the court said in its official syllabus: "Where both parties claimed title to land under the same person, and one of them sought to have the deed under which the others claimed title canceled on account of alleged mental incapacity on the part of the person under whom both claimed, it was not competent for the defendants to attack the title of such person, or to show that the deed conveying title to him had not been properly attested for record, by offering proof that the official witness did not reside in the county where the deed purported to have been executed."

In *Slone v. Kelley* (1911) 143 Ky. 135, 136 S. W. 138, wherein the plaintiffs relied on a deed which had, by order of a court of competent jurisdiction, been set aside and canceled, and the defendant's claim rested on a deed from the same source, it was held that, the latter being unassailed, judgment was properly given for the defendant under the general rule.

In *Clough v. Welsh* (1911) 229 Pa. 386, 78 Atl. 1000, on the abstract of title filed by the plaintiff, he showed title out of the commonwealth to one

Thompson, a number of tax sales being in the line of title. The defendant claimed by adverse possession and by grant from the heirs of Thompson. In applying the rule, the court said: "Notwithstanding the fact that the only evidence of title offered by defendant on the trial was based on the title in Thompson, yet he attempted to attack the validity of some of the tax sales in the line of the Thompson title. As both parties were claiming under Thompson, the trial court was undoubtedly right in holding, as set forth in its opinion sur motion for new trial, that 'the pleadings in this case clearly show that the plaintiff and defendant both claim under a common source, to wit, from Alexander Thompson. Such being the case, it does not lie in the defendant's mouth to question the title of said Thompson.' The only effect of permitting defendant to invalidate the Thompson title would have been to deprive him of any standing whatever. The authorities are clear that, when both parties claim title under a common source, it is unnecessary to make proof of title beyond that source."

In *Bethea v. Allen* (1913) 95 S. C. 479, 79 S. E. 639, it was held that, as both parties claimed title from a common source, the defendant could not take advantage of a defect in the execution of a deed to the common ancestor.

Where the common ancestor has only the equitable title, but, subsequent to the deed to the plaintiff, completes the contract of purchase and receives the legal title, such contract relates back and inures to the benefit of her grantee, making the rule applicable. *McAvoy v. Franklin* (1911) 146 Wis. 390, 131 N. W. 823.

In *Burchett v. Scott* (1917) 176 Ky. 669, 197 S. W. 397, the appellant claimed ownership of the land by a paper title, as the remote vendee of one Blackburn, to whom a patent was issued in 1857, and also under a paper title, as the remote vendee of one Dean, who secured in 1848 a patent for land, part of which, as appellant claimed, was the land in controversy. The patents, it was claimed, over-

lapped, and the land in dispute, according to appellant, was covered in whole, or at least in part, by both of them. The appellee claimed under a paper title as the remote vendee of Dean. The court found as a fact that the land in dispute was a part of the Dean patent, and held, therefore, that any assertion of title on the part of the appellant, going back to the Blackburn patent, should be put to one side as not available.

In *Cronin v. Gore* (1878) 38 Mich. 381, the plaintiff, Gore, brought an action of ejectment and recovered a strip of land, 44½ feet wide, as included in a grant to himself of a tract of 4 acres, which, by a surveyor's error, had been laid out that much narrower than was correct. The proof showed a purchase by plaintiff from one Stewart, and that, immediately on the execution of the deed, a survey was made and lines set by the plaintiff according to it. This survey was subsequently used as a basis for survey and deed to the grantor of the defendant. Later, the first survey was found incorrect, and the boundaries extended to take in part of the tract conveyed to the defendant. In reversing a judgment of the lower court, it was said: "Inasmuch as all parties claim through Stewart, and Sullivan's [defendant's grantor] deed refers to that of Gore for boundaries, it is not necessary to show title back of the common grantor."

In *Nitche v. Earle* (1889) 117 Ind. 270, 19 N. E. 749, it was claimed that, as the appellee had never taken possession of the land, it was incumbent on him to show a complete chain of title from the United States. In disposing of this contention, the court said: "This theory is not tenable in this case. Courts of this state take knowledge of the acts of Congress granting to this state swamp land, which, taken in connection with the patent from the state, make a complete chain of title. In addition to this, it is a well-settled principle that, when the plaintiff and defendant claim through a common source of title, it is sufficient for the plaintiff to deduce his title from the common

source of title. In this case both plaintiff and defendant claim title from the state of Indiana, and it was only incumbent on the plaintiff to show that he had the better title from the state."

Where both parties claim title by patent from the county to swamp lands, and it is conceded that at the time of the issuance of the patent to the plaintiff the title was in the county, the defendant will not be permitted to attack the validity of the plaintiff's claim by showing that his patent, because of an alleged irregularity, has been revoked. *Cunningham v. Snow* (1884) 82 Mo. 587.

In *Barton v. Erickson* (1883) 14 Neb. 164, 15 N. W. 206, the plaintiff, acting for a church corporation, claimed title by deed from the Union Pacific Railroad, while the defendants claimed by deed from the same company through an agent. It was very strenuously insisted that the plaintiffs must fail in their action because they did not introduce the patent from the government of the United States to the railroad company for the lots in question, but the court, in applying the general rule, said: "The rule seems to be well settled that a party is estopped from denying a title under which he claims to derive his right to the premises. Where both parties claim title from the same grantor, it is sufficient prima facie to prove derivation of title from him, without proving his title. 2 Greenl. Ev. § 307; *Hart v. Johnson* (1833) 6 Ohio, 89; *Conger v. Converse* (1859) 9 Iowa, 554. It was unnecessary, therefore, to introduce the patent from the United States for the lots in question."

In *McCarthy v. Birmingham* (1902) 2 Neb. (Unof.) 724, 89 N. W. 1003, the plaintiff showed title by purchase from her immediate grantor, and the defendants claimed under a verbal contract with the plaintiff. In appealing from a judgment for the plaintiff, the defendants urged that the evidence was insufficient, because plaintiff failed to trace her chain of title to a grant from the United States government. The court said: "But under the issues involved in this con-

troversy this was not necessary, for defendants asserted a title and a right of possession bottomed on a contract alleged to have been made by one of them with the plaintiff, and hence they all claim title from a common source, and it is a well-established rule in actions in ejectment that, where title is derived from a common source, plaintiff need only prove title from this common source."

The fact that the plaintiff filed an abstract of title, under which he claimed, that reached back to the sovereignty of the soil, which he did not establish by proof, does not alter the rule. *Sellman v. Hardin* (1882) 58 Tex. 86.

In *Thompson v. Graham* (1872) 9 Phila. (Pa.) 53, the plaintiffs deduced title through sundry mesne conveyances from Richard W. Wells and wife, by deed made in 1847. They then gave in evidence a letter of attorney, dated April 16, 1856, from the parties owning the entire property (including plaintiffs' predecessors in the title to the one-seventh now in suit), to William F. Griffiths, as attorney in fact, and a lease by Griffiths under said power, to one Rutter, for fifteen years from June 7, 1856. They then called Griffiths, and proved by him that defendants went into possession of the premises as assignees of the said term to Rutter, and that the lease had expired. Thereupon plaintiffs closed, and defendants moved for a nonsuit, on the ground that plaintiff in ejectment could not recover without showing title out of the commonwealth. It was held that this was properly refused, the court saying: "Plaintiffs having shown that defendants came into possession as tenants, it was not competent for the latter to attack the title by showing a better one in any third person. We see no reason why title in the commonwealth should be treated as any exception to the general rule."

Where both parties claimed title to land under different grants on the same entry, it was held that the legality of the entry and the fact that the land was open to entry could not be

denied. *Waldo v. Wilson* (1917) 173 N. C. 689, 92 S. E. 692.

Where, in an action of ejectment, the answer admits the title in a grantor, it is sufficient for the plaintiff to prove a chain of title to such grantor, who is regarded as the common source of title. *Horning v. Sweet* (1880) 27 Minn. 277, 6 N. W. 782. See to the same effect: *Cooper v. Galbraith* (1819) 3 Wash. C. C. 549, Fed. Cas. No. 3,193; *Pollock v. Cocke* (1851) 19 Ala. 188; *Seabury v. Stewart* (1853) 22 Ala. 207, 58 Am. Dec. 254; *Florence Bldg. & Ins. Asso. v. Schall* (1895) 107 Ala. 531, 18 So. 108; *Anderson v. Smith* (1853) 2 Mackey (D. C.) 275; *Beall v. Brown* (1888) 6 Mackey (D. C.) 574, affirmed in (1892) 149 U. S. 766, 37 L. ed. 960, 13 Sup. Ct. Rep. 1043; *Johnstone v. Scott* (1863) 11 Mich. 232; *Gillum v. Case* (1890) 67 Miss. 538, 7 So. 551; *Smith v. Lindsey* (1886) 89 Mo. 76, 1 S. W. 88.

*b. Title claimed by descent or devise.*

The rule is not confined to conveyances by deed from the common source, but is applied as well where one or both parties claim by descent or devise from a common ancestor, and when parties, if living, would thus be estopped, their heirs and privies in estate are likewise estopped.

Thus, in *Kerbough v. Vance* (1873) 6 Baxt. (Tenn.) 110, it is said: "The doctrine as applicable to privies and heirs is that the heir, to be estopped, must claim the property as heir, and therefore must be a privy in estate with his ancestor." In that case, the rule and distinction are well illustrated. It was held that as to an undivided interest of one fifth, owned by one Vance, and by him conveyed to Kerbough by deed which embraced another contract, the defendants would be estopped, because they occupied the relation of heirs and privies of Vance; but as to four fifths which the defendants did not claim under Vance, but as common heirs of their father, they were not estopped.

In *Robinson v. Hillman* (1911) 36 App. D. C. 576, the plaintiffs claimed title as devisees, and the defendants under a deed from the common source, and it was held unnecessary to inquire

into the sufficiency of the instruments to show title from the sovereignty of the soil.

In *Hellard v. Nance* (1908) — Ky. L. Rep. —, 114 S. W. 277, the rule was applied where the plaintiffs claimed as the heirs of the common ancestor, and the defendant by deed from his widow.

In *Watkins v. Northern Coal & Coke Co.* (1909) — Ky. —, 119 S. W. 225, the court said: "It is also contended by appellee that appellants failed to show title in themselves, and that therefore the judgment denying them a recovery should have been affirmed. Both parties claim from a common source of title. It was not necessary for appellants to trace the origin of their title further back, as appellee is estopped to deny the title of its grantor. When appellants proved that the title had been vested in their father, that he was dead and intestate, and they his lawful issue, they had made out a prima facie right to recover. If their father had made a conveyance of the land, or had otherwise parted with his title, or if appellants had been divested of their title, that was upon the appellee to show."

In *Myrick v. Wells* (1876) 52 Miss. 149, it was held proper to refuse a request for instructions that the rule of law which relieves a plaintiff in ejectment from proving a perfect title in a common source, from which both parties claim, applies only to cases in which both parties claim their title by deed, the court saying: "This position, though pressed in argument, seems unsupported by any authorities which have been produced, or with which we are familiar; nor do we see any reason or principle why the rule should be different in cases of common descent from that in cases of common title deeds."

In *Griffin v. Sheffield* (1860) 38 Miss. 359, 77 Am. Dec. 646, both parties claimed by descent from the common ancestor, and the rule was laid down by the court as follows: "It is admitted as a general rule that it is competent for a defendant in ejectment to protect himself in his possession by showing an outstanding title in another, upon the principle that the



plaintiff in ejectment must recover upon the strength of his own title. This rule is as ancient as the action itself, and has its origin in the just presumption that the party in possession is either the true owner, or holds under the true owner, until the contrary is made to appear. But the exception is almost as ancient as the rule, that when the plaintiff in ejectment shows that both parties derive their title from the same common source, and that he has the older and better title from that source, it is not competent for the defendant, after such acknowledgment of the title of the common source, to protect himself in possession by proving an outstanding title in a third person, with which he shows no connection. For, in such case, the law will presume from such acknowledgment on his part that such title is vested in the common source, and inures to the benefit and support of the plaintiff's title. The authorities to this point are numerous and almost unbroken."

In *Clemens v. Meyer* (1892) 44 La. Ann. 390, 10 So. 797, both parties claimed from one Groves,—the plaintiff by inheritance, and the defendant by deed from the coheir of the plaintiff's father. In applying the rule, the court said: "It is held as settled, if the parties trace their title to the same source, neither will be permitted to attack the title of their common author."

In *Wood v. McGuire* (1856) 17 Ga. 308, the plaintiffs claimed title by the will of their grandfather, and the defendant by deed from the same source, and it was held that it was not incumbent on the plaintiffs to go beyond him and "deduce the chain, link by link," from the original grantee to the common source.

In *Perolio v. Doe* (1916) 197 Ala. 560, 73 So. 197, it appeared that the plaintiff claimed title through the enforcement of a vendor's lien against the common source, and the defendant as heir and by purchase from the children of the common source. The court held that neither could deny the title of the common grantor, "nor was

it necessary to trace the title beyond" him.

In *Ware v. Dewberry* (1887) 84 Ala. 568, 4 So. 404, the defendants had come into possession of the land sued for, as the heirs of one Aaron Dewberry, holding by privity of estate under him as their deceased father and ancestor. He had purchased the land from the plaintiff, having paid a part of the purchase money and gone into possession during his lifetime. Under this state of facts it was held that the defendants were estopped from denying the original title of the plaintiff, from whom they claimed derivatively, the court saying: "They must show either a divestiture of the plaintiff's title by conveyance of some kind from him, or else an adverse possession for a sufficient time to bar the right of entry on his part."

In *Pendley v. Madison* (1887) 83 Ala. 484, 3 So. 618, action in ejectment was brought by the administrator of the estate of one Madison, deceased. It appeared that the widow, claiming under his will, had sold the land to the grantor of the defendant, and the decision turned on the construction of the will. The court, holding that since the will gave to the widow only a life estate in the property, a judgment in favor of the plaintiff was correct, said: "Both parties to the suit claim to have derived title from the same common source—James Madison, the testator of the plaintiff. The whole contention, therefore, resolves itself into one as to the relative superiority of the two claims of title put in evidence before the court on the trial, each party being estopped from denying the validity of Madison's title."

In *Jay v. Michael* (1895) 82 Md. 1, 33 Atl. 322, the plaintiffs claimed by inheritance from their ancestor, and the defendants by deed from the same source. The court said: "It was not necessary, therefore, for the plaintiffs to produce evidence to establish the title beyond the Misses Smith in order to make out a prima facie case, for it is well settled that when the plaintiff and defendant in an ejectment suit are claiming title through the same

party, it is 'prima facie sufficient to prove derivation or title from that party, without producing any patents or deeds to prove title in him,'—following the decisions in *Ahern v. White* (1873) 39 Md. 409, and *Elwood v. Lannon* (1876) 27 Md. 200. In the former case it was said: "There are many cases in which the well-settled rule of ejectment law that to enable a plaintiff to recover he must show title regularly deduced from the state, or adverse possession for twenty years or more, is dispensed with. Instances of such exceptions to the general rule are where the action is brought by a mortgagee against his mortgagor, by a landlord against his tenant, by a purchaser at sheriff's sale against the judgment debtor, and also where both parties claim under conveyances from the same grantor. . . . In our opinion, the present case falls directly within the reason of these exceptions, and that it was the duty of the court, upon the state of the case made by the defendant himself, simply to determine which was the better title, that under the judgment and that under the mortgage both being derived from the same party."

And in *Elwood v. Lannon* (Md.) supra, where by an admission of the defendants it was shown that they and the plaintiff both claimed under the same person, it was decided that it was prima facie sufficient to prove derivation of title from that party, without producing any patents or deeds to prove title in him.

In *Gaines v. New Orleans* (1867) 6 Wall. (U. S.) 642, 18 L. ed. 950, the complainant sought to recover valuable real estate in the city of New Orleans, under the will of her father, made in 1813. There was interposed as one of the defenses that an equitable title of two thirds of the property was in two persons, as partners and creditors of the deceased, by virtue of certain partnership articles of June 19, 1813, the legal title being admittedly in the deceased. The court said: "If, however, it was, and there is an outstanding equitable title in Chew and Relf to the property in litigation, the defendants cannot plead

the fact in bar of the right of complainant to recover. The defendants, equally with the complainant, claim title from the same common source. This is clear from the pleadings and proof. If, therefore, both parties claim title from the same person, neither is at liberty to deny that such person had title. On this point the Louisiana authorities are uniform. This rule is the same in equity as at law, and is well stated in *Garrett v. Lyle* (1855) 27 Ala. 589. The court in that case says: 'We do not deny in equity as well as at law the plaintiff must recover upon the strength of his own title; but because this is the rule it does not follow he must show a good title against all the world; it is enough that he shows a right to recover against the defendants. And there are many cases in which he has this right, although another person must recover it from him.'"

Where the plaintiffs claimed title through a deed from the heirs of one Crohan, who was the common source of title, the court said: "Defendants insist that the deed by the widow of Crohan . . . was independent of any right derived from the husband of the grantor, and that, therefore, he was not the source of their title and no common source was shown. We do not think this contention can be sustained. The deed was, doubtless, made and accepted under the belief of both parties to it that the grantor derived some assignable interest from her deceased husband; otherwise a deed had as well have been taken from any disinterested person. Indeed, defendants, on the trial, admitted that they based their claim solely under the deed from the widow as such. The question is not whether the defendants secured a good title by the deed, but whether their claim of title is from a source through which plaintiffs also claim. We think it sufficiently appears that both plaintiffs and defendants claim through Thomas Crohan." The general rule is declared by the court as follows: "When both parties to an ejectment suit claim title through the same third person, it is

not usually necessary for plaintiff to go back of the common source in order to prove a title upon which he can recover. It is enough that he shows a better title through the common source than defendant can show through the same source. Before a defendant can be allowed to impeach the common source, he must establish that he has acquired a superior title. To show a better outstanding title will not help him." *Sell v. McAnaw* (1897) 138 Mo. 267, 39 S. W. 779.

In *Robinson v. Hillman* (1911) 36 App. D. C. 576, the plaintiffs claimed title as devisees, and the defendants under a deed from the common source, and it was held unnecessary to inquire into the sufficiency of the instruments to show title from the sovereignty of the soil.

In *Chouquette v. Barada* (1862) 33 Mo. 249, the plaintiff claimed title by descent and also by purchase from other heirs of one Motier, after the death of his widow, and the defendants by sheriff's deed in execution against the widow, offering in evidence a will of Motier by which, without mentioning any of his children, he devised all of his property to his widow, and it was held that evidence of both plaintiffs and defendants to show interest claimed by the widow in the property was properly admitted.

In *Phelan v. Kelly* (1841) 25 Wend. (N. Y.) 389, the rule was applied. In that case all the parties were heirs of one Bond, who, it appeared, had no paper title. The defendants had taken a lease from a prior claimant of the land, and attempted to set this up in bar of the claim of the plaintiff, a coheir, and it was held that an outstanding title could not be set up to defend a possession acquired in common with other heirs, to the exclusion of the latter.

In *Jackson ex dem. Norris v. Smith* (1827) 7 Cow. (N. Y.) 717, a peculiar state of facts existed. The plaintiffs claimed title as the heirs of one Norris, and it appeared that the defendant had executed a deed to him, taking a bond or contract to repurchase the premises, under which he was still in

possession. The defendant attempted to prove that the entire transaction was a cover for a usurious loan from Norris, and it was held that, the defendant, having taken a contract from Norris for the purchase of the premises in question, was estopped from denying his title, or showing title in himself, unless he could succeed in proving the whole transaction to have been a cover for a usurious loan.

In *Caldwell v. Neely* (1879) 81 N. C. 114, the plaintiff claimed by descent from one Neely, and the defendant by deed from another heir, and it was held to be error to permit the defendant to deny the descent from Neely to the heirs, from one of whom the plaintiff, and from the other the defendant, deduced title to a moiety of the land.

In *Den ex dem. Ives v. Sawyer* (1838) 20 N. C. 179 (4 Dev. & B. L. 51), the plaintiff claimed by devise from her father, and on the objection of the defendant that no grant from the state was shown, she offered in evidence a deed from her husband and herself to one Leigh, under whom the defendant claimed, which recited that the land was part of that held by her father. The plaintiff contended that this deed was void as to her for want of private acknowledgment, and it was held that, although void as to her, the deed was an acknowledgment on the part of the defendant that the father of plaintiff had title in the land, and that he derived title from the same source, and hence could not deny the latter's title.

In *Riddle v. Murphy* (1821) 7 Serg. & R. (Pa.) 230, the plaintiffs were the heirs of the devisees of one Murphy, and the defendant claimed under a sheriff's sale in execution against Murphy's estate, and it was contended that the plaintiffs were bound to show title in Murphy at the time of his death. The court, per Gibson, J., said: "Both parties claim under the same title [derived from one Cornelius Murphy]. It is too clear, therefore, for argument, that the plaintiffs were not bound to trace back their title beyond Cornelius Murphy. If there was a title adverse to his, either in the

commonwealth or in a third person, it lay on the defendant to show it."

In *Kilgore v. Kirkland* (1904) 69 S. C. 78, 48 S. E. 44, the plaintiff claimed as the heir of one Kilgore, and the defendants as heirs of the grantee of the same person. And it was held that the question as to the connection of the plaintiff with that common source was one of fact for the jury, and a nonsuit was properly refused. This ruling followed the decision in *Smythe v. Tolbert* (1884) 22 S. C. 133.

In *Ferebee v. Hinton* (1889) 102 N. C. 99, 8 S. E. 922, the plaintiffs claimed title as devisees under the will of their mother, the defendants by deed of trust for the same property to their assignor, and it was held that the charge of the lower court that there was no need to show title out of the state" was "so manifestly correct that it is needless to cite, in support of it, any of the numerous authorities in our state."

In *Johnson v. Cobb* (1888) 29 S. C. 372, 7 S. E. 601, the plaintiffs claimed as the heirs at law of one Buchanan. It appeared that, during their minority and absence from the state, their grandfather applied for a partition of the property, and as guardian ad litem consented to its sale without notice to the minors. He retained the purchase money, and the property by mesne conveyance became, as alleged, vested in the defendants. It was contended that the plaintiffs had shown no title in themselves, but the court held that it was unnecessary for the plaintiffs to trace title further back than Buchanan, the common source.

In *Rhett v. Jenkins* (1886) 25 S. C. 453, the common source was a person of color, through whom the defendants claimed by devise, and the plaintiffs by sheriff's deed in execution of two judgments. It was contended that the original grantor, being a slave, could not have a good legal title. The court held that the right of the common source to hold the title could not be disputed.

In *Pyles v. Reeve* (1851) 38 S. C. L. (4 Rich.) 555, the plaintiffs claimed title by descent, and the defendant by purchase from the same source, and

it was held that a nonsuit, on the ground "that plaintiffs had not shown title to the land in dispute, and defendant, being in possession, should have been protected," was properly refused.

In *Geiger v. Kaigler* (1880) 15 S. C. 263, the plaintiffs claimed under the will of their father, and the defendant by possession, held under the administrator in a way not disclosed. In affirming a judgment for the plaintiffs, the court speaks of the rule under discussion as being an exception to the general rule in ejectment, that a plaintiff must recover on the strength of his own title.

In *Hill v. Robertson* (1846) 32 S. C. L. (1 Strobb.) 1, the land in controversy had been purchased by the plaintiff's father, who soon after died intestate, leaving the plaintiff an infant. His administrator leased the land to the defendant, who later bought it at judicial sale. It was held that the rule applied.

The general rule was recognized, but not applied, in *Wilson v. Wilson* (1917) 137 Tenn. 590, 195 S. W. 113. In that case the plaintiffs claimed as the widow and children of one Wilson, a slave, and the defendants as children by a first wife. By the law of Tennessee, "all free persons of color who were living together as man and wife in this state while in a state of slavery are hereby declared to be man and wife," and persons of color who have been living as man and wife in other states, and who have moved to this state," are within the provisions of the law. It appeared that the first wife of Wilson died before he left Mississippi for Tennessee, which latter state he entered with the mother of the plaintiffs, and it was held that the children of the first wife, being without the enabling act, could not inherit; the rule as to the common source, therefore, not being applicable.

In *Carver v. Maxwell* (1902) 110 Tenn. 75, 71 S. W. 752, the plaintiffs claimed as the descendants of a former slave, and the issue of a slave marriage, and the defendant under a deed made by the widow, who was the

second wife of the slave referred to. The second marriage was entered into during the slave period, but continued after the slaves were emancipated. It was held that the statute (Shannon's Code, § 4179) referred to in *Wilson v. Wilson* (Tenn.) *supra*, applied, and since both parties thus claimed from a common source, it was unnecessary for the plaintiffs to trace their title further.

In *Beasley v. Rowly* (1898) — Tenn. —, 52 S. W. 322, it appeared that, prior to 1868, one Hare was the owner of the land in question, and that he became bankrupt and his assignee conveyed the property by deed to his daughter, who then executed a deed to her father for his life, reserving the fee in herself. The plaintiffs were children and heirs of this daughter, and the defendants claimed by devise from Hare. There was no evidence of fraud as against creditors, and it was held that even if there had been it would not affect the conveyance, and the arrangement would have been binding on Hare and his heirs, devisees, and assignees, and they could not raise the question.

In *Bleidorn v. Oakdale Iron, Coal & Transp. Co.* (1896) — Tenn. —, 43 S. W. 360, the plaintiff claimed by will, and the defendant by tax title and possession thereunder, and set up a certain outstanding title. The jury found that both plaintiff and defendant derived from a common source, and the court, after a review of the authorities, held that the defendant was estopped from setting up and showing outstanding title for the purpose of defeating plaintiff's suit.

In *Wortham v. Cherry* (1859) 3 Head (Tenn.) 468, the plaintiffs claimed as the heirs of one Wortham, and the defendant by a tax deed from the same source. On the trial, exceptions were taken to the probate and registration of certain of the conveyances executed to the plaintiff's ancestor, and it was said: "In the view we have taken of the case, it is not necessary that we should notice these exceptions. On the other hand, the regularity of the proceedings in the tax sale was impeached; but we are

likewise relieved from the necessity of noticing the objections to the validity of said sale. We place the decision upon grounds different from those assumed in the argument. First. In the present case, both parties derive their title from Lewis F. Wortham,— the plaintiffs by descent, and the defendant by purchase at the tax sale. And it is a well-established principle in the action of ejectment that, where both parties claim title under the same third person, it is sufficient to prove the derivation of title from him, without proving his title. *Tillinghast's Adams, Ejectment*, 248; 2 Greenl. Ev. § 307. The introduction of the title papers excepted to was, therefore, unnecessary, and they will be left out of view. The defendant derives whatever title he may have under Lewis F. Wortham, and is therefore estopped to gainsay his title."

In *Royston v. Wear* (1859) 3 Head (Tenn.) 8, the plaintiffs claimed one undivided third part of the land in question as the children of Hugh and Margaret Wear, the former of whom had executed a deed to the ancestor of the defendants without joining his wife. It was held that the defendants were estopped from denying the title in the common source, since they were parties and privies of their ancestor, who would have been estopped if living.

In *Paschal v. Acklin* (1863) 27 Tex. 175, the plaintiff claimed as the widow of one Franklin, and the defendant by will from the same source, and it was held that a charge that it was not necessary for the plaintiffs to show a continuous chain of title in writing from the common source was correct.

In *Second M. E. Church v. Humphrey* (1894) 142 N. Y. 137, 36 N. E. 812, the premises in question were claimed to have been purchased by the plaintiff from one Dixon, who died in 1849, and the defendant claimed under a deed from the only heir at law through mesne conveyances. It was held that the claim of title by the defendant recognized the title of the plaintiff, and admitted its existence; therefore, he could not dispute that title.

In *Crabtree v. Whiteselle* (1885) 65 Tex. 111, wherein it appeared that land had been partitioned among a mother and her children, the part in controversy falling to the mother, the court said: "If there was a mistake in the partition, by which she got more than her share, still what she got was the land in controversy, and by agreeing that she was the common source of title, the appellant is precluded from claiming an interest in the land not derived from her."

*c. Title claimed under judicial sale.*

Where a sheriff's deed is the common source of title, the rule applies, and neither party is at liberty to contest it. *Doe ex dem. Foster v. Dugan* (1837) 8 Ohio, 87, 31 Am. Dec. 432.

In *Den ex dem. Love v. Gates* (1839) 20 N. C. 498 (4 Dev. & B. L. 363) both parties claimed by sheriff's deed in execution of different judgments against the same person, and the defendant offered to prove an outstanding title, at the same time attacking the title of the common source by offering in evidence a patent to a third person, prior to the possession of the common source. The admission of this evidence was held to be reversible error, the court saying: "As the party in possession of land is presumed to be the owner until the contrary appears, the claimant in ejectment must show a good title in himself; he cannot found his claim upon the weakness of that of the defendant; for possession gives the defendant a right against every man who cannot establish a good title in himself against everybody. The defendant, therefore, generally is permitted to show a better title than the plaintiffs in a third person. But it has been decided in this state that, where both parties claim title under the same person, it is not competent to either, as such claimants, to deny that such person had title."

In *Stewart v. Shoenfelt* (1825) 13 Serg. & R. (Pa.) 360, both the plaintiff and the defendant claimed title under a sale for unpaid taxes, and it was contended that the plaintiff could not recover without showing title to

be out of the commonwealth. In applying the general rule, the court said: "Under the circumstances of this case, I have no doubt that the plaintiff might recover, without direct proof of the title being out of the commonwealth; because both plaintiff and defendant claimed under the commonwealth, which was an indirect admission by the defendant that the title had passed from the commonwealth. The plaintiff gave evidence of a title under a sale for taxes, and so, likewise, did the defendant. Now land cannot be assessed for taxes while the title remains in the commonwealth. The fact, therefore, of the title being out of the commonwealth was virtually admitted by the defendant; and it is evident that what is admitted by one party need not be proved by the other."

Where the plaintiff and the defendant respectively claimed under separate and distinct tax sales and deeds made at different dates, it was held that there was nothing in the position of the parties to preclude a denial by either of the validity of the other's title, although, since it was the effort of each party to show that he had acquired the title of the same person to the land in dispute, neither could have required the other to go beyond that common source of title. *Feagin v. Jones* (1891) 94 Ala. 597, 10 So. 537. See also *Pollard v. Cocke* (1851) 19 Ala. 188.

The rule was recognized, although not applied, in *McClure v. Engelhardt* (1855) 17 Ill. 47. In that case the plaintiffs claimed title from one Shares, by execution under a mortgage foreclosure and sheriff's deed, and for the defendant deduced title from the same source. The defendant himself offered to show title in the mortgagees, and there rested, contenting himself with objections to the plaintiff's title, without setting up any in himself. A judgment in favor of the defendant was reversed, the court saying: "If the defendant has any title, he should have presented it." This case appears to be an exception to the general rule, in that the court stressed the point as material that the

claim as to the source of the defendant's title was made by the plaintiff, and not by the defendant himself.

The rule is equally applicable where the plaintiff alone claims title by a judicial sale. Thus where, in an action of ejectment, the plaintiff claimed title by purchase under a writ of fieri facias in a suit against the common source, and the defendant claimed under a deed of conveyance, it was held to be proper to admit evidence to prove that the deed was fraudulent and void as against the plaintiff. *Remington v. Linthicum* (1840) 14 Pet. (U. S.) 84, 10 L. ed. 364.

In *Sexton v. Rhames* (1860) 13 Wis. 99, it appeared that the plaintiff based his title on a sheriff's sale and deed under two judgments against one Robert Rhames, and the defendant made the point that the plaintiff had failed to show that the judgment debtor at any time was the owner of the premises in fee, or had an interest therein, or that he was entitled to the possession of the premises. A judgment of nonsuit was set aside, the appellate court saying: "After a general denial in his answers of the allegations in the complaint, the respondent proceeded to set up another distinct ground of defense. He alleged that one John N. Rhames, his lessor, was the owner of the land described in the complaint, and that said John N. claimed title in fee under a decree of the circuit court of Dodge county, made on the 15th of October, 1855, in a case between said John N. and Robert Rhames and wife, and then the decree is set out *hæc verba*. From the decree it appears that on the 6th of March, 1855, the title to the premises was in Robert Rhames; that on that day he sold the same to the lessor of the respondent for a consideration therein named, and Robert and wife made and executed a deed for the same, but there was a mistake in the description of the land, the wrong tract being described therein; and that John N. commenced a suit in chancery to reform the deed, and to have the title to the correct tract (the one in dispute) decreed to be in him from and after the said 6th of March;

and that such a decree was rendered on the 15th of October, 1855. Now, it will be seen, here was a direct admission in the answer that the title to the premises was in Robert Rhames long after the Littell and Baker judgment was docketed. What reason is there for saying that the appellant could not avail himself of this admission of record? We know of none. Was the appellant under the necessity of showing that the title to the property was in Robert Rhames, so that the lien of the Littell and Baker judgment attached, when this fact was admitted in the answer? We think not. Both parties claim under Robert Rhames, and it was sufficient to derive title from him without proving his title."

In *Hyder v. Butler* (1899) 103 Tenn. 289, 52 S. W. 876, the plaintiff claimed under a sheriff's deed, and the defendant by a deed from the judgment debtor before the levy and sale. It was urged that the plaintiff could not recover because he had not made a full deraignment of his title, but the court said: "He has . . . produced only the deed of the sheriff, and the record supporting it, yet that is sufficient, since he and the defendant both claim under Maupin. Deraignment to the common source is all that the law requires in such a case, the defendant being estopped to gainsay the title of the person under whom he claims to hold."

In an action in ejectment where the defendant pleaded adverse possession the common source of title was admitted. It appeared that the plaintiff claimed under a sheriff's deed under an execution for delinquent taxes, and the defendant offered evidence to show that at the time of the sale the property was not assessed in the name of the judgment debtor. It was held that the plaintiff's objection to this evidence should have been sustained. *Stevenson v. Black* (1902) 168 Mo. 549, 68 S. W. 909.

In *Izlar v. Haitley* (1885) 24 S. C. 382, the plaintiff deduced title from one Clayton by sheriff's deed, and the defendant, in her answer, by adverse possession. On the trial, however, there was evidence of a verbal gift

and possession of the land from her father, the common source. The distinction between the two lines of defense is pointed out by the court as follows: "Where the gift is relied upon, proved, and sustained by ten years' possession under it, that would, as it seems to us, be a case where both of the parties claimed through a common source, and in that event the plaintiff would not be required to prove title in the common source either by papers or ten years' possession, as in such case neither party would be allowed to dispute the title of the common source."

In *Murphy v. Barnett* (1818) 6 N. C. (2 *Murph.*) 251, the plaintiff claimed by sheriff's deed on a sale under an execution against one Barnett. A short time prior to the issuance of the *fi. fa.*, the debtor executed to his son, the defendant, a deed of the property. The defendant offered evidence to show a defect in Barnett's title, but the court held that this could not be done, and as both parties claimed directly from him, they were privies in estate, and neither was competent to deny his title.

In *Brown v. Smith* (1861) 53 N. C. (8 *Jones, L.*) 331, the plaintiff claimed title under a sheriff's deed given on a sale under execution and judgment against one Turner. He then showed a deed for the same land executed by Turner to the defendant, and offered to prove that the latter deed was without consideration and was given to defeat a judgment obtained against Turner. The defendant then offered evidence to show that by a sale under the second judgment the property was conveyed to one Miller by conveyance antedating the deed of the plaintiff. The court said: "There seems to be nothing to prevent the application of the principle that, when both parties claim title under the same person, the defendant cannot defend an action by showing title in a third person, unless he has acquired such outstanding title, or connects himself with it."

In *Whissenhunt v. Jones* (1878) 78 N. C. 361, both parties claimed title under one Yount, the plaintiff by deed, introducing in evidence a sher-

iff's deed to connect the defendant with the common source, and to estop him from denying Yount's title. Applying the general rule, the court said: "In such case the rule is settled in this state that it is not competent for either claimant to deny that such person had the title; and though the defendants may show that they have in themselves a better title than the plaintiff, they cannot set up a title in a third person. *Den ex dem. Love v. Gates* (1839) 20 N. C. 498 (4 *Dev. & B. L.* 363). The plaintiff here had the elder and superior title, and was, therefore, entitled to recover."

In *Jackson ex dem. Witherell v. Jones* (1828) 9 *Cow. (N. Y.)* 182, it appeared that the plaintiff claimed a right to recover the premises in question as purchaser at sheriff's sale under two judgments, and the defendant in possession claimed under a lease from the same source. It was held that the plaintiff need not show title in the judgment debtor, and that the defendant was estopped from denying his title as landlord.

In *Huff v. Morton* (1887) 94 Mo. 405, 7 S. W. 283, it was held that the plaintiff's title under a sheriff's sale and deed, made in 1874, was superior to that of the defendant under a deed of trust from the common source, made in 1872, and plaintiff was entitled to recover, it being unnecessary to notice defects alleged to exist in the plaintiff's chain of title from the government to the common source.

In *Conger v. Converse* (1859) 9 Iowa, 554, it appeared that both parties claimed under one Bullis,—the plaintiff under a purchase at sheriff's sale, the defendant by deed from the execution defendant,—and the doctrine was thus stated by the court: "As both parties claim under the same third person, it was unnecessary for the plaintiff to prove title in Bullis."

In *Hall v. Lance* (1861) 25 Ill. 277, it appeared that one Howard was seised in fee of the land which plaintiffs claimed by sheriff's deed in execution of a judgment against him, and the defendants offered in evidence a mortgage given by the common source, judgment and execution upon it, and a



sheriff's deed to them. The trial court refused an instruction that "if the jury believe, from the evidence, that the defendant Lance was in possession of the premises at the time of the commencement of the suit, that makes out a prima facie right in the plaintiffs to recover against the defendant Lance," and judgment was rendered for the defendants. In reversing this, the appellate court said: "A mortgage, even after condition broken, is not an absolute outstanding title of which a stranger can take advantage and defeat a recovery in ejectment by the mortgagor or one claiming under him. It is available for the mortgagee or his tenant, but not for the tenant of the mortgagor. It may be that the defendant might have shown that he had attorned to the mortgagee, of the condition broken, and thus defended his possession under the mortgage; but of this the record affords no proof. The defense, then, must rest entirely on the judgment of foreclosure. Whether that judgment would constitute a defense must depend entirely on the fact whether the record of the mortgage on which the judgment was rendered was older than the judgment under which the plaintiff claimed title. This the record fails to disclose. There is nothing to show that the scire facias was brought on the record of the mortgage produced on trial. For aught that appeared, the foreclosure may have been of a junior mortgage, subsequent to the judgment under which the plaintiff claimed. The judgment, then, of foreclosure on the scire facias, was not sufficient to constitute a defense to the plaintiff's title."

In *Bay State Min. & Townsite Co. v. Jackson* (1900) 27 Colo. 139, 60 Pac. 573, the plaintiff claimed title to a placer mining claim by virtue of a sheriff's deed in execution against one Welch, and the defendants by a later deed from Welch himself. It was held that neither could attack the title of Welch.

In *Frink v. Roe* (1886) 70 Cal. 296, 11 Pac. 820, the plaintiff deraigned title through sundry mesne conveyances following a sheriff's deed to one

McHenry, in the chain of title being one Rising, the common source. It was held that the defendants could not attack the validity of the sheriff's deed to McHenry.

In *Rucker v. Hyde* (1907) 118 Tenn. 358, 100 S. W. 739, the complainants relied on a deed made by a trustee under a foreclosure sale, and since the defendants claimed title from the same source, it was held that the complainants need not deraign title from the state.

In *Mickey v. Stratton* (1879) 5 Sawy. 475, Fed. Cas. No. 9,530, it was said: "The plaintiff and defendant both claim under Shiel, and it is not necessary for either to prove title farther back than he. The defendant sets up an estate in fee in Willis in the premises, to defeat a recovery by the plaintiff in this action, and, if he has any interest therein upon the evidence, it is derived from Shiel by means of the sheriff's sale and deed. The plaintiff claims under Shiel also, by a conveyance subsequent to that of the sheriff. Neither is, therefore, at liberty to deny Shiel's title at the time of the sheriff's sale."

In *Alabama White Marble Co. v. Eureka White Marble Quarries* (1914) 190 Ala. 595, 67 So. 505, the defendant claimed through mesne conveyances following a sheriff's deed under a foreclosure of mortgage, while the plaintiff had title by quitclaim deed. The immediate grantor of the plaintiff was a foreign corporation, and the latter, not having complied with the state laws relating to foreign corporations, could not, it was held, transfer a good title to oust the defendant in ejectment.

In *Miller v. Surls* (1856) 19 Ga. 331, 65 Am. Dec. 592, the plaintiff claimed by mesne conveyance from one Perry, while the defendant's claim rested on a sheriff's sale in execution of a judgment after the deed to plaintiff's grantor, and it was held that the title by which Perry claimed was immaterial, the only question being who was prior in point of time.

In *Feimster v. McRorie* (1854) 46 N. C. (1 Jones, L.) 547, the defendant admitted the general rule, but con-

tended that it did not extend to a defendant who claimed as a purchaser at sheriff's sale. The court disposed of this contention as follows: "We are not aware of any principle upon which the first objection can be sustained, and it is directly opposed by the case of *Den ex dem. Gilliam v. Bird* (1848) 30 N. C. (8 Ired. L.) 280, 49 Am. Dec. 379, where the defendant claimed from a purchaser at sheriff's sale, and yet it was not pretended that the rule was excluded on that account."

In an action of ejectment for a house and lot, the plaintiff showed title by deed, and the defendant claimed under a sheriff's sale in execution of a judgment against the plaintiff's grantor. It appeared that the property was part of what had once been a public street. It was held that the defendant, in attacking the plaintiff's title, could not set this up as an outstanding title. *Den ex dem. Gilliam v. Bird* (N. C.) *supra*.

In *Brown v. Brown* (1870) 45 Mo. 412, the plaintiff claimed title from his deceased brother, under a purchase from the latter's administrator. It appeared that soon after the purchase he entered into possession, and so continued during a period of nine years. During his absence in California the defendant got into possession, and claimed title alleged to have been acquired from the plaintiff himself through a judicial sale. It was held that he could not attack the plaintiff's deed from the administrator.

In *Holland v. Adair* (1874) 55 Mo. 40, both parties claimed title to the land in controversy through one Holland, the plaintiff by deed directly, and the defendants by virtue of a sheriff's deed, founded on an attachment, judgment, and execution under which the land was sold by the sheriff to the defendant. It was held that all that was requisite for the plaintiff, in order to make a *prima facie* case, was to deduce his title from the common source.

In *Butcher v. Rogers* (1875) 60 Mo. 138, the plaintiff claimed title by mesne conveyance from the same person under whom the defendant claimed by sheriff's deed. It was held

that, since both claimed title through the common source, it was entirely unnecessary for the plaintiff to trace a chain of title back to the government.

In *Luen v. Wilson* (1887) 85 Ky. 503, 3 S. W. 911, the plaintiff claimed by deed, and the defendant by foreclosure of a lien, both tracing title to a common source. It was contended that the plaintiff was not entitled to recover, because he did not exhibit or trace his title back to the commonwealth. But it was said by the court: "Both parties are, however, claiming under the same third party, and in such a case it is sufficient to show a derivation of title from him."

In *Doyle v. Wade* (1887) 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516, during the course of the trial the defendant offered evidence to show that the title to the property in suit was in a third person, but this was held inadmissible, since the plaintiffs claimed title through a deed to their ancestor, and the defendant through a purchaser at a sale of the property under a judgment against him.

In *Feller v. Lee* (1910) 225 Mo. 319, 124 S. W. 1129, the plaintiff claimed through mesne conveyance and foreclosure of a deed of trust, while the defendant held by adverse possession and by a sheriff's sale in execution against the common grantor. It was held that the title of the common source would not be attacked.

In *Bliss v. Tidrick* (1910) 25 S. D. 533, 32 L.R.A.(N.S.) 854, 127 N. W. 852, Ann. Cas. 1912C, 671, both parties claimed title from a common source, one by deed, and the other by sale under an attachment execution. It was said: "Whenever both parties claim under the same person, neither of them can deny the title of such person, and, as between two parties claiming from the same person, the one holding the elder title must prevail, with, of course, the reservation that a subsequent purchaser in good faith, for value and without notice, actual or constructive, will be protected as against a prior conveyance."

#### IV. *Affidavit of title from common source under Illinois statute.*

In Illinois, it is provided by statute

that, where the plaintiff in ejectment swears that both parties claim title through a common source, he is not obliged to go back of the common source and trace his title from the government, unless the defendant denies under oath that he claims title under that source, or swears that he claims title under some other source. *Burns v. Edwards* (1895) 163 Ill. 494, 45 N. E. 113; *Chicago, R. I. & P. R. Co. v. Hardt* (1891) 138 Ill. 120, 27 N. E. 910; *Cairo & St. L. R. Co. v. Parrott* (1879) 92 Ill. 194. See also *Smith v. Laatsch* (1885) 114 Ill. 271, 2 N. E. 59.

In *Lake Erie & W. R. Co. v. Whitham* (1895) 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014, the plaintiff sought to bring his case within the provisions of the act. In holding the plaintiff's affidavit to be sufficient, the court said: "Upon the trial he stated, on oath, that he claimed title from the Johnston heirs, and that, as he understood it, the defendant claimed title from the same source. This, we think, was sufficient to require the defendant, or its agent or attorney, to deny, on oath, that it claimed title through such source, or that it claimed title through some other source, in order to compel the plaintiff to deduce title from any other than such common source. No such denial was made, on oath, by or on behalf of the defendant, and we think, therefore, it was sufficient, *prima facie*, for him to trace his title to such common source."

In *Roosevelt v. Hungate* (1884) 110 Ill. 595, the plaintiff showed by affidavit that one Iselin was the common source of each party's title to all the lands in dispute, except the undivided one-sixth part of a certain 40-acre tract, and that one McKnelly was the common source of title as to that. He then introduced in evidence deeds from each to himself, and it was held that this proof made out a *prima facie* case for the plaintiff, and entitled him to a judgment for the lands, unless a good defense was shown by the defendant.

The sufficiency of an affidavit as to the common source was also passed on

in *Hartshorn v. Dawson* (1875) 79 Ill. 108. On the trial, the attorney for the plaintiff, being sworn, stated that he was acquainted with the title to the lands in controversy, as it appeared of record; that both plaintiff and defendants claimed title from a common source, stating what it was; and that he also knew this from conversation with the parties. On being cross-examined, he stated that his only knowledge was derived from the records and what appellant said when he purchased, and that he had held no recent conversation with him on the subject, and did not know what he might then claim. It was held that this was sufficient, the court saying: "The section must have a reasonable construction, and it cannot be required that a party, to avail of its benefit, must be able to positively state that he knows the secret thoughts of his adversary at the time he makes the oath. A party purchasing a particular claim to property, and placing a deed therefor on record, is presumed to claim in accordance with that purchase and deed; and in the absence of evidence of any other or different claim, another person, acquainted with such purchase and the contents of such deed, might well swear that he knew the nature of his claim. If appellant, in fact, claimed under another or different source of title, it was only necessary that he should have so stated on oath, when appellee would have been compelled to go behind that source of title. Not having done so, he has no cause to complain that appellee was permitted to commence with his evidence where he did."

In *Brown v. Schintz* (1902) 203 Ill. 136, 67 N. E. 767, it was said by the appellants "that the appellee did not prove his title from the government down to the time of the conveyance relied on, and that the affidavit of common source was not sufficient to avoid the necessity of that proof. Appellants and two of their tenants were parties defendant in the court below, and the affidavit as to common source related solely to the tenants, and was that they and the plaintiff claimed title from a common source, through

appellant Brown. Appellee was appellants' grantee, and for the purpose of that trial, and as between them, we think it sufficient for appellee to have introduced the deed from appellants, by which the appellants conveyed and warranted the title to the premises. The words of that grant were 'convey and warrant,' and if the question was only between the grantors and the grantee we can see no reason for requiring the evidence as to title, when they alone were concerned, to go beyond that. Appellants were estopped to deny that they had conveyed a good title to appellee."

Where the plaintiff alleges a common source of title, and the defendant denies on oath that he claims title through a common source with the plaintiff, it is incumbent on the latter to prove title in himself as at common law. This he could do in two ways: First, by showing such title derived from a paramount source of title as from the government; or, second, by proving that he and the defendant did claim through a common source and that his was the better title. *North Chillicothe v. Burr* (1900) 185 Ill. 322, 57 N. E. 82, following the rule as laid down in *Smith v. Laatsch* (Ill.) supra.

#### V. *Exceptions to rule.*

##### a. *In general.*

The doctrine does not apply where the defendant denies the derivation of title from the same source as the plaintiff, and claims an independent source. *Kerbough v. Vance* (1873) 6 Baxt. (Tenn.) 110.

In *Butt v. Mastin* (1905) 143 Ala. 321, 39 So. 217, wherein the plaintiff attempted to prove that the defendant held title from one Hunt, but the deeds introduced for that purpose carried only a portion of the land in dispute to Hunt, it was said by the court: "We think the rule as to common source applies to the land involved in this suit, and that a claim from a common source is not established by showing that defendant claims title to a part of a subdivision, of which the land in controversy is a part, but is distinct from the portion claimed by the defendant; and it makes no difference

that the grantor set up as the common source acquired title to the entire subdivision, of which the defendant's parcel is a part, by a single conveyance. In other words, we do not think that a party who claims title to only a part of fractional section 34 through Hunt admits by so doing that Hunt had a title to the other part of fractional section 34, although Hunt had a deed or patent purporting to convey to him all of it. It might be that the defendant's grantor purchased the part to which he thought Hunt had a good title, and did not purchase the balance of the subdivision for the very reason that he considered Hunt's claim thereto defective. Could it, therefore, be pretended that, in purchasing a part only, the purchaser admitted the title of his grantor to the part of the subdivision that he did not purchase? We think not."

So in *Leech v. Karthaus* (1904) 141 Ala. 509, 37 So. 676, wherein the plaintiffs claimed title through one McCracken, and the defendants, excepting one, were not shown to claim through him, or to have made any admission respecting title, it was held that, to show a right to recover against them, the plaintiffs were under the necessity of proving that they, the plaintiffs, had held prior possession of the lot in question, or that McCracken, or someone else with whom they were in privity, had held title or prior possession.

In *Miller v. Wilson* (1798) 2 Yeates (Pa.) 294, the plaintiff claimed the lands in question under the will of his great-grandfather, while the defendant deduced under a deed from the tax commissioners under sale for unpaid taxes. It was said by the court: "The defendant has affirmed the right of the grandfather, tenant in tail, by purchasing from the commissioners the lands as his property. The plaintiff has shown under what title and in what manner his grandfather came into possession of the lands, and that his interest therein ceased with his death, the estate then becoming vested in the plaintiff. Unless the defendant can show some other right under which the grandfather held the lands,

the plaintiff is under no necessity of going into the previous title."

In *Union Bank v. Manard* (1873) 51 Mo. 548, the plaintiff attempted to derive title to the land in itself by a patent from the United States, tracing title from the patentee, through others. In this attempt it wholly failed, but, in order to show its right to a recovery, introduced a deed purporting to convey the land described in the petition to G. and H. The plaintiff, then, to show that the defendant claimed to hold title derived from the same persons from whom the plaintiff claimed, and that he could not, therefore, dispute the title of plaintiff's grantors, offered in evidence a sheriff's deed in execution against G. and others, purporting to convey the same lands, and then by mesne conveyances to the one under whom the defendant had entered and was in possession, invoking the rule of law that, where "both parties in an ejectment suit claim under a common grantor, it is admitted that all that is necessary for the plaintiff to do in order to insure a recovery in such case is to show that he has the better title derived from the common grantor. That someone else may have a better title in such case does not matter." It was held, however, that since the plaintiff showed title in itself from G. and H., and title in the defendant only from G., that the latter was not estopped from denying the title of H., and, having shown a better title from G. than the plaintiff's, he was entitled to recover.

Where the defendant claims under a mortgagor by a private sale subject to the mortgage, under the foreclosure of which the plaintiff claims, it will not prevent a recovery against him to prove that another person was in possession prior to the mortgagor, and that such person put the mortgagor in possession. *Scott v. Singer* (1875) 54 Ga. 689.

The rule is inapplicable where the deed from the common source is uncertain as to the interest conveyed. Thus it has been said: "While the rule referred to may be correct and applicable in ordinary cases, and the presumption may be that where a per-

son in possession of premises, exercising rights of and claiming ownership therein, conveys the same, a grantee thereof might be able to maintain ejectment against another claiming title from the same person, yet this cannot be extended to cases where the deed from such common grantor does not purport to convey the entire title, or leaves it uncertain and indefinite what interest was conveyed, without the aid of other testimony which is not furnished." *Campau v. Campau* (1877) 37 Mich. 245.

The rule does not prevent the defendant from showing that at the time of conveyance the common ancestor had parted with the legal title. Thus the defendant may show that the common source had parted with the title to the defendant's grantor for a valuable consideration, prior to the execution and sheriff's sale under which the plaintiff claims. *Newlin v. Osborne* (1855) 47 N. C. (2 Jones, L.) 163.

The rule does not apply where the plaintiff and defendant derive title to separate and distinct tracts from a common grantor, who derived the tracts from different sources. In such cases the term "common grantor" is not synonymous with "common source." See the reported case (*JENNINGS v. MARSTON*, ante, 855).

A question of disputed boundaries arose in *Smith v. Stanley* (1912) 114 Va. 117, 75 S. E. 742, where, as in the reported case (*JENNINGS v. MARSTON*), the defendant denied that the conveyance of two distinct parcels of land, one to one grantee and the other to another grantee, showed that the parties derived title from a common source, within the meaning of that term, although the deed to the junior grantee called for the lines of the senior grantee. It was held, however, that whatever might be the merits of such a contention, it could not be raised for the first time in the appellate court, since in the trial court both parties had proceeded upon the theory that it was a case of common source of title.

The rule does not apply where one of the parties can show a better title

in himself. *Copeland v. Sauls* (1853) 46 N. C. (1 Jones, L.) 70.

In *New England Mortg. Secur. Co. v. Clayton* (1898) 119 Ala. 361, 24 So. 362, it appeared that the common source had executed two mortgages, one in 1882 to the predecessor in title to the defendant, and a second one in 1887 to the plaintiff. In the chain of defendant's title there was an indorsement of a mortgage not using "apt words" to convey the legal title to land. In affirming judgment for the defendant, the court said: "A mere statement of the facts is sufficient to justify the judgment of the court. Both parties claim title from a common source, Jasper N. Hendricks, the mortgage executed to Paden, under which defendant holds, being the older. Not only was the Paden mortgage the older, but the mortgage day transpired before the execution of the plaintiff's mortgage, and there was no legal title in the mortgagor at the time of the execution of the second mortgage. Again, the rule of law which will not permit a defendant in ejectment to set up an outstanding superior legal title, when both parties claim from a common source, has no application. There was no attempt to show an outstanding title superior to the title of Jasper N. Hendricks, the common source of both titles. The purpose of the introduction of the mortgage was to show that whatever title Jasper N. Hendricks owned had passed from him, before the execution of the second mortgage, and did not vest in the plaintiff. Conceding that there were no apt words to convey the legal title to land by the transfer from Paden to J. H. Hendricks, the evidence shows that J. H. Hendricks went into possession of the land, under and by virtue of the transfer of the mortgage to him, and being in possession, he executed a deed of conveyance to Charles Clayton, who took possession under his purchase. He certainly had a perfect equity to the land, derived from the first mortgage. Being in possession, with a perfect equity, the rule did not prohibit him from introducing in evidence the first mortgage."

Where the defendant claimed title

under the plaintiff by virtue of a sheriff's deed to him, made in pursuance of a sale under an execution issued against a third person, whom defendant contends derived title from the plaintiff, it was held that, the plaintiff having thereafter occupied the property as a homestead, it was exempt from sale and execution, and the defendant acquired no title by the sheriff's deed. *Worley v. Hicks* (1901) 161 Mo. 340, 61 S. W. 818.

Where the deed from the common source, introduced by the plaintiff, is void because of insanity, he is not estopped from denying the title of the defendant, who claimed by sheriff's deed through an intermediate holder. *Doe ex dem. McDougald v. McLean* (1863) 60 N. C. (1 Winst. L.) 120.

Likewise, where it was conceded by both parties that A. was the original owner of the land, and the plaintiff, claiming to have purchased of him, exhibited his deed, showing title, the deed was attacked by the defendants, heirs of A., on the ground of the grantor's want of mental capacity to make a deed, and it was held to be incumbent on the defendants to show a want of capacity on the part of the grantor before they could defeat a recovery, and not to be incumbent on the plaintiff to show title from the commonwealth down. *Alsop v. Weir* (1885) 7 Ky. L. Rep. 366 (abstract).

An exception to the general rule is found in *McConnell v. Rhodes* (1853) 14 Ga. 313. In that case the plaintiff by a subpoena duces tecum compelled the defendant to produce her deeds, which connected her with the common source, and, in affirming a judgment for the defendant, the court said: "The evidence relied upon by the plaintiff in execution was forced out of the claimant at his instance for his use. It was not before the court by the claimant's consent. It does not appear that her title is derived alone from the defendant in execution. Non constat but that she has and will rely upon other title and better title. The rule, therefore, that a party is estopped from denying the title under which both litigants claimed, does not apply."

In *Smith v. Otley* (1853) 26 Miss. 291, the general rule is recognized, but under the facts of the case, it was held that it did not apply. It appeared that the plaintiff claimed as purchaser at sheriff's sale under an execution against one Hill, and the defendant was permitted to show that Hill's only connection with the premises was a deed of trust executed by him for the benefit of a third person, who in turn paid the purchase money and took possession.

And it has been held that the doctrine does not go to the extent of denying to the defendant the right to show the character of the title in the common source, whether of a term for years, or whether it was legal or equitable. Such proof does not deny the title, but discloses precisely what it is. *Morgan v. Hazlehurst Lodge* (1876) 53 Miss. 665, wherein it is said: "When the plaintiff has shown that the defendant derails title back to the same person under whom he claims, he is not required to go further, and show that such title is good against all opposers. He has made out a prima facie case. Both parties have acted on the assumption that the title is good; and the question is, which holds the title, or which has the oldest derivation. The defendant is under estoppel no further than that he shall not be permitted to prove a paramount title in a stranger, with which 'he shows no connection.' *Griffen v. Sheffield* (1860) 38 Miss. 391, 77 Am. Dec. 646; *Den ex dem. Paul v. Ward* (1833) 15 N. C. (4 Dev. L.) 247; *Den ex dem. Love v. Gates* (1839) 20 N. C. 498 (4 Dev. & B. L. 363). If, however, he has acquired that title, he has done no wrong to the plaintiff, has violated no trust, and has broken no allegiance. *Wade v. Thompson* (1876) 52 Miss. 367."

#### *b. Acquisition of paramount title.*

Notwithstanding the insufficiency of his title under a common source, the defendant may in ejectment defeat the action by showing that there is a title superior to that of the common source, and that he is the holder of that title. *Rice v. St. Louis, A. & T. R. Co.* (1894)

87 Tex. 90, 47 Am. St. Rep. 72, 26 S. W. 1047.

An exception is made to the general rule when the defendant can show that the true title was in a third person, paramount to the title of the person under whom the plaintiff and defendant both claim; and that the defendant has acquired this paramount title from such third person, or can connect himself with such third person, as by showing that he held possession for him, or under him. *Newlin v. Osborne* (1855) 47 N. C. (2 Jones, L.) 163.

The defendant, if not otherwise estopped, may still set up a title paramount to the common source, and derive the title to himself, or a title from the common grantor by a deed, or under an encumbrance created by such grantor, prior to the title of the plaintiff. *Reid v. Anderson* (1898) 13 App. D. C. 30; *Moss v. Union Bank* (1874) 7 Baxt. (Tenn.) 216.

See also *Anderson v. Reid* (1897) 10 App. D. C. 426, a former appeal of (1898) 13 App. D. C. 30, wherein it was said: "The mere verbal disclaimer of a common source, made at the time of the offer of the proof thereof, cannot affect the operation of the rule. When the plaintiff, assuming the hazard, makes proof of the common source, and shows that his is the older title, duly protected by registration in accordance with the requirements of the law against an innocent purchaser, he makes a prima facie case, entitling him to recover, unless the defendant, being under no estoppel, can show that he claims under another and different title. 'Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance.' *Robertson v. Pickrell* (1883) 109 U. S. 608, 615, 27 L. ed. 1049, 1051, 3 Sup. Ct. Rep. 407."

"But while the defendant is thus precluded as to the common source of title, he may show a better title in himself, obtained from other sources than that of the person under whom he so claims." *Ryan v. Martin* (1884) 91 N. C. 464.

"When the adversary parties to an

action for the recovery of real estate derive their claims from one and the same person, neither is at liberty to dispute his title or to assert a superior and better title in another, unless he has acquired that title, or in some way connects himself with the true owner." *Caldwell v. Neely* (1879) 81 N. C. 114.

"Ordinarily, the defendant may rest on his possession merely, or he may show an outstanding title in a stranger. In either case he will succeed, unless the plaintiff has shown such right of possession as is good against all the world. This rule has no application where both parties trace title to a common source. In that case the defendant cannot protect his possession by setting up a paramount title in another person, with which he has no connection." *Wade v. Thompson* (1876) 52 Miss. 367.

"The defendant cannot defeat a recovery by the plaintiff having the better title, by showing a superior title outstanding in a third person, with which he has no connection; but the superior title meant is one older than the common source, or the title under which both claim as the foundation of their title. The reason why the defendant may not protect himself by appealing to an outstanding title in a third person, with which he has no connection, is that he has acknowledged the title of the common source, and for that reason is precluded from questioning its validity, at the time of his taking under it. But this reason does not apply to a title in a third person which accrued after the date when defendant recognized the common source of title by taking title under it; and as to such subsequently accrued title, there is no hindrance to the defendant to avail himself of it. As to that there is no estoppel upon him. A tenant is estopped to deny the title he acknowledged by accepting the lease, but he may show that that title has been divested from the landlord and vested in another since he accepted the lease, because the estoppel relates only to the time of the act which gives rise to it. The same principle applies to the defendant who de-

rived title from a common source with that of the plaintiff in ejectment, and the same rule exists." *McCready v. Lansdale* (1881) 58 Miss. 877.

In *Chesapeake Beach R. Co. v. Washington, P. & C. R. Co.* (1904) 23 App. D. C. 587, it was said: "No principle is more firmly established than that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. Until the plaintiff has made a *prima facie* case the defendant is not called upon to justify his possession. Where the plaintiff's right is not founded upon a previous adverse possession under all the conditions requisite to confer title, he must, as a general rule, connect himself by a chain of transfer with the sovereignty of the soil. An exception to the rule arises where he can show that the title under which the defendant claims has an intermediate common source with his own."

In setting up a defense of an outstanding title in a third person, not only must the defendant connect himself with that title, but, in order to defeat the action in this way, the outstanding title must be most clearly and satisfactorily made out, and a suit cannot be defeated by the existence of a doubtful claim to title, on the part of a third person, in no wise connected with the title of either party. *Brain-tree v. Battles* (1834) 6 Vt. 395.

Unless the defendant can show that he has in himself the outstanding title, the plaintiff must recover. *Johnson v. Watts* (1853) 46 N. C. (1 Jones, L.) 228.

"It is a familiar rule of law that a defendant in ejectment cannot avail himself of an outstanding paramount title unless he connects himself with that title. But, to bring the defendant within this rule, the outstanding title must be prior and paramount to the common source. The reason for this rule is that both parties are estopped from disputing the title in the common source, hence, neither will be heard to set up an outstanding title paramount to the common source, unless he can connect himself with it. Where plaintiff establishes and relies



upon a common source, he opens his chain of title deraigning from that common source to any attack which the defendant may find available." *Bursey v. Lyon* (1908) 32 App. D. C. 231.

In *Thomas v. Kelly* (1854) 46 N. C. (1 Jones, L.) 375, it was held that the defendant was estopped from setting up an outstanding title in a third person, after it had been proved that the deed to him from the common ancestor was never delivered, but was wrongly and forcibly taken by him. The court, in distinguishing the rule from technical estoppel, said: "The law applicable to this case is well settled, and the only difficulty which it presents arises from a misapplication of terms. The defendant, for the reasons given by his counsel, is not, technically speaking, estopped from denying the title of Joseph Thomas, Jr., under whom the plaintiff's lessor claims. But, as both the lessor and the defendant set up a claim to the land under the same person, neither of them can deny the title of that person. This is a rule, not strictly of estoppel, but one founded in justice and convenience, which has been long recognized, and acted upon in this state."

In *Mathews v. Lecompte* (1857) 24 Mo. 545, both parties claimed title from a common source, and the defendant, having the junior conveyance, offered to show an outstanding title in a third person. The evidence was held to be inadmissible.

In *Jackson ex dem. Livingston v. Walker* (1827) 7 Cow. (N. Y.) 637, it appeared that the plaintiff claimed from one Storm, who was in possession of the premises under a contract of sale. The defendant claimed as the lessee of one Garnsey who, during the absence from the country of Storm, entered into possession by agreement with the latter's wife. It was held that defendant was estopped to show Garnsey's title or an outstanding title against Storm, the plaintiff being entitled to the latter's possession, thus acquired by the defendant.

The same question of an outstanding title in another arose in *Den v. Winans* (1833) 14 N. J. L. 1. In that

case the plaintiff claimed by sheriff's deed in execution of a judgment against the defendant, who offered evidence to prove a prior judgment and execution by sheriff's deed to a third person, under whom he claimed as lessee. It was held that the evidence was properly rejected.

So in *Wolfe v. Dowell* (1849) 13 Smedes & M. (Miss.) 103, 51 Am. Dec. 147, it was said: "The 7th, 8th, and 9th charges are but variations of a single proposition, 'that if both parties to an ejectment claim title through one person as a common source, the defendant will not be permitted to set up an encumbrance by such person as an outstanding title.' This proposition is too broad. The law is laid down very plainly in *Doe ex dem. Huntington v. Pritchard* (1848) 11 Smedes & M. (Miss.) 327. It is there said: 'The plaintiff in ejectment can only recover upon the strength of his own title, as being good against the world, or as being good against the defendant by estoppel.' The plaintiff, in the first instance, need go no farther than the title of the person under whom they both claim. But the defendant may set up a title adverse to that of such person, and if he does, the plaintiff must show such title to be invalid, or produce some superior title, or fail. The defendant may hold adversely to the debtor, because of an encumbrance. He may have the title of the encumbrancer as well as of the debtor; and if he have, we see no reason why he may not oppose it to the plaintiff."

In *Burns v. Goff* (1891) 79 Tex. 236, 14 S. W. 1009, it was said: "The rule which renders it unnecessary for a plaintiff to deraign title beyond the common source is one of convenience, and does not deprive a defendant of the right to show that he has the superior right through the common source or otherwise. The statute provides that 'proof of a common source may be made by the plaintiff, by certified copies of the deeds showing a claim of title to the defendant emanating from and under such common source.' When a deed is intro-

duced which shows such a claim by a defendant, that is sufficient, although the deed may be for some cause inoperative. If a defendant claims through a purchaser under execution against a plaintiff, the sheriff's deed may not for some cause pass the title, yet such a deed will be sufficient evidence of common source, and the plaintiff in such a case need not deraign title beyond himself as common source. . . . If defendant has superior right to the land, whether this arises from adverse possession or other fact, this he is not precluded from showing; but, in the absence of some evidence on his part tending to show such superior right, the plaintiff would be entitled to recover on proof of claim of title by defendant, emanating from and under the common source, made in the manner prescribed by the statute."

"It is well-settled law that a defendant in ejectment, who is not a mere trespasser on the land sued for, may always set up a paramount title, outstanding in a third person, unless the plaintiff and defendant claim title, or whatever right less than absolute title they assert and rely on, from a common source." Hence, where the defendant does not claim title or any right from the ancestor of the plaintiffs, whose title they rely on for a recovery, but by conveyance from one in possession and transmitting that possession to the defendant, it was open to him to set up in defense of the action a paramount outstanding title. *Stephenson v. Reeves* (1891) 92 Ala. 582, 8 So. 695.

The ruling in *Stephenson v. Reeves* was recognized in *Matkin v. Marx* (1892) 96 Ala. 501, 11 So. 633, but the facts in the latter case showed that both the plaintiff and defendant claimed title and right from a common source, and it was held that the defendant was not in a position to plead that the title to the property sued for was not in the common source, but in third parties.

But see *Rice v. St. Louis, A. & T. R. Co.* (1894) 87 Tex. 90, 47 Am. St. Rep. 72, 26 S. W. 1047, where the court

said: "And even without showing that he holds such superior title, it may be that his defense ought to prevail, provided he prove affirmatively not merely that someone had the title anterior to that of the common source, but also that such previous title never vested in the common source. . . . There are eminent authorities which hold that in order to defeat a recovery when the plaintiff has proved that both parties claim from a common source, and that his is the superior title under that source, the defendant must not only show that there is an outstanding title, but that he must connect himself with that title. *Cooke v. Avery* (1892) 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Cox v. Hart* (1892) 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Christenbury v. King* (1881) 85 N. C. 229; *Caldwell v. Neely* (1879) 81 N. C. 114. But it seems to us that so great a restriction of the defendant's right is not in accordance with sound principles. Since the plaintiff must prove his title in order to recover, it would seem that when he has shown title under the common source, that proof by defendant, however made, that the common grantor had no title, ought to be a defense."

In *Fenn v. Louisell* (1908) 87 C. C. A. 670, 160 Fed. 458, it was held that, as both parties deraigned title from a common source, the validity of a prior tax title was immaterial, and as the defendant neither connected himself with the alleged outstanding title, nor traced it to any person at a time subsequent to the conveyance to the common-source title, the questions arising in relation to outstanding title in another were also immaterial.

If the defendant does not derive his possession from the plaintiff, but claims adversely, he may buy in an outstanding title to defend his possession. But such title will not suffice unless the defendant shows that it was subsisting and available, on which a recovery could be had in ejectment. *Wade v. Thompson* (1876) 52 Miss. 367. W. M. C.

W. F. LEACH, as Guardian, etc., Appt.,  
v.

WILLIAM GRAY et al.

*Alabama Supreme Court — December 20, 1917.*

(— Ala. —, 77 So. 341.)

**Partnership — liquidation — set-off against loan by partner.**

1. Where a partner, guardian of a minor, lends his ward's money to the firm without taking the security required by statute, the claim against the partnership is his own, which, in the liquidation of the partnership, upon its insolvency, may be set off against debts due by him to the partnership.

[See note on this question beginning on page 894.]

**Guardian and ward — loan without security — personal liability.**

2. A guardian lending the money of his ward upon security which he knows to be insufficient, or has no good reason to believe is sufficient, is personally liable for its loss.

[See 12 R. C. L. 1182.]

**— individual liability of guardian.**

3. The lending by a guardian of his ward's money without taking the security required by statute results in an individual liability of the guardian unless the ward elects to ratify the transaction.

[See 12 R. C. L. 1182, 1183.]

**— borrower of ward's money as trustee.**

4. One borrowing a ward's money from his guardian without giving the security required by statute becomes a trustee of the money in invitum, and the ward may hold borrower and lender accountable as joint and several trustees.

**Set-off — against claim of partnership.**

5. That a partner could not sue the partnership at law to recover money due from it to him does not prevent equity, upon a partnership accounting, from setting off against a partnership claim upon him a loan made by him to it of money belonging to his ward.

[See 24 R. C. L. 870, 871.]

**APPEAL** by the guardian from a decree of the Circuit Court for Tallapoosa County (Whiteside, J.) correcting and confirming the report of the register, in a suit for the dissolution of a partnership and an accounting of its affairs. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. James W. Strother and J. P. Oliver for appellant.

Mr. D. W. Crawford, for appellees:

When a guardian uses funds of his wards in the business of a partnership of which such guardian is a member, or lends such funds without mortgage or other security than the credit of the borrower, he is guilty of a devastavit and conversion of such funds.

*Lee v. Lee*, 55 Ala. 590, 67 Ala. 406; *May v. Duke*, 61 Ala. 53; *McGowan v. Milner*, 195 Ala. 44, 70 So. 175; *Bank of Guntersville v. United States Fidelity & G. Co.* — Ala. —, 75 So. 168.

Anything which the guardian receives as the proceeds of such devastavit, whether notes or simple contract indebtedness, is not assets of the estate of his ward, and does not become

such assets without a ratification of his unauthorized act by his ward, after such ward reaches his or her majority, or by a ratification thereof by a court of competent jurisdiction, acting on behalf of such ward.

*May v. Duke*, 61 Ala. 53; *Tomkies v. Reynolds*, 17 Ala. 109; *Lee v. Lee*, 67 Ala. 406.

Until such guardian has been relieved of liability for such devastavit, he can sue and recover the proceeds thereof in his own name, even though he has been removed or has resigned as guardian.

*Tomkies v. Reynolds*, 17 Ala. 109; *Bryan v. Wilson*, 27 Ala. 208; *Collins v. Greene*, 67 Ala. 211; *Wright v. Robinson*, 94 Ala. 479, 10 So. 319; *Dickson v. McLarney*, 97 Ala. 383, 12 So. 398.

The proceeds of such devastavit being the personal property of the guardian, in the absence of the ward intervening and claiming such proceeds in an action by the guardian therefor, the debtor can plead as a set-off, a debt due by the guardian in his individual capacity to such debtor.

*May v. Duke*, 61 Ala. 53; *Tomkies v. Reynolds*, *supra*; *Drennen v. Gilmore Bros.* 132 Ala. 246, 90 Am. St. Rep. 902, 31 So. 90.

Even though strict mutuality of demands is lacking, equity will allow a set-off, if justice and good conscience require that it be allowed, and insolvency is a recognized ground for set-off in equity.

*Pom. Eq. Jur.* 8d ed. § 189, p. 239; *High, Inj.* § 244; *Farris v. Houston*, 78 Ala. 250; *Renfroe v. Yarbrough*, 144 Ala. 487, 39 So. 660; *Fowler v. Bellingher*, 140 Ala. 240, 37 So. 225; *O'Neill v. Perryman*, 102 Ala. 522, 14 So. 898; *Nixon v. Clear Creek Lumber Co.* 150 Ala. 602, 9 L.R.A. (N.S.) 1255, 48 So. 805.

The chancery court, having taken jurisdiction for the purpose of dissolving the partnership and stating an account between the partners, properly determined all controversies relating to partnership affairs.

*Northen v. Tatum*, 164 Ala. 368, 51 So. 17.

When a guardian has been guilty of a devastavit, the payment thereof to the guardian, or the return of the proceeds thereof to him, would not discharge his surety for his liability for said devastavit, but the liability of the surety is fixed when the devastavit is committed, and remains until the wards have been settled with.

*Matthews v. Mauldin*, 142 Ala. 484, 38 So. 849, 4 Ann. Cas. 344; *May v. Duke*, 61 Ala. 53.

The only method by which the surety on the bond of a guardian can be relieved from liability on such bond is the method prescribed by statute.

*Hamner v. Mason*, 24 Ala. 480.

Only those sureties who join in the application to be relieved from future liability by reason of such suretyship are discharged from such future liability; and those will only be discharged from liability for breaches committed subsequent to the filing of the new bond by the guardian.

*May v. Duke and Matthews v. Mauldin*, *supra*.

Where an estate is being adminis-

tered in the chancery court, the court has jurisdiction to marshal the debts as well as the assets of the estate, and to require all persons holding claims against the estate, to file their claims with the register, and to bar all claims not so filed.

*Louisville Mfg. Co. v. Brown*, 101 Ala. 273, 13 So. 15; *Taber v. Royal Ins. Co.* 124 Ala. 681, 26 So. 252; 34 Cyc. 340.

*Messrs. N. D. Denson & Sons* also for appellees.

*Thomas, J.*, delivered the opinion of the court:

There is but one question presented by the appeal, and the record is unnecessarily voluminous in the presentation of that question.

May a guardian who, without security, has loaned money of his ward to a firm of which he is a member, in a suit in equity to dissolve and settle that insolvent partnership, have the amount so loaned paid back to him by the receiver out of the assets of the partnership, or may the individual indebtedness of such partner to his firm be set off against such claim?

In answering concretely the question propounded, it may be important to observe that one of the complainants in this case, a member of the partnership being liquidated in the court of equity, was a surety on the bond of the respondent guardian (appellant here) at the time the questioned loan was made to said firm; that said complaining partner and surety is a large creditor of the partnership, having liquidated many of its general debts; that respondent member of the partnership, who made the loan thereto, was the active managing member of the firm; and that this partner personally was insolvent at the time of the settlement of the partnership affairs in equity.

The decree of the chancellor was to the effect that the amount so loaned was a devastavit of the guardian. Thereafter the sureties on his official bond were responsible to the ward, on accounting to the court having jurisdiction; and, the respondent partner being indebted to

the firm in a sum largely in excess of the loan, said amount may be credited upon said partner's individual indebtedness to the partnership.

It is not denied that, when the guardian loaned his ward's funds to the partnership without "bond or mortgage, or a good personal security," as required by statute, he committed a devastavit. Code of 1907, § 4376; *Lee v. Lee*, 55 Ala. 590; *May v. Duke*, 61 Ala. 53; *Lee v. Lee*, 67 Ala. 406; *McGowan v. Milner*, 195 Ala. 44, 52, 70 So. 175.

In the absence of statute, it is a guardian's duty to loan the moneys of his ward with security; and if he knows the security to be insufficient, or "has not good reason for believing sufficient, whatever was the credit, or the solvency of the borrower," he is liable, because such a loan is a breach of trust,—a violation of duty. *Smith v. Smith*, 4 Johns. Ch. 281; *Lee v. Lee*, supra.

In *McGowan v. Milner*, supra, we said on this subject: "The use of trust funds, or a loan to the firm of which the guardian was a member, was a devastavit for which the guardian must account, and he is not entitled to commissions thereon."

A necessary consequence of such a devastavit by the guardian, his making a loan in disregard of the statute, is that he and his sureties assume, and are subject to, the repayment of such money to the ward.

As between the borrower and the lender, such a devastavit results in an individual obligation, that may be superseded only by ratification of the transaction by the ward,—his election to treat the debt as an asset of his estate. That is to say, where the ward is under no legal disability, and, having the right of election under the law, freely exercises that right by ratifying the unlawful act of his guardian, such property becomes that of the ward's estate. Without such election, the conversion involves the

guardian in liability from which he cannot be relieved "until satisfaction is made to the cestui que trust. The debt contracted by the borrower (by way of the devastavit) is his individual property, unless the cestui que trust elects to treat it as assets, and when the trustee collects it, in the absence of an election by the cestui que trust, it is his own debt he collects." *May v. Duke*, 61 Ala. 53, 57.

In *Tomkies v. Reynolds*, 17 Ala. 109, 115, 116, Chief Justice Dargan said: "For instance, if an executor or administrator make a contract in reference to the assets of the estate, which would amount to a devastavit and render him individually liable to the estate for the amount of money due on the contract, those interested may hold him responsible and may decline to pursue the party who contracted with the executor. Should he be denied the right to sue the party who contracted with him, because he has been removed from office, when he is individually liable to the estate for the debt that the defendant promised to pay him?"

Of the *Tomkies* Case it is interesting to note that Judge Stone was the attorney for appellee, who maintained the right of the executor who loaned the money or choses in action of the estate without authority to do so to sue on the contract in his own name until he has been discharged from liability incurred by the devastavit, and that this right of action exists notwithstanding such executor has resigned or been removed from the executorship. *Bryan v. Wilson*, 27 Ala. 208, 215; *Waldrop v. Pearson*, 42 Ala. 636; *Dunlap v. Newman*, 47 Ala. 429; *McGehee v. Slater*, 50 Ala. 431; *Waring v. Lewis*, 53 Ala. 615; *Collins v. Greene*, 67 Ala. 211, 215.

The debt for the loan of his ward's money was an individual demand of W. F. Leach against the partnership at the time of the devastavit, and thereafter down to the holding of the reference. He had the legal right to collect the debt in his in-

Guardian and ward—loan without security—personal liability.

—individual liability of guardian.

dividual capacity. In a suit to liquidate the partnership, the partnership could set off, as against such individual claim, debts due the partnership by the said Leach. In *Drennen v. Gilmore Bros.* 132 Ala. 246, 90 Am. St. Rep. 902, 31 So. 90, it is said of set-off: "A set-off, to be available, must be owned by defendant in absolute right at the time suit is brought. It is not enough that, together with another partner, the defendant owns the claim. It must be such demand as that he, in his own name, or in the names of defendants sued, without bringing in the name of a stranger to the suit, may maintain an action of debt or indebitatus assumpsit upon it against the party or all the parties suing, as the case may be. Less than that is not mutuality. Ownership at the time of suit brought is of the very essence of the right." . . . In order to sustain a set-off under the statute, the debts must be mutual, and the demands must be subsisting causes of action such as will give to the plaintiff and defendant a simultaneous cause of action, the one against the other, at the time the suit is brought."

Partnership—  
liquidation—  
set-off against  
loan by partner.

dividual claim, debts due the partnership by the said Leach. In *Drennen v. Gilmore Bros.* 132 Ala. 246, 90 Am. St. Rep. 902, 31 So. 90, it is said of set-off: "A set-off, to be available, must be owned by defendant in absolute right at the time suit is brought. It is not enough that, together with another partner, the defendant owns the claim. It must be such demand as that he, in his own name, or in the names of defendants sued, without bringing in the name of a stranger to the suit, may maintain an action of debt or indebitatus assumpsit upon it against the party or all the parties suing, as the case may be. Less than that is not mutuality. Ownership at the time of suit brought is of the very essence of the right." . . . In order to sustain a set-off under the statute, the debts must be mutual, and the demands must be subsisting causes of action such as will give to the plaintiff and defendant a simultaneous cause of action, the one against the other, at the time the suit is brought."

If the amount due on said note of the partnership to W. F. Leach, guardian, is not set off by the amount due that partnership by him, the ward may maintain suit against the individual members of the firm for the conversion, since it is clear that the partnership had notice of the trust nature of the funds. It is established, not only that when a guardian lends the moneys of his ward without security he is guilty of a breach of official duty, but that, if the borrower thereof is cognizant

of such breach of duty, he becomes a trustee of the money in invitum; and the ward may hold them accountable as joint and several trustees. *Lee v. Lee*, supra; *Robinson v. Peabworth*,

Guardian and  
ward—borrower  
of ward's money  
as trustee.

71 Ala. 240; *Milhous v. Dunham*, 78 Ala. 48; *Wolffe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Collier v. Henderson*, 86 Ala. 279, 7 So. 488; *Goldthwaite v. Ellison*, 99 Ala. 497, 12 So. 812.

It cannot be urged against the set-off that Leach, being a partner, could not sue the partnership at law. The same rule does not obtain in equity, since that court, having taken over the liquidation

Set-off—against  
claim of  
partnership.

of the partnership, "will proceed to the complete determination of all controversies touching . . . its demands against the members" thereof "and their claims." *Northen v. Tatum*, 164 Ala. 368, 374, 51 So. 17; *Hicks v. Meadows*, 198 Ala. 246, 69 So. 432; *Nixon v. Clear Creek Lumber Co.* 150 Ala. 602, 9 L.R.A. (N.S.) 1255, 43 So. 805; *Farris v. Houston*, 78 Ala. 250.

The guardian and the sureties on his official bond, becoming liable for the conversion of the fund at the time of the devastavit, will be held to account on final settlement of the guardianship. In this suit the ward is not exercising his right of election to ratify the unauthorized act of the guardian in making the loan, by filing his claim therefor against the partnership. The ward may elect to require the guardian and the sureties on his official bond to respond therefor on final settlement, or to require the guardian (*Williamson v. Howell*, 4 Ala. 693; *Chilton v. Parks*, 15 Ala. 671; *Ragland v. Calhoun*, 36 Ala. 606; *Gravett v. Malone*, 54 Ala. 19; *Hailey v. Boyd*, 64 Ala. 399; *Grace v. Martin*, 47 Ala. 135; *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555) and the individuals composing the partnership when the loan was made, one or both, having knowledge of the existence of the trust, to account therefor.

It results that the decree of the Chancellor is affirmed.

*Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.*

## ANNOTATION.

**Right to set off personal indebtedness of guardian or other fiduciary against claim arising out of transaction involving devastavit.**

An exhaustive search has failed to reveal any case, other than the reported case (*LEACH v. GRAY*, ante, 890), discussing the right to set off a personal indebtedness of a guardian or other fiduciary against a claim arising out of a transaction involving a devastavit. In the reported case it is held that where a guardian loans, without the security required by statute, the funds of his ward to a partnership of which the guardian is a member, he commits a devastavit which makes him and his surety liable on his bond, so that he can treat the loan as an individual demand against the firm, and therefore in a suit in equity to dissolve and settle the partnership, the individual indebtedness of the guardian to the firm can be set off against the claim arising out of the devastavit.

Whether or not the rights and remedies of the ward could in any circumstances be prejudiced by allowing such a set-off is not specifically discussed; but it is pointed out that the ward had not elected to ratify the unauthorized loan or file any claim against the partnership, and it is also pointed out that the remedies of the ward may be against the guardian and sureties on the bond, or by requiring an account from the guardian and any other members of the firm who knew of the trust in the money loaned.

As the controversy in this case seems to have been between the guardian and other members of the partnership, and the court says "it may be important to observe" that one of the copartners was surety on the guardian's bond and was also a large creditor of the firm by reason of liquidating many of its general debts, these facts should, perhaps, not be overlooked in interpreting the decision.

They suggest a special reason why the creditor-partner, who was a surety on the guardian's bond, should have this set-off allowed him in order to extinguish the loan. If the guardian had been allowed to collect it as an individual demand, and had failed to pay the money over to the ward, the surety might have eventually been held to make the loan good, while the allowance of the set-off protects him against this contingency.

While not squarely in point therewith, two cases may be cited as supporting the doctrine of the reported case at least by way of analogy, it not appearing clearly in either of those cases whether a devastavit was committed. Thus in *Montgomery v. Rauer* (1899) 125 Cal. 227, 57 Pac. 894, an action for moneys had and received, it appeared that the mother of the plaintiffs, who was also the guardian of their estates, had put into the defendant's hands a portion of the funds of the estates. These funds were received with full knowledge of their origin and character by the defendant. It was held that he could not set off against the claim for these funds, certain individual debts of the guardian. So, in *Jeffray v. Towar* (1902) 63 N. J. Eq. 530, 53 Atl. 182, an action for an accounting by the complainant against the administrator of his deceased trustee and a third person, it appeared that the trustee had carried two accounts with the third person, a stockbroker, one being an individual account and the other an account as trustee. The court held that, having knowledge of the character of the funds carried under the trustee account, the defendant broker could not set off against it a balance due on the individual account of the trustee.

W. J. K.

JOSEPH COLLINS, Plff. in Err.,  
v.  
OKLAHOMA STATE HOSPITAL et al.

*Oklahoma Supreme Court — July 25, 1916.*

(— Okla. —, 184 Pac. 946.)

**Libel — publication — writing name on hospital records.**

1. The mere writing of the word "colored" opposite the name of a patient on the records of a hospital is not a publication so as to become libelous if there is nothing to show that the records had ever been examined or read by any person whatever.

[See note on this question beginning on page 900.]

**— calling white person colored.**

2. In this state it is libelous per se to write of or concerning a white person that said person is colored.

[See 17 R. C. L. 292.]

**— placing white person in colored ward.**

3. A cause of action for libel cannot be maintained against a hospital for the insane on account of the act of its officers and employees in placing a white patient in that part of the institution set apart and used for colored patients.

**— construction of language — rule.**

4. In construing language alleged to be libelous, the courts should give to said language the same meaning and understanding as is usually applied thereto.

[See 17 R. C. L. 312.]

**Statute — construction — libel.**

5. Section 4956 of the Revised Laws of 1910 considered, and held, that the general words, "or other fixed representation," are used for the purpose of including other species of the same kind as the particular words there used, "writing, printing, picture, or effigy."

[See 25 R. C. L. 996.]

**Libel — privilege — letter.**

6. The letter which constitutes the second cause of action, and attached to the petition as a part thereof, examined, and the same held to be privileged.

[See 17 R. C. L. 341.]

**Definition — colored.**

7. The word "colored" and its abbreviation "col.," as applied to a person, is synonymous with "negro."

Headnotes 1-5 by HOOKER, C.

**ERROR** to the District Court for Oklahoma County (Hayson, J.) to review a judgment sustaining a demurrer to a petition filed to recover damages for an alleged libel. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Robert L. McLendon, Charles West, Joseph L. Hull, and H. H. Hagan for plaintiff in error.

Messrs. Parker & Simons, Burford, Robertson, & Hoffman, S. P. Freeling, and R. E. Wood for defendants in error.

Hooker, C., filed the following opinion:

It is alleged in the petition in this case that Joseph Collins is a white person, and that Lee Collins, a female about thirty-three years of age, is his daughter by his wife,

and is a white person of pure Caucasian blood; that the defendant companies are domestic corporations, and that the Oklahoma Sanitarium Company was on July 14, 1914, engaged in the business of operating for profit a hospital for the insane at Norman, Oklahoma, and that about November 19, 1914, the Oklahoma State Hospital became the successor to the Oklahoma Sanitarium Company in said business; that on or about the 30th of July, 1914, the said Lee Collins, hav-



ing been previously adjudged insane and committed by the proper court to the asylum, was taken by the plaintiff to the Oklahoma Sanitarium Company as an insane patient for treatment, where she was received by said company and placed in a ward used by the white people at said place; that a few days thereafter those in charge of the institution placed her in a ward set apart for negro patients, and entered upon its records opposite her name the word "colored," and thereby held her out to the world as a woman having negro blood, which condition continued until February, 1915. It is alleged by the plaintiff that by reason of this act said defendants falsely and maliciously imputed to this plaintiff either the commission of a crime against the laws of this state, or else of being of negro blood, and that, inasmuch as he and his family were respected in the community in which they resided and recognized as white people, this false imputation caused a doubt upon his social status, and caused him great humiliation, etc., for which he sought damages in the sum of \$25,000.

In the second cause of action it is alleged that on or about the 22d day of January, 1915, said defendants did commit a wrongful libel by publishing a written statement made by them to Joseph Collins, this plaintiff, in the form of a letter, which is as follows:

Oklahoma State Hospital,  
Norman, Okla., Jan. 22, 1915.  
Joe Collins,  
Valliant, Okla.

Dear Sir:—

I have yours of the 15th inst., in answer beg to say that Lee Collins (Col.) is in fairly good mental condition; also good physical condition. We are unable to say whether this improvement is more than temporary at this time.

Yours truly,

AAT.AK D. W. Griffin,  
Superintendent.

—and that said letter was exhibited

to A. A. Thurlow and other persons, and sent through the United States mail, which contained the false statement that Lee Collins was a negro, and by reason thereof the plaintiff was damaged in the sum of \$25,000.

The first question for us to determine is whether it is libelous within the purview of our statute for the authorities in charge of an insane institution to place a white person in that part thereof set apart for negro patients. It is charged in the petition that the officers and agents of the company placed Lee Collins in a ward set apart for negro patients, and thereby declared to the world that she was a negro woman, and that it entered upon its records opposite her name, wherever it appeared, the word "colored."

It will be noticed that there is no charge in this first cause of action in said petition contained that the word "colored," written opposite the name of Lee Collins, was ever published, and in order to constitute libel there must be a publication. Under the allegations of the petition the writing of the word "colored" opposite her name upon the records of the institution is not a publication, as it is not alleged that the same was ever seen by anyone, or that said books had ever been examined by anyone whatsoever, or that the word thus written had ever been seen or read by any person whomsoever. This, in our judgment, is necessary before an action for libel can be based thereon, so far as the writing of said word is concerned. Necessarily the person who wrote the word in the books must have seen it, but that person must have been the agent of the corporation, if the act is to be said to be the act of the corporation, and such agent was for that purpose the corporation itself. It can hardly be said to be a publication of a libel for one to show the libelous matter to himself.

Libel—publication—writing name on hospital records.

This eliminates the charge in the

(— Okla. —, 184 Pac. 946.)

first cause of action that the word "colored" was written opposite the name of Lee Collins, and leaves for us to determine whether it is libelous under our statute for an institution of this character to place a white person in a ward set apart for its negro patients. The question whether it is libelous per se to write of or concerning a white person that he is a negro has been before the courts of many states of this Union, and has been decided from both viewpoints. To determine this, however, we must refer to § 4956 of the Revised Laws of 1910, and by that we see that any false or malicious unprivileged publication by writing, printing, etc., which exposes any person to public hatred, contempt, etc., is libelous. In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected insurmountable barriers between the races when viewed from a social and a personal standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous

per se to write of  
—calling white  
person colored. or concerning a  
white person that  
he is colored. Nothing could expose him to more obloquy or contempt, or bring him into more disrepute, than a charge of this character. *Spencer v. Looney*, 116 Va. 767, 82 S. E. 745; *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71; *Flood v. News & Courier Co.* 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685; *Jones v. Polk*, 190 Ala. 243, 67 So. 577; *Upton v. Times-Democrat Pub. Co.* 104 La. 141, 28 So. 970.

Is the placing of a white patient in that part of the institution used and set apart for colored patients libelous, so as to give to the patient or others a cause of action within the statutory definition of libel? What is libel in this state must be determined by the provision of the statute as defined by § 4956 of the

7 A.L.R.—57.

Revised Laws of 1910. In other words, a cause of action for libel in this state is statutory, and to determine what is libelous herein we must refer to the statute, as that is controlling.

Section 4956 of the Revised Laws of 1910 is as follows: "Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends."

But we cannot see, under the view that we take of this provision of the statute, how an action for libel can be based thereon. By reference to this statute we find that the general words, "or other fixed representation," follow the enumeration of particular classes of things contained in said section, to wit, "writing, printing, picture, or effigy," and under the well-known rule of statutory construction the general words "or other fixed representation" will be construed as applicable only to the things of the same general nature or class as those enumerated, to wit, "writing, printing, picture, or effigy."

The particular words used are presumed to describe certain species, and the general words are used for the purpose of including other species of the same kind or genus. The words "or other fixed representation," following the enumeration of "writing, printing, picture, or effigy," are therefore to be read as "other such like kind or character." What was the legislative intent in the enactment of this statute, when the words "or other fixed representation" were incorporated therein? If the legislature had intended the general words, "or other fixed representation," to be used in their unrestricted sense, they would have

made no mention of the particular classes mentioned above in said statute. The generic term in this statute is the false and unprivileged publication, and the

**Statute—construction—libel.**

special words are used to describe the classes or species of the generic term, and the general words are used to include other species of the same kind as those referred to in the particular words above given. In 86 Cyc. 1119, it is said: "By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."

See the authorities cited in the notes on page 1120.

In 21 Am. & Eng. Enc. Law, 2d ed. 1012, it is said: "Where general words follow particular ones, the rule is to construe the former as applicable to persons or things ejusdem generis. This rule, which is sometimes called Lord Tenterden's rule, has been stated, as to the word 'other,' thus: Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis

with, and not of a quality superior to or different from, those specifically enumerated."

See the authorities cited in the note on this page.

This court, in the case of *Kansas City Southern R. Co. v. Wallace*, 38 Okla. 233, 46 L.R.A. (N.S.) 112, 132 Pac. 908, said: "It is true that, under the doctrine ejusdem generis, general words, such as those just referred to, for the purpose of ascertaining the intent of the legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the supreme court of Missouri in the case of *State v. Smith*, 288 Mo. 242, 33 L.R.A. (N.S.) 179, 185 S. W. 465: "The rule of ejusdem generis is . . . resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class or be discarded altogether."

Now we submit that the part of special words here used did not exhaust the class intended, and therefore the general words did not have a meaning beyond the class, and cannot be discarded. In other words, there might be a question of doubt as to whether an engraving or a statue or a waxed figure would come within the special words used in this statute; but the legislature, in order to embrace everything within the class, used the words "or other fixed representation." Numerous authorities could be cited upon either side of this proposition, for it is entirely a matter of legislative intent, to be determined from a construction of the statute. The way we view it, however, and applying what to us is a fair and a reasonable construction of the statute in question, we must hold that the words "or other fixed representation" must be limited to the class

intended by the use of the particular words "writing, printing, picture, or effigy," as contained in the first part of the statute.

We cannot say that placing a white patient in that part of the institution set apart for colored patients comes within the application of the statute so as to make the same libelous. However, if it were libelous, we exceedingly doubt, under the provision of our statute, whether the plaintiff would have a cause of action therefor.

As to the second cause of action, it is contended that the communication complained of is a privileged communication; the same being a letter from the superintendent of the asylum to the father of Lee Collins, a patient at that institution, in reference to her, and being written in reply to a letter addressed to the institution by the plaintiff here. In the brief of the plaintiff in error it is said: "In this letter in the instant case the subject-matter of the letter was the mental condition of Lee Collins. As to that the letter was qualifiedly privileged, but the letter of inquiry did not seek information as to the race of Lee Collins. That fact had no reference to her mental condition and had no bearing upon it. When the information was volunteered that Lee Collins was colored, it was information neither asked for by the letter of inquiry, nor pertinent to the letter of reply. It was entirely foreign, untrue, derogatory matter, for which the defendants cannot claim the cloak of qualifiedly privileged."

Courts, in construing publication alone to be libelous, must adopt the same meaning, and give to the words used the same understanding, as others would ordinarily give to them. If the words as used would ordinarily convey to the public a meaning which would subject one to obloquy, etc., and are otherwise libelous, the court should give to them that meaning and understanding. If an abbrevi-

ated word is used, the court should give to the abbreviation the same meaning and understanding that is commonly given and understood by the use of such an abbreviated word. Here the abbreviated word for "colored," or "Col.," is used in said letter, and is complained of as libelous. "Col." is an abbreviation for "colored," and the word "colored" is synonymous with the word "negro," and inasmuch as "Col." is an abbreviation for "colored," and the word "colored," as applied to the person, is synonymous with the word "negro," it is libelous per se to write of a white person that he is colored.

We agree with the defendant in error that the entire contents of this letter complained of is privileged. It was written by the superintendent of an institution having in charge the patients of the state, helpless and unfortunate as they are, to the father of one of the patients, no doubt grievously interested in that patient's welfare. The law as well as the dictates of common humanity imposed upon the superintendent of that institution the duty of answering inquiries of such character, and likewise the duty of answering fully, fairly, and freely as to the condition of the patient inquired about. As we view it, the subject-matter of the letter was Lee Collins, and it was the duty of the superintendent, to write to her father, not alone as to her mental condition and her physical welfare, but any other fact or circumstance which he should know in order that he might be the better enabled to aid and assist in her comfort and welfare. If she was regarded at the institution as colored, it was his duty to inform the father of that fact, so that, if an injury was being done to her, it could be remedied; and if the letter, which is the publication complained of, is protected by the rule of being qualifiedly privileged in all other things save and except the use of the ab-

Libel—placing  
white person in  
colored ward.

Definition—  
colored.

Libel—privilege  
—letter.

—construction of  
language—rule.

breviated word "Col.," then the entire subject-matter of the letter was likewise within the rule.

Viewing this matter as we do, we must hold that the allegations contained in the first cause of action of the petition do not set forth facts sufficient to constitute libel within the purview of our statute, and that the libelous matter complained of in the second cause of action is privileged, and the judgment of the trial court in sustaining a demurrer thereto must be affirmed.

**Per Curiam:**

Adopted in whole.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down October 28, 1919:

The petition for rehearing in this case was heretofore granted, and the cause has been reheard on oral argument and briefs submitted. After further consideration of the questions urged for reversal of the judgment of the trial court, we are of the opinion that the former decision is correct, and the opinion of the Commission, filed on July 25, 1916, is adopted as the opinion of the court in this case.

### ANNOTATION.

#### **Libel and slander: entries in records as a publication.**

It will be seen that it is held in the reported case (*COLLINS v. OKLAHOMA STATE HOSPITAL*, ante, 895) that to write in the records of an insane asylum, opposite the name of a white person, that such person is colored, is not in itself a publication, there being no allegations that anyone saw the records or examined the books in which the records were kept. No other case has been found where the question of publication has been limited to the mere entry in records.

In *Landis v. Campbell* (1883) 79 Mo. 433, 49 Am. Rep. 239, the defendants, the pastor and two of the ruling elders of a Presbyterian church, with the other members of its session, adopted a preamble and resolution suspending the plaintiff from the communion of the church. The plaintiff in one count relied as publication of the alleged libel upon adoption of the same by the session, recording it upon its minute book, the oral announcement of the expulsion of the plaintiff by the pastor to the congregation, a written copy of the proceedings, furnished to the plaintiff by one of the defendants as clerk of the session, and the exhibition of the proceedings to McDonald and Hulett, members of the session, who were not parties to the action, in order to procure their signatures to the same; in another count plaintiff

relied, as a publication of the alleged libel, upon a reading of the same from a copy by the pastor to the congregation, the entering the same on the session minutes, and exhibiting them to the members of the session, by its clerk, to get their signatures to them. The court said: "The reading the preamble and resolutions of suspension was a publication within the meaning of that term, as employed in relation to libels; but when a member has been excommunicated, it may be promulgated by the pastor by reading the resolution of expulsion in the presence of the congregation, according to the practice of the church, and that act will, of itself, furnish no foundation for an action against him.

. . . The court properly instructed the jury that neither the entry upon the book kept by the sessions for that purpose, of the resolution of suspension and excommunication, nor the announcement of the latter to the congregation by Campbell [the pastor], was a publication of either of the alleged libels, but should also have included in the instruction the preamble to the resolution of suspension. It also correctly declared that the writing and sending of the letter in evidence by defendant Sanders to plaintiff was no publication of the libel, but erred in declaring that his exhibition of the

paper to Hulett and McDonald, members of the session, for their signatures, was a publication. There was no evidence that Sanders, or anyone else, exhibited the resolution to anyone except McDonald and Hulett, members of the session, and the testimony was that it was shown to them only to procure their signatures to the paper, as members of the session."

In *Beardsley v. Tappan* (1851) Fed. Cas. No. 1,188a, new trial denied in (1867) 5 Blatchf. 497, Fed. Cas. No. 1189, reversed on another ground in (1871) 10 Wall. (U. S.) 427, 19 L. ed. 974, a suit against a proprietor of a mercantile agency on account of an entry in the agency's books, the court instructed the jury, inter alia, as follows: "Plaintiffs have shown, after proving the words were prima facie actionable, that they were published. It does not signify that they were in general circulation; but in law they are published if intentionally passed from the composer to any other person not entitled to them. The plaintiffs must show publication. One of the witnesses took it down verbatim, as it was read to him. They show that this writing was not in possession exclusively of the defendant; that it was not copied by him; that there were others in the office who had access to the book; that these either saw the report or heard it read. This is sufficient publication in law. If Mr. Douglas alone saw it, there is publication."

In *Patmont v. International Christian Missionary Asso.* (1909) — Minn. —, 171 N. W. 302, where the defendant had circulated copies of its corporate record, it was held that "a religious corporation maintaining a church and a Bible college is, upon hearing reports derogatory of the character of the dean of its college, qualifiedly privileged in directing an investigation, and in entering its action reciting the nature of the reports on its corporate records, and in calling the attention thereto of its officers directly interested, and it cannot be charged with libel for so doing, except upon proof of actual malice." The court observed that "the plaintiff does not claim that there has been an excessive publication resulting in a loss of privilege." The matter of privilege is, however, beyond the scope of the note.

It may be noted that in *Harris v. Nashville Trust Co.* (1913) 128 Tenn. 573, 49 L.R.A.(N.S.) 897, 162 S. W. 584, Ann. Cas. 1914C, 885, the court said: "No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matter on court records, as by probate of a will."

For a somewhat analogous point, reference is made to the case of *Prins v. Holland-North America Mortg. Co.* 5 A.L.R. 451, and to the annotation following that case on page 455, on "Communications between different officers of corporation." B. B. B.

## PITTSBURGH & WEST VIRGINIA GAS COMPANY et al.

v.

PENTRESS GAS COMPANY et al.,

and

CHARTIERS OIL COMPANY, Appt.

*West Virginia Supreme Court of Appeals — September 16, 1919.*

(— W. Va. —, 100 S. E. 296.)

**Mines — wrongful taking of oil and gas — credit for expenses.**

1. One who enters upon a tract of land under an oil and gas lease, with full knowledge of the facts which render the same invalid, and produces

the oil therefrom, is not entitled, when sued for the value of the oil so produced and sold from the lands by the party having the superior right, to any deduction from such value because of expenditures made by him in producing and marketing such oil.

[See note on this question beginning on page 908.]

**Trespass — entry with knowledge of facts — good faith.**

2. One who, with full knowledge of the facts which make his claim of title to land invalid, enters thereon and commits acts of trespass, is a wilful trespasser within the meaning of the law, even though he may honestly believe that under such known facts the law confers upon him good title.

[See 18 R. C. L. 1255.]

**Interest — when allowed.**

3. Where, in an action for damages, it appears that the complaining party was entitled to receive the fixed money value of property converted at a certain time, in ascertaining his damages at the time of recovery, it is proper to

add interest on such fixed value from the time of such conversion to the date of recovery.

[See 8 R. C. L. 537.]

**Mines — recovery by owner of oil lease for oil delivered to property owner by trespasser.**

4. The owner of an oil lease is not, upon recovering possession from a trespasser admitted to the property by its owner, entitled to recover for the oil produced by the trespasser from the property and delivered to the owner under the terms of the contract made with the trespasser, the quantity being the same as that called for by the original lease.

**APPEAL** by the defendant oil company from decrees of the Circuit Court for Monongalia County in favor of plaintiffs in separate suits brought to enjoin defendants from further drilling for oil on certain premises, for an accounting, and for the recovery of money received by them for the oil alleged to have been wrongfully taken from the premises. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Edward S. Craig and Cox & Baker, for appellant:

The appellees were not entitled to any allowance for improvements.

Chesapeake & O. R. Co. v. Deepwater R. Co. 57 W. Va. 695, 50 S. E. 890; Snider v. Snider, 3 W. Va. 200; Dawson v. Grow, 29 W. Va. 338, 1 S. E. 564; Effinger v. Hall, 81 Va. 94; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19; Hall v. Hall, 30 W. Va. 784, 5 S. E. 260; Hardman v. Brown, 77 W. Va. 478; 88 S. E. 1016; Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134.

The rule obtaining in this state between cotenants, or their lessees, in relation to allowance for drilling for and producing oil, does not apply to appellees, who were not cotenants, but trespassers.

McNeely v. South Penn Oil Co. 58 W. Va. 438, 52 S. E. 480; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19; South Penn Oil Co. v. Haight, 71 W. Va. 720, 78 S. E. 759.

Appellees cannot be allowed cost and expense of drilling for pumping or producing the oil, because to do so would allow them the expenses and cost of their trespasses.

38 Cyc. 1141, and cases cited in note 20; E. E. Bolles Wooden-Ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; 4 Sutherland, Damages, § 1127, p. 4259.

These suits being in equity, the appellant is not confined to damages as for trespasses, but can waive the trespasses, and pursue the oil and recover its value, or the price at which it was sold.

Parks v. Morris, L. & Co. 63 W. Va. 51, 59 S. E. 753; Cecil v. Clark, 49 W. Va. 459, 39 S. E. 202; Quigley Furniture Co. v. Rhea, 114 Va. 271, 76 S. E. 380.

The appellant is entitled to interest on the value or price of the oil taken, from the time taken.

Cecil v. Clark, 49 W. Va. 459; 39 S. E. 202; Shepherd v. McQuilkin, 2 W. Va. 90.

In fixing the value of the oil taken, the appellant is entitled to the highest

value obtaining between the date of taking and the date of the institution of these suits, or the date of the decision thereof.

38 Cyc. 2096; 4 Sutherland, Damages, § 1118, p. 4239.

Messrs. Charles A. Goodwin and Glasscock & Glasscock for appellees.

Ritz, J., delivered the opinion of the court:

Plaintiffs are the successors in title to the lessee in two oil and gas leases, executed by the owners of separate tracts of land lying in Monongalia county. These leases are indefinite in their term, and are what are commonly called "no-term leases." They provide for the drilling of a well within a certain time, or for the payment of a certain sum of money quarterly in lieu of drilling. For a number of years the plaintiffs and their predecessors paid the commutation money in lieu of drilling, and kept the leases alive in that way. At the end of one of the quarterly periods for which this commutation money had been paid, the landowners notified the holders of the leases that the same were canceled, and refused to receive the rental moneys for the next quarter. This contention of the landowners was disputed by the holders of the leases. Shortly thereafter the owners of the land made other leases to the defendants, or their predecessors, covering the same tracts of land, and both plaintiffs and defendants thereupon made locations upon each of the tracts of land with a view to drilling for oil or gas thereon. In the one instance the landowner, and in the other the defendant Pentress Gas Company, filed their bills in the circuit court of Monongalia county, setting up the facts as aforesaid, and asking that the plaintiffs here be enjoined from drilling upon said land under the old leases, contending that the same were canceled, and also be enjoined from interfering with the holders of the junior leases in their operations upon said lands. This injunction was granted, and while it was in force the defendants, claim-

ing under the junior leases, drilled a well on each of the tracts of land, and produced oil therefrom. Upon a final hearing the circuit court perpetuated the injunctions and canceled the senior leases. An appeal was prosecuted from those decrees, and this court reversed the same, holding the senior leases valid and binding, and the junior lessors without right, and dismissed the bills. *Johnson v. Armstrong*, 81 W. Va. 399; 94 S. E. 753.

Thereafter the plaintiffs brought these suits and invoked the jurisdiction of equity to enjoin the defendants, the holders of the junior leases, from further operations upon said lands, and to have an accounting and recovery of the money received by said defendants for the oil taken from the premises. The cases were submitted upon a statement of agreed facts, from which it appears that the defendants expended in the drilling of each of the wells more than the sum of \$5,000, and that they also expended in what is termed caring for, storing, and transporting the oil from the wells on the premises the sum of more than \$1,500 in each case, which sums so expended by them in drilling the wells and in marketing the oil it is asked may be set off against the amounts received for the oil produced. The court below declined to allow defendants credit for the cost of drilling the wells, but did allow them credit for the other expenses in connection with said oil, and in the one case this was sufficient to entirely offset the amount received for oil, and in the other to reduce such amount to an inconsiderable sum. The plaintiffs contend that the defendants in their operations upon these lands were wilful trespassers, and are not entitled to any credit for money expended by them in producing or marketing the oil which they sold from the lands; while, on the other hand, it is contended by the defendants that they were acting in good faith, believing their rights superior to the rights of plaintiffs, for which reason they are



entitled to credit for the expenses incurred in the production of the oil, and further that, even if this is not the case, under decisions of this court cited by counsel, which will be hereafter referred to, they are entitled to be credited in an accounting with such cost of production.

The first question which naturally presents itself is: What was the status of the defendants in relation to these lands at the time they drilled the wells thereon? That they were trespassers there is no doubt, but, as will be hereafter seen, a wilful trespasser is upon a different footing from one who can be said to be acting in good faith. The defendants contend that they were not wilful trespassers, because they honestly believed that their title was superior to that of the plaintiffs. They were cognizant of every fact affecting their rights or interests in the lands, as well as the rights and interests of the plaintiffs, and their contention of good faith rests upon the sole ground that they honestly misjudged the law. They believed that under the law the existing facts, of which they were fully informed, gave them the superior right. The plaintiffs did not acquiesce in this view, but, on the contrary, vigorously contested it, and contended from the very beginning that they alone had right to drill for oil and gas on these lands. Can the fact that one acts under a misconception of the law characterize his acts as innocent? The presumption is that every man knows the law, and when he is fully informed as to the facts, and makes a wrong application of the law thereto, ordinarily he will be bound by his acts to the same extent as if he had no misconception in regard to the law which controls. He is presumed to be as fully informed as to the law controlling under a given state of facts at one time as at another, and if he acts upon his own interpretation of the law he does so at his peril. In this case, as before observed, the defendants were fully informed as to the facts, and com-

mitted the acts which resulted in the extraction of the oil with this full knowledge, and with the further knowledge that their interpretation of the law was vigorously contested by the plaintiffs. It may be said that the defendants had such confidence in their judgment as to be willing to take the risk of an unfavorable decision. Entire good faith, it occurs to us, would have dictated to them that the proper course would be to wait until the controversy had been finally determined before expending large sums of money in drilling upon the land.

This doctrine is fully discussed in the case of *Chesapeake & O. R. Co. v. Deepwater R. Co.* 57 W. Va. 641-695, 50 S. E. 890. In that case the Chesapeake & Ohio Railway Company entered upon the lands under an order of the circuit court, and spent large sums of money in constructing a tunnel. It was afterwards determined that the Deepwater Railway Company had the better right to the right of way in dispute, and, notwithstanding the tunnel constructed by the Chesapeake & Ohio Railway Company was beneficial to the Deepwater Railway Company in its operations, this court denied any right to compensation for the money expended and the improvements made. It was there held that the Chesapeake & Ohio Railway Company could not be a bona fide occupant of the land, although it had entered thereon under an order of the court, believing its title to be good, because it had notice of all of the facts, being ignorant only of matter of law. The same doctrine was announced in *Snider v. Snider*, 3 W. Va. 200. And in *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564, it was held that, to entitle an evicted claimant to compensation for improvements put upon lands, he must have acted bona fide, and that one having knowledge of all the facts in regard to the title to the land, or means of knowledge, is not such bona fide claimant. In that case it was held that the rec- ordation of the deed gave notice of

the adverse claim, and that the one making improvements was charged with knowledge of such deed from the fact of its recordation alone. And in the case of *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260, it was likewise held that one evicted from land, claiming for improvements placed thereon, will not be entitled thereto unless he was a bona fide occupant, and that to be such bona fide occupant it must appear that he not only believed he had good title, and made the improvements in good faith under that belief, but it must be further shown that he at the time had reasonable grounds to believe his title good. If the title under which he claimed appeared upon its face to be defective upon a proper application of legal principles thereto, he could not be held to be acting in good faith.

This doctrine is announced in other cases decided by this court, and is well sustained both upon reason and authority. Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land? Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drilled the wells on these lands, were wilful trespassers, just as

Trespass—entry with knowledge of facts—good faith.

much so as though there had been no question but that the plaintiffs had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith, even though their judgment upon the law of the case should not be approved.

Having reached this conclusion, what, then, are the plaintiffs entitled to recover in these cases? In

case of a trespass to real property by removing timber or mineral therefrom, it seems that the injured party may sue for damages done to the estate, or he may bring his suit in the nature of trover and conversion for the thing severed from the estate, and recover it, or its value. In case he sues for the injury to the estate, the measure of his damages is the depreciation in the value thereof by reason of the trespass; but in case he elects to waive any consequential injury by reason of the trespass, and sue only for the material severed, or its value, then the measure of his damages is arrived at in another way. By severing a part of the freehold and converting it into personalty, the trespasser does not thereby become vested with title. The title still remains in him to whom the real estate belonged at the time the trespass was committed, and he can follow the article so long as he can find it, and recover it for his own benefit without any deduction for the cost of making the severance. *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L.R.A. 813, 44 Am. St. Rep. 439, and note.

In this case the plaintiffs do not seek to recover damages for the injury inflicted upon their estate. They seek to recover the value of the oil taken from the property by the defendants as a result of the trespass committed upon their rights. They do not attempt to recover the oil itself, for the very good reason that it has gone beyond the control of either of the parties. It might seem that, if the owner of real estate is entitled to recover the property severed therefrom by a trespasser, without deduction for the cost of such severance where the same increases the value of the property, whether the trespass is wilful or otherwise, he would be entitled to recover the value of the article after its severance, where the trespasser has put it beyond his control to recover the article itself; and indeed many of the cases so hold. It seems to us, however, that

the better rule is that laid down by the Supreme Court of the United States in *E. E. Bolles Wooden-ware Co. v. United States*, 106 U. S. 482, 27 L. ed. 230, 1 Sup. Ct. Rep. 398, and that is that, where the trespass

Mines—wrongful taking of oil and gas—credit for expenses.

is wilful, the measure of damages is the value of the property at the time and place of demand without deduction for labor and expense; but where such trespass is not wilful, but is the result of a mistake of fact, the measure of plaintiff's damages is the value of the article after its severance, less the proper expense of such severance. *Sutherland, Damages*, § 1020; *J. F. Ball & Bro. Lumber Co. v. Simms Lumber Co.* 18 L.R.A. (N.S.) 244, and note (121 La. 627, 46 So. 674); *Bailey v. Chicago, M. & St. P. R. Co.* 19 L.R.A. 658, and note (8 S. D. 531, 54 N. W. 596); *Gaskins v. Davis*, 115 N. C. 85, 25 L.R.A. 813, 44 Am. St. Rep. 439, 20 S. E. 188; *Winchester v. Craig*, 33 Mich. 205.

Many more authorities to the same effect might be cited, but they are thoroughly considered in the cases above noted. In the case of *Guffey v. Smith*, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526, the United States Supreme Court considered a question similar to the one we have here. That was a controversy between junior and senior lessees, in which the one not entitled to the property had produced oil therefrom, and that court held that the proper measure of recovery was the value of the oil sold from the land by the trespasser, without any credit for such sums as he had expended in producing the same after he became a wilful trespasser, but with credit for such sums as had been expended by him while he was in ignorance of one of the facts making his lease invalid.

Counsel for the defendants here attempt to distinguish that case upon the ground that in Illinois one holding an oil and gas lease is held to have an interest in the land, while in this jurisdiction the holder

of such a lease before production thereunder is held not to have an interest in the land as such, but only an exclusive right to drill the land for the purpose of producing these minerals, and to produce the same after they are discovered. This can make no difference in the application of the principle, for the reason that the trespass committed here was to the plaintiffs' rights, regardless of what they were. Admittedly plaintiffs had the exclusive right to drill this land for oil and gas, and the defendants wrongfully took this right from them. Plaintiffs likewise had the right, upon discovery of the oil and gas, to produce and sell the same, and of this right they were deprived by the defendants; so that it makes no difference as to the extent of the plaintiffs' interests, the result is that they have been deprived of them, and that by the defendants' unwarranted acts. This would lead to the conclusion that the plaintiffs were entitled to decrees at least for the amounts received by the defendants for the oil produced from these premises, without deduction for the amount spent in the production thereof.

But the defendants claim that these cases are controlled by the decisions of this court in the cases of *Williamson v. Jones*, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19; *McNeely v. South Penn Oil Co.* 58 W. Va. 438, 52 S. E. 480, and *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 78 S. E. 759, in each of which cases it was held that a joint tenant, who had committed waste upon the common property, by producing and selling the oil therefrom, should be given credit in an accounting for the amount expended by him in such production. In all of those cases the party committing the waste did so with knowledge or means of knowledge of the facts affecting his title. In the *Williamson-Jones Case*, Jones claimed to be the owner of the whole of the land, and believed himself to be such owner,

having bought the same at a judicial sale; but the court held that he was chargeable with the knowledge that an inspection of the record would disclose. To this extent this decision is stronger against the trespasser than that of *Guffey v. Smith*, above cited, for in that case the Supreme Court held that, even though the senior lease was recorded, the junior lessee would not be charged with notice of it from that fact alone. Believing himself to be the owner of the whole tract of land, he developed the same for oil and gas, and thereafter the owners of the other seven tenths sued him for an accounting. Judge Brannon in that case says that by dry law Jones would not be entitled to any credit for the money expended by him in doing the drilling, but because of the equities existing he was allowed such credit.

How did these equities arise? In the case of joint tenants, each is to an extent the agent of the other in the matter of caring for the joint property, and a joint tenant who commits waste because of this relationship is, to some extent at least, in the same situation as an agent who acts in excess of his authority. If one of the joint owners is in possession of the real estate, he has the right to use it, but not to commit waste thereon, subject to an accounting with his cotenant for the rents and profits derivable from such estate. If he exceeds his authority and commits waste, there is an equitable relation between him and his cotenant similar to that existing between a principal and an agent who exceeds his authority. It is well settled that if an agent exceeds his authority in making a contract for his principal, and the principal subsequently accepts the benefits of the contract, he must likewise submit to its obligations. There is a similar relation, perhaps not, however, so well defined, or existing in the same degree, between joint tenants, where one exceeds his authority by committing waste up-

on the joint estate, and this is the relation because of which the equities spoken of by Judge Brannon arose.

The same may be said of the decision in the other two cases referred to. The matters decided involved waste committed by joint tenants. In the *McNeely Case* Judge Poffenbarger, speaking for this court, says that the court seems to have gone to the utmost limit of equity jurisdiction to relieve from the rigors of the common and statutory law in allowing the expense incurred by the drilling in that case, and we quite agree with this conclusion. We are not willing to extend those limits, so as to include a trespass committed by one who is a stranger to the title. In the *Haught Case*, above referred to, it is intimated in the opinion that the decision would have been different, were it not for the fact that the notice given by the joint tenant out of possession, to his cotenant, was more of an invitation to go on with the drilling than it was a prohibition thereof. It cannot be doubted that there is a relation between joint tenants, from which equities may arise in favor of the one or the other, which does not exist between strangers, and for this reason equity may relieve against the harshness of the rule of law otherwise applicable.

The plaintiffs claim that they are entitled, not only to the oil received by the defendants and sold by them, but also to the one eighth thereof delivered to the owners of the land. They argue that, while it is true the landowners are entitled to receive one eighth of the oil produced, yet this delivery of the one eighth to the landowners by the defendants did not fulfil their contract with the landowners. This may be quite true; but it must be borne in mind that the plaintiffs are only under obligation to deliver to the landowners one eighth of the oil produced by them. They are under no obligation to deliver one eighth of

the oil produced by a trespasser, especially when such trespasser is put upon the land by the landowners themselves. We do not think, therefore, that the plaintiffs' contention in this regard has merit.

Plaintiffs also contend that they are entitled to receive, not only the price at which the oil was sold, but to have interest thereon as a part of the damages, from the time the defendants received the money until it is paid to them; and they further contend that they are entitled to receive the highest market price of the oil between the time that it was produced and the institution of these suits. Both of these contentions cannot stand. Their bills in these cases pray that they be decreed the amount received by the defendants for the oil produced and sold from the premises. This is inconsistent with the demand for the highest market price of such oil between the date of its production and the bringing of the suits. Plaintiffs were, however, entitled to have this money at the time the oil was converted into money. The oil was theirs, and they elected by their suits to take what defendants actually received for it, but contend

that as part of their damages interest should be added to this amount until the same is paid. In this contention we think they are correct. While ordinarily interest is not recoverable as a part of unliquidated damages, still, in ascertaining the amount of damages to which one is entitled, where it appears that such damages are determined by a fixed sum, to which the plaintiff was entitled at a particular time, interest may be added to it as one of the elements constituting the amount to which the plaintiff is entitled at the time of the recovery. 8 R. C. L. 537. This was our holding in *Cresap v. Brown*, 82 W. Va. 467, 96 S. E. 66.

In these cases we are of opinion that the plaintiffs are entitled to decrees in their favor for the amounts actually received by the defendants for the oil sold by them from the premises, with interest on each of these amounts from the time the same was so received until the entry of such decrees, without any deduction therefrom for money expended by the defendants for producing and marketing such oil.

The decrees appealed from will be reversed, and the cases remanded for the entry of such decree.

## ANNOTATION.

**Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or mineral.**

- I. Innocent trespass:
  - a. Generally, 908.
  - b. Proof of good faith, 922.
- II. Wilful trespass:
  - a. Rule in United States, 922.
  - b. Rule in England and Canada, 926.
- III. Rule in Alabama and Colorado, 927.
- IV. Rule in Illinois, 930.
- V. Rule in Maryland, 932.
- VI. Rule in South Dakota, 932.

### *I. Innocent trespass.*

#### *a. Generally.*

It is the prevailing rule that a trespasser who encroaches on the land of another, mining and removing miner-

als, if the taking is inadvertent or under a claim of right or a bona fide belief of title, is liable in damages only for the minerals removed, based on their value as they lay in the mine before being disturbed, or, as is often expressed, their value in situ. And if evidence is not obtainable of the value of the minerals in situ, or if the circumstances of the case make it impracticable to fix their value in this manner, the same result is generally arrived at by proving their value at the mouth of the pit, and deducting therefrom the expense of mining and transporting them to that place.

**United States.**—Guffey v. Smith (1914) 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; Aurora Hill Consol. Min. Co. v. 85 Min. Co. (1888) 12 Sawy. 359, 34 Fed. 515; Colorado Cent. Consol. Min. Co. v. Turck (1895) 17 C. C. A. 128, 36 U. S. App. 208, 70 Fed. 294; Durant Min. Co. v. Percy Consol. Min. Co. (1899) 35 C. C. A. 252, 93 Fed. 166, 20 Mor. Min. Rep. 27; United States v. Homestake Min. Co. (1902) 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (1904) 64 C. C. A. 180, 129 Fed. 668; Turner v. Seep (1909) 167 Fed. 646; Central Coal & Coke Co. v. Penny (1909) 97 C. C. A. 600, 173 Fed. 340; Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co. (1913) 122 C. C. A. 113, 203 Fed. 795; United States v. Midway Northern Oil Co. (1916) 232 Fed. 619; United States v. McCutchen (1916) 238 Fed. 575.

**California.**—Maye v. Yappen (1863) 23 Cal. 306, 10 Mor. Min. Rep. 101; Goller v. Fett (1886) 30 Cal. 481, 11 Mor. Min. Rep. 171; Hendricks v. Spring Valley Min. & Irrig. Co. (1881) 58 Cal. 190, 41 Am. Rep. 257; Empire Gold Min. Co. v. Bonanza Gold Min. Co. (1885) 67 Cal. 406, 7 Pac. 810; Lightner Min. Co. v. Lane (1911) 161 Cal. 689, 120 Pac. 777, Ann. Cas. 1913C, 1093.

**Indiana.**—Sunnyside Coal & Coke Co. v. Reitz (1895) 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; American Sand & Gravel Co. v. Spencer (1913) 55 Ind. App. 523, 103 N. E. 426; Kahle v. Crown Oil Co. (1913) 180 Ind. 131, 100 N. E. 681; Campbell v. Smith (1913) 180 Ind. 159, 101 N. E. 89; Bryson v. Crown Oil Co. (1916) 185 Ind. 156, 112 N. E. 1.

**Iowa.**—Stewart v. Colfax Consol. Coal Co. (1910) 147 Iowa, 548, 126 N. W. 449; Chamberlain v. Collinson (1877) 45 Iowa, 429, 9 Mor. Min. Rep. 36.

**Kentucky.**—Sandy River Cannel Coal Co. v. White House Cannel Coal Co. (1907) 125 Ky. 278, 101 S. W. 319, 102 S. W. 320; Burke Hollow Coal Co. v. Lawson (1912) 151 Ky. 305, 151 S. W. 657; Bennett Jellico Coal Co. v.

East Jellico Coal Co. (1913) 152 Ky. 838, 154 S. W. 922.

**Massachusetts.**—Stockbridge Iron Co. v. Cone Iron Works (1869) 102 Mass. 80, 6 Mor. Min. Rep. 317.

**Michigan.**—Hartford Iron Min. Co. v. Cambria Min. Co. (1892) 93 Mich. 90, 32 Am. St. Rep. 488, 53 N. W. 4, 17 Mor. Min. Rep. 515.

**Missouri.**—Austin v. Huntsville Coal & Min. Co. (1880) 72 Mo. 535, 37 Am. Rep. 446, 9 Mor. Min. Rep. 115; Lyons v. Central Coal & Coke Co. (1911) 239 Mo. 626, 144 S. W. 503.

**Montana.**—Fitzgerald v. Clark (1895) 17 Mont. 100, 30 L.R.A. 803, 52 Am. St. Rep. 665, 42 Pac. 278.

**Nevada.**—Waters v. Stevenson (1878) 13 Nev. 157, 29 Am. Rep. 293, 10 Mor. Min. Rep. 240.

**New York.**—Dyke v. National Transit Co. (1897) 22 App. Div. 360, 49 N. Y. Supp. 180.

**Ohio.**—Keys v. Pittsburg & W. Coal Co. (1898) 58 Ohio St. 246, 41 L.R.A. 681, 65 Am. St. Rep. 754, 50 N. E. 911.

**Pennsylvania.**—Forsyth v. Wells (1861) 41 Pa. 291, 80 Am. Dec. 617, 14 Mor. Min. Rep. 493; Kier v. Peterson (1861) 41 Pa. 257, 8 Mor. Min. Rep. 499; Coleman's Appeal (1869) 62 Pa. 252, 14 Mor. Min. Rep. 221; Ege v. Kille (1877) 84 Pa. 333, 10 Mor. Min. Rep. 212; Oak Ridge Coal Co. v. Rogers (1884) 108 Pa. 147; Duffield v. Rosenzweig (1891) 144 Pa. 520, 23 Atl. 4; Crawford v. Forest Oil Co. (1904) 208 Pa. 5, 57 Atl. 47; Little v. Greek (1912) 233 Pa. 534, 82 Atl. 955; Kingston v. Lehigh Valley Coal Co. (1913) 241 Pa. 469, 49 L.R.A. (N.S.) 557, 88 Atl. 763; Kingston v. Lehigh Valley Coal Co. (1913) 241 Pa. 481, 88 Atl. 768; Stark v. Pennsylvania Coal Co. (1913) 241 Pa. 597, 88 Atl. 770; Matthews v. Rush (1919) 262 Pa. 524, 105 Atl. 817.

**South Carolina.**—State v. Pacific Guano Co. (1884) 22 S. C. 50.

**Tennessee.**—Dougherty v. Chesnutt (1887) 86 Tenn. 1, 5 S. W. 444; Coal Creek Min. & Mfg. Co. v. Moses (1885) 15 Lea, 300, 54 Am. Rep. 415, 15 Mor. Min. Rep. 544; Ross v. Scott (1885) 15 Lea, 479.

Texas. — *Bender v. Brooks* (1913) 103 Tex. 329, 127 S. W. 168, Ann. Cas. 1913A, 559; *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.* (1913) 106 Tex. 94, 51 L.R.A.(N.S.) 268, 157 S. W. 737; *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (1911) — Tex. Civ. App. —, 137 S. W. 171.

England.—*Brown v. Dibbs* (1877) 37 L. T. N. S. 171, 25 Week. Rep. 776; *Joicey v. Dickinson* (1881) 45 L. T. N. S. 643; *Livingstone v. Rawyards Coal Co.* (1880) L. R. 5 App. Cas. 25, 42 L. T. N. S. 334, 28 Week. Rep. 357, 10 Mor. Min. Rep. 291; *Trotter v. Maclean* (1879) L. R. 13 Ch. Div. 574, 42 L. T. N. S. 118, 28 Week. Rep. 244, 10 Mor. Min. Rep. 268; *Wood v. Morewood* (1878) 3 Q. B. 440, 114 Eng. Reprint, 575, 10 Mor. Min. Rep. 77; *Ash-ton v. Stock* (1877) L. R. 6 Ch. Div. 719, 25 Week. Rep. 862; *Elias v. Griffith* (1878) L. R. 8 Ch. Div. 521, 38 L. T. N. S. 871, 26 Week. Rep. 369; *Atty. Gen. v. Tomline* (1877) 46 L. J. Ch. N. S. 654, L. R. 5 Ch. Div. 750, 36 L. T. N. S. 684, 25 Week. Rep. 802; *Re United Merthyr Collieries Co.* (1872) L. R. 15 Eq. 46, 21 Week. Rep. 117, 10 Mor. Min. Rep. 153; *Jegon v. Vivian* (1871) L. R. 6 Ch. 742, 40 L. J. Ch. N. S. 389, 17 Eng. Rul. Cas. 848, 8 Mor. Min. Rep. 628; *Hilton v. Woods* (1867) L. R. 4 Eq. 432, 36 L. J. Ch. N. S. 941, 16 L. T. N. S. 736, 15 Week. Rep. 1105, 10 Mor. Min. Rep. 110. Compare *Wild v. Holt* (1842) 9 Mees. & W. 672, 152 Eng. Reprint, 234, 1 Dowl. N. S. 376, 11 L. J. Exch. N. S. 285, 12 Mor. Min. Rep. 182; *Morgan v. Powell* (1842) 3 Q. B. 281, 114 Eng. Reprint, 514, 2 Gale & D. 721, 11 L. J. Q. B. N. S. 263, 6 Jur. 1109, 10 Mor. Min. Rep. 79; *Powell v. Aiken* (1858) 4 Kay & J. 343, 70 Eng. Reprint, 144; and *Martin v. Porter* (1839) 5 Mees. & W. 351, 151 Eng. Reprint, 149, 2 Horn & H. 70, 17 Eng. Rul. Cas. 841, 10 Mor. Min. Rep. 75.

Canada.—*Lamb v. Kincaid* (1907) 38 Can. S. C. 516, 8 Ann. Cas. 36; *Kirkpatrick v. McNamee* (1905) 25 Can. L. T. Occ. N. 125, 36 Can. S. C. 152; *Fleming v. McNeill* (1903) 7 Terr. L. R. 192.

Ore.

If a trespasser takes and converts ore from the property of another through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, the measure of damages is the value of the ore as it was in the ground before it was disturbed by the trespasser; that is, the amount recovered and realized by defendant in its mill, less the actual cost of mining, transporting, and treating the ore. *Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co.* (1913) 122 C. C. A. 113, 203 Fed. 795. See to the same effect, *United States v. Homestake Min. Co.* (1902) 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365, (dictum).

The measure of damages for wrongfully taking ore from the land of another through inadvertence or mistake, or in the honest belief that one is acting within his legal rights, is the value of the ore in the mine. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (1904) 64 C. C. A. 180, 129 Fed. 668.

In *Hendricks v. Spring Valley Min. & Irrig. Co.* (1881) 53 Cal. 190, 41 Am. Rep. 257, it appeared that the plaintiff and the defendant were the owners of adjoining mining claims. The defendant, in working its own claim by hydraulic process, washed away gravel so that large portions of the surface of the plaintiff's claim caved and fell upon the adjoining ground of defendant and were washed away, and the gold was extracted by the defendant. The plaintiff thereupon brought action to recover damages for the trespass. It was held that the defendant would have been liable for the amount of gold taken from the gravel that fell from the plaintiff's claim, but for the fact that its value was less than the necessary cost of extracting it.

In *Maye v. Yappen* (1863) 23 Cal. 306, 10 Mor. Min. Rep. 101, it appeared that the plaintiffs and the defendants were owners of adjoining mining claims, and that the defendants unintentionally mined over the dividing line, extracting gold and gold-bearing earth from the plaintiffs' claim. Ac-

tion was brought by the plaintiffs to recover the value of the gold converted. There was no dispute as to the trespass, but the plaintiffs contended that the trial court should not have allowed evidence showing that defendants were ignorant of the location of the boundary line. The appellate court held that the admission of this testimony was error, as the right of plaintiffs to recover the damages they had actually sustained was not affected by the fact that the trespass was not wilful, and, as the plaintiffs had the means of ascertaining their boundary line, they were guilty of negligence in not learning its exact location. After reviewing authorities, the court then said: "The proper rule for damages, in a case like the present, is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages, the expense of extracting the gold and separating it from the earth, after it is first removed from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." It will be observed that the court laid down two apparently conflicting rules for the measure of damages.

In *Goller v. Pett* (1866) 30 Cal. 432, 11 Mor. Min. Rep. 171, *Maye v. Yappen* (Cal.) supra, was followed in holding that it was error to exclude evidence of "the expense of digging the gold-bearing earth."

In *Lamb v. Kincaid* (1903) 33 Can. S. C. 516, 8 Ann. Cas. 36, an action to recover damages for the invasion of the plaintiffs' placer mining claim by the defendants, and the value of a quantity of gold which the defendants had removed therefrom and converted to their own use, Duff, J., speaking for the court, said: "It has for some years been the settled law applicable to cases of coal-mining trespass, where the trespass is not wilful, that in estimating when that forms an element in the damages to which the

plaintiff is entitled—the value of the coal abstracted, the coal is to be treated as in situ, and from its value at the mouth of the pit is to be deducted the cost of severing it from its natural bed and of bringing it to bank."

In *Kirkpatrick v. McNamee* (1905) 25 Can. L. T. Occ. N. 125, 36 Can. S. C. 152, the plaintiff sued to recover damages sustained through trespass committed by the defendants on a placer mining claim, the trespasses consisting of the removal of pay dirt and gold-bearing gravel from a portion of the claim, and the washing up by the defendants and converting to their own use of the gold therein. It was held that, as the evidence showed that the defendants' intentions were honest, and did not disclose wilful carelessness, the mild rule for the measure of damages should apply, and the defendants should be allowed the full cost of getting out the gold as well as the cost of washing after the earth was dug out.

Where one has innocently and unintentionally committed a trespass; by working over his own line into his neighbor's adjacent mine, the measure of damages is, besides any actual injury to the land, the value of the ore in place, or, at the farthest, when first severed. *Coleman's Appeal* (1869) 62 Pa. 252, 14 Mor. Min. Rep. 221.

In *Durant Min. Co. v. Percy Consol. Min. Co.* (1899) 35 C. C. A. 252, 93 Fed. 166, 20 Mor. Min. Rep. 27, it appeared that the plaintiff and the defendant were adjoining mine operators, and that the defendant extended its workings into the mine of plaintiff, and extracted ores therefrom. Sanborn, J., speaking for the circuit court of appeals, said: "One, who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more." He then ruled that the defendant could limit the recovery of the owner by deduct-



ing from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point.

*Aurora Hill Consol. Min. Co. v. 85 Min. Co.* (1888) 12 Sawy. 359, 34 Fed. 515, was an action of ejectment, brought to recover possession of a mining claim, together with damages for ore alleged to have been removed therefrom and converted by defendants to their own use. It appeared that the grantors of defendants, together with some of the defendants in person, relocated this mine, recording their notice of relocation, and entered thereon, extracting and removing several tons of ore. They attempted to justify the relocation by reason of the fact that the plaintiff had failed to do the annual work thereon, as required by statute. The court held that, after the entry and payment of the purchase money for the mine, the plaintiff was not required to expend any further sum of money thereon, pending the final decision on his application and the issue of a patent; and the defendant was, therefore, a trespasser. In fixing the measure of damages, the court said: "There is evidence in the case which might bring the measure of damages within the severer rule laid down in *Wooden-Ware Co. v. United States* (1882) 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398. It is in evidence, undisputed, that plaintiff, by its well-known agent, remonstrated with defendants and denied their right to locate the mine or work upon the same, or remove ore therefrom, and constantly asserted plaintiff's rights. And finally, plaintiff was compelled to bring this action to dispossess defendants. I have, however, adopted the measure above indicated, allowing the defendants the cost of extraction and reduction, non constat, however, but that plaintiff could have extracted and reduced this ore at less expense than it was done by defendants."

In *Colorado Cent. Consol. Min. Co. v. Turck* (1895) 17 C. C. A. 128, 36 U. S. App. 208, 70 Fed. 294, it appeared that plaintiff and defendant

were owners of adjoining mining claims, and that a vein having its apex within the side lines of plaintiff's claim, in its descent into the earth, passed outside of the side lines of his claim. The defendant, finding the vein within its own side lines, took possession of it as its own property, extracting ore therefrom, and converting it to its own use. The plaintiff thereupon brought an action in ejectment and recovered judgment, and thereafter brought the present suit to recover damages for the wrongful conversion of the ore. The jury having found that the defendant was not a wilful trespasser, the court held the measure of damages to be the value of the ore taken, less the cost and expense of breaking it and bringing it to the mouth of the mine.

If a trespasser invades the mine of another, extracting mineral therefrom, and such invasion is the result of honest mistake and inadvertence, the measure of damages is the value of the mineral extracted, less the cost of mining and milling. *Lightner Min. Co. v. Lane* (1911) 161 Cal. 689, 120 Pac. 777, Ann. Cas. 1913C, 1098.

In *Empire Gold Min. Co. v. Bonanza Gold Min. Co.* (1885) 67 Cal. 406, 7 Pac. 810, it appeared that the plaintiff and defendant were owners of adjoining mining claims, and that defendant had worked beyond its line and upon the claim of plaintiff. The court, while not questioning the doctrine of damages in the case of unintentional trespass as enunciated in the earlier cases held that the rule could not be extended so as to entitle a defendant who had committed a trespass to justify his act and obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty since for every trespass upon real property the law presumes nominal damages. This rule, it will be observed, is apparently in conflict with the rule in *Hendricks v. Spring Valley Min. & Irrig. Co.* (1881) 58 Cal. 190, 41 Am. Rep. 257, *infra*, and, although the latter case was not mentioned in the opinion in this case, the holding in the *Hendricks*

Case, in so far as it conflicts with the doctrine herein enunciated, must be assumed to be overruled.

In *Chamberlain v. Collinson* (1877) 45 Iowa, 429, 9 Mor. Min. Rep. 86, the question arose as to the measure of damages for trespass to a mining claim. It was held that, as the trespasser was not guilty of a wilful wrong or gross neglect, the measure of damages should be the value of the mineral unmined, or the value of it mined, less the reasonable cost of mining it.

In *Fitzgerald v. Clark* (1895) 17 Mont. 100, 80 L.R.A. 808, 52 Am. St. Rep. 665, 42 Pac. 273, action was brought to recover the value of ore taken by defendants from a portion of a vein lying within defendants' claim, but having its apex within plaintiff's claim. An instruction that the measure of damages was the market value of the ores on the dump, after deducting the cost of mining and hoisting, including the cost of smelting and reducing the ore, was held to be correct.

*Waters v. Stevensen* (1878) 13 Nev. 157, 29 Am. Rep. 293, 10 Mor. Min. Rep. 240, was an action brought against defendant for extracting and removing a quantity of ore from plaintiff's mine. The verdict of the jury established the fact that the trespass was committed unintentionally, and was the result of inadvertence and mistake, the defendant believing that he was mining within the boundaries of his own adjoining mine. The lower court held the measure of damages to be the gross yield of the ore, less the necessary expense of assorting, transporting, hoisting, handling, and milling, and all other necessary expense after the ore was picked down in the mine. It was held, on appeal, that the necessary cost of mining the ores should also be deducted.

*Ege v. Kille* (1877) 84 Pa. 383, 10 Mor. Min. Rep. 212, was an action for mesne profits arising from ore lands, it appearing that defendants were bona fide purchasers for value under color of title. It was held that the defendants, having acted in good faith in the working of the mines and re-

moval of the ore, were liable only for the value of the ore in place, such value to be ascertained by deducting from the market value of the ore when delivered in the market the cost of mining, cleansing, and delivery.

*Stockbridge Iron Co. v. Cone Iron Works* (1869) 102 Mass. 80, 6 Mor. Min. Rep. 817, was a proceeding in equity for an injunction to restrain defendants from removing ore from the land of plaintiff, and for damages for the trespass committed in mining and removing the ore. It was held that the measure of damages was the value of the ore as it lay in the bed, and not as it was after defendants had increased its value by removing it.

In *Hartford Iron Min. Co. v. Cambria Min. Co.* (1892) 93 Mich. 90, 32 Am. St. Rep. 488, 53 N. W. 4, 17 Mor. Min. Rep. 515, an action of trover was brought to recover the value of iron ore wrongfully mined by defendant from the land of which the plaintiff was lessee under a mining lease. The plaintiff was allowed to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by defendant to the owner. On appeal, the rule of damages adopted was held to be sufficiently favorable to the defendant.

Coal.

*Stewart v. Colfax Consol. Coal Co.* (1910) 147 Iowa, 548, 126 N. W. 449, was an action to recover damages occasioned to plaintiff by the wrongful act of defendant in mining and appropriating from plaintiff's land the coal under  $\frac{1}{4}$  of an acre, which had been reserved in a deed from plaintiff to defendant's grantor, of the coal lying under the tract of land therein described. No evidence having been adduced showing wilfulness or negligence, the measure of damages was held to be the value of the coal for mining purposes immediately before the taking and removal took place.

In *Bennett Jellico Coal Co. v. East Jellico Coal Co.* (1913) 152 Ky. 888, 154 S. W. 922, wherein it appeared that the defendant mined coal on the land of plaintiff, owing to a confusion in the boundary lines, it was held that

the measure of damages was the usual and customary royalty paid in that locality for mining coal of the same quality, and in veins of the same approximate thickness.

In *Burke Hollow Coal Co. v. Lawson* (1912) 151 Ky. 305, 151 S. W. 657, it appeared that the defendant coal company had inadvertently mined over the boundary line which separated its land from the land of plaintiff, removing a quantity of coal from plaintiff's land. It was held that the defendant was entitled to recover only the value of the coal as it lay in the mine, or the usual reasonable royalty paid for the right of mining.

In *Sandy River Cannel Coal Co. v. Whitehouse Cannel Coal Co.* (1907) 125 Ky. 278, 101 S. W. 319, 102 S. W. 320, it appeared that the plaintiff and defendant owned adjoining coal lands, and a dispute arose between them as to the location of the dividing line. The plaintiff, claiming that defendant was extracting coal from its land, brought suit for an injunction and to establish the boundary line. Pending the determination of this suit, defendant, being about to abandon its mine, entered into an agreement with plaintiff whereby the defendant was allowed to remove coal from under plaintiff's land, giving a bond to account for all coal mined and removed beyond the boundary line, as claimed by the plaintiff, in case the court should determine the issue of the boundary line in favor of plaintiff. The defendant mined and removed coal under these conditions, and subsequently the boundary line was determined in accordance with plaintiff's contention. It was held that the trespass committed by defendant was under a bona fide claim of right, and the plaintiff could recover only the value of the coal as it lay in the mine before it was disturbed, or a reasonable royalty on the amount of coal removed.

In *Lyons v. Central Coal & Coke Co.* (1911) 239 Mo. 626, 144 S. W. 503, suit was brought against the defendant, who trespassed on the land of plaintiff, removing coal therefrom and converting it to its own use. It appeared that the trespass was inadvertent and

innocent of intentional wrong. The court held that the proper measure of damages was the value of the coal as it lay in its bed, which, if both the plaintiff and the defendant were engaged in mining operations, should be ascertained by deducting from the value of the coal in the market the cost of putting it there; but if the plaintiff was not engaged in mining operations, and had no facilities for mining the coal, the value of the coal should be determined on the basis of the usual royalty paid to a landowner.

*Austin v. Huntsville Coal & Min. Co.* (1886) 72 Mo. 535, 27 Am. Rep. 446, was an action of trespass to recover damages for mining and taking coal from under plaintiff's land. It was held that where there is no element of wilfulness or wrong, or such gross negligence or disregard of others' rights as leads necessarily to the inference of wilfulness or wrong, the true measure of damages for the coal taken is its value at the mouth of the shaft, less the cost of mining it and delivering it to that point.

In *Keys v. Pittsburg & W. Coal Co.* (1898) 58 Ohio St. 246, 41 L.R.A. 681, 65 Am. St. Rep. 754, 50 N. E. 911, it was held that where a purchaser acting in good faith under a belief that the title to property in which he is mining coal will be perfected by proceedings instituted in the probate court for that purpose, or by the infant grantors when they arrive at age, continues to mine coal and converts it to his own use, the measure of damages in an action brought against him is the value of the coal in place at the time it was mined. It was further held that there was no substantial difference between the rule fixing the measure of damages at the value of the coal in place, and the rule that the value of the coal when severed, less the cost of severance, would be the measure of damages.

In *Matthews v. Rush* (1919) 262 Pa. 524, 105 Atl. 817, it appeared that the plaintiffs were the owners of a tract of land adjoining another tract from which defendants were mining coal; that in the course of their operations the defendants removed, and convert-

ed to their own use, coal from under plaintiffs' land. Action was brought under a statute giving the right to treble damages where the taking was with knowledge of the rights of the owner. The court took occasion to lay down the rule for the measure of damages where the trespass was not tortious, and held, in such cases, the measure of damages ordinarily to be the value of the coal in place, and not its value at the tipple less the expense of mining and conveying it there.

In *Kingston v. Lehigh Valley Coal Co.* (1913) 241 Pa. 469, 49 L.R.A. (N.S.) 557, 88 Atl. 763, the owner of coal lands leased the surface of the lands to a tenant for years, whose assignee mined and removed coal therefrom. The reversioner thereupon brought an injunction proceeding, restraining the commission of further waste, and an action for trespass against the assignee of the tenant for the value of the coal mined. It was held that the measure of damages should be the value of the coal in place, if there was evidence of such value, and if there was no evidence of the actual value of the coal in place the damages should be determined by finding the value at the mouth of the pit, and deducting from this estimate what it would cost to mine and transport it there. As to the proper method of determining the value of the coal in place, the court said: "Ordinarily, the value of coal in place is understood to mean its value in a state of nature; in other words, its acreage value in the solid body. As to virgin, undeveloped coal, this is a primary rule for ascertaining the value of coal in place. This primary rule should likewise prevail except in those cases in which, by reason of the location of the coal, its proximity to mining operations, or its accessibility to transportation facilities, it has a present market value on the royalty basis. If the injured party owns a tract of coal land which has a present market value for operation as a going mine, and it has a market value for operating purposes at a price per ton,—that is, what is known as a royalty,—he should not be deprived of the advantage which

the situation of his property gives him, and in such a case it is proper to allow a recovery on the basis of royalty value." See to the same effect, *Kingston v. Lehigh Valley Coal Co.* (1913) 241 Pa. 481, 88 Atl. 768.

*Stark v. Pennsylvania Coal Co.* (1913) 241 Pa. 597, 88 Atl. 770, was an action of trespass to recover damages from the defendant for the mining of coal on a small tract of land to which the plaintiffs claimed title. It appeared that the defendant had acted under an honest mistake as to its rights, being ignorant of the exact location of the boundary line separating its tract from the tract of plaintiffs. In discussing the question of the measure of damages it was said: "Both parties agreed here that the proper measure of damages is the fair value of the coal in place at the time of taking. If, as is admitted, the defendant acted fairly and honestly and in the full belief that it had a right to the coal, then the damages are to be fairly measured by giving to the plaintiffs the fair purchase price of the coal. The best evidence of this value is the amount of royalty which such coal would command, for that is presumptively all that the owners of the coal could have obtained for it, had the coal been sold."

In *Little v. Greek* (1912) 283 Pa. 584, 82 Atl. 955, an action for damages against a person who wrongfully removed coal from lands excepted in a lease of coal lands, the measure of damages was held to be the value of the coal in place. Two methods of ascertaining this value were recognized by the court, which held that it was proper to admit evidence of the value of the coal at the mouth of the pit, from which should be deducted the cost of mining and transporting it to that point, and also evidence of the royalty value of the coal in place.

In *Oak Ridge Coal Co. v. Rogers* (1884) 108 Pa. 147, the following instruction to the jury was approved on appeal. "The measure of damages is the fair value of the coal at the place there. If there is a market price in place, in the pit or mine, that would be the value you would put upon it,

and if there is evidence from which you can find what it was worth before it was touched, it is your duty to do so. If there is no evidence to fix the value in place, what it would be worth at the pit mouth, then you may find what it was worth at a distant market, deducting what it was worth to take it there, even if you had to go to Europe to sell it."

*Forsyth v. Wells* (1861) 41 Pa. 291, 80 Am. Dec. 617, 14 Mor. Min. Rep. 493, was an action of trover for coal mined by the defendant on land of the plaintiff, and converted to his own use. The parties were owners of adjoining tracts of coal lands, and the defendant had opened a mine upon his own land, near the line, and worked it for years. The dividing line was not exactly known, and the plaintiff claimed that the defendant had dug coal over the line and out of her land, which was denied. The plaintiff claimed that the measure of damage was the value of the coal when dug in the bank, or what was called "knocked down," while the defendant contended that the measure of damages would be the value of the coal in the ground before he had expended any labor in preparing it for market, in support of which he offered evidence which was rejected; and the jury was charged that the value of the coal when "knocked down" in the bank was the proper measure of damages. It was held that, while trespass is the more obvious and proper remedy in cases of this character, the plaintiff, however, could waive the taking and sue in trover. The court said: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have

caused. Such would manifestly be the measure in trespass for mesne profits."

In *Coal Creek Min. & Mfg. Co. v. Moses* (1885) 15 Lea (Tenn.) 300, 54 Am. Rep. 415, 15 Mor. Min. Rep. 544, it appeared that the defendant, in working a coal mine on his own land which adjoined the land of complainant, unintentionally and inadvertently encroached on the complainant's land, removing coal therefrom and converting it to its own use. A bill in equity was filed to charge the defendant with the value of coal mined by it on the land of complainant. Upon the trial of the action the chancellor charged the defendant with the value of the coal thus mined at the mouth of the mine, deducting only the expense of removing it there from the place where it was dug. It was held on appeal that the measure of damages was the value of the coal in situ before the trespass.

In *Ross v. Scott* (1885) 15 Lea (Tenn.) 479, it appeared that the defendant in good faith, under an honest belief of title, mined coal on the land of complainant. As to the measure of damages, the court said: "The weight of authority, both of English and American, now is that where there is an honest dispute as to title, or where the trespass has been from ignorance, and not wilful, the damages will be confined to the value of the property before the trespass was committed, or, to use the language of the English courts, 'at the same rate as if the property taken had been purchased in situ by the defendant at the fair market value of the district.'"

In *Brown v. Dibbs* (1877) 37 L. T. N. S. (Eng.) 171, 25 Week. Rep. 776, the plaintiff, who was the vendee of a coal mine, brought action against the vendor who, pending a suit for specific performance, worked the mine for his own benefit. The measure of damages was held to be the market value of the coal in situ, or its value at the place where it was to be sold, less the cost of severing it and removing it to that place.

In *Livingstone v. Rawyards Coal Co.* (1880) L. R. 5 App. Cas. (Eng.) 25,

42 L. T. N. S. 334, 28 Week. Rep. 357, 44 J. P. 392, 10 Mor. Min. Rep. 291, it appeared that the defendant mined coal from under land of which the coal rights belonged to the plaintiff. The trespass was admitted, neither the plaintiff nor the defendant knowing of the plaintiff's rights until after a quantity of coal had been mined and removed. The only question arising was the measure of damages in a case of unintentional trespass. The defendants were held to be charged with the value of the ore at the same rate as if the mine was purchased by them while the minerals were yet part of the soil, at the fair market value of the district, and the best evidence of this value in this case was held to be the amount of royalty paid on coal in the surrounding field.

In *Trotter v. Maclean* (1879) L. R. 13 Ch. Div. (Eng.) 574, 49 L. J. Ch. N. S. 256, 42 L. T. N. S. 118, 28 Week. Rep. 244, 10 Mor. Min. Rep. 268, it appeared that the owner of a coal mine worked from his own mine into an adjoining mine, in the bona fide belief that he was to obtain a contract authorizing him to work, and gave to the trustee in charge of the adjoining land notice that he was about to commence working the mine. Subsequently it developed that the trustee had no power to make the contract. In an action for trespass it was held that the taking of coal by the plaintiff before he was notified that the contract would not be let should be treated in the light of an inadvertent trespass, and the defendant should be allowed the cost of severing the coal and bringing it to the bank.

In *Hilton v. Woods* (1867) L. R. 4 Eq. (Eng.) 432, 10 Mor. Min. Rep. 110, the value of the coal in place was made the measure of damages against a defendant who had mined it under a belief that he was its owner. He had bought of one who had no title, and after he had mined a part of the coal, an action was brought against him by its owner to restrain further mining and for an account of the coal already mined. Sir R. Malins, V. C., after reviewing authorities, announced his intention of following the

rule adopted in *Wood v. Morewood* (Eng.) *infra*, and, in ordering an accounting for the coal taken from the plaintiff, said: "I propose to declare that, in estimating the amount to be paid by the defendant for the coal gotten by him, he is to be paid the fair value of such coal, as if the coal field had been purchased from the plaintiff by the defendant at the fair market value of the district."

*Wood v. Morewood* (1878) 3 Q. B. 440, 114 Eng. Reprint, 575, 10 Mor. Min. Rep. 77, an action of trover for coals converted, seems to be regarded as a leading case on the measure of damages where the taking has been inadvertent. The rule laid down in *Hilton v. Wood* (Eng.) *supra*, was applied by Parke, B., who told the jury that, if they found for the plaintiff, but thought that the defendant was not guilty of fraud or negligence, and acted fairly and honestly in the full belief that he had a right to do as he did, they might give the fair value of the coals as if the coal field had been purchased by the plaintiff. This estimate was adopted by the jury.

In *Ashton v. Stock* (1877) L. R. 6 Ch. Div. (Eng.) 719, 25 Week. Rep. 862, the defendant had for several years worked a coal mine, under a bona fide belief of title. In an action to recover damages for the value of the coal converted, it was held that, in view of the circumstances appearing in the case, the defendant was entitled to an allowance of his expenses of severing the coal as well as bringing it to bank. See to the same effect, *Elias v. Griffith* (1878) L. R. 8 Ch. Div. (Eng.) 521, 38 L. T. N. S. 871, 26 Week. Rep. 869; *Joicey v. Dickinson* (1881) 45 L. T. N. S. (Eng.) 643.

The rule for the measure of damages in cases of trespass in taking the coal of another depends upon the circumstances under which the coal was taken. If the coal was converted through inadvertence or mistake, or in the honest belief that the trespasser was acting within his legal rights, the measure of damages is the value of the coal as it was in the ground before it was disturbed by the trespasser.

*Central Coal & Coke Co. v. Penny* (1909) 97 C. C. A. 600, 173 Fed. 340.

In *Re United Merthyr Collieries Co.* (1872) L. R. 15 Eq. (Eng.) 46, 10 Mor. Min. Rep. 153, it appeared that coal had been wrongfully taken by working into the mine of an adjoining owner, it appearing from the evidence that the trespasser was ignorant of the location of the boundary line. It was held that, since there was no suggestion of fraud, the more lenient rule should be applied, and accordingly the defendant was ordered to pay the value of the coal at the pit's mouth, deducting the cost of severance and the cost of carrying it to the pit's mouth, so as to place the owner in the same position as if he had himself severed and raised the coal. In this connection, Sir James Bacon, V. C., said: "Here there is no suggestion of fraud that I can attend to. There has been no evidence relating to it, and it may have been a mere mistake. But what also weighs with me greatly is this: The claimants are themselves owners of mines. They seek their profit by severing the coal in the mine and bringing it to the surface and then selling it. If they had been undisturbed in the possession of which they now complain, they must have incurred an expense in securing the coal before they could have made a profit. The mere disbursement, then, which has been made by the United Merthyr Company in severing the coal, is doing no wrong that I can see to the claimant."

In *Jegon v. Vivian* (1871) L. R. 6 Ch. (Eng.) 742, 40 L. J. Ch. N. S. 389, 17 Eng. Rul. Cas. 843, 8 Mor. Min. Rep. 628, it appeared that a tenant for life, with certain powers of leasing, demised the seams and veins of coal under a parcel of land for twenty-one years, with the understanding that the lease was to continue for a period of sixty years if the tenant for life had power so to lease, and the lessee was given power under the lease to dig and sell the coal under the surface of the land. The lessee entered upon the lease and proceeded to work the coal, and, after the expiration of twenty-one years, continued the mining oper-

ations, claiming to be entitled to do so for sixty years. After much litigation this claim was decided to be invalid as against the reversioner. Action was brought for an accounting of the value of the coal taken from the mine after the expiration of the twenty-one year period. It was held that the defendants should pay for the coal at its fair market value, as if they were purchasers, all expenses of hewing and raising to be allowed.

*Martin v. Porter* (1839) 5 Mees. & W. 351, 151 Eng. Reprint, 149, 2 Horn & H. 70, 10 Mor. Min. Rep. 75, 17 Eng. Rul. Cas. 841, was an action of trespass for breaking and entering the plaintiff's close, and mining and carrying away coal. The defendant was owner of the adjoining estate and had worked the coal under the plaintiff's land. At the trial the question was on what principle the damages were to be assessed. It was held that, the action being trespass, the plaintiff was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be its price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth. It will be seen that this decision, like all that follow it, was based upon a principle not accepted by the majority of jurisdictions, viz., that, if the owner cannot obtain his property in species, he is entitled in all cases to the increased value.

In *Wild v. Holt* (1842) 9 Mees. & W. 672, 152 Eng. Reprint, 284, 12 Mor. Min. Rep. 182, it appeared that the defendant, in working his own mining claim, inadvertently trespassed on the land of plaintiff, removing mineral therefrom and converting it to his own use. In laying down a rule for the measure of damages, Parke, B., said: "Then, as to the damages, the jury are at liberty to give the full value of the coals, calculated at the time when they first exist as chattels, without deducting the expense of getting them, according to the rule laid down in the case of *Martin v. Porter* (Eng.) *supra*, which is a very salutary

one, because the parties must know—at least, they may know by proper dealing—that they are trespassing on their neighbor's property."

*Morgan v. Powell* (1842) 3 Q. B. 281, 114 Eng. Reprint, 514, appears to have been similar to *Martin v. Porter* (Eng.) *supra*, Coleridge, J., stated that he felt bound by the rule laid down in *Martin v. Porter*, although he expressed a doubt as to its correctness, and in a note to the case is found the following: "By a shorthand writer's notes, his Lordship appears to have said: 'But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he had actually sustained, and that all he would have a right to ask at your hands would have been to put him in the same position as he would have been if the coal had never been stirred.'" See also *Rowell v. Aiken* (1858) 4 Kay & J. 848, 70 Eng. Reprint, 144.

In *Fleming v. McNeill* (1908) 7 Terr. L. Rep. (Can.) 192, an action was brought for an injunction to restrain defendants from digging and removing coal from plaintiff's land, and for damage for coal removed. It was held that as the evidence adduced on the trial of the case did not show any deliberate and intentional trespass by defendants, with knowledge that they had no right whatever to do the act, but, on the contrary, showed that they had a reasonable color of title, they were not wilful wrongdoers in the sense that they had no right to do what they did do. In fixing the amount of damages, Wetmore, J., said: "Under the circumstances of this case, and under the authorities, the measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging it and transporting it there as a merchantable article; and by digging it I mean hewing it, as it is expressed in some of the cases."

Where a trespass on coal-bearing land is the result of an honest mistake, the damages may be reduced by the value of the labor expended in mining. *Sunnyside Coal & Coke Co.*

*v. Reitz* (1895) 14 Ind. App. 478, 39 N. E. 541, 48 N. E. 46.

#### OIL.

In *United States v. Midway Northern Oil Co.* (1916) 232 Fed. 619, the government sought to obtain decrees that the several tracts of land described in the bills were the property of the United States, and for an injunction restraining the defendants from trespassing on the lands or extracting the oil therefrom, and an accounting for oil previously extracted and disposed of. It appeared that the defendants had built derricks, drilled wells, and extracted oil from public lands, under advice of counsel that they could acquire rights under the Mineral Laws. The measure of damages was held to be the market value of the oil, taken at the time it was used or disposed of by the defendants, less the cost of extracting and marketing the oil, excluding from such cost the work of sinking wells, development, or improvement, or in discovering or reaching the oil, and including the value of any permanent and useful improvements to the property made by defendants. See to the same effect, *United States v. M'Cutchen* (1916) 238 Fed. 575.

In *Guffey v. Smith* (1914) 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526, a controversy arose between junior and senior lessees of oil lands. It appeared that the defendant, who was not entitled to the property, had produced oil therefrom, and the plaintiff brought an action for an accounting. It was held that the proper measure of damage was the value of the oil sold from the lands by the defendant, without any credit for such sums as he had expended in producing the same after he became a wilful trespasser, but with credit for such sums as had been expended by him while he was in ignorance of one of the facts making his lease invalid.

In *Kahle v. Crown Oil Co.* (1913) 180 Ind. 181, 100 N. E. 681, it appeared that the plaintiffs had obtained oil and gas leases on certain lands, and, after they had complied with the terms and conditions provided for in the leases, the lessors refused to abide by the



terms of the leases, declared them terminated, and brought an action to declare them void and to quiet title to their lands. Judgment was rendered in favor of the lessors, and thereafter the defendants, with full knowledge of these leases and of the litigation concerning them, accepted oil and gas leases on the same land. After the defendants had taken actual possession of the real estate and had drilled wells thereon for oil and gas, the plaintiffs, within the time allowed by law, appealed from the judgment declaring their leases void, and the appellate court reversed the lower court and remanded the case for a new trial. A large quantity of oil was obtained from the land by the defendants during the pending of this appeal. It did not appear that the defendants had notice of the fact that the plaintiffs intended to appeal from the judgment. The court held that under these conditions the defendants were not wilful trespassers, and in ruling on the measure of damages said: "The general rule is that if the wrongful act is committed unintentionally, or by mistake, or in the honest belief that the party is acting within his legal rights, in estimating the damages the recovery must be limited to the value of the product taken, less what it costs to produce it."

In *Dyke v. National Transit Co.* (1897) 22 App. Div. 360, 49 N. Y. Supp. 180, it appeared that the defendants, being in possession of, and claiming in good faith to be the owners of, premises which were actually owned by the plaintiff, entered into a contract with a third party for the sinking of oil wells upon the premises. The third party having abandoned the contract, one of the defendants resumed operations thereunder, and the oil was delivered to the defendant, the National Transit Company, for transportation. Upon the trial of the action which was brought to recover the value of the petroleum so taken from the plaintiff's land, the court held that the defendants were not entitled to offset the expense of procuring the oil from the value of the oil after it was taken from the wells. On

appeal, however, the true measure of damages was held to be the value of the oil as it lay in the earth. The court said: "The distinction is between a wilful trespasser and a mistaken one. The one knows he is wrong, and the other believes he is right. When the latter is shown to be wrong, if he makes full indemnity, justice can exact no more." See to the same effect, *Turner v. Seep* (1909) 167 Fed. 646, modified in other respects in (1910) 102 C. C. A. 368, 179 Fed. 74.

In *Crawford v. Forest Oil Co.* (1904) 208 Pa. 5, 57 Atl. 47, the defendant, a tenant under an oil lease executed by one having an estate for life, continued to take oil from the land after the death of the life tenant. In an action for trespass brought by the remainderman against the defendant, the measure of damages was held to be the value in the pipe lines, of the oil taken, less the expense of putting it there, including the labor and necessary improvements and repairs to the fixtures and appliances used in the conduction of the oil.

In *Duffield v. Rosenzweig* (1891) 144 Pa. 520, 23 Atl. 4, an action for trespass to land and damages for the removal of oil therefrom, Clark, J., said: "But, assuming that an action of trespass is a proper remedy, and that the defendant invaded the territory of the plaintiff's protection to put down wells, and took out oil to the amount of 8,253 barrels, as the testimony appears to show, what should be the measure of the plaintiff's recovery? He should not be permitted to recover the price of all this oil, for the defendant was, in any event, entitled to a royalty out of it; and it does not appear, nor can it in any satisfactory way be made to appear, that the plaintiff would have been able, by any means within his power, to produce the whole, or any definite or certain portion, of the oil, at the sites to which he was restricted."

*Kier v. Peterson* (1861) 41 Pa. 357, 8 Mor. Min. Rep. 499, was an action of trover for 50,000 gallons of petroleum, which were the unexpected product of certain salt wells which had been sunk by defendant on land leased

to him by plaintiff for the purpose of manufacturing salt. The court held that the plaintiff had misconceived his action, the proper remedy being by a bill in equity for an accounting, and hence did not consider the question of value, in relation to which there was no contest. However, Woodward, J., concurring in the judgment on the sole ground that the plaintiff had misconceived his action, remarked that he thought the judge below correctly comprehended the measure of damages; that "the plaintiff was not entitled to the labor of defendant, but only to the value of the oil at the instant of separation from the freehold."

One who bores a well upon the land of another, extracting oil from the land, under the belief in good faith, and on reasonable grounds therefor, that he had a right to do so, is liable in damages for the value of the oil in the tanks, less the reasonable cost of extracting it. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (1911) — *Tex. Civ. App.* —, 137 S. W. 171, affirmed in (1913) 106 *Tex.* 94, 51 L.R.A. (N.S.) 268, 157 S. W. 737; *Bender v. Brooks* (1913) 103 *Tex.* 329, 127 S. W. 168, *Ann. Cas.* 1913A, 559.

Where one trespasses on the land of another, removing oil and converting it to his own use, if he commits the trespass unintentionally, or by mistake, or in the honest belief that he is acting within his legal rights, the measure of liability is the value of the property taken, less what it costs to produce it. *Bryson v. Crown Oil Co.* (1916) 185 *Ind.* 156, 112 N. E. 1.

In *Campbell v. Smith* (1913) 180 *Ind.* 159, 101 N. E. 89, it appeared that the plaintiff held oil and gas leases in certain lands, and the owner of the land, after giving the plaintiff notice that he intended to terminate the lease, brought suit to cancel the lease, and thereafter made leases covering the same land to other parties, who, without any objection by the plaintiff, removed oil from the land. The plaintiff thereupon brought suit against the landowner and the subsequent lessees. On appeal by the landowner, it was held that she was not a wilful trespasser, and therefore the cost of pro-

ducing the oil should be deducted from its value at the surface, and, where the value of the oil was exceeded by such costs, the plaintiff could not recover.

#### Marble.

In *Dougherty v. Chesnutt* (1887) 86 *Tenn.* 1, 5 S. W. 444, it appeared that the defendant, under a mistaken claim of title, invaded the marble quarry of plaintiff, and removed therefrom stone which he sold. It was held that the plaintiff should recover the value of the marble taken and sold, as it lay at the quarry cut, dressed, and prepared for market, less the actual expense of thus cutting, dressing, and preparing it for market; but the actual expense should in no event exceed the usual and reasonable expense.

#### Coprolites.

In *Atty. Gen. v. Tomline* (1877) 46 L. J. Ch. N. S. (Eng.) 654, L. R. 5 Ch. Div. 750, 36 L. T. N. S. 684, 25 *Week. Rep.* 802, it appeared that the lord of a manor entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, mining and removing from the land a quantity of coprolites. The copyhold tenant thereupon instituted a proceeding to obtain an injunction to restrain the defendant from continuing the trespass, and to obtain damages for the mineral removed. It was held that, although the property in the coprolites was in the lord, in the absence of custom he could not dig for them without permission of the tenant; and the proper measure of damages was held to be the gross amount produced by the sale of the coprolites, less the expense of working, and such a sum by way of profit as would have induced a stranger to undertake the working.

#### Phosphate.

In an action by the state against one who had unlawfully removed phosphates from the bed of a stream, acting under an honest but mistaken belief in his right to the phosphates, the measure of damages was held to be the value of the phosphates less the amount the defendant had added to their value by their removal and prep-

aration for market. *State v. Pacific Guano Co.* (1884) 22 S. C. 50.

*b. Proof of good faith.*

The wrongful taking of ore from the land of another, in the absence of all other evidence, raises a presumption of fact that the trespasser took it intentionally and wilfully. This presumption, however, is a disputable one, and the trespasser may overcome it, and may limit the recovery against him to the lower measure of damages, by proof presented on behalf of the owner or on his own behalf, that he took the ore unintentionally, in good faith, in the honest belief that he was lawfully exercising a right which he possessed. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (1904) 64 C. C. A. 180, 129 Fed. 668. See to the same effect, *Central Coal & Coke Co. v. Penny* (1909) 97 C. C. A. 600, 178 Fed. 340; *United States v. Homestake Min. Co.* (1902) 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365.

The mere taking and converting to one's own use of the property of another constitutes a trespass and raises a legal presumption that the taker intended to do what he did do, and is thereby an intentional trespasser. In that event, and in the absence of any further evidence, the owner of the property taken is entitled to a verdict fixed in amount by the higher measure of damages, based upon this legal presumption. The law, therefore, places the trespasser under the burden of overthrowing, by proof, this presumption. *Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co.* (1913) 122 C. C. A. 113, 203 Fed. 795, writ of certiorari denied in (1913) 231 U. S. 747, 58 L. ed. 464, 34 Sup. Ct. Rep. 320.

"One who acts in good faith, on the erroneous advice of reputable counsel on questions of legal right concerning which a layman could hardly have actual notice, is not chargeable with bad faith, or with a wilful intent to commit a wrongful act, because his counsel was mistaken in his view of the law." *United States v. Homestake Min. Co.* (Fed.) supra.

The foregoing passage is quoted with approval in *United States v. Midway Northern Oil Co.* (1916) 232 Fed. 619, in which it is also said that there is a marked difference between those who recklessly, or with actual intent to rob others, trespass upon their property, and those who, acting on the advice of counsel, trespass by mistake, with no evil purpose, but with an honest belief that they have a right to do so.

In a court of equity, at least, the imputation of being wilful trespassers will not be indulged in as against those who are shown to have acted in good faith in reliance on the advice of reputable counsel. *United States v. M'Cutchen* (1916) 288 Fed. 575.

The test to determine whether one is a wilful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a wilful trespasser. *United States v. Homestake Min. Co.* (Fed.) supra. See to the same effect *Durant Min. Co. v. Percy Consol. Min. Co.* (1899) 35 C. C. A. 252, 98 Fed. 166, 20 Mor. Min. Rep. 27.

*II. Wilful trespass.*

*a. Rule in United States.*

The American jurisdictions which have had occasion to pass on the question of the measure of damages against a trespasser who removes oil or other mineral from the land of another are virtually unanimous in holding that if the taking is reckless, wilful, or intentional, or without claim of right or title, the trespasser is liable for the enhanced value of the product when and where it is finally converted to the use of the trespasser, without any deduction for expenses incurred, or for any value he may have added to the mineral by his labor.

*United States.—Cheeney v. Nebraska & C. Stone Co.* (1890) 41 Fed. 740; *Durant Min. Co. v. Percy Consol. Min.*

Co. (1899) 85 C. C. A. 252, 98 Fed. 166, 20 Mor. Min. Rep. 27; United States v. Homestake Min. Co. (1902) 54 C. C. A. 303, 117 Fed. 481; Sweeney v. Hanley (1908) 61 C. C. A. 153, 126 Fed. 97; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (1904) 64 C. C. A. 180, 129 Fed. 668; Central Coal & Coke Co. v. Penny (1909) 97 C. C. A. 600, 173 Fed. 340; Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co. (1913) 122 C. C. A. 113, 203 Fed. 795; Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. (1913) 122 C. C. A. 402, 204 Fed. 166, Ann. Cas. 1918B, 571; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. (1892) 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 438.

**Arizona.**—Alta Min. & Smelting Co. v. Benson Min. & Smelting Co. (1888) 2 Ariz. 382, 16 Pac. 565.

**California.**—Lightner Min. Co. v. Lane (1911) 161 Cal. 609, 120 Pac. 777, Ann. Cas. 1918C, 1093.

**Colorado.**—See *infra*, III.

**Indiana.**—Sunnyside Coal & Coke Co. v. Reitz (1895) 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; American Sand & Gravel Co. v. Spencer (1913) 55 Ind. App. 528, 103 N. E. 426; Bryson v. Crown Oil Co. (1916) 185 Ind. 156, 112 N. E. 1; Kahle v. Crown Oil Co. (1913) 180 Ind. 131, 100 N. E. 681.

**Nevada.**—Patches v. Keeley (1887) 19 Nev. 404, 14 Pac. 347.

**New York.**—Baker v. Hart (1889) 52 Hun, 368, 5 N. Y. Supp. 345.

**Tennessee.**—Dougherty v. Chesnutt (1887) 36 Tenn. 1, 5 S. W. 444.

**Texas.**—Kelvin Lumber & Supply Co. v. Copper State Min. Co. (1918) — Tex. Civ. App. —, 203 S. W. 68.

**West Virginia.**—See the reported case (PITTSBURGH & W. V. GAS CO. v. PENTRESS GAS CO. *ante*, 901).

The measure of damages for the reckless, wilful, or intentional taking of ore from the land of another, without right, is the enhanced value of the ore when it is finally converted to the use of the trespasser, without allowance to him for the labor bestowed or expense incurred in removing it and preparing it for market. Silver King Coalition Mines Co. v. Silver King

Consol. Min. Co. (1913) 122 C. C. A. 402, 204 Fed. 166, Ann. Cas. 1918B, 571. See to the same effect, United States v. Homestake Min. Co. (1902) 54 C. C. A. 303, 117 Fed. 481; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (1904) 64 C. C. A. 180, 129 Fed. 668; Kahle v. Crown Oil Co. (*Ind.*) *supra*.

In Liberty Bell Min. Co. v. Smuggler-Union Min. Co. (1913) 122 C. C. A. 113, 203 Fed. 795, an instruction that if the ore was either recklessly, wilfully, or intentionally taken by the defendant company, then the measure of the plaintiff's damages would be the enhanced value of the ore when and where it was finally converted to the use of defendant, was held, on appeal, to be correct.

In Central Coal & Coke Co. v. Penny (1909) 97 C. C. A. 600, 173 Fed. 340, it appeared that the defendants purchased land claimed by plaintiffs, and that the plaintiffs had been, for more than twenty years, in the notorious, uninterrupted, exclusive adverse possession of this land, on which they had maintained a church and cemetery. It further appeared that in the deed under which defendants claimed, there was an exception of the land on which plaintiffs' church was standing. The defendants, on being advised by counsel that the exception was void, and that plaintiffs had no right or title to the land except permission to use the surface for their church and burying ground, mined and removed coal from under this land. The court held that, in view of the notorious possession of the land by the plaintiffs, of the church and graveyard thereon in plain view from the defendants' shaft, of the warning exception in the deeds, and of the fact that defendants refrained from inquiring of plaintiffs what their claims to the land and the coal in question were, there was substantial evidence that the defendants took and converted the coal with a reckless disregard of the rights of plaintiffs, and, if the jury so found, the measure of damages should be the enhanced value of the coal at the mouth of the shaft, or where it was

finally converted to the use of the defendant.

In *Sweeney v. Hanley* (1903) 61 C. C. A. 153, 126 Fed. 97, a cotenant who had first fraudulently obtained from his fellow tenant conveyance of his share of the common property, and thereafter had extracted the mineral from it, was denied an allowance for his labor and expense. The court held that the complainant was entitled to the enhanced value of his share of the mineral extracted and sold by the defendant while the complainant was fraudulently dispossessed by him, without any deduction or allowance for the labor and expense of mining and marketing.

In *Durant Min. Co. v. Percy Consol. Min. Co.* (1899) 35 C. C. A. 252, 93 Fed. 166, 20 Mor. Min. Rep. 27, it appeared that the plaintiff and defendant were the owners of adjoining mining claims. The defendant, in working its mine, removed some ore from a stope many hundred feet beneath the surface of the earth, which proved to be on the line between the two claims, so that about 43 per cent of the ore taken from it was on the plaintiff's claim. The plaintiff thereupon brought suit for damages for the conversion of the ore. It was held that, as there was evidence tending to show that the trespass was wilful as well as evidence which tended to show that it was unintentional, an instruction that if defendant had been negligent in failing to discover the location of his property he was estopped to say that the taking was not wilful or intentional was erroneous. It was further held that if the jury should find that the trespass was wilful and intentional the measure of damages would be the full value of the property taken, at the time of the conversion, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market.

*Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* (1892) 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488, the defendant contended that it should be cred-

ited with the cost of mining the ores. The court, however, affirmed the holding of the supreme court of Arizona, and held that the defendant was not entitled to this credit, since it received and converted the ores with knowledge that they belonged to the plaintiff.

In *Cheney v. Nebraska & C. Stone Co.* (1890) 41 Fed. 740, it appeared that plaintiff and defendant were the owners of adjoining lands. A stone quarry was opened by defendant immediately east of the boundary line, and on ground which afterwards proved to be the plaintiff's. Doubts having arisen as to whether the quarry was on plaintiff's or defendant's land, a survey was made with the knowledge and assent of both parties, and it was then ascertained that the greater part of the quarry was on plaintiff's land. Action was then brought to recover the value of the stone taken from the quarry by defendant after the true line between the tracts owned by the parties had been surveyed. It was held that, as the trespass was wilful, an instruction that the defendant was liable in damage for the value of the stone after it was detached from the land, and had become personalty, was correct.

In *Alta Min. & Smelting Co. v. Benson Min. & Smelting Co.* (1888) 2 Ariz. 362, 16 Pac. 565, action for conversion was brought against the defendant, who had purchased ore obtained from the plaintiff's mine by trespassers. The lower court found that the trespasses were with knowledge of plaintiff's ownership of the mine, and that the defendant, at the time it received said ore, had knowledge that it came from plaintiff's mine and that it was the property of plaintiff. It was held that the measure of damages was the value of the ore when broken down at the mine, allowing nothing for the labor expended in mining.

In *Lightner Min. Co. v. Lane* (1911) 161 Cal. 689, 120 Pac. 777, Ann. Cas. 1913C, 1093, it was held that a mine owner who, through the underground openings in his mine, secretly, know-

ingly, and wilfully removed ore from the vein of an adjoining proprietor, was guilty of fraud, and was chargeable with the value of the mineral after reduction, without any allowance for expenses of mining and milling.

One who wilfully and intentionally takes oil from the land of another must respond in damages for the full value of the oil taken, at the time of conversion, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market. *Bryson v. Crown Oil Co.* (1916) 185 Ind. 156, 112 N. E. 1.

In *American Sand & Gravel Co. v. Spencer* (1913) 55 Ind. App. 523, 103 N. E. 426, the plaintiff brought an action in the nature of trespass *de bonis asportatis* against the defendant, who, it was alleged, entered on the land of plaintiff without his consent, with knowledge at the time that the land belonged to plaintiff, and removed therefrom sand and appropriated it to its own use. The defendant knew that it was taking the same from the plaintiff's land, but claimed that it believed that it had a right to do so. It was held that the evidence was sufficient to sustain a finding of wilful and intentional trespass, and defendant should be held accountable for the value of the sand secured or removed at the time and place of conversion, or the highest market price of such substance at any time between the severance and conversion, deducting nothing on account of labor and expense.

*Sunnyside Coal & Coke Co. v. Reitz* (1895) 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46, was an action for trespass in mining and removing coal from land of the plaintiff, the plaintiff seeking to recover the value of the coal. It was held that, as the evidence showed that the trespass was committed knowingly and intentionally, the measure of damages should be the value of the coal converted at the place where it lay after it had been mined, allowing nothing to the defendant for severing the coal or removing it.

See to the same effect, *Dougherty v.*

*Chesnutt* (1887) 86 Tenn. 1, 5 S. W. 444.

In *Patchen v. Keeley* (1887) 19 Nev. 404, 14 Pac. 347, an action of trespass against defendants for mining and removing ore from plaintiff's mine, it was held that the plaintiff was entitled to recover nominal damages in any event, and whether the defendants could demand a deduction of reasonable marketing expenses would depend upon the facts that should have been left to and decided by the jury. If the jury found that defendants were wilful trespassers, no deductions were allowable for working expenses, but in that case the plaintiff was entitled to the enhanced value of the property taken.

In *Baker v. Hart* (1889) 52 Hun, 363, 5 N. Y. Supp. 345, it appeared that the plaintiffs were lessees of certain lands, under a lease which gave them the exclusive right to the devised premises, and the sole and exclusive right to quarry and remove stone therefrom during a term of years. The defendants were lessees of an adjoining lot from the same lessor, and they entered upon the quarry of the plaintiffs and took out a quantity of stone, cutting it and taking it to New York. This action was brought for the value of the stone so taken. The defendants insisted that the plaintiffs could only recover the value of the stone in the quarry, but it was held that the plaintiffs could recover the value of the stone after it was cut by defendants and transported to the place of destination.

In *Kelvin Lumber & Supply Co. v. Copper State Min. Co.* (1918) — Tex. Civ. App. —, 203 S. W. 68, it appeared that two of the defendants entered on the mining claim of the plaintiff, extracting and removing ore therefrom, which was sold to the defendant lumber company, the trespass having been committed in an attempt to relocate a mining claim. Although it did not appear whether the defendants were wilful trespassers, it was held that they were not entitled to recover expenses incurred in taking out the ore.

*b. Rule in England and Canada.*

It is the prevailing rule in England and Canada that where a trespasser mines and removes minerals from the land of another, and the trespass is wilful, or fraudulent, or discloses a sinister intention on the part of the defendant, the cost of severance is not allowed, but the defendant may obtain an allowance for expenses incurred in bringing the mineral to bank. *Yukon Gold Co. v. Boyle Concessions* (1914) — Yukon, —, 19 D. L. R. 386; *Lamb v. Kincaid* (1907) 38 Can. S. C. 516, 8 Ann. Cas. 36; *Trotter v. Maclean* (1879) L. R. 13 Ch. Div. 574, 49 L. J. Ch. N. S. 256, 42 L. T. N. S. 118, 28 Week. Rep. 244, 10 Mor. Min. Rep. 263; *Phillips v. Homfray* (1871) L. R. 6 Ch. 770, 14 Mor. Min. Rep. 677; *Llynvi Coal & I. Co. v. Brogden* (1870) L. R. 11 Eq. 188, 40 L. J. Ch. N. S. 46, 23 L. T. N. S. 518, 19 Week. Rep. 196; *Ecclesiastical Comrs. v. North Eastern R. Co.* (1877) L. R. 4 Ch. Div. 845, 47 L. J. Ch. N. S. 20, 36 L. T. N. S. 174, 12 Mor. Min. Rep. 609; *Joicey v. Dickinson* (1882) 45 L. T. N. S. 643.

In *Lamb v. Kincaid* (1907) 38 Can. S. C. 516, 8 Ann. Cas. 36, the plaintiff and defendants were owners of adjoining mining claims. A dispute arose as to the boundary line, and the matter was referred to the gold commissioner, who gave a judgment favorable to the defendants in this action. While an appeal from this judgment was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of gold-bearing earth from the disputed and undisputed portions of the location, intermixing the products without keeping any account of the quantity taken, and appropriated the gold recovered. It was held that as the evidence disclosed a sinister intention on the part of defendants, and a deliberate blending of the materials by them, the trespass should be considered wilful, and in consequence they were liable in damage for the total value of so much of the intermixed products as was not strictly proved to have come from the undisputed portion of the location, with no

allowance for the necessary cost of working and mining the gold.

In *Yukon Gold Co. v. Boyle Concessions*, supra, the court followed the rule of law laid down in *Lamb v. Kincaid*, supra, and held that the defendant, who wilfully trespassed on a mining claim, removing minerals therefrom, could obtain no allowance for the working cost of dredging.

Where a mine owner worked an adjoining mine, believing he was to obtain a contract entitling him to do so, and during his working of the mine was notified that no contract would be made, his working of the mine after this notification should be treated as fraudulent, and in an action for damages for the trespass he should be allowed only the cost of bringing the minerals to the bank. *Trotter v. Maclean* (1879) L. R. 13 Ch. Div. 574, 49 L. J. Ch. N. S. 256, 42 L. T. N. S. 118, 28 Week. Rep. 244, 10 Mor. Min. Rep. 677.

In *Phillips v. Homfray* (1871) L. R. 6 Ch. 770, 14 Mor. Min. Rep. 677, the owners of a colliery entered into a contract with an adjoining landowner for the purchase of his land, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a quantity of coal from under it. Action was brought by the owners of the colliery to enforce the contract, and the landowner also brought suit to recover for the value of the ore converted. It was held that the landowner was entitled to the value of the coal mined on his land, with an allowance for raising, but none for mining, the coal.

In *Llynvi Coal & I. Co. v. Brogden* (1870) L. R. 11 Eq. 188, 40 L. J. Ch. N. S. 46, 23 L. T. N. S. 518, 19 Week. Rep. 196, a bill in equity was filed stating that the defendants were owners of a mine adjoining a mine of the plaintiffs, and that the defendants, in working that portion of the seam which lay beneath their mine, had extended their workings so as to pass the boundary line of their property, and encroached upon the plaintiffs' portion of the seam, mining and raising coal belonging to the plaintiffs. The bill prayed for an account of all

coal worked by the defendants from under the plaintiffs' mine, and of the value of such coal. It was held that the defendants were liable to account for the value of the coal at the pit's mouth, with just allowance for the cost of raising, but not of getting or severing the coal. This rule was applied on the theory that the defendant had acted in a manner wholly unauthorized and unlawful. See to the same effect, *Ecclesiastical Comrs. v. North Eastern R. Co.* (1877) L. R. 4 Ch. Div. 845, 47 L. J. Ch. N. S. 20, 36 L. T. N. S. 174, 12 Mor. Min. Rep. 609.

In a few cases in England and Canada a wilful or fraudulent trespasser who mines and removes minerals from the land of another has been held not entitled to a deduction for the expense either of severing the mineral or of bringing it to bank. *Olsen v. Desjarlais* (1910) 15 West. L. Rep. 72; *Livingstone v. Rawyards Coal Co.* (1880) L. R. 5 App. Cas. 25, 42 L. T. N. S. 334, 28 Week. Rep. 367, 44 J. P. 392, 10 Mor. Min. Rep. 291; *Bulli Coal Min. Co. v. Osborne* [1899] A. C. 351, 68 L. J. P. C. N. S. 49, 47 Week. Rep. 545, 80 L. T. N. S. 430, 15 Times L. R. 257.

In *Olsen v. Desjarlais*, *supra*, the plaintiff, defendant, and a third person, who were the owners of adjoining placer mining claims, entered into a partnership agreement for the purpose of doing the necessary representation work on the three claims. It was provided in the agreement that the work to be performed on any of the claims should be limited to the representation work required by the Placer Mining Act. Under this agreement the defendant performed sufficient work on his own location to comply with the mining regulations for the renewal of all three claims. Thereafter, the defendant, believing that his location was worked out, commenced operations on the plaintiff's claim, taking out a quantity of pay dirt. It was held that, although the defendant had a right to enter on the plaintiff's claim, he became a trespasser the moment he continued the working of the claim after a sufficient amount of work had been done for the

necessary representation of the true claimant; and, as it was disclosed by the evidence that he did so continue, he became a wilful trespasser, and was liable in damages for the full value of the gold recovered, without any deduction for the expenses incurred in recovering it.

In *Bulli Coal Min. Co. v. Osborne*, *supra*, the defendant had for a number of years taken coal from the plaintiff's land by means of secret underground passages, and under circumstances which made the trespass fraudulent. It was held that the defendant was liable for the market value of the coal at the mouth of the pit, without any allowance for the cost of working and raising.

In *Livingstone v. Rawyards Coal Co.* (1880) L. R. 5 App. Cas. 25, 10 Mor. Min. Rep. 291, the court, by Lord Hatcherley, in ruling on the measure of damages in a case of wilful trespass to mining land, said: "There is no doubt that if a man furtively and in bad faith robs his neighbor of property, and, because it is underground, is probably not for some time detected, the court of equity in this country will struggle, or I would rather say, will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has done."

### III. Rule in Alabama and Colorado.

In Alabama and Colorado, the common-law distinguishing characteristics of the actions of trespass, trover, and detinue are fully maintained, and the principles governing the rules for measuring damages appropriate to the particular form of action pursued, are strictly applied in these states. It has been held that where a trespasser mines and removes mineral from the land of another, and is sued in an action of trover, the measure of damages is the value of the ore when it becomes a chattel, allowing no credit for the value of defendant's labor in effecting the severance; and it seems that the character of entry, as wilful or unintentional, is not taken into con-



sideration. *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.* (1902) 135 Ala. 579, 98 Am. St. Rep. 46, 33 So. 547; *Warrior Coal & Coke Co. v. Mabel Min. Co.* (1896) 112 Ala. 624, 20 So. 918; *Omaha & G. Smelting & Ref. Co. v. Tabor* (1889) 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184.

If the action is one in trover or detinue or trespass de bonis asportatis, for the conversion, detention, or taking of ore, the ore should be treated as a chattel and valued accordingly. Dictum in *Warrior Coal & Coke Co. v. Mabel Min. Co.* (1896) 112 Ala. 624, 20 So. 918.

In *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.* supra, an action of trover was brought by the plaintiff against the defendant for the mining and conversion by the latter of coal on or out of the land of the plaintiff. It appeared that the acts of the defendant were neither wilful nor intentional, but were done inadvertently, under the mistaken belief that the land trespassed on belonged to it. The measure of damages was held to be the value of the coal as it lay in the mine when and after it had been severed from the realty, allowing no credit for the value of defendant's labor in effecting the severance; and not the value of the coal in and as a part of the realty.

In *Omaha & G. Smelting & Ref. Co. v. Tabor*, supra, the defendant, who purchased ore from one who obtained the ore by trespassing on the plaintiff's mine, was sued in trover. The court held the defendant liable, and held the measure of damages to be the value of the ore sold, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the defendant's place of business. The character of entry, it was held, whether wilful and malicious, or in good faith, through inadvertence, or mistake, could not be considered.

Where the action is in trespass, the measure of damages for an innocent trespass is the same as that obtaining in the majority of jurisdictions and set forth infra, in subdivision I. a.

*Warrior Coal & Coke Co. v. Mabel Min. Co.* (1896) 112 Ala. 624, 20 So. 918; *St. Clair v. Cash Gold Min. & Mill Co.* (1897) 9 Colo. App. 235, 47 Pac. 466, 18 Mor. Min. Rep. 523; *Little Pittsburgh Consol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655; *Montrozona Gold Min. Co. v. Thatcher* (1904) 19 Colo. App. 371, 75 Pac. 595; *United Coal Co. v. Canon City Coal Co.* (1897) 24 Colo. 116, 48 Pac. 1045, 18 Mor. Min. Rep. 639; *Liberty Bell Min. Co. v. Moorhead Min. & Mill. Co.* (1914) 58 Colo. 308, 145 Pac. 686.

*Warrior Coal & Coke Co. v. Mabel Min. Co.* supra, was an action for trespass to coal lands. It appeared that the defendant, in working its own mine, inadvertently encroached upon the coal embedded in the adjoining land of the plaintiff, and severed and carried away therefrom a large quantity of plaintiff's coal. It was held that the measure of damages was the value of the coal as a part of the realty, and not as a chattel after its removal.

In a case of innocent trespass by mining and milling metalliferous ores, where the trespasser sells the finished product and applies the proceeds to his own use, the owner should be reimbursed for his actual loss, and his damages are compensatory only. The measure of damages is the gross value of the ore in place before it was disturbed, not the net product or gross proceeds. The damages may be ascertained by deducting from the enhanced value or gross proceeds the cost of making the product at the time of conversion. *Liberty Bell Min. Co. v. Moorhead Min. & Mill. Co.* (1914) supra.

In *Montrozona Gold Min. Co. v. Thatcher* (1904) 19 Colo. App. 371, 75 Pac. 595, the defendant leased a mine from the plaintiff, obligating himself to sink a shaft a certain depth on or before a certain date, under penalty of forfeiture of the lease. The defendant failed to complete the shaft within the time specified, but continued to mine the property, claiming that, as he had substantially complied

with the contract by completing the shaft a few days after the expiration of the time limit, the lease was not forfeited. The court held, however, that the lease was forfeited, but that the lessee was not a wilful trespasser, and, in ruling on the measure of damages, said: "Under the facts as disclosed by this record, appellants cannot be considered wilful trespassers within the ordinary legal acceptance of that term, and therefore should be allowed, upon an accounting, the cost of mining, tramping, and hoisting the ore to the surface."

Where the defendants trespassed on the mine of the plaintiffs, mining and removing coal therefrom, if the trespass was innocent in character, the rule of damages is, in an action of trespass, the value of the ore at the time of conversion, less the amount which the defendants by their labor had added to that value. *United Coal Co. v. Canon City Coal Co.* (1897) 24 Colo. 116, 48 Pac. 1045, 18 Mor. Min. Rep. 639.

The measure of damages for an innocent trespass by taking ore from another's mining claim is the value of the ore as it was in the mine, and the defendants can limit the recovery, first, by the value of what is taken; second, by the cost of mining and extracting, tramping and hoisting to the surface, or delivering it at the pit's mouth. This is the value of the ore to the plaintiff, who would be compelled to stand these expenses if he had mined the ore himself. The cost of reduction also is usually a legitimate item of deduction. *St. Clair v. Cash Gold Min. & Mill. Co.* (1897) 9 Colo. App. 285, 47 Pac. 466, 18 Mor. Min. Rep. 523. See to the same effect, *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655.

Likewise several Colorado cases have laid down, in actions for trespass, the same rule as to wilful trespass as prevails in the majority of American jurisdictions. *St. Clair v. Cash Gold Min. & Mill. Co.* (1897) 9 Colo. App. 235, 47 Pac. 466, 18 Mor. Min. Rep. 523; *Little Pittsburg Con-*

*sol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655; *United Coal Co. v. Canon City Coal Co.* (1897) 24 Colo. 116, 48 Pac. 1045, 18 Mor. Min. Rep. 639; *Liberty Bell Min. & Mill. Co. v. Moorhead Min. & Mill. Co.* (1914) 58 Colo. 308, 145 Pac. 686.

In *Liberty Bell Min. & Mill. Co. v. Moorhead Min. & Mill. Co.* supra, action for trespass was brought against the defendant, who, in working its own mine, drove beneath the surface of plaintiff's mining location underground workings into plaintiff's territory, mining and removing ore therefrom. The question arose as to the measure of damages in instances of wilful trespass, the court holding that "in case of wilful trespass upon metalliferous veins, where the trespasser has mined, milled, and sold a finished product, the conversion takes place when he applies the proceeds to his own use, and the measure of damages is the enhanced value or gross proceeds realized from the ore, without deductions on account of any value the trespasser may have bestowed upon the ore by his labor."

In *United Coal Co. v. Canon City Coal Co.* (1897) 24 Colo. 116, 48 Pac. 1045, 18 Mor. Min. Rep. 639, action was brought against the defendants for wrongfully trespassing upon the plaintiff's land, mining and removing coal therefrom. The lower court found that the trespass committed by defendants was committed in a wilful and grossly and culpably negligent manner. It was held on appeal that the court was amply justified in finding that the trespass was wilful, and, in ruling on the measure of damages, the court said: "The defendants being wilful trespassers, it was proper to allow the full value of the coal mined, without deduction for their labor and expense in mining the same, the rule of damages being the value of the ore at the time and place it is severed from the realty."

Where the defendants trespassed on the mine of plaintiff, taking out ore, not as the result of an honest mistake or an honest intention, but

under circumstances which showed that they had knowledge of the situation, or where the circumstances were such as to legally charge them with this knowledge, they are entitled to no deduction, and they may not reduce the amount of recovery by proving the cost of mining. Having been guilty of a wilful trespass, they can reap no benefit from their own wrong, and must pay the value of the ore, without credit for the labor incident to its extraction. *St. Clair v. Cash Gold Min. & Mill. Co.* (1897) 9 Colo. App. 235, 47 Pac. 466, 18 Mor. Min. Rep. 523. See to the same effect *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655.

#### IV. Rule in Illinois.

In Illinois, the measure of damages in the case of a trespasser who wrongfully mines and removes mineral from the lands of another is held to be the value of the article converted at the time it becomes a chattel, or, if removed to the mouth of the pit, its value at such place less the cost of conveying it there. In no instance is the trespasser allowed credit for the expenses incurred and labor bestowed in mining or producing the product. This rule applies although the trespass may have been inadvertent, and the rule is the same in both trespass and trover, the only variation being when circumstances of aggravation are relied on in trespass, in which case punitive damages may be recovered. *Thomas Pressed Brick Co. v. Hexter* (1895) 60 Ill. App. 58; *Smoot v. Consolidated Coal Co.* (1904) 114 Ill. App. 512; *Perrine v. Chicago & H. Coal Co.* (1912) 173 Ill. App. 287; *Donovan v. Consolidated Coal Co.* (1900) 187 Ill. 28, 79 Am. St. Rep. 206, 58 N. E. 290, 21 Mor. Min. Rep. 91, affirming (1900) 88 Ill. App. 589; *McGuire v. Boyd Coal & Coke Co.* (1908) 236 Ill. 69, 86 N. E. 174; *Robertson v. Jones* (1874) 71 Ill. 405, 10 Mor. Min. Rep. 190; *McLean County Coal Co. v. Long* (1876) 81 Ill. 359, 10 Mor. Min. Rep. 198; *Illinois & St. L. R. Co. v. Ogle* (1876) 82 Ill. 627, 25 Am. Rep.

842, 10 Mor. Min. Rep. 198; *McLean County Coal Co. v. Lennon* (1879) 91 Ill. 561, 33 Am. Rep. 64, 10 Mor. Min. Rep. 277; *Illinois & St. L. R. Co. v. Ogle* (1879) 92 Ill. 358, 10 Mor. Min. Rep. 282.

*Perrine v. Chicago & H. Coal Co.* (1912) 173 Ill. App. 287, was an action in trespass wherein it appeared that the defendant, in working its coal mine, inadvertently dug and removed coal from the land of plaintiff, due to a mistaken view of the boundary line. The measure of damages was held to be the value of the coal immediately after it was severed from the land, allowing no deduction for the cost of severance.

In *McGuire v. Boyd Coal & Coke Co.* (1908) 236 Ill. 69, 86 N. E. 174, a proceeding was instituted to enjoin defendants from removing coal from land in which the complainant held the mineral rights, and to recover damages for coal previously removed. One defendant, it appeared, owned the coal under the land adjoining that in which the complainant owned the mineral rights, which he leased to his co-defendant, the *Boyd Coal & Coke Company*. The company, under his express direction, knowingly and intentionally went over the line and mined and removed complainant's coal. The measure of damages was held to be the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where mined. The defendant was held not to be entitled to anything for the general expense of mining. The only deduction allowed from the value of the coal at the mouth of the pit was the expenses for loading and hauling the coal to the foot of the shaft, and of hoisting and dumping it into the car at the top.

In *Smoot v. Consolidated Coal Co.* (1904) 114 Ill. App. 512, it appeared that the plaintiff in 1898 conveyed to the defendant the coal rights in a certain parcel of land. The veins of coal carried in considerable quantities a mineral known as "sulphur rocks" or "iron pyrites," which in the usual course of mining for coal was severed from the soil, and, being of no value, was treated as waste. However, about

the year 1901, an invention having opened a market for this hitherto waste material in the manufacture of acids, the defendant, in the operation of the mine on plaintiff's land, saved and sold a large quantity of this mineral. It was held that the defendant was guilty of conversion, and the measure of damages was held to be the value of the iron pyrites at the mouth of the pit, less the cost of digging it and the cost of separating it from the merchantable coal. The court, in fixing the measure of damages, reviewed the holdings in *Donovan v. Consolidated Coal Co.* (1900) 187 Ill. 28, 79 Am. St. Rep. 206, 58 N. E. 290, 21 Mor. Min. Rep. 91, affirming (1900) 88 Ill. App. 589, *supra*, and *McLean County Coal Co. v. Long* (1876) 81 Ill. 359, 10 Mor. Min. Rep. 193, *supra*, and, while adhering to the rule laid down in those cases, distinguished the case in hand, *Bonne, J.*, saying: "The removal by appellee of the iron pyrites in question, from its place of deposit in the coal vein, is not attributable to negligence or inadvertence, but to a right, incident to its right by grant under the deed, to remove the coal. It is undisputed that appellee must, of necessity, remove the iron pyrites in availing itself of its right under the deed to remove the coal."

In *Donovan v. Consolidated Coal Co.* *supra*, it appeared that the defendant owned a tract of land in which was a coal mine, and also owned the surface of an adjoining tract, in which tract the plaintiff owned the coal rights. The defendant entered into a contract with a mining company by which he leased to them for a term of years his mine, and also granted to them the right to mine and remove the coal underlying the first tract, as well as the coal of plaintiff to which he did not have or claim any title, the mining company agreeing to pay the defendant a certain price per ton for all the coal so mined. The mining company, through its agent, removed coal from the tract in which the plaintiff had the coal rights, and paid the defendant therefor the price per ton specified in his contract. The court

held that, as the defendant authorized and directed the trespass, he was liable to the plaintiff, and held the measure of damages to be the full value of the coal at the mouth of the pit, less the cost of transporting it thither and, if it was loaded on railroad cars, the expense incident thereto, but no allowance should be made for digging.

In *Thomas Pressed Brick Co. v. Herter*, *supra*, it appeared that the plaintiff and defendant owned adjoining tracts of coal-bearing lands, and that the defendant company operated a mine on its land and in its operations extended the mine into, and removed coal from, the land of plaintiff. Action for trespass was brought by plaintiff to recover damages for the coal taken. In fixing the amount of damages recoverable, the court said: "The measure of appellee's right of recovery or damages is the value of the coal at the mouth of the pit or mine, less the cost of conveying it there from the place where dug or mined, allowing nothing for digging or the labor of separating stone, sulphur, slate, earth, or other substances from it. Nothing is to be allowed the appellant company for the mining, or any other acts necessary to the production of the coal as an article of commerce."

In *McLean County Coal Co. v. Long* (1876) 81 Ill. 359, 10 Mor. Min. Rep. 193, action in trover was brought by the plaintiff against the defendant coal company to recover damages for the conversion of a quantity of coal taken from the land of plaintiff. There was no controversy about the fact of taking and converting the coal, the only question being as to the measure of damages. It was held that the same rule prevailed in trespass for breaking and entering a coal mine and carrying away coal, and trover for the coal, except when circumstances of aggravation are relied on in trespass. This rule is the value of the coal at the moment it was severed by the defendant and thrown into the run. The defendant cannot be reimbursed for the expense and trouble of mining it, but he can be allowed the expense necessary to carry it to the mouth of

the pit, as any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth. See to the same effect, *McLean County Coal Co. v. Lennon* (1879) 91 Ill. 561, 33 Am. Rep. 64, 10 Mor. Min. Rep. 277.

*Robertson v. Jones* (1874) 71 Ill. 405, 10 Mor. Min. Rep. 190, was an action for trespass, brought by plaintiff against defendant to recover damages for coal taken from the mine of plaintiff. It was held that the plaintiff could recover the value of the coal after it was dug in the bank, or he could recover its value at the mouth of the pit, less the cost of conveying it after it was dug to the mouth of the pit, and was not limited to the value of the coal taken as it lay in the ground, and the defendant should be allowed nothing for digging. See to the same effect, *Illinois & St. L. R. Co. v. Ogle* (1876) 82 Ill. 627, 25 Am. Rep. 342, 10 Mor. Min. Rep. 198; *Illinois & St. L. R. Co. v. Ogle* (1879) 92 Ill. 353, 10 Mor. Min. Rep. 282.

#### *V. Rule in Maryland.*

In Maryland, prior to 1894, the cases uniformly held the measure of damages in cases where one trespassed on land and mined and removed mineral therefrom, to be the value of the mineral after it was severed from its native land without allowance for expenses incurred in severing; and the measure of the value was generally deemed to be the price of the coal after it arrived at the mouth of the pit, allowing a deduction for the cost of conveying it there. This rule was applied irrespective of whether the trespass was inadvertent or under a bona fide claim of title, or was committed negligently, the only variation of the rule being when circumstances of aggravation were relied on, in which case punitive damages could be recovered. *Atlantic & G. C. Consol. Coal Co. v. Maryland Coal Co.* (1884) 62 Md. 135; *Blaen Avon Coal Co. v. McCulloch* (1882) 59 Md. 403, 43 Am. Rep. 560; *Franklin Coal Co. v. McMillan* (1878) 49 Md. 549, 33 Am. Rep. 280, 10 Mor. Min. Rep. 224; *Barton Coal Co. v. Cox* (1873) 39 Md. 1, 17 Am. Rep. 525, 10 Mor. Min. Rep. 157.

However, by a statute since enacted (Pub. Civ. Laws, § 92, art. 75), it is provided that "in the absence of fraud, negligence, or wilful trespass the measure of damages for the wrongful working and abstracting of another's minerals is the value of the minerals in their native state, before severance, to the person from whose property they were taken at the time of the taking." And the same statute further provides that "if one furtively or in bad faith works and abstracts minerals from the land of another, the party so offending may be charged with the whole value of the minerals taken, and allowed no deduction in respect of his labor and expenses in getting them." Under that act the rule as enunciated in the latest reported case dealing with the question, is in accord with the general rule as heretofore stated. *Mt. Savage George's Creek Coal Co. v. Monahan* (1918) 132 Md. 654, 104 Atl. 480.

In that case a bill in equity was filed to restrain the defendant from trespassing on the plaintiff's land and mining and carrying away coal, and for damages for coal removed. The court, after quoting sections of the statute referred to above, recognized the fact that the rule, as laid down in former cases where the trespass was inadvertent, or under a claim of right or title, had been changed by this statute so as to make the trespasser in such cases liable only for the value of the coal as it lay in the bed before being mined, but held, however, that there was ample evidence to show negligence of a very decided character, and the measure of damages, therefore, should be the value of the coal after severance, allowing the defendant nothing for expenses in effecting the severance.

#### *VI. Rule in South Dakota.*

By a statute in South Dakota it is provided that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest from that date, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property

at any time between the conversion and the verdict, without interest, at the option of the injured party.

In *Golden Reward Min. Co. v. Buxton Min. Co.* (1899) 38 C. C. A. 228, 97 Fed. 413, the plaintiff brought an action in trespass against the defendant to recover damages for a wrongful entry upon its mine, situated in South Dakota, and for the removal therefrom and conversion to its own use of a large amount of gold and silver bearing ore. It was held that since the wrong complained of, for which compensation was demanded, was the unlawful conversion of the mineral-bearing ores after they had been broken down and converted into person-

alty, the action, therefore, was in its essence a suit for the wrongful conversion of personal property, notwithstanding the fact that the complaint also charged a trespass on real property; and the statute was held to be applicable, since the action had been prosecuted with reasonable diligence. In this connection the court said: "We can conceive no sufficient reason why the form of the action should deprive a plaintiff of the benefit of the rule, when, as in the present instance, it transpires that the action is essentially one for the wrongful conversion of personal property, and when no other kind of damage is recovered."

W. F. F.

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S. S. HART et al., Appts.,

v.

CITIZENS' NATIONAL BANK of Ft. Scott, Kansas.

*Kansas Supreme Court — November 8, 1919.*

(105 Kan. 434, 185 Pac. 1.)

**Limitation of actions — bar against trustee — effect on beneficiaries.**

A testatrix devised and bequeathed property to a trustee for the benefit of her grandchildren. The beneficiaries were minors, and were not to receive the trust estate until they reached the age of twenty-five years. Until that time the trustee was vested with title and with full power and discretion respecting management and disposition of the trust property. A portion of the property consisted of bank stock, which the trustee disposed of to the defendant, under such circumstances as to constitute a breach of trust, in which the defendant knowingly participated. Afterwards the trustee resigned, and another trustee was appointed, who became vested with the same title and authority as her predecessor. She suffered her right of action to recover the bank stock, or its proceeds or value, from the defendant, to become barred by the Statute of Limitations. Held, subsequent action by the beneficiaries, after they became of age, against the bank for the same relief, was barred.

[See note on this question beginning on page 938.]

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Headnote by BURCH, J.

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APPEAL by plaintiffs from a judgment of the District Court for Bourbon County (Gates, J.) in favor of defendant in an action brought to recover bank stock, or its proceeds or value, belonging to a certain trust estate which a trustee thereof disposed of to the defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sheppard, Sheppard, & Sheppard and John B. Hart for appellants.

Messrs. John H. Crain and A. M. Keene, for appellee:

The trustee, who is a necessary party to the action, is the one who is bound to account to the cestui que trust, and is the only one for whom judgment can be rendered herein.

Perrin v. Lepper, 26 Fed. 545; Winn v. Strickland, 34 Fla. 610, 16 So. 606; Cassiday v. McDaniel, 8 B. Mon. 519; Phipps v. Tarpley, 24 Miss. 597; Reed v. Reed, 16 N. J. Eq. 248; Gates v. Bennett, 33 Ark. 475; Grant v. Heverin, 77 Cal. 263, 19 Pac. 493, 18 Pac. 647; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Reed v. Harris, 7 Robt. 151; Pennsylvania R. Co. v. Duncan, 111 Pa. 352, 5 Atl. 742; Myers v. Hale, 17 Mo. App. 204; Western R. Co. v. Nolan, 48 N. Y. 513; Paget v. Pease, 53 Hun, 636, 24 N. Y. S. R. 762, 6 N. Y. Supp. 386; Lindheim v. Manhattan R. Co. 68 Hun, 122, 22 N. Y. Supp. 685; Ashton v. Atlantic Bank, 3 Allen, 217.

Demurrer is not proper to present defect of parties.

Yount v. Hoover, 95 Kan. 755, L.R.A. 1915F, 1120, 149 Pac. 508, Ann. Cas. 1918C, 148.

The Statute of Limitations is a bar to this claim.

19 Am. & Eng. Enc. Law, 185, § 5; 25 Cyc. 1010-1012; Kennedy v. Winn, 80 Ala. 165; Naddo v. Bardon, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493, affirming 47 Fed. 782; Badger v. Badger, 2 Wall. 87, 17 L. ed. 836; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328, 3 Mor. Min. Rep. 688.

When the trustee is barred the beneficiary is also barred.

Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 785; Bryan v. Weems, 29 Ala. 426, 65 Am. Dec. 407; Patchett v. Pacific Coast R. Co. 100 Cal. 505, 35 Pac. 73; Brady v. Walters, 55 Ga. 25; Coleman v. Walker, 3 Met. (Ky.) 65, 77 Am. Dec. 163; Weaver v. Leiman, 52 Md. 708; Burkhead v. Colson, 22 N. C. (2 Dev. & B. Eq.) 77; Williams v. Otey, 8 Humph. 563, 47 Am. Dec. 632; McAdams v. McAdams, 10 Tex. Civ. App. 653, 32 S. W. 87; Sheppard v. Turpin, 3 Gratt. 373; Fleming v. Gilmer, 35 Ala. 62; Hastie v. Aiken, 67 Ala. 313; McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Wilmerding v. Russ, 33 Conn. 67; Mathews v. Durkee, 34 Fla. 559, 16 So. 411; Pendergrast v. Foley, 8 Ga. 1;

Ford v. Cook, 73 Ga. 215; Crawley v. Richardson, 78 Ga. 213; McCrary v. Clements, 95 Ga. 778, 22 S. E. 675; Rosson v. Anderson, 9 B. Mon. 423; Darnall v. Adams, 13 B. Mon. 273; Daniells v. Daniells, 92 Mich. 208, 52 N. W. 303; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Ervin v. Brooks, 111 N. C. 358, 16 S. E. 240; South Carolina Mfg. Co. v. Bank of State, 27 S. C. Eq. (6 Rich.) 227; Sanchez v. Dow, 23 Fla. 445, 2 So. 842; Wells v. Perry, 62 Mo. 573; Stevenson v. Saline County, 65 Mo. 425; James v. James, 41 Ark. 301; Clay Center v. Myers, 52 Kan. 363, 35 Pac. 25.

The trustee had the right to sell the bank stock, and the bank had the right to buy it.

Fisher v. Fairbank, 188 Ill. 187, 53 N. E. 962; Dickson v. New York Biscuit Co. 211 Ill. 468, 71 N. E. 1058; Hinds v. Hinds, 85 Ind. 312; McCleary v. Chipman, 32 Ind. App. 489, 68 N. E. 320; Hughes v. Bent, 118 Ky. 609, 81 S. W. 931; Purdie v. Whitney, 20 Pick. 25; Goodrich v. Proctor, 1 Gray, 570; Hackett v. Hackett, 67 N. H. 424, 40 Atl. 434; Wetmore v. Midmer, 21 N. J. Eq. 242; Bigelow v. Tilden, 52 App. Div. 390, 65 N. Y. Supp. 140; Reade v. Continental Trust Co. 28 Misc. 721, 60 N. Y. Supp. 258; Whatley v. Oglesby, — Tex. Civ. App. —, 44 S. W. 44; Re Trelease, 49 Misc. 205, 96 N. Y. Supp. 138, affirmed in 115 App. Div. 654, 100 N. Y. Supp. 1051; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; Carter v. Brooker, 4 Ky. L. Rep. 722 (abstract); Taft v. Smith, 186 Mass. 31, 70 N. E. 1031; Bartol's Estate, 182 Pa. 407, 38 Atl. 527; Clark v. Anderson, 13 Bush, 111; Merriwether v. Merriwether, 3 Ky. L. Rep. 326.

Burch, J., delivered the opinion of the court:

The action was one for relief by beneficiaries of a trust, regarding bank stock belonging to the trust estate which the trustee disposed of to the defendant. The plaintiffs were defeated, and appeal.

The will of Nellie D. Stadden devised and bequeathed one third of her estate to her son, Leo I. Stadden, one third to her daughter, Lillian M. Prager, and one third to Leo I. Stadden as trustee for the testatrix's grandchildren, the plaintiffs, who were children of a deceased daughter, Nellie Stadden Hart. The

beneficiaries were minors, and were not to receive the trust estate until they arrived at the age of twenty-five years. Until that time, the trustee was vested with title, and with power and discretion over management and disposition of the estate, as complete and absolute as language could express. The following clause of the will related specifically to property of the kind in controversy. "My said trustee is also empowered to continue to hold any and all stocks coming into his power as trustee and receive the dividends therefrom, or to sell the same and loan or invest the proceeds from such sale as to him may seem best and proper."

The trustee duly qualified, and entered upon administration of the trust.

The husband of the testatrix was a wholesale grocer. After his death the business was incorporated as the I. Stadden Grocery Company, the entire capital stock of which was subscribed by the testatrix and her children, Leo Stadden and Lillian Prager. The testatrix used the grocery company very much as other people use a bank, for the purpose of depositing and withdrawing funds. A part of the assets of the trust estate consisted of a share of a large credit which she had on the books of the grocery company at the time of her death,—and it may be said that the grocery company was considered to be as sound financially as the defendant bank itself. A part of the personal property disposed of by the will consisted of shares of stock of the grocery company and shares of the capital stock of the defendant bank. By virtue of a division of property between the legatees named in the will, shares of grocery company stock and shares of bank stock were set off to the trust estate, and, on application of the trustee, the defendant issued a certificate for twenty shares of its capital stock to "Leo I. Stadden, trustee."

The grocery company was indebted to the bank. The president of

the bank desired the indebtedness reduced, and in order to do so, in February or March, 1902, Leo I. Stadden, trustee, indorsed in blank and delivered to the bank the certificate which had been issued to him, at its par value of \$100 per share. The bank gave the grocery company credit on its indebtedness, and the trustee's account with the grocery company was given proper credit. The bank continued to own the stock until July or August, 1904, when it was disposed of to purchasers for value, and, assuming the present action to be well grounded, it was not possible for the plaintiffs to recover the identical shares. Some of the facts just stated are disputed; but, for the purpose of the decision, the plaintiffs' version of what occurred is accepted. It is also assumed, as the plaintiffs contend, that the bank knew the fiduciary capacity and relation in which Leo I. Stadden held the certificate.

Leo I. Stadden resigned as trustee in May, 1902, and his sister, Lillian M. Prager, was duly appointed in his stead. She qualified as trustee, and became vested with full title to the trust estate, and vested with all power and discretion over it conferred by the will. Because the bank stock had been disposed of by her predecessor, it did not come into her possession; but there did come into her possession as part of the trust estate a large credit to the account of the trustee on the books of the grocery company, composed in part of the proceeds of the sale of the bank stock. Evidence for the plaintiffs indicated that Lillian M. Prager knew the bank stock had been applied on the grocery company's indebtedness to the bank about the time the transaction occurred. Her husband, William Prager, was then secretary and treasurer of the grocery company. He transacted all, or substantially all, of his wife's business as trustee. Immediately after her appointment, Lee Hart, father of the plaintiffs, who was then living, told William Prager that Leo had disposed of the



bank stock, and it would not be among the things turned over. William Prager was informed that the bank stock went to the credit of the children on the books of the grocery company, and if Lillian M. Prager did not, as she testified, personally know the fact at the time, she was charged with knowledge directly after she became trustee.

On May 26, 1902, the grocery company sold its merchandise, went out of business, and proceeded to wind up its affairs. The trustee did not attempt to recover the stock from the bank, or attempt to recover its value from either Leo I. Stadden or the bank, and the value of the stock was not realized from the credit on the books of the grocery company. In April, 1916, the beneficiaries commenced this action on their own account.

The district court did not make findings of fact, and the basis of its judgment can only be surmised. Under the well-understood rule, the judgment includes a finding of all facts supported by evidence and inferences from evidence favorable to the defendant, which will sustain the decision on any legally tenable theory.

About the time this suit was commenced, Lillian M. Prager asked to be relieved as trustee. The beneficiaries intervened in the proceeding, and charged her with various derelictions of duty, whereby the trust estate had been greatly depleted, to their detriment. The matter was tried, and the court made extensive findings of fact, covering administration of the trust from the time it was created, including the bank-stock transaction. The trial followed the trial of the present action. The two cases were taken under advisement, and were decided on the same day. With reference to the bank-stock transaction, the court, in the matter of the trusteeship of Lillian M. Prager, made the following finding: "In thus using the capital stock held by him as trustee in reducing the indebtedness of the grocery company to the bank,

and in increasing the indebtedness of the grocery company to himself as trustee, Leo I. Stadden acted in good faith, without any intent to injure or endanger the trust estate, and in the honest belief that the change of investment of this portion of the trust fund was the best thing to do under the circumstances, and would not result in any loss to the trust estate; and I find that in so doing he was guilty of no act which would render him responsible for loss, if any occurred, and that he was exercising fairly and honestly his judgment and discretion in the handling of the trust estate, in accordance with the power conferred upon him by the trust instrument."

It is likely the decision in the suit against the bank was rested on a similar finding, not formally stated. However this may be, substantially at the close of the evidence in the bank's case, leave was asked and granted to amend the answer to raise the bar of the Statute of Limitations. The application was resisted, and the ruling permitting the answer to be amended is assigned as error. The subject was clearly one within the discretion of the court. All the facts had been fully developed. Nothing additional was offered, or indicated as available, which would affect the starting or the running of the Statute of Limitations, and the plaintiff suffered no legal prejudice from the amendment.

Assuming that in disposing of the stock to the bank the trustee was guilty of a breach of trust, and that the bank, having knowledge of the breach, and participating in it, became itself trustee ex maleficio of the stock, the present action by the beneficiaries was barred. After the spoliation occurred, a new trustee was appointed. As soon as Lillian M. Prager qualified as trustee, she took title to the trust estate, and became vested with all rights of action pertaining to the trust and trust property. The bene-

Limitation of  
actions—bar  
against trustee—  
effect on  
beneficiaries.

ficiaries had no title to the trust property, no control over it, and no right of action growing out of its management and disposition. The new trustee had a complete, matured cause of action against both her unfaithful predecessor and the bank for devastavit, and a variety of remedies were available to her. She alone could pursue them, and she neglected to do so. After the lapse of three, or five years,—it is not material which,—she became barred, and when she became barred the beneficiaries were barred, although they were then minors. "The general rule is that whenever the right of action in a trustee who is vested with the legal estate and is competent to sue is barred by limitation, the right of the cestui que trust is also barred; and this rule applies whether the cestui que trust be sui juris, or under disability during the period of limitation." 25 Cyc. 1010. The plaintiffs cite the following text relating to persons between whom the Statute of Limitations is operative: "The general rule is that for a trust to be exempt from the statute, not only must it be an express trust cognizable solely in equity, but the contest or suit involving it must arise between the trustee and the cestui que trust. But this rule is not always strictly adhered to, and is subject to numerous qualifications. Thus it has been held that a third person who knowingly participates in a trustee's breach of trust is no more entitled to avail himself of the statute than is the trustee. Where property having been held under an express trust comes into the hands of a third person having notice of the trust, it is held in some cases that the third person occupies the position of an express trustee and is not protected by the statute; although in other cases it is held that he is merely a constructive trustee and that the statute applies in his favor, especially where the trust funds may be recovered in an action at law." 25 Cyc. 1165.

All the decisions cited as qualify-

ing the general rule of the text have been examined. It would unduly extend this opinion to review them. In this state there is but one form of civil action, whether the right to relief be legal or equitable in its nature, and all actions, whether such as were formerly denominated actions at law or suits in equity, must be commenced within the periods prescribed by the Statute of Limitations. The declarations that a third person, who knowingly participates in a trustee's breach of trust, is no more entitled to avail himself of the statute than the trustee, is altogether too broad, and its indiscriminate application would lead to abrogation of the Statute of Limitations in many cases to which it was designed to apply. In this state express trusts and constructive trusts arising by operation of law are wholly distinct in origin and nature, and to identify them for any adventitious purpose would lead to confusion. Probably as clear a statement of the principle involved as the court's own investigation has revealed appears in a case cited in connection with the text quoted, in one of the volumes of annual annotations to Cyc.: "One who knowingly takes title to property which is subject to a trust, himself becomes a trustee ex maleficio, and will have to account to the beneficiaries or cestuis que trust for such property. The Statute of Limitations does not run against the beneficiaries under legal disabilities simply because it has fully run against their trustee who has conveyed the legal title to the parties sued by them, and who took with full knowledge of the trust impressed upon the property. So that where certificates of stock were issued to a mother as trustee for her children, and defendants bought the stock from her, with full knowledge of such trust, a suit ten years afterwards by the children, who because of legal disabilities are not otherwise barred, is not barred as to them. The principle that when the trustee is barred all the beneficiar-

ies, whether under legal disabilities or not, are barred, has no application to such a case. That principle applies only where the trustee could sue, but fails to do so." *Elliott v. Landis Mach. Co.* 236 Mo. 546, Syl. 3, 139 S. W. 356.

In the present instance, after the locus pœnitentiæ had been passed, Leo I. Stadden as trustee could not sue the bank, because he was estopped to dispute the vesting of title which he had transferred. The bank, however, having knowledge of the trust and its breach, was prevented from taking title stripped of the trust. The relation of the property to the trust estate was preserved by making the bank a constructive trustee by operation of law consequent upon its own wrong. If nothing else had happened, when the time came for the beneficiaries to call for an accounting, and for delivery to them of the trust property, or its proceeds or value, they

might have recovered from the bank, notwithstanding lapse of time. But something else did happen. Another trustee came into office, clothed with the right and charged with the duty to call upon Leo I. Stadden and the bank for an accounting, and for delivery of the trust property, or its proceeds or value. Her authority in those respects was precisely that of adult beneficiaries at termination of the trust; and nobody would contend that, after termination of the trust, adult beneficiaries could delay assertion of their right beyond the period fixed by the Statute of Limitations. The new trustee neglected to bring action against the bank, her right of action became barred, and in that respect the plaintiffs stand in her shoes. Their remedy lies in calling the second trustee to account,—but that is another story.

The judgment of the District Court is affirmed.

#### ANNOTATION.

**Appointment of new trustee as affecting running of Statute of Limitations in favor of third person who has received trust property through breach of trust by former trustee.**

In the reported case (*HART v. CITIZENS' NAT. BANK*, ante, 938), wherein action is brought by the beneficiaries of an express trust to recover trust property received by a third person through a breach of trust by the former trustee, the court holds that although the third person became a constructive trustee, against whom the action would not have been barred by

the lapse of time, still the failure of a trustee thereafter appointed, to bring an action within the period prescribed by statute, precludes an assertion of the rights of the beneficiaries beyond the prescribed period of limitation. No case other than the reported case appears to have passed on the precise question therein considered.

R. E. B.

SOPHIA TODD et al.

v.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al.

*California Supreme Court (In Banc) — October 9, 1919.*

(— Cal. —, 184 Pac. 684.)

**Power — right to revoke.**

1. A power which is declared irrevocable, by which the interest of the

constituent in a legacy is assigned to the attorney, the intention being declared that the power is coupled with an interest, but which also provides that the balance, after deducting expenses, outlays, and compensation, shall be remitted to the constituent, is not coupled with an interest, but may be revoked at the pleasure of the constituent.

[See note on this question beginning on page 947.]

**Mandamus — for substitution of attorney — facts to be considered.**

2. Letters, affidavits, and consent of petitioners, attached to a motion for substitution of attorney because the acting attorney was without authority, are part of the facts which the court, in a mandamus proceeding to compel the substitution, may consider in determining whether or not petitioners have been denied a legal right.

**Attorney and client — right to change attorney.**

3. A litigant may change his attorney at any time except where the attorney has an interest in the subject-matter of the suit.

[See 2 R. C. L. 957.]

**Power — right to revoke.**

4. Even though a power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent, where the power is not at the same time coupled with an interest, or given as security for the payment of money or the performance of any act deemed of value.

[See 21 R. C. L. 886, 889.]

**— what makes power irrevocable.**

5. To constitute an irrevocable pow-

er of attorney there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney and will survive the constituent, or the power must be given as security for the payment of a sum of money other than that which arises as compensation in the exercise of the power, or as security for the performance of some act of value.

[See 21 R. C. L. 839.]

**— construction — repugnant clauses.**

6. The repugnancy in a power of attorney must be reconciled so as to give effect to the repugnant clauses in keeping with the general intent or predominant purpose of the instrument.

[See 21 R. C. L. 881.]

**— what interest in attorney necessary to prevent revocation.**

7. The interest which an attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the power itself, apart from the proceeds, that, if the power were revoked, he would be deprived of a substantial right.

[See 21 R. C. L. 889.]

**APPLICATION** by petitioners for a writ of mandamus to compel respondents to substitute attorneys in proceedings in the Matter of the Estate of Christine Sharbach, deceased. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. T. E. K. Cormac and W. J. Tuska for petitioners.

Messrs. Shelton & Levy, for respondents:

Plaintiffs are entitled to a writ only if they can show that it was mandatory upon the probate court to grant the motion for substitution.

Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670.

The power of attorney is coupled with an interest.

Norton v. Whitehead, 84 Cal. 268, 18 Am. St. Rep. 172, 24 Pac. 154; Flanagan v. Brown, 70 Cal. 259, 11 Pac. 706; Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207; Gulf, C. & S. F. R. Co. v. Miller, 21 Tex. Civ. App. 609, 53 S. W.

709; Merrill v. Bradley, 52 Tex. Civ. App. 527, 121 S. W. 561; Cage v. Atwater, 136 Cal. 170, 68 Pac. 581.

Thus, the fact that the attorney is not permanently to retain all that is assigned to him does not detract from the force of the assignment, nor convert it into a mere promise to pay on the part of the principal.

Barr v. Schroeder, 32 Cal. 609.

Considering the effect of the letter of attorney to be an assignment of the interest as security for the payment of "services rendered and to be rendered," and of "expenses and outlays," the power coupled with such an interest is irrevocable.

Marziou v. Pioche, 8 Cal. 522; Nor-

ton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154; Stewart v. Hilton, 19 Blatchf. 290, 7 Fed. 562; Babrowsky v. United States Grand Lodge, O. B. A. 129 App. Div. 695, 113 N. Y. Supp. 1080; American Loan & T. Co. v. Billings, 58 Minn. 187, 59 N. W. 998; Hilliard v. Beattie, 67 N. H. 571, 39 Atl. 897; Citizens' State Bank v. E. A. Tessman & Co. 121 Minn. 34, 140 N. W. 178; Gulf, C. & S. F. R. Co. v. Miller, 21 Tex. Civ. App. 609, 53 S. W. 709; Merrill v. Bradley, 52 Tex. Civ. App. 527, 121 S. W. 561.

Lawlor, J., delivered the opinion of the court:

Application for a writ of mandate. On April 28, 1919, the petitioners herein filed an application for a writ of mandate to be directed against the respondents, the court having refused to grant a motion made by the petitioners for the substitution of attorneys in the matter of the estate of Christine Sharbach, deceased. On May 1, 1919, an alternative writ of mandate was issued by this court, and on June 2, 1919, the respondents interposed a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action for a writ of mandate. At the same time the respondents filed an answer to the petition. The matter was thereupon orally heard and submitted for decision.

Petitioners, Sophia Todd and Louise Weber, residents of England, were named as legatees in the will of Christine Sharbach, who died in San Francisco on November 21, 1917. On January 3, 1918, each of the petitioners executed a separate power of attorney to L. O. Thieme of Chicago, Illinois; the powers being identical except as to the name of the constituent. That of Louise Weber reads as follows:

Power of attorney.

Know all men by these presents: That, I, Louise Weber, of 46 Carlton street, West Hartlepool in the county of Durham, England, spinster, being of lawful age, do hereby make, constitute, and appoint L. O. Thieme of Chicago, Illinois, to be my true and lawful attorney in fact

with full power and authority to collect, receipt for, and sue for my distributive share, legacy, or claim of any kind, nature, or description, which I may have against or may now or at any future date be entitled to from the estate of Christine Sharbach, deceased, and to take possession of any personal property disbursed in kind by the personal representative of said estate; also to collect any policies of insurance, or death benefits in which I may be named as beneficiary; to take charge of and manage any real estate in which I may have an interest, to collect rents, pay taxes, and to institute and conduct any proceedings for the partition or sale of any such real estate, and to institute, conduct, or defend all suits at law or in equity which may concern the subject-matter of this instrument, to retain and discharge counsel, to execute refunding bonds, statutory bonds, or bonds of any kind, nature, or description, to enter my appearance and waive notice in the matter of any final accounting, to indorse checks and other papers of whatsoever kind, to compromise claims, to execute releases and to execute all other suitable instruments in writing, to carry into effect the various powers herein granted, and to do and perform all other acts as fully and effectually as I might do or perform if personally present, with full power to appoint and discharge substitutes, hereby revoking all powers of attorney heretofore executed by me.

And for and in consideration of the sum of \$1 to me in hand paid, the receipt of which is hereby acknowledged, and in further consideration of services rendered and to be rendered and moneys to be advanced for court cost and other necessary expenses in this behalf by my said attorney in fact, I do hereby assign, transfer, and set over unto my said attorney in fact all of the subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of

Christine Sharbach, deceased, or which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney, coupled with an interest in the subject-matter thereof.

After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me through his corresponding bank.

In witness whereof I have hereunto set my hand and seal this 8d day of January A. D. 1918.

On January 22, 1918, L. O. Thieme executed a power of substitution in favor of Eugene W. Levy, an attorney at law of San Francisco, as follows: "Know all men by these presents: That I, the undersigned, L. O. Thieme, of the city of Chicago, state of Illinois, by virtue of the power and authority to me given in and by the letters of attorney dated January 3, 1918, of Sophia Todd, and January 3, 1918, of Louise Weber, do hereby substitute and appoint Eugene W. Levy, attorney at law of the city of San Francisco, in the county of San Francisco, and state of California, as the true and lawful attorney and substitute of myself and the said constituents named in the said letters of attorney, to do, execute, and perform all and every act and thing requisite and necessary to be done, as fully to all intents and purposes as the said constituents or I myself could do if personally present, hereby ratifying and confirming all that the said attorney and substitute hereby made, shall do in the premises by virtue hereof and of the said letters of attorney."

Pursuant to the foregoing substitution, Mr. Levy, on January 30, 1918, filed a notice of appearance in the proceedings in the estate of Christine Sharbach, deceased, as attorney for the petitioners herein; the will of the deceased having been admitted to probate on December

21, 1917. The estate consists entirely of stocks and bonds, and there is no litigation in connection with these legacies; the administration of the estate being purely formal. On November 11, 1918, notice was served upon Mr. Levy that petitioners would, on November 18th, following, apply to the superior court of the city and county of San Francisco for an order substituting T. E. K. Cormac, Esq., "as attorney for the said Sophia Todd and Louise Weber, respectively, in all proceedings in the matter of the estate of Christine Sharbach, deceased, in the place of the said Eugene W. Levy, Esq." The motion, which was heard and denied on April 21, 1919, after a number of continuances granted at the request of Mr. Levy, was "made on the ground that the appearance of the said Eugene W. Levy as attorney for the said Sophia Todd was unauthorized by the said Sophia Todd; and that the same is in furtherance of justice, and will be heard upon letters, affidavits, and consent of the said Sophia Todd, copies of which papers are hereto annexed, and other oral and documentary evidence." The notice of Louise Weber was in identical terms.

The letters and affidavits here referred to show that the petitioners on April 5, 1918, three months after executing the power of attorney to L. O. Thieme, and two months after Mr. Levy had filed an appearance, executed a power of attorney in favor of T. E. K. Cormac, Esq., of San Francisco, "by which he is empowered to represent us in California, and elsewhere in America, for all purposes connected with estates of said decedent, and by which we expressly canceled, withdrew, and revoked the power of attorney we had formerly given to L. O. Thieme & Company . . . and under which they or any substitutes or agents of theirs might be claiming to represent us in California or elsewhere." (Italics ours.)

Petitioners contend that under § 284 of the Code of Civil Procedure

they "have the absolute right to change their attorney at any stage of the proceedings," and that the motion for substitution of attorneys made to the court below, supported by the letters and affidavits showing that the power of attorney held by Mr. Levy had been revoked by petitioners, should have been granted. Section 284 reads:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

"(1) Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes.

"(2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

It is evident that the motion herein was made under subdivision 2.

It is urged on behalf of respondents that, since the motion for substitution specified particularly that petitioners' present attorney was not authorized to represent them, they are confined to that ground here, and that if it be found that the allegation was not well taken, the order denying the motion must be upheld and the writ denied. In other words, respondents argue that if it be found that Mr. Levy was at any time authorized to represent the petitioners the writ must be denied without going into the question whether that authority has been revoked. In support of this contention respondents cite *Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670. In that case application was made for a writ of mandate for the substitution of attorneys, which was denied on the ground that the petition did not state facts authorizing the granting of the writ; namely, it did not appear from the record that notice, as required by subdivision 2, § 284, Code of Civil Procedure, and § 1005, *id.*, had been given to the attorney there sought to be substituted out of the case. The court said: "While mandate will lie to compel judicial action, and in some instances even specific action (Wood

*v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766), and is an appropriate remedy in a proper case to obtain the relief here sought (*People ex rel. Downer v. Norton*, 16 Cal. 436), it may not be invoked to require a judicial officer to act in a particular way, except it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse."

While it is true, as we have pointed out, that the motion herein was made on the ground "that the appearance of the said Eugene W. Levy as the attorney" for the petitioners "was unauthorized" by them, it is also true that the motion was made "upon letters, affidavits, and consent" of the petitioners, which documents were attached to and made a part of the motion. These, therefore, became a part of the facts which, under the plain terms of the decision in *Rundberg v. Belcher*, *supra*, are to be considered by this court in making the "legal deduction" as to whether "the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse." As we have seen, the import of these documents is that the present attorney was not authorized by the petitioners to represent them in the probate proceedings, and, further, that the power of attorney under which he claimed authority to act had been revoked by them.

Respondents contend that the power of attorney which Mr. Levy holds as the substitute of Mr. Thieme is irrevocable; that it is made so by the language: "I do hereby assign, transfer, and set over unto my said attorney in fact all of the said subject-matter of this power of attorney, that is to say, of all property, real or personal, to which I may be entitled out of the estate of Christine Sharbach, deceased, or

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which arise out of the death of said deceased in any manner whatsoever, it being my intention that this power of attorney shall be construed as a power of attorney coupled with an interest in the subject-matter thereof."

It is well settled that a client has a right to change his attorney at any time, except where the attorney has an interest in the subject-matter of the suit. In 6 C. J. at page 677, it is said: "This right of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney has been given (Carver v. United States, 7 Ct. Cl. 499; People ex rel. Downer v. Norton, 16 Cal. 436; Crosby v. Hatch, 155 Iowa, 312, 316, 135 N. W. 1079), or the attorney has rendered valuable services under his employment (Gage v. Atwater, 136 Cal. 170, 68 Pac. 581), or the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action (ibid). There is an exception, however, where the attorney has acquired an interest in the property. Louque v. Dejan, 129 La. 519, 38 L.R.A. (N.S.) 389, 56 So. 427; Gulf, C. & S. F. R. Co. v. Miller, 21 Tex. Civ. App. 609, 58 S. W. 709; Wylie v. Coxe, 15 How. 415, 14 L. ed. 753."

It is said in 2 R. C. L. 957: "The right of a client to change his attorney at will is based on necessity in view both of the delicate and confidential nature of the relation between them, and of the evil engendered by friction or distrust. According to some decisions, an exception to the general rule as to the power of the client to discharge his attorney at will seems to exist where the power of the attorney is coupled with an interest in the cause of action. Louque v. Dejan, supra."

It becomes necessary, therefore, to consider what constitutes a power coupled with an interest, and whether the interest here given is such as to render the power irrevocable. What constitutes a power

of attorney coupled with an interest has been considered in numerous decisions. The leading case on the subject, however, is the decision rendered by Chief Justice Marshall in Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. In that case the owner of an interest in a certain vessel, then at sea, to secure a loan of money, executed to the lender contemporaneously with the loan a power of attorney authorizing him to sell the borrower's interest in the vessel, which power, by its terms, was to become void on payment of the loan. The borrower died before payment, and the question was presented whether his death operated to revoke the power. It was decided that the power was revoked by the death of the grantor. The general doctrine that a power must be exercised in the name of the principal, and does not survive his death, was held to be applicable. But the court, in the decision of the question, proceeded to consider the exception to the rule in cases where the power was coupled with an interest, and to define the meaning of that phrase. In a luminous statement the chief justice confined the scope of the exception to cases where, together with the power, there was vested in the donee an estate, right, or interest in the subject of the power, as distinguished from an interest in the proceeds of the power when exercised. In the former case he declared that the power would not be extinguished by the death of the creator of the power, because it attached to the estate of the donee in the subject thereof, and was capable of execution in his own name after the death of the principal, unlike cases where the power was unconnected with any interest in the thing itself, and the only interest was in the execution of the power. The learned chief justice said: "It becomes necessary to inquire, what is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised? Or is it an interest in that which is produced by the



exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

The doctrine thus enunciated has been adhered to in the following well-reasoned cases: *Barr v. Schroeder*, 32 Cal. 617; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Hammond v. Allen*, 2 Sumn. 387, Fed. Cas. No. 6,000; *Nicks v. Rector*, 4 Ark. 251, 280; *Schauber v. Jackson*, 2 Wend. 13, 54; *Terwilliger v. Ontario, C. & S. R. Co.* 149 N. Y. 86, 92, 43 N. E. 434; *Frederick's Appeal*, 52 Pa. 338, 342, 91 Am. Dec. 162; *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah, 313, 4 Mor. Min. Rep. 19; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *Louque v. Dejan*, 129 La. 519, 38 L.R.A. (N.S.) 389, 56 So. 427; *Gulf, C. & S. F. R. Co. v. Miller*, 21 Tex. Civ. App. 609, 53 S. W. 709; *Wylie v. Coxe*, 15 How. 415, 14 L. ed. 753; *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207.

In *Hartley's Appeal* a situation quite similar to the one in the present case was presented, the chief difference being that there the constituent did not assign her legacy to the attorneys in fact. In that case *Hannah Gallion* made to *Hartley* and *Minor* a power of attorney to

collect and receive all money and property coming to her as heir of *John Douglass*, deceased, with power to convey her interest in the real estate of the decedent, "the said *Hartley* and *Minor* to receive as compensation for their services herein one half of the net proceeds of my interest in said estate which may be collected or received by them as my attorneys, after paying all costs and expenses, they to receive no further compensation for any services they may render or expenses they may incur or pay as my attorneys." Subsequently she gave another power of attorney to one *Howland* for the same purpose, and in it revoked that to *Hartley* and *Minor*. The latter, as attorneys of *Hannah Gallion*, petitioned the court for a citation to the administrator of *Douglass's* estate to settle his account. This was objected to because of the power of attorney to *Howland*. On this ground the court refused to grant the citation, and dismissed the petition. *Hartley* and *Minor* appealed from this decree. The appellate court said: "There was no error committed by the court below in holding the power of attorney of *Hannah Gallion* to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong, or be coming, to her. For these services the attorneys were to have one half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, *there must coexist with the power an interest in the thing or estate to*

be disposed of or managed under the power. An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have advanced money and who it was agreed should be secured in that way.

"In the case in hand the power and the interest could not coexist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would ipso facto extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended." (*Italics ours.*)

But there are powers which the constituent cannot revoke, although they do not come within Chief Justice Marshall's definition of a power coupled with an interest. This is clearly recognized by him in *Hunt v. Rousmanier*, supra. After stating the general rule that a power may at any time be revoked by the party conferring it, he says: "But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law."

An instance of a letter of attorney given as security for money is presented in *Norton v. Whitehead*, 84 Cal. 264, 18 Am. St. Rep. 172, 24 Pac. 154. In that case a contractor borrowed from the plaintiff, his foreman on the work, various sums of money to enable him to carry on the contract. Afterwards he executed to the plaintiff an assignment of all moneys due or to become due "for any work I may perform, the assignment to remain good and in full force until all notes due, or which are to become due . . . from me are paid." Later

he gave plaintiff a power of attorney reciting that "whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid" to plaintiff, and giving him power to collect such moneys. These instruments were deposited with the other parties to the contract. The contractor died and the work was completed by his administrator. It was held that the plaintiff had such an interest in the moneys due on the contract as to prevent a revocation of the power on the contractor's death, and that the plaintiff was entitled to collect it as against the administrator.

But it has been held that, even though the power of attorney is made in terms irrevocable, that fact will not prevent revocation by the constituent, where the power is not at the same time coupled with an interest or given as security for the payment of money, or for the performance of an act deemed of value. *Blackstone v. Buttermore*, 58 Pa. 266; *Bonney v. Smith*, 17 Ill. 531; *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213; *Martin v. Lamkin*, 188 Ill. App. 481, 487; *McKellop v. Dewitz*, 42 Okla. 220, 52 L.R.A. (N.S.) 255, 140 Pac. 1161; 6 C. J. 677. In *Blackstone v. Buttermore*, supra, it was said: "A mere power, like a will, is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for the service of executing the power will not make the power irrevocable."

It is well settled, therefore, that in order to constitute an irrevocable power of attorney there must coexist with the power a beneficial interest in the subject thereof which is enforceable in the name of the attorney in fact, and will survive the constituent; or the power must be given as security for

Power—right to  
revoke.

—what makes  
power  
irrevocable.

the payment of a sum of money other than that which arises as compensation through the exercise of the power; or as security for the performance of some act of value.

It now remains for us to examine in the light of the foregoing authorities the power of attorney in the instant case, and to determine whether or not it is coupled with such an interest, or given as security, either for the payment of money or the performance of an act, so as to make it irrevocable. As we have seen, the power of attorney in this case forms a part of a contract which in express terms purports to assign to the attorney in fact all of the petitioner's interest in the estate, and at the same time expressly stating that it is the intention of the constituents that it shall be a power of attorney coupled with an interest. The letter then goes on to say: "After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me through his corresponding bank."

Respondents in their answer on this point have this to say:

"There is an inconsistency between this clause and the preceding assignment of the entire interest of the legatee, because if such assigned interest were deducted, there would be nothing left to remit. If the two clauses were deemed irreconcilable, the instrument would be interpreted most strongly against the petitioner, the promisor. Civ. Code, § 1654. Consequently the assignment would be upheld. The inconsistency cannot be permitted to defeat the plain terms of assignment and the paramount provision of the instrument.

"But the inconsistency is apparent and not real. When aided by the settled rule of construction that repugnancy must be reconciled so as to give effect to the repugnant clauses, subordinate to the general intent and purpose (Civ. Code, § 1653), the meaning of the power of attorney becomes plain. The pre-

dominant purpose to create a power coupled with an interest, and thus an irrevocable agency, is expressly declared. To insure this result the entire interest is transferred. But the assignment is not intended to be absolute so as to divest the petitioner of all further claim to her legacy. The transfer is really one in trust pursuant to which the attorney in fact takes the legal title with a corresponding duty to account. He himself has a beneficial interest sufficient at least to pay for his services and outlays."

That there is an inconsistency between the two clauses is clear. Nor do we question respondents' statement of the rule of construction that under such circumstances the repugnant clauses must be reconciled so as to give effect to the repugnant clauses in keeping with the general intent or predominant purpose of the instrument. But we cannot agree with respondents in their statement of what is the "predominant purpose" or "paramount provision" of the instrument. It is clear to us that the chief purpose of the constituents here was not, as respondents contend, "to create a power coupled with an interest and thus an irrevocable agency," but rather to make an assignment in trust to the attorney in fact in order to facilitate the collection of the legacies, and to insure the reimbursement of the attorney in fact for his outlays, and for compensation for his services. Now, since the reimbursements and compensations were to be taken from the legacies, it may be conceded that they are to that extent an interest in the subject of the power, and that the interest arose when the assignment was made; that is to say, the power and the interest concurred. The assignment, in other words, created a present interest in the legacies, but only in the sense we have indicated,—to the extent of reimbursements and compensation. But this does not render the power

—construction—  
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irrevocable. The mere expression, "a power coupled with an interest," does not necessarily render the power irrevocable. It is plain from the foregoing authorities that the interest which the attorney in fact must

have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable. Such is not the case here. The interest in the proceeds of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than an assurance that the attorney in fact will be reimbursed and compensated out of the legacies when collected. A revocation of the power would in no way deprive the attorney in fact of any right, for the reason that he is entitled to be reimbursed for any sums expended by him and to be compensated out of the legacies for any services rendered under the power up to the time of revocation. Nor can the creation of a trust, which has placed the bare legal title in the attorney in fact, with a corresponding duty to account, be considered upon any theory as confer-

ring upon the attorney in fact such a beneficial interest as to render the power irrevocable. Fairly considered, the contract herein creates a trust with a corresponding duty to account. It has no meaning other than this. The case would be quite different if, in addition to providing for reimbursements and compensation, the contract vested in the attorney in fact a definite share in the ownership of the legacies. In such an event, the power would be "ingrafted upon an estate in the thing," and under such a contract to permit the revocation of the power and substitute the attorney in fact out of the case would be to prevent him from exercising the right of property.

Petitioners urge that the power of attorney is unconscionable and should not, therefore, be recognized in equity, since it professes to assign all of petitioners' legacy without consideration. It is likewise contended that the power of attorney was secured through fraud and misrepresentation. It is sufficient to say that such questions have no proper place in the determination of this proceeding. The order of substitution should have been made.

Let a peremptory writ of mandate issue.

We concur: Angellotti, Ch. J.; Shaw, J.; Olney, J.; Lennon, J.; Wilbur, J.; Melvin, J.

## ANNOTATION.

### Revocability of power or agency to collect interest in estate.

To the general rule of law that a principal may revoke the power of his agent or attorney at his mere pleasure or caprice, there is a well-defined exception to the effect that where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the

law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the power or not. See 21 R. C. L. 887.

The question with which the present annotation is concerned is whether this exception to the rule is applicable to a power or agency to collect an interest in an estate. The determination of that question with respect to a given case seems to depend entirely on the facts of that case, and therefore

no general doctrine can be evolved from the authorities dealing with the particular kind of agency under consideration.

In each of the following cases it was held, as in the reported case (*TODD v. SUPERIOR CT.* ante, 938), that the agency or power of attorney involved was not one coupled with an interest, and therefore was revocable: *Mansfield v. Mansfield* (1827) 6 Conn. 559, 16 Am. Dec. 76; *Weaver v. Richards* (1906) 144 Mich. 395, 6 L.R.A. (N.S.) 855, 108 N. W. 382; *Healy v. Healy* (1912) 76 N. H. 504, 85 Atl. 156; *Hartley's Appeal* (1866) 53 Pa. 212, 91 Am. Dec. 207; *Connor v. Parsons* (1895) — Tex. Civ. App. —, 30 S. W. 83.

In *Hartley's Appeal* (1866) 53 Pa. 212, 91 Am. Dec. 207, supra, the power of attorney under consideration provided that the attorneys were to receive as compensation for their services, "one half of the net proceeds of my interest in said estate which may be collected or received by them as my attorneys, after paying all costs and expenses, they to receive no further compensation for any service they may render or expenses they may incur or pay as my attorneys." It was held that the stipulation created merely an ordinary agency and was revocable. The court said: "It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong or be coming to her. For these services the attorneys were to have one half of the net proceeds of what they might receive or recover for her. The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the plea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed

under the power. . . . In the case in hand the power and the interest could not coexist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would ipso facto extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended."

In *Mansfield v. Mansfield* (1827) 6 Conn. 559, 16 Am. Dec. 76, it was held that a power of attorney "to obtain, sue for, and prosecute, and settle and discharge, and finally adjust, all such claim or claims" as the grantor of the power might have against the estate of her late husband, and to retain all expenses and fees incurred in connection with its execution, and to account for what remained, created a mere naked power, revocable at the will of the grantor.

In *Healy v. Healy* (1912) 76 N. H. 504, 85 Atl. 156, it appeared that the defendants, as heirs of an estate, joined in a power of attorney, authorizing a cousin to administer the estate and distribute their respective shares, on the erroneous assumption that the plaintiffs, as uncles, aunts, and cousins of the deceased were entitled to participate in the distribution of the estate. Discovering their error, the defendants revoked the power. It was contended that the power was irrevocable, it being, in effect, an agreement for the distribution of the estate, and that the defendants were estopped to deny that the plaintiffs were also heirs. It was held that the power was revocable.

In *Connor v. Parsons* (1895) — Tex. Civ. App. —, 30 S. W. 83, the power of attorney involved authorized the attorney "to bring suit for, settle up, compromise, release, obtain, or recover interest" in the estate inherited from the parents of the principal. It appeared that the principal also entered into another written agreement of even date, authorizing the attorney to reimburse himself for all expenditures made in connection with the execution of the power, and to retain, as his compensation, one half of the

proceeds. A conveyance was made under the power subsequent to the death of the principal. In an action to set aside this conveyance it was held that the power was not coupled with an interest, and hence the authority created by it was revoked by the principal's death.

In *Weaver v. Richards* (1906) 144 Mich. 395, 6 L.R.A. (N.S.) 855, 108 N. W. 382, a power given by several heirs to "ask, demand, recover, and receive," etc., all interest in an estate, was held to have been revoked by the death of one of the heirs, even though the power was expressly made irrevocable, and the salary and expenses of the agent were to be paid out of the proceeds. To the same effect, see the reported case (*TODD v. SUPERIOR CT. ante*, 938).

However, where the subject-matter of a power or agency to collect an interest in an estate was conveyed by way of security, it was held that the power was irrevocable. *Babrowsky v. United States Grand Lodge, O. B. A.* (1908) 129 App. Div. 695, 113 N. Y. Supp. 1080. In that case it appeared that a husband, during his lifetime, was a member of a fraternal benefit organization. At his death, his widow became entitled to \$500, to be collected by assessment from the members. To secure certain sums of money paid out for her benefit, the widow executed a power of attorney to her creditor, empowering him to collect the aforesaid benefit. After the widow's death, the lodge paid the benefit to the attorney. It was claimed by the heirs that the power of attorney was revoked by her death, and that the lodge had no right to pay the benefit to the attorney. The court, however, treated the power as being, in effect, an assignment of the

fund, and held that it was a power coupled with an interest which survived the death of the creator.

It seems that a principal may become estopped to assert the revocation of a power of attorney to collect an interest in an estate, which otherwise would be revocable. *Butcher v. Quinn* (1903) 86 App. Div. 391, 83 N. Y. Supp. 700. In that case it appeared that the plaintiff executed a power of attorney "expressly retaining and employing the attorney to ask, demand, and sue for all moneys belonging to the estate, due to them or any of them." In accordance with the power the attorney instituted suit, and subsequently the plaintiff revoked the power of attorney, but, by advice of new counsel, permitted the suit to proceed to trial and judgment without notifying the defendants. An adverse judgment was rendered, and the plaintiff claimed that the proceedings were unauthorized, and asked to have the judgment set aside. The court said: "Having intentionally permitted the suit to proceed to judgment, and the mandate of the judgment to be carried out without any intimation to the other parties of her objections or her dissatisfaction, the plaintiff has lost the right to now obtain redress at their expense."

It has also been held that a court of equity would set aside an otherwise irrevocable power or agency to collect an interest in an estate where it appeared that its procurement had been fraudulent, and a purchaser under the power was charged with notice of the defect in the agent's title, an express revocation having been recorded. *Merrill v. Bradley* (1908) 52 Tex. Civ. App. 527, 121 S. W. 561. A. S. M.

W. H. A. SHERMAN, Appt.,

v.

PERCY L. HARLEY et al., Respts.

*California Supreme Court (Dept. No. 1)—July 30, 1918.*

(178 Cal. 584, 174 Pac. 901.)

**Corporation — stock issued for property at discount — effect of knowledge of creditors.**

1. One giving credit to a corporation with full knowledge that its stock was issued for property worth less than the par value of the stock cannot hold the stockholders liable for the unpaid balance of the value of the stock.

[See note on this question beginning on page 972.]

—stockholder's liability — stock issued for less than par value.

2. When, at the inception of its enterprise, a corporation issues its stock for a consideration in money or property of admitted value less than the par value of the stock, the subscribers are liable to the corporation and its creditors for the unpaid portion of the subscription.

[See 7 R. C. L. 359.]

**Application of payments — balances due on unpaid stock subscriptions — unenforceable claim.**

3. One holding against a corporation a judgment upon two notes for the payment of one of which the holder cannot look to the unpaid balances of stock subscriptions cannot, upon collecting by voluntary payments such unpaid balances, apply them to such note so as to leave the other note and judgment a valid claim against the unpaid balances of other subscribers.

[See 21 R. C. L. 93.]

**APPEAL** by plaintiff from a judgment of the Superior Court for Los Angeles County (Finlayson, J.) in favor of defendants in an action brought to recover the amounts alleged to be due upon defendants' liability as stockholders for the unpaid portion of their subscription to the stock of a corporation against which plaintiff held two judgments. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Stutsman & Stutsman and Maurice F. Enderle, for appellant:

Plaintiff as the owner of the two judgments in question had the right to apply the compromise payments made to him by certain defendants equally upon each judgment.

Wendt v. Ross, 33 Cal. 650; Byrnes v. Claffey, 69 Cal. 120, 10 Pac. 321; Harrison v. Woodward, 11 Cal. App. 15, 103 Pac. 933; Sere v. McGovern, 65 Cal. 244, 3 Pac. 859.

It was not only the right, but it was the duty, of the pledgee to bring suit on the pledged note, for the purpose of collection of the money due thereon.

Fernandez v. Tormey, 121 Cal. 515, 53 Pac. 1119; McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068.

Where property sold is a negotiable instrument and all the statutory requirements have been complied with,

the purchaser takes absolute title, even against the pledgeor.

Brittan v. Oakland Bank, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

The fact that the defendant stockholders may have purchased their stock "in the open market" would be of no avail.

O'Dea v. Hollywood Cemetery Asso. 154 Cal. 53, 97 Pac. 1; Perkins v. Cowles, 157 Cal. 625, 30 L.R.A. (N.S.) 283, 137 Am. St. Rep. 153, 108 Pac. 711.

Mr. G. E. Harpham, for respondents Harley et al.:

Plaintiff as trustee for Fairbanks, Morse, & Company, the owners of one judgment as a direct debt, and the holder of the other as collateral to the direct debt, stands in their shoes, and his rights must be measured by their rights.

McArthur v. Magee, 114 Cal. 129, 45 Pac. 1068; Haber v. Brown, 101 Cal. 453, 35 Pac. 1035; R. H. Herron Co. v. Shaw, 165 Cal. 671, 133 Pac. 488, Ann. Cas. 1915A, 1265.

Mr. William Ellis Lady, for respondents Humphries et al.:

Plaintiff could not make an election as to how the collections he made should be applied, because there was only one obligation.

Murdock v. Clarke, 88 Cal. 384, 26 Pac. 601; Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

Messrs. G. F. McCulloch and T. R. Wallace also for respondents.

Richards, Judge pro tem, delivered the opinion of the court:

This is an appeal from a judgment in the defendants' favor, in an action brought by plaintiff as the holder of two judgments against a corporation known as the Oleum Development Company, to recover from said defendants the several amounts claimed to be due upon their stockholders' liability for the unpaid portion of their subscription to the stock of the said corporation. The facts of the case, as embodied in the findings of the court, may be summarized as follows:

The Oleum Development Company was originally incorporated under the name of the Clark Copper Company and under the laws of the state of Arizona, but for the purpose of doing business in the state of California, with a capital stock of \$1,250,000, divided into that number of shares with a par value of \$1 per share. Shortly after its organization the corporation purchased six undeveloped mining claims in the county of Inyo, California, and as the purchase price thereof issued in one certificate the entire amount of its said capital stock as fully paid-up stock, delivering the same to one H. L. Percy, as one of the owners and as trustee for the other owners of said mining claims. The court finds that the actual value of the mining claims was never in excess of \$29,333, and that the directors of the corporation knew this fact at the time of their acquisition, but believed in good

faith that they could be developed in a value equal to the capitalization of the corporation. Upon their attempted development this did not prove to be the case, as a result of which said Percy returned the certificate of stock which he had received as the purchase price of said mining claims, to the treasury of the corporation, and they thereafter issued to said Percy and his associates 775,000 shares of said stock to be used as promotion stock. A little later Percy and his associates returned to the treasury 695,000 shares of this issue in order to set at rest some dissatisfaction, and there was presently issued to Percy and his associates 295,000 of these shares, for which they paid into the treasury of the corporation the sum of \$40,000. Not long thereafter the corporation sold 165,000 shares of its capital stock then in its treasury to other persons, receiving therefor the sum of 10 cents per share. Out of this somewhat confused series of transactions the court finds that the corporation emerged with an issued capital stock of 460,000 shares. For 295,000 shares it had received in property and money from said Percy and his associates an amount not exceeding 37.05 cents per share, and for the remaining 165,000 shares of stock it had received the sum of 10 cents per share. All of this stock was issued as fully paid-up stock by the corporation, and the defendants in this action became the owners thereof, either directly by purchase from the corporation or from Percy and his associates, or mediately through purchase in the open market. In the meantime the name of the corporation was changed to the Oleum Development Company, and under this latter name the corporation, after the above transactions had been consummated, executed and delivered two promissory notes for value received, each approximately for the sum of \$10,000, one of said notes being made and delivered to a corporation known as Fairbanks, Morse, & Company, and the other being



made and delivered to a corporation known as the Fielding J. Stilson Company. Fielding J. Stilson himself was, it appears, the vice president and general manager of the Oleum Development Company. Subsequent to the making and issue of the said last-named note, he caused the said Fielding J. Stilson Company to transfer it to the Fairbanks-Morse Company as collateral security for the first-named note. Neither of these notes was paid, in consequence of which the Fairbanks-Morse Company assigned them to the plaintiff in this action for collection. The plaintiff thereupon brought separate actions upon each of these notes against their maker, and recovered two separate judgments thereon. Judgment upon the note given to the Fairbanks-Morse Company being for the sum of \$10,269.17 and judgment upon the note given to the Fielding J. Stilson Company being for the sum of \$9,785.70. Executions upon each of these judgments being returned unsatisfied, the plaintiff commenced this action against the stockholders of the Oleum Development Company to recover the amounts alleged to be due from each upon the amount of his unpaid subscription to the capital stock of the said corporation. After the commencement of this action, and before the trial thereof, the plaintiff collected from a considerable number of the stockholders joined as defendants herein, other than the respondents herein, various sums of money upon their liability as stockholders, under § 322 of the Civil Code. Said sums of money so collected aggregated the sum of \$6,970.83. The plaintiff, also during the pendency of this suit, collected from various other stockholders other than respondents herein sums aggregating \$11,676.95 upon their alleged liability for the balance of their unpaid subscriptions. In making these payments to the plaintiff these stockholders did not make any direction as to how the money so paid by them should be applied upon the two judgments

held by plaintiff against this corporation, nor did the corporation itself make any direction as to the application of these payments by its stockholders on account of its obligations, nor did the Fielding J. Stilson Company make any direction or request that the moneys collected on account of the judgment which was based upon the note which it had assigned to the Fairbanks-Morse Company as collateral security for the note, made directly to the corporation, be applied to the payment and satisfaction of the Fairbanks-Morse Company judgment. Accordingly the plaintiff, as these several amounts were collected from the stockholders with whom he settled, applied the same equally on account of the two judgments held by him. The foregoing facts were all found by the court upon the trial of this action, and were based upon sufficient proofs. In addition thereto, evidence was offered on behalf of the defendants, from which the court made a further finding to the effect that at the time the Fielding J. Stilson Company extended the credit to the Oleum Development Company for which the note to it was given, it was fully aware of the transactions regarding the original issue of the capital stock of the Clark Copper Company, as above set forth, and knew that the stock issued by it in the course of said transaction was issued as fully paid-up stock, and knew that at the time of its issuance in payment for said unpatented mining claims they were not worth in excess of \$29,333, and "that said Fielding J. Stilson Company did not give credit to the Oleum Development Company upon the assumption that its stock issued as fully paid-up stock had been paid for in property equal in cash value to the par value of the stock issued therefor, or upon the assumption that said Oleum Development Company had received for the whole issue of its capital stock aught other than six undeveloped unpatented mining claims of a value not exceeding \$29,333; that said Fielding J.

Stilson Company knew that the defendants bought said Oleum Development Company stock as fully paid-up stock." As a conclusion of law from the foregoing findings of fact the court found:

"That plaintiff herein is not entitled to recover from the defendants any sum or sums upon their liability as such stockholders to the said Oleum Development Company, under his said judgment recovered in cause No. 92,740, for the reason that the said Fielding J. Stilson Company, a corporation, did not extend credit to the said Oleum Development Company, a corporation, in reliance upon the assumption that full par value had been received by the said last-named corporation for the stock it had issued as fully paid.

"That plaintiff herein, as judgment creditor under causes Nos. 92,740 and 92,741, did not have the right to apply any portion of said sum of \$11,676.95, collected as above stated, upon the amount due under the judgment obtained in cause No. 92,740, and that said plaintiff did not have the right to direct his said attorneys to make application of any portion of said sum so collected in satisfaction of the judgment obtained in said cause No. 92,740, for the reason, firstly, that he was not entitled to recover against the stockholders under said judgment; and, secondly, that the relation of debtor and creditor does not exist between defendant stockholders of a corporation and a judgment creditor thereof in an action to enforce the payment by such creditor of the unpaid balance due upon the par value of the capital stock from such stockholders to such corporation, the right to make application by a creditor existing only where such relation exists. And the court further concludes that because the amount so collected as above exceeds the amount due to plaintiff under his judgment in cause No. 92,741, plaintiff is not entitled to recover anything in this action from said defendants, and judgment is accordingly ordered to be entered herein

in favor of said defendants and against plaintiff for their costs."

Upon the basis of these findings and conclusions of law the court rendered judgment in favor of the defendants.

The appellant makes two points upon appeal from this judgment, neither of which, we think, can be sustained. The first of these is that as to the so-called Stilson note and judgment the fact that the Fielding J. Stilson Company, at the time it extended credit to and took the note of the Oleum Development Company, was fully aware of the transactions through which the corporation had caused to be issued the large portion of its capital stock as fully paid-up stock for a consideration in property and value amounting to less than one third in value of the par value of its stock heretofore issued, was insufficient to justify a conclusion of law that the plaintiff was not entitled to recover, on the Stilson note and judgment, anything from these defendants upon their stockholders' liability for the unpaid portion of their subscription.

It may not be questioned that as a general rule the law is well settled in this state that when, at the inception of its enterprise, a corporation issues its stock for a consideration in money or property of admitted value less than the par value of such stock, the subscribers to such stock giving such consideration are liable to the corporation and to its creditors for the unpaid portion of the subscription. *Vermont Marble Co. v. Declez Granite Co.* 135 Cal. 579, 56 L.R.A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265; *J. F. Lucey Co. v. McMullen*, — Cal. —, 173 Pac. 1000. The basis of this doctrine, as is well stated in the case of *R. H. Herron Co. v. Shaw*, *supra*, is that credit is given in reliance on the presumption that full par value has been re-

Corporation—  
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issued for less  
than par value.

ceived by the corporation for the stock it has issued as fully paid.

Where, however, it appears, as it does in this case, from the pleadings, the uncontradicted proofs, and the clear and positive findings of the court, that the particular creditor

—stock issued for property at discount—effect of knowledge of creditors.

at the time the credit was given extended the credit with full knowledge of the difference between the par value of the stock and the value of the property received for it, an exception to the rule exists. This exception and the reason for it are well stated in 4 Thompson on Corporations, 2d ed. § 3983, as follows: "On principle and authority, a creditor who deals with the corporation with full knowledge of the manner in which its shares have been paid for is not defrauded by the taking of overvalued property as payment for stock, and hence is estopped to raise that question."

And in Morawetz on Private Corporations, vol. 2, § 829, the rule is stated as follows: "So if the capital of a corporation was declared to be fully paid up in consideration of specific property of less value than the amount of the capital, a person who should voluntarily deal with the company knowing the character and value of the property so transferred to the company would have no claim upon the shareholders for any further contribution of capital. By voluntarily dealing with the company under the circumstances he must be deemed to have assented to the existing arrangement; the company and its shareholders having offered to contract only on these terms."

In 10 Cyc. 478, title Corporations, the author, in discussing this matter, says: "On whatever theory the conclusion is placed the rule seems to be that those who extend credit to the corporation with full knowledge as to the manner in which its shares have been paid for, if at all, cannot charge its shareholders with any supposed difference between real value and fictitious value in case of payment in property."

See also *Finletter v. Appleton*, 195 Pa. 349, 45 Atl. 1063; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198; *Easton Nat. Bank v. American Brick & Tile Co.* 70 N. J. Eq. 782, 8 L.R.A. (N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Lea v. Iron Belt Mercantile Co.* 119 Ala. 271, 24 So. 28. It would thus seem that the foregoing exception to the general rule regarding the liability of stockholders for their unpaid subscriptions must be given full application to the case at bar. It follows that the Fielding J. Stilson Company had no right of recourse upon the stockholders of the Oleum Development Company; therefore, that the plaintiff, as the transferee of their note after maturity, had no such right of recovery.

This brings us to the second point made by appellant, wherein it is contended that the trial court erred in refusing to approve the plaintiff's effort to apply the moneys received by him from those stockholders who settled with him on account of their alleged liability for unpaid subscriptions, equally to both of the judgments upon which this action was predicated. The total amount so received by plaintiff on account of his claim against said stockholders for their unpaid subscriptions was the sum of \$11,676.95, which would have more than sufficed, had it all been applied to the Fairbanks-Morse judgment, to have fully satisfied the same; that it should

have been so applied seems incontrovertible in view of our above conclusion that the holders of the Stilson note and of the judgment based thereon had no right of recovery against any of the stockholders of the Oleum Development Company on account of their unpaid subscriptions. Having no such right of action, the plaintiff could have had no right of direc-

Application of payments—balances due on unpaid stock subscriptions—unenforceable claim.

tion of any sums paid by such stockholders to the payment of an obligation for which they were not liable, but was bound to apply the whole of such sums so received to the settlement of the obligation and judgment upon which they were liable, namely, upon the Fairbanks-Morse judgment. The court, therefore, rightly directed that such application of all of the sums so received by the plaintiff should be made; and since the effect of such application would be to fully pay the amount of said last-named judgment, and since, as we have already seen, the respondents herein were not liable upon the indebtedness of the corporation evidenced by the Stilson judgment, it follows that the conclusion of the trial court that the

plaintiff was not entitled to recover upon either judgment was correct. Judgment affirmed.

Shaw and Sloss, JJ., concur.

**NOTE.**

The decision in the reported case (SHERMAN v. HARLEY, ante, 950), that one who extends credit to a corporation with full knowledge that its stock was issued for property worth less than par value of stock cannot hold the stockholders liable, is in accord with the weight of authority, as shown in the annotation following DU PONT v. BALL, post, 972, on creditor's knowledge that stock is unpaid as affecting stockholders' liability.

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T. COLEMAN DU PONT et al., Appts.,

v.

JAMES FRANK BALL et al., Receivers of the Arlington Hotel Company.

*Delaware Supreme Court — November 20, 1918.*

(— Del. —, 106 Atl. 39.)

**Estoppel — to enforce stockholder's liability.**

1. A creditor of a corporation is not estopped to enforce the statutory liability of stockholders for the unpaid amount of their subscriptions by assisting or acquiescing in the issuance of the stock as full paid and non-assessable, although it is not paid for in fact.

[See note on this question beginning on page 972.]

**Receiver — insolvent corporation — stockholder's liability — statutory remedy.**

2. A provision in a general corporation law for an action at law or a suit in equity to enforce the liability of stockholders for the benefit of creditors does not destroy the existing equitable remedy of a bill in equity for the appointment of a receiver on the ground of insolvency.

[See 7 R. C. L. 383.]

— necessity of unsatisfied judgment.

3. A judgment and execution returned unsatisfied are not necessary to establish the insolvency of the corporation in order to permit a suit against the stockholders in a proceeding in equity for the appointment of a receiver

for the corporation on the ground of its insolvency.

[See 23 R. C. L. 16.]

**Corporation — unpaid stock — trust fund.**

4. Unpaid stock of a corporation constitutes in equity a trust fund for the benefit of creditors of the corporation.

[See 7 R. C. L. 356.]

— unpaid stock as assets.

5. Unpaid stock of a corporation constitutes assets which may be collected by a receiver of the corporation in case of its insolvency.

[See 7 R. C. L. 356.]

— agreement that stock shall not be paid for — ultra vires.

6. An agreement by a corporation

Ch. 213, 80 Atl. 666; *Kimball v. New England Roller Grate Co.* 69 N. H. 485, 45 Atl. 253.

If a supposed holder of spurious stock can exercise none of the rights or privileges of a stockholder, it must necessarily follow that he cannot be held liable, as an unpaid stockholder, to pay the claims of creditors of the corporation, in case of insolvency or otherwise.

*Union R. Co. v. Sneed*, 99 Tenn. 1, 41 S. W. 364; *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665; *Winters v. Armstrong*, 37 Fed. 508; *Schierenberg v. Stephens*, 32 Mo. App. 314; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 222, 40 L. J. C. P. N. S. 117, 28 L. T. N. S. 854, 19 Week. Rep. 505.

The unpaid common stockholders of Arlington Hotel Company are not liable in any proceeding to pay the debts of those creditors who extended credit to the company with knowledge of the facts and circumstances under which the common stock was issued.

*Easton Nat. Bank v. American Brick & Tile Co.* 70 N. E. Eq. 722, 64 Atl. 1095; *Cook, Corp.* §§ 42 et seq.; *Clark, Corp.* §§ 146, 148; 2 *Clark & M. Corp.* §§ 1262 et seq.; 4 *Thomp. Corp.* §§ 3417-3422, 3913, 3924, 5021-5025; *Rickerson Roller Mill Co. v. Farrell Foundry & Mach. Co.* 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554; *Great Western Min. & Mfg. Co. v. Harris*, 63 C. C. A. 51, 128 Fed. 321, affirmed in 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L.R.A. 679, 18 Am. St. Rep. 510, 44 N. W. 198; *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L.R.A. 470, 81 Am. St. Rep. 637, 50 N. W. 1117; *Downer v. Union Land Co.* 118 Minn. 410, 129 N. W. 777; *State Trust Co. v. Turner*, 111 Iowa, 664, 53 L.R.A. 136, 82 N. W. 1029; *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Utica Fire Alarm Teleg. Co. v. Waggoner Watchman Clock Co.* 166 Mich. 618, 132 N. W. 502; *Miller v. Higginbotham*, 29 Ky. L. Rep. 547, 93 S. W. 655; *McDowell v. Lindsay*, 213 Pa. 591, 63 Atl. 130; *Lea v. Iron Belt Mercantile Co.* 147 Ala. 421, 8 L.R.A. (N.S.) 279, 119 Am. St. Rep. 93, 42 So. 415; *Easton Nat. Bank v.*

*American Brick & Tile Co.* 8 L.R.A. (N.S.) 271, note.

In the pending receivership cause, the unpaid stockholders of Arlington Hotel Company cannot be held liable to the creditors for interest on their claims after the date of the decree appointing the receivers.

*Blair v. Clayton Enterprise Co.* 9 Del. Ch. 95, 77 Atl. 740; 5 *Thomp. Corp.* 2d ed. § 6446; *Lippitt v. Thames Loan & T. Co.* 88 Conn. 185, 90 Atl. 369; *Tredegar Co. v. Seaboard Air Line R. Co.* 105 C. C. A. 501, 183 Fed. 289.

The appellant Coleman Du Pont cannot equitably be held liable under the chancellor's decree for all the claims of creditors of the Arlington Hotel Company.

*Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104.

Messrs. *Saulsbury, Morris, & Rodney* for appellant Blackstone.

Messrs. *John R. Nicholson* and *Henry H. Glassie*, for appellees:

The capital stock of a corporation is a trust fund for the payment of its creditors.

*Upton v. Tribilcock*, 91 U. S. 45, 47, 23 L. ed. 203, 204; *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. ed. 220, 222.

A simulated payment for stock is not valid as to creditors.

*Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Crawford v. Rohrer*, 59 Md. 599.

Directors have no power to release a holder of stock to the prejudice of the creditors.

*Hawley v. Upton*, 102 U. S. 314, 316, 26 L. ed. 179, 180; *Webster v. Upton*, 91 U. S. 65, 71, 23 L. ed. 384, 387.

It is not necessary that the person to be charged as shareholder should have subscribed for the stock, much less that the stock should have been issued or tendered to him. It is sufficient that the relation of the shareholder is established between him and the company.

*Hawley v. Upton*, supra; *Webster v. Upton*, 91 U. S. 65, 67, 68, 23 L. ed. 384, 386, 387; *Handley v. Stutz*, 139 U. S. 417, 427, 35 L. ed. 227, 234, 11 Sup. Ct. Rep. 530.

The liability to creditors for the full par value of the stock remains as an incident of the holding of stock, unless and until it passes into the hands of bona fide holders for a valuable consideration, and without notice.

*Sanger v. Upton*, 91 U. S. 56, 60, 23 L. ed. 220, 222; *Webster v. Upton*, 91 U. S. 65, 69, 23 L. ed. 384, 387; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 183, 39 N. E. 725; *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449, 20 N. W. 764.

Where stock is issued upon a money consideration, the obligation resting upon the holder of it is to contribute to the payment of the corporation's debts the total amount called for by the shares, whatever be the amount for which the corporation stipulated with him to issue it.

*Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. ed. 968, 973.

The taking of property at an exaggerated estimate of its value raises a strong presumption that the valuation was not made in good faith, but with a fraudulent purpose.

*Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 345, 30 L. ed. 420, 421, 7 Sup. Ct. Rep. 231; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 183, 39 N. E. 725.

Whenever the true value of the property or services is insignificant, compared with the par value of the stock issued for it, that fact alone is indicative of fraud.

*Coleman v. Howe*, supra; *R. H. Heron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265; *Berry v. Rood*, 168 Mo. 816, 67 S. W. 644; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Allen v. Grant*, 122 Ga. 557, 50 S. E. 494; *Hebberd v. Southwestern Land & Cattle Co.* 55 N. J. Eq. 18, 36 Atl. 122.

The stock fraudulently issued remained chargeable with the sum necessary to complete the amount of its par value, or such proportion of that sum as would be required to satisfy the debt of the company, in the hands of any person to whom such stock might come, unless that person could show that he was an innocent purchaser for value without notice.

*Sanger v. Upton*, 91 U. S. 56, 64, 23 L. ed. 220, 223; *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449, 20 N. W. 764; *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

It is not necessary that a certificate for stock should be either issued or tendered in order to charge the person who has agreed to take the same.

*Hawley v. Upton*, 102 U. S. 314, 26 L. ed. 179; *Webster v. Upton*, 91 U. S. 65, 67, 68, 23 L. ed. 384, 386, 387; *United States Independent Teleph. Co. v. O'Grady*, 75 N. J. Eq. 301, 21 L.R.A. (N.S.) 732, 71 Atl. 1040.

An attempt now to treat the bonus stock as purchased for the same consideration as the preferred stock necessarily results in that watering of stock which is prohibited by the statute.

*Easton Nat. Bank v. American Brick & Tile Co.* 70 N. J. Eq. 732, 8 L.R.A. (N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84; *Security Trust Co. v. Ford*, 75 Ohio St. 322, 8 L.R.A. (N.S.) 263, 79 N. E. 474; *Gillett v. Chicago Title & T. Co.* 230 Ill. 373, 82 N. E. 891.

In the second place, the designation of the stock as bonus stock is sufficient to put a purchaser on inquiry that the stock so issued had not been paid for, either in cash, or in its equivalent in property.

See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

There was no merit in the objection that complainant had no judgment in Delaware.

*Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; *Tyler v. Savage*, 143 U. S. 79, 97, 36 L. ed. 82, 89, 12 Sup. Ct. Rep. 340.

The objection, moreover, not having been seasonably made in the lower court, must be regarded as waived.

*Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 90, 109, 52 L. ed. 403, 412, 28 Sup. Ct. Rep. 219; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 535, 33 L. ed. 1021, 1024, 10 Sup. Ct. Rep. 604.

The requirement of judgment and unsatisfied execution has no application to proceedings of this character.

*Pennsylvania Steel Co. v. New York City R. Co.* 117 C. C. A. 550, 198 Fed. 721; *Case v. Beauregard (Case v. New Orleans & C. R. Co.)* 101 U. S. 688, 690, 25 L. ed. 1004, 1005; *Low v. R. P. K. Pressed Metal Co.* 91 Conn. 91, L.R.A.1917D, 291, 99 Atl. 1; *Terry v. Tubman*, 92 U. S. 156, 161, 23 L. ed. 537, 539; *Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 90, 109, 52 L. ed. 403, 412, 28 Sup. Ct. Rep. 219; *Hollingshead v. Woodward*, 107 N. Y. 96, 13 N. E. 621; *State Sav. Asso. v. Kellogg*, 52 Mo. 583; *Van Wagenen v. Patterson Sav. Bank*, 10 N. J. Eq. 13; *Butler v. Commonwealth Tobacco Co.* 74 N. J. Eq. 423, 70 Atl. 319; *Van Wagoner v. Paterson Gaslight Co.* 23 N. J. L. 283; *Pierce v. Old Dominion*

Copper Min. & Smelting Co. 67 N. J. Eq. 399, 58 Atl. 319; McDermott v. Woodhouse, 87 N. J. Eq. 124, 99 Atl. 103.

After an accounting, ascertaining the corporate debt and assessing the proportion of unpaid stock required to satisfy it, there is no error in authorizing the receivers to call upon the sole stockholder resident in the jurisdiction (whose unpaid balance exceeds the entire debt) to satisfy such debt in the first instance, since stockholders stand, among themselves, in the relation of cosureties, and the stockholder so paying has full right of subrogation.

Lewisohn v. Stoddard, 78 Conn. 575, 63 Atl. 621; Mountain Lake Land Co. v. Blair, 109 Va. 147, 68 S. E. 751; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Holcombe v. Trenton White City Co. 80 N. J. Eq. 122, 82 Atl. 618; Wolcott v. Waldstein, 86 N. J. Eq. 63, 97 Atl. 951.

All unpaid shares, being bound ratably, to the extent of the amounts necessary to complete their par, for the debts of the company, the enforcement of unpaid preferred stock subscriptions in full cannot possibly be a condition precedent to requiring the shares of unpaid common stock to contribute their respective proportions.

Kirkpatrick v. American Alkali Co. 140 Fed. 186; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co. 57 N. J. Eq. 627, 42 Atl. 585; Scovill v. Thayer, 105 U. S. 143, 156, 26 L. ed. 968, 974; Wetherbee v. Baker, 35 N. J. Eq. 501; Hood v. McNaughton, 54 N. J. L. 425, 24 Atl. 497; Handley v. Stutz, 139 U. S. 417, 427, 35 L. ed. 227, 234, 11 Sup. Ct. Rep. 530; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843.

It was proper to include, for the purposes of assessment, all proved claims of creditors, notwithstanding evidence tending to show that some of them may have had notice of the bonus character of the common stock.

Easton Nat. Bank v. American Brick & Tile Co. 70 N. J. Eq. 732, 8 L.R.A. (N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84; Sprague v. National Bank, 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926, Ann. Cas. 1917A, 104.

The assessment properly included an amount sufficient to cover interest and the expenses of the receivership.

Spring Coal Co. v. Keech, L.R.A.

1917D, 1152, 152 C. C. A. 98, 239 Fed. 48; American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co. 233 U. S. 261, 58 L. ed. 949, 34 Sup. Ct. Rep. 502; Pennsylvania Steel Co. v. New York City R. Co. 132 C. C. A. 518, 216 Fed. 458; People v. Merchants' Trust Co. 187 N. Y. 293, 79 N. E. 1004; Lippitt v. Thames Loan & T. Co. 88 Conn. 185, 90 Atl. 369; Kirkpatrick v. American Alkali Co. 140 Fed. 190; Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co. 57 N. J. Eq. 628, 42 Atl. 585.

Pennewill, Ch. J., delivered the opinion of the court:

The statement of the case contained in the opinion of the chancellor, from whose decree this appeal was taken, is so clear and comprehensive that it is deemed unnecessary to restate in this opinion the facts, the pertinent constitutional and statutory provisions, the proceeding in the lower court, and the many questions argued by counsel. We shall discuss only those questions that appear to be important, and upon which the appellants seemed to mainly rely.

Upon the much-debated question of jurisdiction the court have reached the opinion, after a very careful examination of the case, that the conclusion of the chancellor is sound. But our opinion is based upon reasoning somewhat different from that of the chancellor.

The court are not much concerned about the history of the law respecting the stockholder's liability for the debts of the corporation before the enactment of our General Corporation Act (22 Del. Laws, chap. 394). The learned and elaborate discussion of this subject, including the trust theory and the holding-out theory, in the briefs of counsel, is interesting but not very helpful. Whatever may have been the law before, and whether the statute of this state is simply declaratory of pre-existing law or not, the important fact is that the statute clearly and expressly states the stockholder's liability to creditors to the extent of the par value of stock not paid for. The only troublesome question

is: What proceeding may be employed to enforce the liability?

Are the two remedies mentioned in § 49 of the Delaware act exclusive of a pre-existing remedy that would be equally, if not more, convenient and effective in carrying out its purpose; and if they are, does the statute mean that the remedy "by bill in chancery" shall be initiated by what is known as a creditor's bill? Or does it mean any proceeding in that court that is adapted to the accomplishment of the purpose sought? It so happens that New Jersey has an incorporation law very similar to ours, and most of the questions raised in this case have been raised there and settled by decisions of the highest court of that state.

A good deal of ingenuity and refinement has been used by counsel for the appellants in the effort to show that there is a very substantial difference between the statutes of the two states, but the argument is not convincing. There is, of course, some difference in language, but it seems to us the effort to find any in principle is strained, and the distinction contended for exceedingly technical.

There is but one difference noted by the appellants which need be considered by the court. The difference to which we refer, and upon which alone it is possible to base an argument, is the concluding clause of § 20 of the Delaware act which does not appear in the New Jersey act, viz.: "Which said sum or proportion thereof may be recovered as provided for in § 49 of this act . . . after a writ of execution against the corporation has been returned unsatisfied, as provided for in § 51 of this act. . . ."

The courts of New Jersey have held that the remedies prescribed by § 92 of their act (2 Comp. Stat. 1910, p. 1655), which corresponds with § 49 of the Delaware act, cannot be employed to enforce the liability of stockholders under § 21 of their act, which corresponds with § 20 of our act without the concluding

clause. And the reason for so holding appears to be that said remedies are made available in actions against officers and directors, as well as stockholders, and that the legislature in enacting § 92 had in mind liabilities other than those that might arise under their § 21.

We agree with the construction placed upon § 92 of the New Jersey act by the courts of that state, and, therefore, hold that the remedies prescribed by § 49 of the Delaware act could not be employed to enforce the stockholder's liability under § 20, if that section did not contain the clause which specifically makes such remedies available.

And we are more strongly confirmed in this opinion because, upon investigation, it is found that said § 49 was taken from the Incorporation Act of 1883 (17 Del. Laws, chap. 147), which did not contain the concluding clause of § 20 of the present act.

The concluding clause of § 20, unlike the New Jersey law, expressly makes said remedies applicable, so that the questions that arise, touching the matter of jurisdictions, are the two we have already mentioned.

But assuming that the procedure adopted in the court below was not authorized or contemplated by the statute, are the remedies mentioned in § 49 and made available to creditors by § 20 of our statute exclusive of the usual procedure employed in collecting the assets and paying the debts of an insolvent corporation, viz., a bill in chancery for the appointment of receivers on the ground of insolvency?

If the statute had not provided any remedy at all for enforcing the stockholder's liability under § 20, unquestionably the creditor would have a remedy in equity, and such has been the decision of the courts of New Jersey and other states in similar cases. Can it be that because the Delaware act provides that the creditor may enforce the stockholder's liability under § 20 by an action at law or by bill in chancery he is not permitted to enforce such



liability by proceeding under the Insolvency Act? Are the remedies prescribed exclusive of or additional to the usual remedy in chancery?

It seems to the court that it was the purpose of the legislature, not to

Receiver—  
insolvent cor-  
poration—  
stockholder's  
liability—  
statutory  
remedy.

take away from the creditor a plain and effective remedy that already existed, but to provide other remedies that

he might use if he preferred to do so, and that might be more available and effective in some cases. It is reasonable to believe that the legislature intended by the concluding part of § 20 to make the creditor independent of receivers appointed under the Insolvency Act, by providing remedies that he might employ directly against the stockholder. And it is also reasonable to believe that the legislature thought there might be cases where the corporation would not be in such a condition of insolvency as would justify the appointment of receivers under the statute, but nevertheless in such a condition that the creditor could not collect his claim by judgment and execution. This view is strengthened by the fact that the statute provides that the particular remedies prescribed may be employed only after judgment has been recovered against the corporation and execution thereon returned unsatisfied.

There can be no doubt that obtaining a judgment and unsatisfied execution against the corporation is a condition precedent to the employment of the remedies mentioned in § 49 by the creditor directly against the stockholders. And the reason is that the law does not permit a creditor to collect his claim from stockholders if he can recover it from the corporation, and the only way his inability to do this can be shown to the court is by a judgment and unsatisfied execution. But if he proceeds independently of the statute, by a bill asking for the appointment of receivers on the ground of in-

solveny, a judgment and execution are not required, because the court is compelled to determine the very fact that the judgment and execution are designed to establish. *Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 24 L.R.A.(N.S.) 628, 86 N. E. 1116, 16 Ann. Cas. 1150.

—necessity of  
unsatisfied  
judgment.

It will be observed that § 41 of the Incorporation Act of 1883, while providing for the creditor an action at law directly against the stockholder did not give him a remedy by bill in chancery. The natural inference from this circumstance is that the legislature intended in the present act to provide for the creditor a direct remedy in chancery also, and in addition to the one he already had under the Insolvency Act.

The giving to the creditor a personal and direct remedy at law by the Act of 1883 did not take away from receivers the power to collect the assets and pay the debts of a corporation; neither did the giving of such a remedy in chancery by the present act take away such power.

It is the opinion of the court, therefore, that there are now two remedies in chancery for the enforcement of the stockholder's liability under § 20, viz.: (1) A proceeding under the Insolvency Act for collecting the assets and paying the debts of the corporation, which remedy existed prior to the passage of the statute and was the one employed in this case. (2) A proceeding by bill in chancery as prescribed by the statute; and this remedy was intended by the legislature to be used by the creditor directly against the stockholder, and must be initiated by a creditor's bill. In the one case a bill would be filed asking for the appointment of a receiver because of insolvency, and this would probably be the procedure chosen where undoubted insolvency could be shown. In the other case the creditor would file a bill against the stockholder if he is unable to collect his claim by legal process as evi-

dened by a judgment and unsatisfactory execution.

The appellants argued strongly and with much confidence that receivers could not, under the law, enforce a stockholder's liability created by statute, as in this case, and cited many authorities which seemed to sustain such proposition. But upon examination the cases referred to do not seem to us to be applicable to the present case. The statute of this state is unlike those that impose a liability upon the stockholder beyond the amount of his unpaid stock, such as double liability statutes. Appellants' cases, for the most part, as well as their citation from 1 Cook on Corporations, 7th ed. § 212, involved what may be termed double or additional liability laws. At the beginning of the section mentioned, it is said: "The state legislatures, however, in many instances, desire to increase the liability of stockholders to corporate creditors. Accordingly statutes are passed expressly declaring that the stockholders shall be liable for a specified sum, in addition to their unpaid subscriptions."

It is this kind of liability that is meant when "statutory liability" is referred to, and Mr. Cook says: "This is called the statutory liability of stockholders."

The failure to note the distinction between the liability of stockholders to the extent of the par value of their stock, and the statutory liability in excess thereof, has resulted in some confusion in the cases and textbooks. The first mentioned, or ordinary liability, is an asset of the corporation, and the second or additional liability is not, it being a liability directly to the creditors, which a receiver, in the absence of statutory authority, has no power to enforce; and it is not resorted to if the assets of the corporation, including unpaid stock, are sufficient to pay the creditors.

Are the amounts unpaid by stockholders on their shares of capital stock assets within the meaning of the law? We think that much of

the confusion in the law upon this subject is removed, and the solution of some of the questions in this case simplified when we recognize, as we must, that before the enactment of our incorporation law it had become a well-settled American doctrine that unpaid stock of a corporation constitutes in equity a trust fund for the benefit of creditors of the corporation. The doctrine was first announced by Mr. Justice Story in *Wood v. Dummer* (1824) 3 Mason, 308, Fed. Cas. No. 17,944. And in *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220, it was said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. . . . It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company: As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

Corporation—  
unpaid stock—  
trust fund.

One reason urged for the contention that unpaid stock is not liable for the debts of the corporation, as we understand the arguments, is because the company issued the stock as full-paid, and agreed that it should be nonassessable. There can be no question, in view of the authorities, that, in the absence of such an agreement, unpaid stock is liable for the debts of

—unpaid stock  
an assets.

the corporation and constitutes assets for such purpose.

And clearly, according to the authorities, the agreement referred to

—agreement that stock shall not be paid for—  
ultra vires.

was ultra vires and void, so that the situation is the same as though there was no such agreement. Stripped of the agreement, it is a plain case of an issuance of stock by the company and acceptance by the holder without being paid for. Under such circumstances there can be no doubt that the acceptor impliedly agreed, and is equitably bound, to pay for the stock. Then it follows that even if the corporation, because of its agreement, could not enforce payment, the receiver appointed under the Insolvency Statute would have a right, in a court of equity and under the direction of the chancellor, to collect it, there being no other assets out of which the debts of the corporation could be paid. Money or property paid for capital stock are assets liable for the debts of the company, and why should money due but unpaid for such stock not be equally liable? Unpaid *subscriptions* unquestionably are liable because they are legal assets, and in our opinion the acceptor of stock not paid for or subscribed for, is likewise bound to pay for it, and his liability constitutes an equitable asset which a statutory receiver can enforce. It is admitted that such a receiver has power to collect unpaid *subscriptions* to the corporation for capital stock because the relation between the stockholder and the company is contractual and the unpaid subscription an asset of the corporation. But a contract or promise to pay may be implied as well as express, and it clearly ap-

—promise to pay for stock.

pears from the authorities that the acceptance of shares of stock under a law similar to ours, without subscription, raises an implied promise to pay for them. Some courts call such a liability an equitable asset, but whatever it may be called it is a liability that may be

enforced to pay the debts of the corporation, and by no one more properly than a receiver appointed under the Insolvency Statute.

In *See v. Heppenheimer*, 69 N. J. Eq. 36, 78, 61 Atl. 860, the court said: "In equity, and as against creditors, the acceptance of stock, without paying for it, places the acceptor in the position of a subscriber."

See also *Odd Fellows Hall Co. v. Glazier*, 5 Harr. (Del.) 172; *Easton Nat. Bank v. American Brick & Tile Co.* 70 N. J. Eq. 732, 8 L.R.A. (N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84; *Holcombe v. Trenton White City Co.* 80 N. J. Eq. 122, 82 Atl. 618.

The common stock having been issued without consideration, it is contended that such an issue was ultra vires and void, and being void, the holders thereof cannot be held liable to the creditors of the company.

This contention would be stronger if the issuance of the stock was ultra vires, and therefore void. But this is a different case from those referred to in which the stock issued was in excess of that authorized by the charter of the company. There the act was held to be ultra vires because the corporation had no power to issue the stock at all. It is not contended in this case that the corporation had no authority to issue the stock, but that it is void because it was issued without being paid for, and under an agreement that it should not be paid for.

It was said in the case of *Rosoff v. Gilbert Transp. Co.* (D. C.) 221 Fed. 986: "Any contract by the company to issue shares at less than par was consequently ultra vires. The defendant, by taking the shares in question, became, under his contract of membership, liable to pay \$100 for each of them. The condition that less was to be accepted, being ultra vires, was void. . . . The company which the receiver represented could, therefore, have maintained this action, and the plaintiff has the same right."

The company in the present case having the right to issue the amount of stock that was issued, the only act that was ultra vires and void in the transaction was the issuance of the stock without its being paid for and the agreement that it was full-paid and nonassessable. In legal effect, therefore, it was the same as though it had been issued without any such agreement.

The law of this state contemplates that stock may be issued contrary to the statute, that is, without being paid for, and if it is so issued the acceptors are made liable to the creditors of the company to the extent of its par value. If the stock issued without consideration is void, and therefore nonassessable for the payment of creditors' claims, there was no reason for the law that provides for its assessment. The law means, and practically says: Corporate stock shall not be issued without valid consideration, but if it is so issued, contrary to law, the acceptor will be bound to pay its par value if the debts of the company cannot be paid otherwise.

The cases cited that were brought to enforce the stockholder's liability for unpaid stock would not have arisen if the issuance of the stock was void, because they were brought to enforce the stockholder's liability for stock that was issued contrary to law.

Although the Constitution of this state provides that "no corporation shall issue stock, except for money paid, labor done, or personal property," etc. (art. 9, § 3), it cannot be that directors who have issued bonus stock to themselves, or acquiesced in its issue, with full knowledge of all the circumstances, can escape the liability the law imposes by claiming that their stock was issued in violation of law. Persons who accept stock issued in violation of law, of which they had knowledge, cannot escape the liability incident to the relation of

stockholders which they have with full knowledge assumed.

And even though stock issued without consideration could be held to be void under our constitutional provision, and could be canceled by the corporation or upon the application of bona fide stockholders, it does not follow that the acceptor of such stock could claim immunity from assessment. Certainly a stockholder cannot escape such assessment if he has held himself out, or permitted himself to be held out, as the owner of the stock; and much less could he escape if he participated in the unlawful issue or acquiesced therein.

*Estoppel—to deny liability of stockholder.*

It is insisted that the liability of common stockholders to pay the debts of the corporation cannot be enforced, if at all, until after subscriptions to the preferred stock have been collected; and the reason assigned is that subscriptions to the preferred stock are contracts made with the company, and constitute assets which the corporation might have collected, and which, therefore, its receiver can collect.

Such subscriptions being clearly property or legal assets of the company, it is argued that they must be collected and applied in payment of the debts of the corporation before the common stockholders, whose stock was not subscribed for and not paid for, can be assessed, because the liability of such stockholders is not an asset of the corporation.

But the statute that imposes the liability makes no distinction, and creates no priority, between stock subscribed for and that which is issued and accepted

*Corporation—stock assessment—priority.*

without being subscribed for. All stockholders to whom was issued stock not paid for are liable under the statute, and no distinction can be made between preferred and common holders without adding something to the statute. And, moreover, there is, as already said, a contractual relation in both cases,

the promise to pay being express where the stock is subscribed for and implied where it is not.

Certainly no good reason can be given why one class of stock should be liable for the debts of the company before another, if neither has been paid for. The liability is the same, and the test, under the statute, is not the class or character of the stock, but whether it has been paid for.

It is contended by one of the appellants, a holder of shares of preferred stock, that "the issue of preferred stock of the company is wholly void and not subject to any assessment for the debts of the company," because the general corporation law of this state provides that "at no time shall the total amount of the preferred stock exceed two thirds of the actual capital paid in cash or property."

It is not denied that the company had authority, under its certificate of incorporation, to issue all the preferred stock that was issued; so that the contention is not based on the fact that the company issued more stock than its charter or certificate of incorporation authorized.

The question raised is simply this: Is the issue of preferred stock void, and nonassessable for the payment of creditors' claims, because the common stock had not been paid for in cash to the company? Creditors could know, and perhaps would be bound to know whether the company, under its certificate of incorporation, was authorized to issue as much preferred stock as was issued, but they could not be expected to know that the common stock had not been paid for. Indeed, they had a right to assume that the par value of the common stock had been paid to the corporation as required by law. It is reasonable, therefore, to hold that the words of the statute, "actual capital paid in cash or property," mean the par value of the

—exceeding proportion of stock paid in.

common stock that is issued, and liable to be assessed for the debts of the corporation. So

far as creditors are concerned stock not paid for may be treated as cash or property because it is liable for the payment of their claims. The position taken by the preferred stockholder is ingenious, but in the opinion of the court unsound in view of other provisions of the General Incorporation Law, and its manifest intent, when considered as a whole.

To hold differently would, in many cases, not only cripple but make nugatory the purpose of the law to protect creditors' claims to the extent of the par value of all stock, whether common or preferred. Moreover, the law does not contemplate that a person may subscribe for and accept preferred stock for his own benefit, hold himself out as the legal owner thereof, and escape liability to bona fide creditors on the ground that his stock was illegally issued and void. He will be estopped from making such defense.

Estoppel—to contest liability on stock.

It is further insisted by the appellants that holders of common stock not paid for are not liable to pay the debts of those creditors who extended credit to the company with knowledge of the facts and circumstances under which the common stock was issued.

It may be conceded that in the absence of a statute the decided weight of authority sustains such contention. But we think this is not the law in any jurisdiction where there is a statute making the holders of unpaid stock liable to the creditors of the company. New Jersey and Illinois

have statutes very similar to ours, and in neither have the courts recognized

Corporation—unpaid stock—effect of knowledge of creditors.

the rule contended for by the appellants. Our statute is very general in its language, and broad enough to comprehend all claims that are legally and equitably collectable. Under it the stockholder's liability is express and unqualified; it makes no exception and recognizes no dis-

inction between creditors. As was said by the court in the Easton Nat. Bank Case, 70 N. J. Eq. 732, 8 L.R.A.(N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84: "In this state, however, the stockholder's liability to creditors no longer depends upon" the trust fund theory, but is held to be statutory. "It depends upon the stockholder's voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none."

But while our statute protects all creditors of the corporation, it comprehends only such claims as are just and valid under the well-settled principles of law. If the proceeding is brought in equity it must be governed by the principles of equity. And this leads us to inquire whether the claims of those creditors who gave credit to the company with full knowledge of all the facts attending the issuance of the stock, and who actively participated in the issuance of the stock, can enforce payment against the stockholders in a court of equity.

We are clearly of the opinion that mere knowledge that stock issued as full-paid and nonassessable was not in fact paid for should not preclude the creditor from enforcing the liability of the holder because the creditor may also know or have good reason to believe that the holders of such stock would be legally liable for the debts of the company to the extent of the par value of their stock. While the creditor with knowledge could not have given credit upon faith that the stock was paid for, he may very well have given credit upon the belief that the holder of the stock would be liable to the creditors under the statute, whether he had paid for it or not.

It was said in the Easton National Bank Case: "Why, if they knew the stock issued as full-paid was not full-paid in fact, may they not be justified in dealing with the very stockholder's liability thus arising as a part of the assets of the company for the purpose of satisfying creditors' claims?"

It did seem to the court for a while that the rule should be different if the creditor had actually participated in the issuance of unpaid stock as full-paid and nonassessable, or had consented thereto. The court were strongly inclined to believe that such a creditor should be estopped in a court of equity from enforcing his claim against other stockholders to whom stock was issued with his assistance or acquiescence. It seemed like permitting a party to take advantage of his own wrong, or to profit by an illegal transaction in which he was, in a sense, *particeps criminis*.

But after a most careful consideration of the question we were forced to the conclusion that such a position could not be sustained by reason or authority. In Illinois and Connecticut, the courts have held that knowledge was not a bar, and the reasoning is broad enough to cover participation as well. But the courts of New Jersey have dealt with cases in which participation was distinctly urged as a bar. The strong and leading case in which this question was involved is the Easton National Bank Case. The court in that case carefully considered the question whether a creditor who was a stockholder with full knowledge of all the facts and circumstances connected with the issuance of the stock not paid for, and who in fact managed or directed the issuance of such stock, could enforce the statutory liability of stockholders in his own behalf. The reasoning of the court seems to us to be sound and unanswerable.

Estoppel—to enforce stockholder's liability.

Justice Pitney, in delivering the opinion, considered the status of a

creditor with knowledge only, and also one who had participated, saying: "As to the status of Frederick Green in the case before us, the evidence does not satisfy us that he participated in the arrangement for the issuance of this stock for the patents. . . . There is nothing, therefore, to bar his individual claim save that he had notice of the fact that the stock was issued as full-paid for property purchased. As already shown, such notice is not sufficient to debar him. As to the claim of Henry Green, he, of course, did participate actively in the transaction that resulted in the improper issuance of the stock in question, and he received a part of the stock himself. But there is nothing to show that he intended any actual fraud upon his fellow stockholders. . . . We do not believe that at that time it was at all contemplated that any creditor of the company would be permitted to remain unpaid. Judge Green was, by common consent, permitted to assume and exercise the entire management of the concerns of the company, all parties being at the time sanguine of its ultimate success. The moneys that he loaned to the company were advanced for the general benefit of the stockholders, including himself. They are a just and lawful claim as against the company, and not an inequitable claim as against the delinquent stockholders. His estate cannot be debarred on the ground of estoppel, for his associates, who are now disputing their individual liability to pay, were not at all misled by the circumstance that their stock certificates were marked 'full-paid,' and for 'property purchased,' since they knew the fact to be otherwise. Nor is the Green estate debarred by the operation of the maxim, 'in pari delicto potior est conditio defendentis.' If it were seeking any advantage out of the unlawful agreement, this maxim would apply. But that agreement being absolutely void on grounds of public policy, his rights as a creditor for moneys ac-

tually advanced remain unimpaired. . . . As against the delinquent stockholders, therefore, . . . both the Green claims are entitled to payment. Payment of the Henry Green claim should, of course, be deferred until his estate contributes its proper portion of the amount necessary to satisfy the decree."

And so in the present case, Mr. Taft, one of the largest creditors, advanced a large amount of money for the general benefit of all the stockholders, and there was no thought at the time that he would be permitted to lose any part of the sum loaned to the company. He must, of course, suffer his part of the loss, but it would not be just or equitable that he should lose the entire amount he advanced for the benefit of all, and with their knowledge and consent. While all those who participated in the issuance of the stock were acting contrary to law, there is nothing to indicate that anyone was seeking to perpetrate a fraud upon the others, or gain an unfair advantage by the transaction. They were acting in good faith towards one another for the accomplishment of a common object, and it is just and equitable that one who gave credit to the company under such circumstances should be able to collect his claim under the statute.

If at the time the delinquent stockholders are given an opportunity to make defense, it is shown that any creditor is not equitably entitled to collect his claim, it will be the duty of the chancellor to so decide. All that this court determines now is that any person who advanced money, rendered services, or contributed other valuable thing to the company honestly, in good faith, and for the general benefit of all, is entitled to recover under the statute, from the delinquent stockholders, his just, reasonable, and equitable claim.

It is strongly insisted by the appellants that it is inequitable that the stockholders should be assessed

and required to pay their assessments before their legal liability is definitely determined, because the amounts assessed may be

Corporation—  
assessment of  
stockholders—  
determination of  
liability.

very much in excess of what they are legally liable to pay. We think this is the correct procedure and should have been adopted by the chancellor, but our conclusion that knowledge or participation on the part of the creditor whose claim is just and equitable constitutes no defense for the stockholder covers every claim, with the possible exception of that of the company's counsel, which is strongly opposed by the appellants because it was upon his advice that the bonus stock was issued as full paid and nonassessable. We do not think this court would be justified, under the circumstances, in ordering the assessments already

—setting aside  
assessments.

made set aside on account of this one claim, which the stockholders will be permitted to contest, if they desire to do so, at the time the distribution of the fund paid in is adjusted.

With respect to the payment or allowance of interest on creditors' claims the court are of the opinion that the general rule should prevail. While it seems to be the rule in courts of equity that claims against an insolvent corporation should not bear interest after the appointment of a receiver, the reason is based largely upon the fact of insolvency, and the consequent insufficiency of the assets to pay the entire indebtedness. In the case of *Blair v. Clayton Enterprise Co.* 9 Del. Ch. 95, 77 Atl. 740, cited by the appellants, the court, in holding that interest should be calculated on claims down to the date of the order of the appointment of a receiver, said: "This is the settled practice in the administration of estates of insolvent corporations in Delaware."

But the reason for such rule does not exist where the assets or prop-

erty legally liable for the payment of creditors' claims is sufficient to pay all of them, including interest. If the creditor had brought an action at law, as he might have done under the statute, or had filed in chancery what is known as a creditor's bill, it would not be contended, we think, that interest could not be collected from the time suit is brought, if there are sufficient assets to pay it.

Interest—on  
claims against  
insolvent corporation.

This is the law in those jurisdictions where the statute provides that stockholders shall be liable for the debts of the company to the extent of the par value of their stocks, and when the proceeding is directly against the stockholders. *Burr v. Wilcox*, 22 N. Y. 551; *Handy v. Draper*, 89 N. Y. 334; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Corning v. McCullough*, 1 N. Y. 58, 49 Am. Dec. 287; *Baker v. Atlas Bank*, 9 Met. 182; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365. And under the National Banking Act (Act Cong. June 3, 1864, chap. 106, 13 Stat. at L. 99), it has been held that interest runs from the date of the comptroller's order to collect an amount equal to the full par value of the stock, the amount due from the stockholders being then liquidated and payable. *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168. In *Burr v. Wilcox* the court said: "This liability cannot, I think, be said to attach upon any particular stockholder until a suit is commenced against him to enforce it. The creditor has a right to select among the stockholders the individual against whom he will proceed; and until he has made this selection, no particular stockholder is liable, and hence no interest can be allowed for any previous time." But, from the time of the commencement of a suit for a debt exceeding the amount of the principal of the defendant's stock, I see no reason why interest should not be allowed. It has then become a fixed liability for a specific amount, and ought, upon general principles, to carry interest."



In the Ohio case the contentions of the parties were very clearly stated by the court as follows: "It was held by the district court that interest should be charged against the stockholders as of the date of the commencement of suit. The contention on part of plaintiffs in error is that in no case can the stockholder be liable for a sum beyond the amount of his stock, to be determined at the time the liability is finally fixed by judicial decree. In other words, that the liability is one created by statutory enactment under the Constitution, to be enforced by decree, and interest cannot be added except by virtue of the decree of the court declaring the liability, and no interest can accrue against the stockholder until the liability is thus declared. On the other hand, the claim is that, while the liability is created by the Constitution and the statute, yet the stockholder places himself under liability by contract when he subscribes for or acquires the stock; and, resting as well upon contract as upon statute, the interest follows the maturing of the obligation, which is at the time when the corporation becomes insolvent and refuses to pay."

The court said: "We agree with the counsel that the question is one which, upon principle, is of very considerable difficulty. . . . The district court, in holding the stockholders for interest after the commencement of the suit, evidently followed the law of that case [Hooker v. Kilgour, 2 Cin. Sup. Ct. Rep. 350]; and, inasmuch as it has been generally acquiesced in as furnishing the true rule, we are not prepared to say it is not the law in this state."

In analogy to the cases mentioned we hold, in the present case, that interest should commence at the time the receivers asked the court to make an assessment upon the stockholders for the payment of creditors' claims, there being nothing before which indicated that they would be expected to pay such claims.

In respect to the expenses and compensation of receivers, and the fees of their counsel, the court are of the opinion that, inasmuch as the receivers are officers or instrumentalities appointed by the court to collect the creditors' claims and carry out the purpose of the statute, they are entitled to

**Receivers—  
compensation—  
who liable.**

proper expenses and reasonable compensation to be paid by the stockholders. They are a part of the machinery employed by the court to accomplish the object sought under the statute, and their expenses and compensation are, therefore, legitimate court costs to be taxed against the respondents.

We think no good reason can be shown why the fees of receiver's counsel should be separately taxed as a part of the costs. Inasmuch, however, as such is the established practice in this state, the court are not disposed to change it. It is not certain in many cases that services of counsel will be required, and even if they should be, it is impossible to tell even approximately, in advance of the service, what counsel will be entitled to receive. The court are of the opinion that the sum estimated by the chancellor for receiver's compensation and expenses, and the fees of their counsel, as well as the estimate for interest on creditors' claims, is largely in excess of what they will be entitled to receive; that said sums should be substantially reduced, and the assessments modified accordingly.

In conclusion, we say that, while we have no doubt the court below had power to require a resident stockholder to pay the entire assessment, we think it inequitable under the facts of this case, and, therefore, hold that the receivers should have been ordered to collect every assessment they should find to be collectable, and that would justify the expense of collection. The entire burden of payment should not, in the first instance, have been imposed upon a single

**—collection from  
resident stock-  
holder.**

stockholder, even though there be no other found in the jurisdiction. The course adopted may be the most convenient for the receivers and expeditious for the creditors, but, in our opinion, hardly fair to the resident stockholder.

And, moreover, it may very well be that statutory receivers appointed by the court would be more successful in collecting claims out of the state than a stockholder who might be subrogated to their rights by an order of said court. But whether that be so or not, it is manifestly unfair that the resident stockholder should, in this case, pay not only all the indebtedness, but also the costs of collecting from other stockholders their proportional parts of the assessment. Under the peculiar facts and circumstances of this case the fair and equitable proceeding would be for the receivers to collect all the assessments, so far as practicable, and by so doing the burden would fall on all stockholders alike according to their holdings.

The decree of the Chancellor will be affirmed, except as modified by this opinion.

Heisel, J., concurring:

I concur in the opinion of the court, excepting as to the claims of Mr. Taft and Mr. Chapin.

Briefly and without argument, I desire to state my conclusions as to those claims. Mr. Taft was a director and promoter of the company from its beginning, and was fully advised of all actions taken in issuing the common stock as bonus for the preferred stock, and participated therein. He knew that the preferred stock was being sold at par, and the common stock, which had been declared by him and the other directors of the company to be "full-paid and nonassessable," was being issued as a bonus to purchasers of

said preferred stock who had nothing to do with the management of the company, to induce them to purchase the preferred stock. He could not, therefore, in good faith, have relied upon any assessment from such holders of common stock to repay advances made by him to the company in the event of the failure of the company to repay him such advances. Mr. Chapin was counsel for the company, and advised and directed the steps taken by Mr. Taft and the other directors in pursuing the course they did pursue. He directed them in the action they took to make the common stock, as he thought, "full-paid and nonassessable," and knew that, as such, it was being issued as a bonus to purchasers of the preferred stock, who had no part in the management of the company, as an inducement to purchase that stock. He now claims the right to have this same common stock assessed in order that he may be paid for his services.

Excepting in the state of New Jersey, where the proceeding was under a statute which the court there said put the creditor's right on a different basis from that under the general law, the overwhelming weight of authority is opposed to such proceeding.

Whether the proceeding in the case at bar for the purpose of assessing the stockholders is under the liability imposed by § 20 of the Incorporation Act, or is under the liability that existed prior to that section, can be of no importance, because § 20 imposed no new liability upon the stockholder, but simply stated or declared a liability that existed prior to its passage.

Therefore it seems to me that the law as generally applied by the courts outside New Jersey should be applied here.

## ANNOTATION.

### Creditor's knowledge that stock is unpaid as affecting stockholders' liability.

#### I. Majority rule:

- a. generally, 972.
- b. Rights of person claiming under creditor, 980.
- c. Constructive notice of unpaid character of stock:
  1. Record of articles of incorporation, 981.
  2. Individual knowledge of agent of creditor, 982.

#### II. Minority rule, 983.

##### I. Majority rule.

###### a. generally.

In most jurisdictions, it is held that, where a creditor knows at the time he extends credit that shares of the capital stock of a corporation have not in fact been paid in full, he will be estopped from enforcing the stockholders' liability for the difference between the amount paid, or value delivered, and the par value of the stock.

**United States.**—*Coit v. North Carolina Gold Amalgamating Co.* (1886) 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Bank of Ft. Madison v. Alden* (1889) 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.* (1895) 70 Fed. 155; *Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.* (1896) 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554; *Cunningham v. Holley, M. M. & Co.* (1903) 58 C. C. A. 140, 121 Fed. 720; *Anglo-American Land Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721, writ of certiorari denied in (1904) 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793; *Re Charles Town Light & P. Co.* (1912) 199 Fed. 846.

**Alabama.**—*Lea v. Iron Belt Mercantile Co.* (1898) 119 Ala. 271, 24 So. 28.

**California.**—*Richardson v. Chicago Packing & Provision Co.* (1900) 6 Cal. Unrep. 606, 63 Pac. 74; *SHERMAN v. HARLEY* (reported herewith) ante, 950.

**Georgia.**—*Hill v. Silvey* (1888) 81 Ga. 513, 3 L.R.A. 150, 8 S. E. 808.

**Indiana.**—*Reel v. Brammer* (1913)

56 Ind. App. 180, 101 N. E. 1043; *Bent v. Underdown* (1901) 156 Ind. 516, 60 N. E. 307.

**Iowa.**—*Callanan v. Windsor* (1889) 78 Iowa, 193, 42 N. W. 652; *State Trust Co. v. Turner* (1900) 111 Iowa, 664, 53 L.R.A. 186, 82 N. W. 1029; *Watt v. German Sav. Bank* (1917) 183 Iowa, 346, 165 N. W. 897.

**Kansas.**—*Walburn v. Chenault* (1890) 43 Kan. 352, 23 Pac. 657.

**Michigan.**—*Young v. Erie Iron Co.* (1887) 65 Mich. 111, 31 N. W. 814; *Ten Eyck v. Pontiac, O. & P. A. R. Co.* (1897) 114 Mich. 494, 72 N. W. 362; *Utica Fire Alarm Teleg. Co. v. Waggoner Watchman Clock Co.* (1911) 166 Mich. 618, 182 N. W. 502; *Courtney v. Youngs* (1918) 202 Mich. 384, 168 N. W. 441.

**Minnesota.**—*First Nat. Bank v. Gustin Minerva Consol. Min. Co.* (1890) 42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

**Missouri.**—*Carp v. Chipley* (1898) 73 Mo. App. 22; *Woolfolk v. January* (1895) 131 Mo. 620, 33 S. W. 432; *Berry v. Rood* (1902) 168 Mo. 316, 67 S. W. 644; *Colonial Trust Co. v. McMillan* (1905) 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Meyer v. Ruby Trust Min. & Mill. Co.* (1905) 192 Mo. 162, 90 S. W. 821; *Euston v. Edgar* (1907) 207 Mo. 287, 105 S. W. 773; *Biggs v. Westen* (1912) 248 Mo. 333, 154 S. W. 708; *Scott v. Luehrmann* (1919) — Mo. —, 213 S. W. 855.

**Nebraska.**—*Dickinson v. Kline* (1914) 96 Neb. 435, 148 N. W. 141.

**Oregon.**—*Farrell v. Davis* (1916) 85 Or. 213, 161 Pac. 94, 703.

**Texas.**—*Mathis v. Pridham* (1892) 1 Tex. Civ. App. 58, 20 S. W. 1015; *Cole v. Adams* (1898) 19 Tex. Civ. App. 507, 49 S. W. 1052.

**Washington.**—*Adamant Mfg. Co. v. Wallace* (1897) 16 Wash. 614, 48 Pac. 415; *Davis v. Ball* (1911) 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750.

**Wisconsin.**—*Whitehill v. Jacobs* (1890) 75 Wis. 474, 44 N. W. 630.

**Wyoming.**—*Tuttle v. Rohrer* (1915)

28 Wyo. 305, 149 Pac. 857, 153 Pac. 27.

The reason of the rule has been stated as follows: "Recovery of a creditor from a stockholder for unpaid subscription for stock, or, in event of payment in property, for the undervaluation, is allowed on the theory that a fraud has been practised on the creditor, who has the right, in dealing with the corporation, to assume that its stock is fully paid; and, of course, there can be no recovery where the creditor deals with full knowledge that payment therefor has not been made." *Watt v. German Sav. Bank (Iowa)* supra.

So, it was said in *Courtney v. Youngs* (1918) 202 Mich. 384, 168 N. W. 441, that "those creditors who participate in a transaction involving the transfer of corporate property at fraudulent valuation, who deal with the company with actual knowledge of what its assets are, and who extend credit knowing fully that the capital stock has been exchanged for property, and know for what property it was exchanged, cannot, when the venture proves disastrous, call upon stockholders upon the theory that they extended credit in reliance upon the capital stock and its being fully paid."

In *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* (1890) 42 Minn. 327, 6 L.R.A. 676, 18 Am. St. Rep. 510, 44 N. W. 198, it was said: "The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders, without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply.

. . . If a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its

par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets."

In *Berry v. Rood* (1901) 168 Mo. 316, 67 S. W. 644, it was said: "If a person, knowing that a corporation has accepted certain property in full payment of its stock, sees fit with that knowledge to lend money to the corporation, he has no more right to call the stockholder to further account for his debt than would the corporation itself."

And in *Biggs v. Westen* (1912) 248 Mo. 333, 154 S. W. 708, the court said: "The law is well settled in this state that no creditor of a corporation, who becomes such with knowledge that its stock, though purporting to have been paid in full, was in point of fact neither paid nor to be paid, but was issued merely as a bonus for the subscription and payment for other stock, can enforce his claim against the corporation by compelling its shareholders to pay to the corporation, its trustee, or other representative, any portion of the stock so donated."

And in *Colonial Trust Co. v. McMillan* (1905) 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933, the court said: "It is good law that, underlying the trust-fund theory and the true-value theory, is the proposition that creditors have the right to assume that stock has been fully paid in money or money's worth . . . and to extend credit on the faith of such assumption; but because of this underlying proposition it follows that if a creditor of an insolvent corporation did not extend credit on the faith of shareholders having paid their stock subscriptions in money or money's worth, but, to the contrary, knew at the time of the creation of the corporate debt that such stock was paid for in simulated values, he is not entitled to the remedy here sought."

In *Lea v. Iron Belt Mercantile Co.* (1898) 119 Ala. 271, 24 So. 28, the court said: "A creditor of a corporation who became such with knowledge

that the corporation had received from a stockholder, in full payment of his stock, property at a gross overvaluation, cannot require such subscribers to pay for its benefit the difference between the par value of the stock and the real value of the land."

It was said in *Adamant Mfg. Co. v. Wallace* (1897) 16 Wash. 614, 48 Pac. 415: "While the doctrine of trust fund is accepted in its broadest sense, it is well settled that a trust will not be impressed upon the stock of the corporation in the hands of the stockholders for the benefit of creditors who dealt with the corporation with knowledge of the fact that the stock had been paid for in property the value of which was less than the face value of the stock."

The Wyoming supreme court has said: "The great weight of authority appears to us to be that one dealing with a corporation with knowledge that stock has been issued as full-paid in exchange for property at an amount above its actual value cannot hold such stockholder for the difference between the actual value of the property and the par value of the stock, in the absence of fraud." *Tuttle v. Rohrer* (1915) 23 Wyo. 305, 149 Pac. 857, 153 Pac. 27.

In *Davies v. Ball* (1911) 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750, the court, discussing the defenses available to the stockholders in a creditor's action for the alleged unpaid balance on their shares, said: "They should be permitted to show, if they can, that the creditors in whose behalf this action was brought, or any of them, dealt with the corporation with knowledge of the fact that the stock was issued for property of less value than the par value of the stock. Any such creditor will be estopped to participate in the trust fund created by an enforcement of the liability of the stockholders."

In *Coit v. North Carolina Gold Amalgamating Co.* (1886) 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231, the creditor of an insolvent corporation sought to enforce the liability of its stockholders to the extent of the amount alleged to be unpaid on the

shares of stock held by them. It appeared that the capital stock had been issued as fully paid, in consideration of property received at a large overvaluation. The plaintiff was aware, at the time he extended credit, that the stock was being issued for a fictitious value, and placed no reliance on the supposed paid-up capital of the corporation. The court held that in the absence of actual fraud a creditor must rely on his faith that the stock had been fully paid to justify a recovery of the alleged unpaid balance on the shares, and that the knowledge of the plaintiff that such was not the case barred the action.

In *Bank of Ft. Madison v. Alden* (1889) 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 382, the plaintiff, as creditor of an insolvent corporation, sought to hold a stockholder liable for the amount alleged unpaid on his stock, which, it seemed, had been purchased with lands not exceeding in cash value 40 per cent of the amount subscribed, and which lands had been later reconveyed. The defense was interposed that the plaintiff had become a creditor with full knowledge of the conditions under which the stock was issued, and the court held that, this being so, the stockholder was not liable.

In *Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.* (1896) 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554, it was held that one who became a creditor of a corporation with knowledge of an agreement by which the corporation contracted to receive less than the par value of its stock from a subscriber would be estopped, on the insolvency of the corporation, from requiring the stockholder to pay his stock in full.

In *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.* (1895) 70 Fed. 155, the plaintiff, seeking to recover the amount of a judgment against an insolvent corporation, alleged that the defendants, as stockholders of the corporation, had not fully paid the amount of their stock subscriptions. The defense was interposed that the plaintiff had been advised of the overvaluation of the

property for which the stock was issued, and that he should be estopped, for this reason, from enforcing the liability of the stockholders for the excess of the valuation. It appeared that a conspicuous recital of the valuation placed on the property which was to sustain the issue of stock was printed on the back of the bonds which plaintiff had acquired, and the court held that he had sufficient notice to estop him from maintaining the action.

In *Cunningham v. Holley*, M. M. & Co. (1903) 58 C. C. A. 140, 121 Fed. 720, wherein it appeared that one who had participated in an incorporation in which stock was issued as full-paid, for property at an overvaluation, afterwards became a creditor of the corporation, it was held that his knowledge of the circumstances under which the stock was issued estopped him from proceeding against the stockholders as for the actual unpaid balance on their stock. The court added: "When stock is so paid for and property is so taken in payment, it is the general rule that the transaction cannot be impeached, even at the suit of a creditor of the corporation, except for fraud. . . . And this is especially true where the creditor has dealt with the corporation with full knowledge of the transaction whereby the shares were paid for, or was a party thereto."

In *Anglo-American Land Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721, writ of certiorari denied in (1904) 196 U. S. 638, 49 L. ed. 630, 23 Sup. Ct. Rep. 793, the plaintiffs, as creditors of a corporation, sought to enforce the payment of claimed unpaid subscriptions to stock held by the defendants. It appeared that the corporation, without any legitimate basis therefor, had issued a stock dividend of 50 per cent on its capital stock, and the plaintiffs maintained that the law implied a promise on the part of those who received the additional stock to pay par value therefor when called on by creditors. The court upheld this contention as an abstract proposition, but since it appeared that the plaintiffs had, with full knowledge of all the facts, ac-

quiesced in this transfer, it was held that they were estopped from recovering on the theory of unpaid balances on stock.

In the case of *Re Charles Town Light & P. Co.* (1912) 199 Fed. 846, the court stated that creditors who have extended credit to a corporation, with knowledge that stock has been issued for property received at an overvaluation, are estopped, in the absence of actual fraud, from thereafter recovering from the holders the unpaid balance of the shares.

Where a creditor sought to recover the unpaid balances on stock subscriptions, which balances existed by reason of a stockholders' agreement that shares should be deemed fully paid on the receipt of \$50 therefor, in which agreement the creditor had joined, the court held that the creditor's knowledge of the transaction would estop him from enforcing the stockholders' liability. *Richardson v. Chicago Packing & Provision Co.* (1900) 6 Cal. Unrep. 606, 63 Pac. 74.

In *SHERMAN v. HARLEY* (reported herewith) ante, 950, the plaintiff, as assignee of a creditor of a corporation, sought to recover from the defendants the several amounts claimed to be due for the unpaid portion of their subscriptions as stockholders in the debtor corporation. The stock in question had been issued for property admittedly of value less than the par value of the stock. The defendants maintained that the plaintiff was not in a position to recover, since, at the time credit was extended to the corporation, he was fully aware of the transactions through which the issuance of the stock as full-paid was made. The court, holding with the defendants, said: "The law is well settled in this state that, when at the inception of its enterprise a corporation issues its stock for a consideration in money or property of admitted value less than the par value of such stock, the subscribers to such stock giving such consideration are liable to the corporation and to its creditors for the unpaid portion of the subscription. . . . The basis of this doctrine . . . is

that credit is given in reliance on the presumption that full par value has been received by the corporation for the stock it has issued as fully paid. Where, however, it appears . . . that the particular creditor, at the time the credit was given, extended the credit with full knowledge of the difference between the par value of the stock and the value of the property received for it, an exception to the rule exists."

And in *Hill v. Silvey* (1888) 81 Ga. 513, 3 L.R.A. 150, 8 S. E. 808, it was held that the creditors of a corporation, by dealing with it after knowledge that its stock was not in fact full-paid, had impliedly waived their right to call on the stockholders for the unpaid balances on their shares. The court said: "If a person should contract with a corporation, or voluntarily give it credit, knowing that its capital had not been fully paid up, but was declared to be fully paid up for the purpose of discharging the shareholders from further liability, the evident intention of both parties would be to make the agreement subject to these conditions; and there would be no equity in charging the shareholders with any further liability on account of the obligation so incurred by the company."

Where creditors extended credit to a corporation with the knowledge that its stock was being issued as fully paid at 14 cents a share, and, on the subsequent insolvency of the corporation, action was brought to satisfy their claim by collecting a part of the difference between the price paid and the par value of the stock, the court said: "Such creditors, with knowledge of the agreement between the corporation and the shareholders, must have extended credit on the strength of the corporation, its business, prospects, and tangible property. They were not induced to give credit to the corporation by reason of a liability against the shareholders which they knew did not exist, and the shareholders were under no obligation to inform such creditors of the nature and terms of their agreement with the corporation

when the facts were equally well known to all. Under such circumstances, creditors have no equitable right to collect a greater sum from the stockholders than the corporation itself could claim as a part of its assets." *Reel v. Brammer* (1918) 56 Ind. App. 180, 101 N. E. 1043.

In *Bent v. Underdown* (1901) 156 Ind. 516, 60 N. E. 307, the creditors of an insolvent corporation sought to collect the unpaid balances on shares held by stockholders of the corporation, it appearing that the shares, with a par value of \$100, had been issued for \$15. The court held that the unpaid balance on the stock could not be recovered, saying: "The articles of association which informed the public of the amount of the capital stock of the corporation also gave notice that the stockholders were under no obligation to pay more than \$15 on each share of the stock subscribed, and that said restriction could only be modified, amended, or repealed by the unanimous consent of all the stockholders. The stockholders made this contract with the corporation, and the public were advised of the same by the articles of association, which were recorded, as required by law, in two public offices in this state. As the stockholders have paid all they agreed to pay, the corporation can claim no more. The creditors, being fully advised of said contract, . . . did not give the corporation credit on the faith of the capital stock being paid in full, but relied upon the part the stockholders agreed to pay. As this has been paid, the creditors can recover no more from the stockholders."

Where the original creditor was a party to an agreement by which the defendant stockholder had purchased stock for 50 cents a share, it was held that an assignee of the creditor could acquire no higher rights against the defendant than his assignor had, and that knowledge of the agreement would preclude the plaintiff from recovering from the stockholder the unpaid balance on his stock. *Callanan v. Windsor* (1889) 78 Iowa, 193, 42 N. W. 652.

In *State Trust Co. v. Turner* (1900)

111 Iowa, 664, 53 L.R.A. 186, 82 N. W. 1029, the assignee of a creditor of a corporation sought to recover the unpaid balance on shares held by the defendant, it appearing that such shares had been issued for property at an excessive overvaluation. The court stated that such payment for stock was payment only to the extent of the property received, but held against the plaintiff, since it appeared that his assignor had knowledge of the circumstances under which the stock was issued. The court quoted *Bank of Ft. Madison v. Alden* (1889) 129 U. S. 872, 32 L. ed. 725, 9 Sup. Ct. Rep. 332, as laying down the rule applicable to the case, as follows: "Where the creditor has full knowledge of the transaction between the corporation and its stockholder at the time he extends credit, he cannot be heard to complain, for the reason that no credit is given upon a representation of a different set of facts than those which actually existed."

And in *Watt v. German Sav. Bank* (1917) 188 Iowa, 346, 165 N. W. 897, the proposition was reaffirmed that where a creditor deals with a corporation with knowledge that its stock is not full-paid, or that shares have been issued as full-paid on receipt of property at an overvaluation, there can be no recovery from a stockholder for the unpaid balance on his shares.

Likewise, in *Walburn v. Chenault* (1890) 43 Kan. 352, 23 Pac. 657, wherein it appeared that a creditor had become such with knowledge that shares were being issued as full-paid, in consideration of property conveyed to the corporation, at an overvaluation, it was held that such knowledge would estop him from enforcing a liability against the stockholders as for unpaid stock.

In *Young v. Erie Iron Co.* (1887) 65 Mich. 111, 31 N. W. 814, the plaintiff sought to recover the amount of a judgment against the defendant mining corporation, by levying on the unpaid balances on shares held by the defendant stockholders. It appeared that the corporation had issued "full-paid" stock for property received at an overvaluation. There was no al-

legation in the creditor's bill that he did not know the circumstances under which the stock was issued as full-paid. The court said: "Although it is a well-established doctrine, founded upon just principles, that the capital stock of a corporation, and especially its unpaid capital in the hands of subscribers or purchasers from the corporation, is a trust fund for the satisfaction of the debts of an insolvent corporation, yet it is equally well settled that persons dealing with corporations may consent to existing arrangements, and by contracting with them, with notice or knowledge of arrangements which limit the liability of the subscribers to pay the full amount of the capital stock, may expressly or impliedly waive the right to compel the stockholders to contribute the full amount of their subscriptions in discharge of corporation obligations." And the court added that "persons . . . contracting with mining corporations, knowing that its capital was not fully paid up, but so declared for the purpose of discharging its stockholders from the unpaid portion thereof, should be considered and held as having done so subject to these conditions."

And in *Ten Eyck v. Pontiac, O. & P. A. R. Co.* (1897) 114 Mich. 494, 72 N. W. 862, it was held that a stockholder who later became a creditor could not enforce the liability of the other stockholders to the extent of the unpaid portion of their shares, where he had participated in the issue of the shares as full-paid, with knowledge that but a small part had been actually paid therefor.

In *Utica Fire Alarm Teleg. Co. v. Waggoner Watchman Clock Co.* (1911) 166 Mich. 618, 182 N. W. 502, it appeared that one of the stock purchasers of a corporation, who had subsequently become a creditor, sought to participate in the unpaid balance on the shares of stockholders who had subscribed thereto, in an agreement whereby 25 per cent was accepted as full payment for the stock issued. The creditor had been a party to the agreement to purchase stock for less than par, and the court said: "Under the



circumstances, may he who became a creditor, after full knowledge of the terms of sale of this stock, participate in the fund created by requiring the stock to be paid in full? An ordinary creditor with such knowledge would have no such right, for the reason that the want of such knowledge is the basis of the right on the part of a creditor to require full payment for such stock. . . . The defendant, a stock purchaser, who was a party to the transaction of purchase for less than par, on becoming a creditor, can claim no greater equities than an ordinary creditor."

Where the administratrix of one who had been both a creditor and stockholder of a corporation sought to hold certain stockholders liable for the alleged unpaid balance on their stock, which had been issued for property at a large overvaluation, and it appeared that the deceased, when he extended credit, had knowledge of the basis on which the stock was issued as nominally full-paid, the court held that no recovery could be had, since the creditor had not been defrauded. *Carp v. Chipley* (1898) 78 Mo. App. 22.

Where, in an action to charge a stockholder to the amount of the alleged unpaid balance on his stock, it appeared that the plaintiff knew, when he extended credit, that the stock of the corporation had been issued as nominally full-paid, in consideration of property taken at an overvaluation, the court refused to allow a recovery, saying: "The great weight of authority in this country is to the effect that in such an action it is essential to establish fraud, and that the creditor must be one who in good faith gave credit in the belief that the stock was full-paid or the stockholders were bound for the unpaid balance." *Woolfolk v. January* (1895) 131 Mo. 620, 33 S. W. 432.

Where the plaintiff, as a corporation creditor, sought to recover an alleged unpaid balance on the shares held by certain stockholders, and it appeared that he was a party to the agreement by which the shares had been issued as full-paid, for property at a fictitious

value, it was held that he could not be heard to say that the stock was unpaid. The court said: "The reason of this rule is that such a person has not given credit to the company upon the faith of the unpaid subscriptions being an asset of the company." *Meyer v. Ruby Trust Min. & Mill. Co.* (1905) 192 Mo. 162, 90 S. W. 821.

Where it appeared that the plaintiff had been a party to an agreement whereby stock was issued as nominally full-paid, in exchange for property at an overvaluation, he was estopped from later enforcing a creditor's right to the unpaid balance on the stock, the court saying: "A stranger dealing with a corporation has a right to presume that it has issued or agreed to issue its stock only for money or money's worth for its full face value, and if the corporation has issued its stock for less, such stranger . . . may have redress on the stockholders to the extent that the stock has not been paid for in full value. . . . But this plaintiff is not in the attitude of a stranger or a creditor without notice; he was a party to the plan of the corporate organization by which it was agreed that the defendant should have this stock for the consideration of the privilege he sold to the corporation, and therefore, as to the plaintiff, it must be adjudged that the defendant has paid for his stock." *Euston v. Edgar* (1907) 207 Mo. 287, 105 S. W. 773.

In *Scott v. Luehrmann* (1919) — Mo. —, 213 S. W. 855, the plaintiffs, as judgment creditors of an insolvent corporation, sought to recover the unpaid balance on shares of stock held by the defendants. It was alleged that the defendants had been allotted shares of stock amounting to \$52,500, and had paid nothing thereon. The answer alleged knowledge on the part of the plaintiffs that the capital stock of the corporation was not paid in money, and it was maintained that this knowledge would estop the plaintiffs from recovering. The court said that there was no question as to the correctness of the equitable principle that knowledge on the part of the creditor, at the time credit was extended,

that shares of stock were issued to the subscribers without payment therefor, would prevent him from enforcing his claim.

In *Dickinson v. Kline* (1914) 96 Neb. 435, 148 N. W. 141, the plaintiff as receiver for a corporation, and to satisfy the claims of outstanding creditors, brought action against the defendants as stockholders, to recover their unpaid subscriptions for stock. It appeared that the defendants had purchased stock at the rate of \$280 for ten shares with a par value of \$1,000, but it further appeared that the creditors had knowledge of the tenor of the agreements, and because of this latter fact the defendants claimed that no recovery should be allowed. The court held that, since the creditors had dealt with the corporation with notice of the facts, a decree against the defendants was reversible error. The principle of law involved was stated as follows: "By the great weight of authority, in the absence of express charter, statutory, or constitutional provisions establishing a different rule, an issue of watered or fictitiously paid-up stock by a corporation, whether the issue was at a discount of its par value, or for property, labor, or services taken at an intentional overvaluation, or gratuitous, is binding upon the corporation, and as against all other parties, except in so far as it may constitute a violation of the rights of . . . subsequent creditors of the corporation. . . . The agreement that payment in full at the par value shall not be required is a fraud upon subsequent creditors who deal with the corporation on the faith of its capital stock being full-paid in fact; and a court of equity, or, by statute in some jurisdictions, a court of law, will, at the instance of creditors, compel the holders of such stock, or their transferees with notice, to pay . . . the difference between the par value of the stock and what has been paid therefor. This does not apply, however, . . . in favor of subsequent creditors who participated therein, or who dealt with the corporation with knowledge of the facts."

In *Farrell v. Davis* (1916) 85 Or.

218, 161 Pac. 94, 708, an action by the assignee of a creditor of an insolvent corporation to recover from the defendants their alleged unpaid stock subscriptions, the court held that, since it appeared that the creditor had knowledge, at the time he acquired his claim, that the stock had been issued for property at an overvaluation, the plaintiff could not recover.

It was held in *Mathis v. Pridham* (1892) 1 Tex. Civ. App. 58, 20 S. W. 1015, that where creditors had knowledge, at the time their claims arose, that the corporation was issuing \$2 in stock for \$1 paid, they could not hold the subscribers liable for the unpaid balance on the par value of the stock issued.

In *Cole v. Adams* (1898) 19 Tex. Civ. App. 507, 49 S. W. 1052, on appeal from a judgment against the defendants for the alleged unpaid balance on shares held by them, which had been issued for property at an overvaluation, it was held that, "as to creditors without notice, property conveyed in payment of stock is not to be considered as a payment, except to the extent of its money or actual value." But the court added that "creditors who had notice, when they extended credit to the corporation, of the manner in which appellants acquired their stock, could not recover."

In *Whitehill v. Jacobs* (1890) 75 Wis. 474, 44 N. W. 630, which was a creditor's suit against the stockholders of an insolvent corporation, it appeared that stock with a par value of \$100,000, had been issued for patent rights worth not more than \$50,000, and the plaintiff sought to enforce the stockholder's liability for the unpaid portion of their stock. The defendants alleged that the plaintiff had knowledge of the transaction at the time he extended credit, and should, therefore, be estopped from recovering in this action. As to this contention, the court said: "If such findings are upheld, the plaintiff is not within the rule, for they demonstrate that he did not give the credit in the belief that the stock was fully paid for, and hence has no valid claim against the stockholders individually."

But the fact that creditors of an insolvent corporation have discovered, since extending credit, that stockholders have not paid in full for their stock, will not prejudice their right to recover the unpaid balances thereon. Thus, in *Scott v. Luehrmann* (1919) — Mo. —, 213 S. W. 855, the court applied the above proposition, since "such subsequent knowledge does not tend to negative their reliance upon the presumption that the corporation was legally organized and its shares of stock had been issued for money or money's worth at the time of its prior contract with them."

And in *Gordon v. Cummings* (1914) 78 Wash. 515, 189 Pac. 489, it was held that subsequent knowledge of the creditor of a corporation that stock which had been issued as full-paid was not so in fact would not deny him the right to enforce the shareholder's liability.

It has been held that a plaintiff need not allege that he became a creditor in ignorance of the fact that stock had not been paid up, knowledge of such facts being a matter of defense, to be set out in the answer. *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.* (1891) 46 Fed. 22.

And in *Gogebic Invest. Co. v. Iron Chief Min. Co.* (1891) 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726, it was held that the defense that the creditor had knowledge that shares were being issued for a consideration much less than the par value was in the nature of an estoppel on the plaintiff, and need not be negated in the complaint.

**b. Rights of person claiming under creditor.**

The assignee of one who has extended credit to a corporation with knowledge that the stock was not in fact full-paid has no greater rights than his assignor, in enforcing the liability of stockholders for unpaid subscriptions. *SHERMAN v. HARLEY* (reported herewith) ante, 950; *Callanan v. Windsor* (1889) 78 Iowa, 193, 42 N. W. 652; *State Trust Co. v. Turner* (1900) 111 Iowa, 664, 53 L.R.A. 186, 82 N. W. 1029; *Walburn v. Chenault*

(1890) 43 Kan. 352, 23 Pac. 657; *Young v. Erie Iron Co.* (1887) 65 Mich. 111, 31 N. W. 814; *Carp v. Chipley* (1898) 73 Mo. App. 22; *Meyer v. Ruby Trust Min. & Mill. Co.* (1905) 192 Mo. 162, 90 S. W. 821; *Farrell v. Davis* (1916) 85 Or. 213, 161 Pac. 94, 703.

In *SHERMAN v. HARLEY* (reported herewith) ante, 950, wherein it appeared that the assignor of the plaintiff had knowledge, at the time he extended credit to a corporation, that its stock had been issued for property admittedly of a value less than the par value of the stock, the court held that this knowledge on the part of the creditor would estop the plaintiff from enforcing the liability of the stockholders for their unpaid subscriptions.

And where the creditor of an insolvent corporation was a party to an agreement by which a defendant stockholder had purchased stock for 50 cents a share, it was held that an assignee of the creditor could acquire no higher rights against the stockholders than his assignor had, and such knowledge imputed to him created an estoppel in an action to recover the unpaid balance on the stock held by the defendant. *Callanan v. Windsor* (1889) 78 Iowa, 193, 42 N. W. 652.

In *State Trust Co. v. Turner* (1900) 111 Iowa, 664, 53 L.R.A. 186, 82 N. W. 1029, the assignee of a creditor, who had knowledge, at the time he extended credit, that the stock of the corporation was not actually full-paid, was held to be estopped from recovering the unpaid amount on the shares held by the defendant.

And similarly, in *Walburn v. Chenault* (1890) 43 Kan. 352, 23 Pac. 657, it was held that both a creditor and his assignee were estopped from enforcing a liability against stockholders for the amount unpaid on their stock, where the creditor knew, at the time he gave credit to the corporation, that such stock was being issued as full-paid, for property conveyed at an overvaluation.

In *Young v. Erie Iron Co.* (1887) 65 Mich. 111, 31 N. W. 814, the plaintiff sought to collect a judgment against a corporation by levying on the unpaid

balances on its shares held by the defendants. It appeared that the plaintiff's assignors had knowledge, when they advanced credit, that such shares were issued as "full-paid," in consideration of property received at an overvaluation, and the court held that the plaintiff was estopped by his assignor's knowledge from recovering the unpaid subscriptions of the defendants.

Where the administratrix of one who had been both a creditor and stockholder of a corporation sought to enforce the stockholder's liability for alleged unpaid subscriptions, and it appeared that the deceased knew, when he extended credit, that the stock was only nominally full-paid, the court held that no liability could be enforced. *Carp v. Chipley* (1898) 73 Mo. App. 22.

In *Meyer v. Ruby Trust Min. & Mill. Co.* (1905) 192 Mo. 162, 90 S. W. 821, the court held that a creditor, who had knowledge of an agreement whereby stock was issued as full-paid for property of a fictitious value, would be estopped from saying the stock was unpaid, and added that an assignee of the creditor by operation of law would stand in no better position.

Likewise, in *Farrell v. Davis* (1916) 85 Or. 213, 161 Pac. 94, 703, it was held that knowledge by a creditor that stock was not in fact full-paid would be imputed to his assignee, and prevent a recovery from the stockholders of the unpaid balance on their shares.

*c. Constructive notice of unpaid character of stock.*

*1. Record of articles of incorporation.*

It seems that the record of the articles of incorporation is not constructive notice to a creditor of the circumstances attending the issuance of stock, or that the stock was not in fact full-paid. *Lea v. Iron Belt Mercantile Co.* (1898) 119 Ala. 271, 24 So. 28; *Stout v. Hubbell* (1898) 104 Iowa, 499, 73 N. W. 1060; *Rogers v. Stag Min. Co.* (1915) 185 Mo. App. 659, 171 S. W. 676.

In *Lea v. Iron Belt Mercantile Co.* (1898) 119 Ala. 271, 24 So. 28, the court conceded that a creditor of a

corporation, who became such with knowledge that the corporation had received property at a gross overvaluation, in full payment of stock, could not require such subscribers to pay the difference between the par value of the stock and the real value of the land. But as to the defendant's contention that the record of incorporation proceedings, amount of capital stock, and the privilege of stockholders to convey property in exchange for stock was notice to the creditor of the overvaluation of property conveyed therefor, the court said: "We are of the opinion that the record of these facts does not operate as constructive notice to subsequent creditors of the real value of the property received in payment of the subscriptions, or that it was grossly overvalued. On the contrary, the creditor would be justified in presuming, from the record, that the law requiring subscriptions to stock to be paid in money or in property, at its reasonable value, had been strictly complied with. The law presumes, when it is shown that the stock has been paid for in full by the conveyance of property, and there is no evidence of the value of the property, that the consideration was adequate."

And where it appeared that the articles of incorporation recited that land to be purchased should be paid for by issuing stock at par, equal to the agreed valuation, the court held that this would not constitute notice of the fraudulent valuation thereof so as to estop a creditor from recovering the unpaid balance on such stock held by the defendant. *Stout v. Hubbell* (1898) 104 Iowa, 499, 73 N. W. 1060.

In *Rogers v. Stag Min. Co.* (1915) 185 Mo. App. 659, 171 S. W. 676, the defendants, in a creditor's action for an alleged unpaid balance on stock held by them, contended that a statute (Rev. Stat. 1900, §§ 2975 & 3340) providing that "a copy of the articles of incorporation shall be filed with the secretary of state and recorded in the county where the corporation is located" was constructive notice to the creditors that stock was fully paid in property of the value given, and fur-

ther maintained that this knowledge would estop a creditor from claiming that the stock was not fully paid up. The court said: "We do not see how such records could give notice that the value stated was sworn to is a fictitious one. Much actual investigation would have to be made to obtain that knowledge. . . . Persons dealing with corporations have a right to assume, in the absence of actual knowledge to the contrary, that the stock is fully paid for in money or money's worth. Estoppel is based on actual knowledge of the fact, or such lack of knowledge as comes from closed eyes, and is equivalent to actual knowledge, or constructive knowledge made so by law."

And a deed recording the transfer of certain property in consideration of stock is not constructive notice that the stock is fully paid. See *Osgood v. King* (1876) 42 Iowa, 478, wherein the plaintiffs, as corporation creditors, sought to recover from the defendant stockholders an alleged unpaid balance on the stock held by them. It appeared that the stock had been issued for certain coal lands, and, as the plaintiffs averred, at such an overvaluation that the actual cash value paid on each \$100 share of stock was about \$14. On demurrer, the defendants alleged that, since the deed of the property transferred to the corporation was on record, it was constructive notice to the creditors that the stock was fully paid, and of the manner of payment. But as to this contention the court held that "it could be no constructive notice to a person proposing to trust a corporation that the capital stock had been paid by the conveyance of a certain amount of land. No one would think of looking at the records for such a purpose, nor does the law require one to do so."

But see *Bent v. Underdown* (1901) 156 Ind. 516, 60 N. E. 307, wherein it was held that since the recorded articles of incorporation recited that the stock was being issued for \$15 a share, with a par value of \$100, the creditors were fully advised thereof, and did not give the corporation credit on the faith of its capital stock being paid in

full. And this constructive notice was held sufficient to estop a recovery of the unpaid 85 per cent on each share.

In Minnesota, it has been provided by statute (Gen. Stat. 1878, § 149) that in the case of mining corporations an issue or sale of stock, purporting to be full-paid, shall not be subject to any further assessments without the consent of the holder. Under that act it has been held that "persons dealing with such a corporation must be held to do so with knowledge that its stock may have been sold at less than par, and purporting to have been full-paid; that, if so sold, it is not assessable; and, consequently, that the amount of its stock outstanding cannot be relied on as indicating the amount of actual assets realized from its stock, and in its hands. There is, therefore, if there be no fraud in fact, no equity in favor of creditors against the purchasers of such stock at such a sale." *Ross v. Kelly* (1887) 36 Minn. 38, 29 N. W. 591.

And under a Wyoming statute directly authorizing the issuance of stock for property, and providing for a declaration of such stock as full-paid in all statements and reports by the company, it has been held that a compliance therewith by a corporation charges its creditors with notice of its actual assets, and in the absence of fraud no individual liability as for unpaid stock attaches to the shareholders. *Tuttle v. Rohrer* (1915) 23 Wyo. 305, 149 Pac. 857, rehearing denied in (1915) 23 Wyo. 318, 153 Pac. 27.

## *2. Individual knowledge of agent of creditor.*

The individual knowledge of an officer or member of a bank that stock of a debtor corporation is not in fact full-paid will not be imputed to the bank so as to prevent its enforcement of a stockholder's liability for his unpaid subscription. *First Nat. Bank v. Northrup* (1910) 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672; *Mathis v. Pridham* (1892) 1 Tex. Civ. App. 58, 20 S. W. 1015; *Martin v. South Salem Land Co.* (1896) 94 Va. 28, 26 S. E. 591.

In *First Nat. Bank v. Northrup*

(1910) 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672, it appeared that the cashier of the plaintiff bank which had loaned money to a corporation, the stock of which was nominally but not actually paid in full, was also the president of the debtor corporation, and had acted for both parties in negotiating the loan. It was maintained by way of defense that the knowledge of the cashier was the knowledge of the bank, but that personal knowledge by its cashier that the stock was not paid in full could not be imputed to the plaintiff, so as to defeat its right to recover the unpaid balances from the stockholders.

And it was held in *Mathis v. Pridham* (1892) 1 Tex. Civ. App. 58, 20 S. W. 1015, that the mere knowledge of the individual who was the president of a bank, which afterward became a creditor of a corporation, that stock was being issued by the corporation which was not in fact full-paid, was not sufficient notice to the bank of such fact.

Likewise, in *Martin v. South Salem Land Co.* (1896) 94 Va. 28, 26 S. E. 591, the court held that knowledge by two of the directors of a banking corporation that stock of a debtor corporation was being issued as full-paid for 30 per cent of its par value was not constructive notice to the banking corporation that the stock of its debtor was not in fact full-paid.

## II. Minority rule.

In the construction of the statutes defining the liability of stockholders for unpaid subscriptions, it has been held in a few jurisdictions that knowledge or want of knowledge that the stock of a corporation is in part unpaid does not affect their liability. *Rosoff v. Gilbert Transp. Co.* (1915) 221 Fed. 972 (under Connecticut statute); *DU PONT v. BALL* (reported herewith) ante, 955; *National Bank v. Pacific R. Co.* (1896) 66 Ill. App. 320; *Sprague v. National Bank* (1898) 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; *Gillett v. Chicago Title & T. Co.* (1907) 230 Ill. 373, 82 N. E. 891; *Nelson v. Chicago Title & T. Co.* (1907) 230 Ill.

440, 82 N. E. 911; *Kent v. Chicago Title & T. Co.* (1907) 230 Ill. 495, 82 N. E. 911; *Williams v. Chamberlain* (1906) 123 Ky. 150, 94 S. W. 29; *Stoecker v. Goodman* (1919) 183 Ky. 380, 209 S. W. 874; *Easton Nat. Bank v. American Brick & Tile Co.* (1906) 70 N. J. Eq. 732, 8 L.R.A.(N.S.) 271, 64 Atl. 971, 10 Ann. Cas. 84.

In *Rosoff v. Gilbert Transp. Co.* (1915) 221 Fed. 972, it appeared that action had been brought in Connecticut by the receiver of an insolvent corporation against stockholders owning the largest amount of unpaid stock, to recover the amount due thereon for the benefit of creditors. Certain of the stockholders brought an intervening bill in equity, praying for a stay of the receiver's suit, and for a reference to determine the amount due. One of the findings of the master on reference was that the creditors were entitled to participate in the recovery, without reference to their knowledge, at the time of extending credit, that such stock was unpaid. Disposing of an exception to this ruling, the court said: "Counsel for the stockholders claim in substance that, where a creditor has notice or knowledge that stock is unpaid when he extends credit, he is not entitled to participate in an assessment against stockholders, and that the same result follows, both when the creditor is also a stockholder and when credit is extended before stock is issued. These claims are based on the erroneous theory that the liability of stockholders to respond to an assessment in Connecticut is by reason of the 'trust fund' or 'fraud' theory, resorted to by the courts of many states to protect creditors of fraudulent corporations. In Connecticut, however, resort has never been had to this theory, for under the Connecticut law, while a stockholder is not liable for the debts of the corporation, he is bound to pay the par value for his stock. . . . There is no suggestion that the 'trust fund' or 'fraud' theory is the basis of the liability in Connecticut, or that the creditors' right to participate is based on these theories. The creditors are held to have a legal

rather than an equitable right. . . . The Connecticut Corporation Act provides: 'Sec. 16. Stockholders' Liability.—Every stockholder, whether an original subscriber or not, shall be liable for any balance due on the stock held by him. . . . If a creditor of a corporation shall obtain a judgment against it, and execution thereon shall be returned unsatisfied, such creditor may recover from any stockholder in such corporation the balance remaining due and unpaid on any stock held by him, so far as may be necessary to satisfy the debt. No subscriber for or holder of stock shall be liable as such for any payment of such stock, or for any debt of the corporation, after the par value of his stock has been paid.' This act seeks to secure the payment of the par value of stock, and to require stockholders to pay the par value, and exempts the stockholders from liability therefor when, and only when, the par value of his stock has been paid. There is no suggestion that certain creditors can enforce this liability, and that certain creditors cannot. The statute clearly contemplates that all creditors are entitled to be paid, and that stockholders are bound to pay them if the stock held by them has not been paid for in full."

In Delaware, in construing the provisions of the General Corporation Law relative to the liability of stockholders for the amount due and unpaid on their stock, the court holds that there is no distinction between creditors as to their knowledge or lack of knowledge of the conditions under which the stock was issued. See the reported case (*Du Pont v. Ball* ante, 955).

In *National Bank v. Pacific R. Co.* (1896) 66 Ill. App. 320, it was held under a statute (Corporation Act, chap. 32, § 25) that knowledge, at the time they gave credit, that stock of the debtor corporation was being issued as full-paid, in exchange for property of known less value, would not estop creditors from thereafter recovering the unpaid balance thereon from defaulting stockholders.

The decision in *National Bank v. Pacific R. Co.* (Ill.) supra, was af-

firmed in *Sprague v. National Bank* (1898) 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, on the authority of a statute (Rev. Stat. § 8, chap. 32) providing that "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him." In construing this section, the court said: "The legislative intent was that any amount unpaid upon subscription to the capital stock of a corporation should constitute a fund, to which a creditor of the corporation might resort to obtain satisfaction of his demand against the corporation. We hold, therefore, that under our statute the right of a creditor to enforce liability against one who has subscribed for stock in a corporation, and has not paid his subscription in full, is not dependent, in any degree, upon the knowledge possessed by the creditor that such subscription was or was not paid in full. If unpaid to the corporation it must be paid to the creditor."

And where certain stockholders maintained that creditors should be estopped from proceeding against them for unpaid balances on stock subscriptions because of the creditors' knowledge, at the time of extending credit, that stock was being issued as fully paid in consideration of the subscriber's rights in certain inventions, it was held that such knowledge would not create an estoppel. The court said: "In *Sprague v. National Bank of America*, supra, we said that the liability of the stockholder to the creditor for the unpaid portion of the subscription for stock is not 'in any wise affected by the fact that the creditor knew or did not know, when he extended credit to the corporation, that the stock was in part unpaid.' We are entirely satisfied with that view, and it is decisive of this question." *Gillett v. Chicago Title & T. Co.* (1907) 280 Ill. 373, 82 N. E. 891.

The decision in *Gillett v. Chicago Title & T. Co.* (Ill.) supra, was held controlling in *Nelson v. Chicago Title & T. Co.* (1907) 230 Ill. 440, 82 N. E. 911, which was an appeal by one of the defendants in the suit in circuit

court which was reviewed in the case cited.

And a similar application of the decision in *Gillett v. Chicago Title & T. Co. (Ill.) supra*, was made in *Kent v. Chicago Title & T. Co. (1907) 230 Ill. 495, 82 N. E. 911*, on the appeal of another codefendant.

In *Williams v. Chamberlain (1906) 128 Ky. 150, 94 S. W. 29*, which arose under an Arizona statute, providing that "the stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for by them," the court said: "It is not material whether creditors of the corporation know the amount of the stock actually subscribed, or the amount actually paid on stock subscribed by shareholders. They have a right to deal with the corporation in good faith and to assume that all shareholders who have subscribed for stock have either paid, or will pay, the amount of their subscription, and in the absence of any agreement or understanding between the creditors and the corporation, or shareholders, as to the amount of the liability of the latter, the question as to the creditors' knowledge or lack of knowledge of the amount the stockholder has paid, or subscribed to pay, is not material."

And in *Stoecker v. Goodman (1919) 183 Ky. 330, 209 S. W. 874*, the court, construing and applying a similar Kentucky statute (*Ky. Stat. § 547*), quoted *Williams v. Chamberlain (Ky.) supra*, as an illustrative precedent, and added: "It is clear from their provisions that the legislature intended to make stockholders absolutely liable to creditors for their unpaid stock subscriptions, without regard to the creditors' knowledge, or want of knowledge, of the fact that the stock was not paid for when the credit was extended."

Earlier decisions in Kentucky followed the majority rule heretofore set forth. See *John R. Proctor Land Co. v. Cooke (1898) 103 Ky. 96, 44 S. W. 391*, wherein the court said: "It appears from the testimony that the creditors of this corporation, who are seeking through the corporation itself

to collect these assessments from appellee, for the purpose of reimbursing them for payments made by them for the company, were the original incorporators, have always been the chief officers of the company, and voluntarily assumed the obligations of the company, with a full knowledge of the conditions upon which the land was transferred to the company and the stock issued in payment therefor. There was no deception or misrepresentation of any kind to induce them to become the security of the company, and in our opinion this suit cannot be sustained by the assumption that by the conveyance of the land appellee had not paid up all he had contracted or was bound to pay by his subscription."

And see *Miller v. Higginbotham (1906) 29 Ky. L. Rep. 547, 93 S. W. 655*, wherein it appeared that the creditor had taken a part in the incorporation of a company, and knew the terms on which stock was issued, it was held that he could not thereafter recover from the other stockholders any part of their unpaid subscriptions. In stating the rule applicable, the court said: "The doctrine is very well settled that a shareholder in a corporation is liable to its creditors for the amount of his unpaid subscription, and that the capital stock of a corporation, including unpaid subscriptions, constitutes a trust fund for the benefit of its creditors. . . . But there is an equally well-recognized rule that a creditor of a corporation, who deals with it with actual knowledge of the fact that the shares of stock are to be regarded as paid up and nonassessable, and that the shareholders are only to be liable for a specified sum or for the amount actually paid in by them, cannot exact from the shareholders the amount of their unpaid subscription."

In *Easton Nat. Bank v. American Brick & Tile Co. (1906) 70 N. J. Eq. 732, 8 L.R.A.(N.S.) 271, 64 Atl. 917, 10 Ann. Cas. 84*, it was held that a creditor could recover the unpaid balance on shares held by stockholders of an insolvent corporation, although



he knew at the time he extended credit that the stock issued as full-paid was not in fact full-paid. The court, discussing the Corporation Act of 1875 (1 Gen. Stat. p. 907), said: "Our Corporation Act places the stockholders' liability to creditors upon a firmer foundation than the 'trust fund doctrine,' . . . the statute absolutely prohibiting agreements for the issue of stock for a consideration less than its par value, and affording relief to all creditors without distinction." This decision reversed the holding in *Easton Nat. Bank v. American Brick & Tile Co.* (1905) 69 N. J. Eq. 326, 60 Atl. 54, that an extension

of credit, with knowledge that stock was not in fact paid in full, would prevent the creditor of an insolvent corporation from enforcing the liability of the stockholders for the unpaid balance on their shares.

And see also *Johnson v. Tennessee Oil, etc., Co.* (1908) 74 N. J. Eq. 32, 69 Atl. 788, wherein the court, deciding the liability of stockholders in a corporation organized under the laws of Arizona, held that under the trust-fund theory they would not be liable for an alleged unpaid subscription, since the creditors knew, when they extended credit, that the stock was not actually full-paid. R. E. B.

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HERBERT A. FOGG

v.

LINWOOD C. TYLER.

*Maine Supreme Judicial Court — May 4, 1914.*

(111 Me. 546, 90 Atl. 481.)

**Partnership — failure to present claim against partner's estate — equalization out of partnership assets.**

1. A creditor of a partnership, who, without fault on his part, fails to present his claim against the separate estate of a partner which was being administered in the probate court, is entitled to a sufficient amount from the receiver of the partnership funds to make his dividends from both estates equal to those of creditors who proved their claims against the individual estate before further dividends are made by him out of the partnership estate.

[See note on this question beginning on page 990.]

— assets — payment of debts.

2. When a partnership is formed the property of the partnership, and, subject to individual debts, the property of the several partners, stands as an initial asset for the payment of all debts which the partnership may incur, and property afterwards acquired by either partnership or individual continues as such asset.

[See 20 R. C. L. 871.]

— separate administration of estate of insolvent partner — effect.

3. That, because of the insanity of

a member of an insolvent partnership, his estate was administered in the probate court and had never gone into the hands of the partnership receiver, does not make the funds of the partnership and of his estate separate and distinct, so that partnership creditors cannot look to both for the settlement of their claims.

— distribution of assets — rule.

4. Partnership assets applicable to debts of the same class should be distributed equally among creditors of the same class.

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REPORT by the Supreme Judicial Court for Penobscot County for the determination by the Law Court of a proceeding for the payment to

petitioner of his claim out of partnership assets in the hands of a receiver.  
*Decree for petitioner.*

The facts are stated in the opinion of the court.

Mr. E. C. Ryder, for petitioner:

Petitioner is equitably entitled to the relief asked for.

1 Pom. Eq. Jur. § 405; Grinnell v. Merchants' Ins. Co. 16 N. J. Eq. 283.

Mr. C. H. Bartlett in propria persona.

Philbrook, J., delivered the opinion of the court:

This is an interlocutory proceeding arising from the above-entitled case in which C. J. Gilfillan is petitioner and is the plaintiff in interest. The proceedings are in equity and come to the law court on report, for determination upon the petition and upon the findings of facts and conclusions by the sitting justice.

The petition is as follows:

"(1) That the late copartnership of Tyler, Fogg, & Co. consisted of the above-named Linwood C. Tyler and Herbert A. Fogg, the said Herbert A. Fogg being a person of unsound mind whose estate is being settled in the probate court within and for said county, by Thomas R. Savage, his guardian.

"(2) That between April 11, 1907, and May 25, 1911, the petitioner made general deposits of money with the late copartnership of Tyler, Fogg, & Co., and that on said 25th day of May, 1911, there was due the petitioner from said copartnership a balance of twenty-one hundred sixty-one dollars fifty-nine cents (\$2,161.59) as appears by the deposit book now in the possession of the petitioner, and also by the books of said late copartnership, which amount is still due the petitioner.

"(3) That the petitioner filed proof of his claim against the firm of Tyler, Fogg, & Co. with Charles H. Bartlett, receiver, and the special master appointed by the court, and received a dividend of 5 per cent of the amount of his claim from the funds in the hands of said receiver, but filed no proof of his claim with the commissioners appointed by the probate court to pass upon claims against the individual estate of Her-

bert A. Fogg, and therefore he has received no dividend from the estate of said Herbert A. Fogg.

"(4) That he employed Leon F. Higgins, of Brewer, in said county, as his agent to look after his interest and do whatever was necessary to secure his claim against said copartnership or any individual thereof; that later he was notified that a committee had been selected by the unsecured creditors, represented by competent local attorneys, to look after their interest and do whatever was necessary to secure their claims; that he signed a contract to pay his proportional part of the expenses of such committee, and that he relied upon said Higgins and said committee to protect his interest and do whatsoever was necessary to secure his claim.

"(5) That it was without fault or negligence on his part that he failed to prove his claim against the individual estate of Herbert A. Fogg, having no knowledge that there were funds belonging to the individual estate of Herbert A. Fogg, or that commissioners had been appointed to pass upon such claims.

"(6) That he has received no dividend on account of the individual estate of Herbert A. Fogg; that the only money he has so far received on account of his claim, either from the receiver of the late copartnership or from the guardian of Herbert A. Fogg, is a dividend of 5 per cent paid by the receiver of said late copartnership.

"(7) That all the assets belonging to the individual estate of Herbert A. Fogg have been distributed; that all other creditors of said late copartnership have received 66.4 per cent of their claims, while he has received but 5 per cent of his claim, and that the receiver of said late copartnership has in his possession funds not yet distributed.

"Wherefore, inasmuch as the omission to prove his claim with the commissioners appointed to pass

upon the claims against the individual estate of Herbert A. Fogg was without fault or negligence on his part, and, inasmuch as sufficient funds remain in the hands of said receiver to pay the amount equitably due the petitioner, and the payment to him of 61.4 per cent of his claim will not work an injustice to other creditors, he respectfully petitions and prays that this court upon hearing will order and direct said Charles H. Bartlett, receiver as aforesaid, to pay to him the sum of 61.4 per cent of his claim, amounting to \$1,327.22."

After proper notice to all parties in interest there was a hearing upon the petition before a single justice, who made the following findings:

"(1) The late copartnership of Tyler, Fogg, & Co., consisting of Linwood C. Tyler and Herbert A. Fogg, is insolvent, and its affairs are in the process of settlement by Charles H. Bartlett, Esq., receiver, appointed by this court.

"(2) Herbert A. Fogg has been adjudged of unsound mind, and his estate has been settled in the probate court as an insolvent estate by Thomas R. Savage, his guardian, under the provisions of chapter 68, Revised Statutes.

"(3) The copartnership of Tyler, Fogg, & Co., at the time it was adjudicated insolvent, was indebted to the petitioner in the sum of twenty-one hundred sixty-one dollars fifty-nine cents (\$2,161.59).

"(4) The petitioner filed proof of his claim with the special master appointed by the court to receive and pass upon claims against the copartnership, who returned, as due the petitioner, including interest, twenty-one hundred sixty-six dollars ninety-nine cents (\$2,166.99).

"(5) The petitioner filed no proof of his claim with the commissioners appointed by the probate court to pass upon claims against the insolvent estate of Herbert A. Fogg, but from evidence presented to me, I find that the omission of the petitioner to present his claim to the commissioners was without fault on

his part, and that he had a reasonable excuse for omitting to do so.

"(6) All creditors of the copartnership of Tyler, Fogg, & Co. whose claims were seasonably proved, except the petitioner, have received or will receive, sixty-six and four-tenths (66.4) per cent of their claims, sixty-one and four-tenths (61.4) per cent from the guardian of Herbert A. Fogg, and five (5) per cent from the receiver, while the petitioner has received but five (5) per cent of his claim, paid by the receiver. He has received no dividend from the estate of Herbert A. Fogg.

"(7) All available assets of the estate of Herbert A. Fogg have been distributed. The claim of the petitioner is barred, not having been presented to the commissioners within the time allowed by statute.

"(8) All claims are of one class, and all are against the copartnership. There are no claims against the individual members of the firm, and there are not sufficient assets of the copartnership and of the individual members thereof to pay the claims in full.

"(9) There remain in the hands of the receiver, undistributed, sufficient assets to pay the petitioner the amount he would have received had he filed his claim with the commissioners appointed to pass upon claims against the individual estate of Herbert A. Fogg, in excess of any future charges and expenditures of the receiver, and such payment will not interfere with payments already made to other creditors. And the receiver will then have assets to be distributed to the creditors when hereafter ordered by the court."

To condense the prayer of the petitioner and the findings of the justice it may be said that the gist of the matter before us is this: The individual assets of Fogg having been administered by the probate court and all paid out to creditors who presented their claims before the commissioners appointed by that court, this petitioner having failed,

through no fault of his own, to present his claim before those commissioners, shall we now order the receiver to pay to this petitioner the amount which he asks for out of funds in the hands of the receiver before making any further dividends to creditors?

Our attention has not been called to any case adjudicated in our courts or elsewhere which is on a parity with the one under consideration. No exact precedent is before us. We must, therefore, resort to fundamental principles and reason, as well as underlying principles of equity, in reaching our conclusion. It will be conceded without citation of the authorities that when a partnership

Partnership—  
assets—pay-  
ment of debts.

is formed the property of the partnership, and, subject to individual debts, the property of the several partners, stands as an initial asset for the payment of all debts which the partnership may incur, and that after-acquired property of partnership or individual continues as such an asset. Ordinarily, therefore, the receiver of a partnership would be under the duty of taking into his custody all partnership assets and all assets of each individual partner which were not required to pay the individual debts of those partners respectively. Assets thus taken into custody would be reduced to cash, and, under proper orders of the court, used to pay the expenses of receivership and liquidating claims of creditors against the partnership.

In the case at bar a seeming complication arises from the fact that one of the partners, Herbert A. Fogg, was an insane person under guardianship. Rev. Stat. chap. 68, § 23, provides that the insolvent estate of an insane person under guardianship is to be settled according to the general provisions of the statute for the settling of insolvent estates of deceased persons. Consequently commissioners were appointed by the probate court to hear claims against the estate of Herbert A. Fogg, but this petitioner, through no fault on his part, failed to present

his claim before those commissioners. Other creditors of the partnership did so present their claims, and, the aggregate of them being greater than the amount of the individual Fogg estate, that estate was applied pro rata to the payment of claims presented to the commissioners, and the individual estate of Fogg was thereby exhausted. At this point, it should be observed that the individual estate of Fogg never came into the actual custody of the receiver, but was paid out by the guardian of Fogg under the decree of the probate court. It has been suggested that the partnership funds in the hands of the receiver and the funds of the estate of Herbert A. Fogg in the hands of his guardian constituted two separate and distinct funds. We cannot indorse this view because, as already stated, his personal

estate, subject to payment of individual debts, — and there were none in this case,—formed part and parcel of an initial and continuing fund which, all through the partnership, stood as assets for the payment of partnership debts. It is true that under the peculiar circumstances arising in this case, and by virtue of the statute just referred to, it became necessary to have the individual estate of Fogg administered through statutory methods, but such administration, being a means of distribution, did not make his personal estate a separate fund which up to that time was, in law, part and parcel of the partnership assets for the payment of partnership debts.

It happened, therefore, that when other creditors presented their claims to the commissioners and this petitioner did not, those other creditors obtained a larger proportion of partnership assets for the payment of their claims than this petitioner did. But partnership assets applicable to debts of the same class should be distributed equally among creditors of the same class.

—separate administration of estate of insolvent partner—effect.

—distribution of assets—rule.

Still bearing in mind the unity of the partnership assets composed of partnership property and individual property, it follows by the rules of receivership, as well as by the rules of equity, that this petitioner should share with other creditors of the same class equally in all the assets applicable to the payment of debts in the class to which this petitioner's debt belonged. Such sharing can only be accomplished now by directing the receiver to pay to this petitioner the amount prayed for before making a further dividend among creditors

—failure to present claim against partner's estate—equalization out of partnership assets.

of the same class to which the petitioner belongs. Thus we shall preserve the idea of the unity of the different component parts which make up the assets of a copartnership, and deal equitably and fairly with all creditors of the same class. So without violation of any principles of law or equity, but rather in harmony with all fundamental principles, we shall do substantial justice and equity by ordering the receiver, before making any further payments or dividends to creditors of the class to which this petitioner belongs, to pay to this petitioner the sum of \$1,327.22.

Decree accordingly.

### ANNOTATION.

**Equalization as between firm creditors, some of whom have received dividends from estates of individual partners and others not.**

No case other than the reported one (FOGG v. TYLER, ante, 986) seems to have passed upon the question presented therein, but the decision to the effect that, where the failure to present the claim against the individual partner was not due to the fault of the creditor, he is entitled to equalization, as against other firm creditors, out of firm funds, before further participation therein by them, seems to be

good law, based as it is upon the fundamental principle that assets applicable to debts of the same class should be equally distributed among creditors of the same class. This reasoning would, of course, equally tend to a denial of equalization where the non-participation in the separate estate of the individual partner was through the fault of the creditor. G. J. C.

NATIONAL CASH REGISTER COMPANY, Appt.,

v.

JOHN HUDE.

*Mississippi Supreme Court (Division B) — January 20, 1919.*

(119 Miss. 86, 80 So. 378.)

**Lien — for recovery of payments in conditional sale contract.**

1. A buyer on condition who rescinds his contract for defects in the article purchased, after making payments under the contract, has no common-law lien on the article for recovery of the payments made.

[See note on this question beginning on page 993.]

**Sale — provision for retention of payments as rent — defective article.**

2. A clause in a conditional sale contract that payments made on the contract shall be retained as rent for the use of the article sold, in case

possession is retaken for failure to pay instalments of purchase money when due, does not apply in case the sale is rescinded by the purchaser for defects in the article purchased.

[See 24 R. C. L. 500.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Warren County (Brien, J.) in its favor, on condition of payment of a certain sum to defendant, in an action brought to recover possession of a cash register sold by plaintiff to defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. C. Bryson, for appellant:

Since the contract does not give defendant a lien on the register to secure a return to him of any part of the purchase price he might pay before refusing to accept the machine, such lien cannot arise except by operation of law or by statute.

17 R. C. L. 601, ¶ 8; *Howze v. Rook Lumber Co.* 118 Miss. 293, 79 So. 98; *Hall Commission Co. v. Crock*, 87 Miss. 445, 40 So. 20, 1006; *Mobile Auto Co. v. Sturges*, 107 Miss. 848, 66 So. 205; *Bowers v. Southern Automatic Music Co.* 114 Miss. 25, 74 So. 774.

Messrs. Henry & Canizaro, for appellee:

Defendant has a lien on the register for the amount paid for it by him.

*Bowers v. Southern Automatic Music Co.* 114 Miss. 25, 74 So. 774.

Plaintiff was estopped from bringing the action of replevin from the register when it had declared and elected in the first suit to sue on the notes without embodying therein a writ of seizure for possession of the register.

35 Cyc. 536; *Munn v. S. F. Bowser & Co.* 114 Miss. 500, 75 So. 372; *Warriener v. Fant*, 114 Miss. 174, 74 So. 822; *Harvison v. Turner*, 116 Miss. 550, 77 So. 728; *Home Ins. Co. v. Tate Mercantile Co.* 117 Miss. 760, 78 So. 709.

The replevin suit cannot be maintained by the seller unless it makes restoration or restitution of the consideration received from defendant.

84 Cyc. 1402; *Raynolds v. Copeland*, 71 Ind. 422; *Havey v. Petrie*, 100 Mich. 190, 59 N. W. 187; *Pangborn v. Ruemennapp*, 74 Mich. 572, 42 N. W. 78; *Oskamp v. Crites*, 37 Neb. 837, 56 N. W. 394; *Dodge v. Fearey*, 19 Hun, 277; *Moffitt v. Shields*, 67 Mich. 610, 35 N. W. 174; 35 Cyc. 513; *Wilcox v. San Jose Fruit Packing Co.* 113 Ala. 519, 59 Am. St. Rep. 135, 21 So. 376; *Adam, M. & A. Co. v. Stewart*, 157 Ind. 678, 87 Am. St. Rep. 240, 61 N. E. 1002; *Hambrick v. Wilkins*, 65 Miss. 18, 7 Am. St. Rep. 631, 3 So. 67.

Ethridge, J., delivered the opinion of the court:

This is a suit by the National Cash

Register Company in replevin for a machine or cash register sold to appellee for use in his business in the city of Vicksburg. The contract provided for cash instalments in monthly payments, and provided, in default of any payment as provided in said note, it is agreed that all unpaid payments shall at once become due and payable, and that upon failure to make any payment provided herein at the time same is due and payable that the company shall take possession and remove said register without process, and in such case it was agreed that all payments theretofore made under the contract are considered as having been made for use of the register while in possession of the purchaser, and such payments shall be retained by the company as rental.

Prior to the institution of this suit the appellant had filed a suit against the appellee in the circuit court for the full amount of the purchase money because of a default in payment, and trial was had in the circuit court, in which the defendant defended upon the ground that the cash register sold him would not do the work it was purchased to do, and that the defects were not discoverable except by use, and on discovering the defects the defendant had notified the company of the defects and elected to rescind the sale, and had tendered the cash register to the appellant. The jury in that case found for the defendant, and no appeal appears to have been taken from that judgment. Thereafter this suit was instituted in replevin, and the defendant declined to surrender the cash register until the register company had repaid to the defendant the sum of \$235 which he had made as payments on the cash register; a part being in cash at the time of the purchase and some pay-

ments after receipt of the cash register. The defendant in this suit also defended on the ground that he was entitled to a common-law lien on the cash register until the money paid on the cash register was repaid. The case was submitted to the circuit judge without a jury, and the judge entered a judgment reciting that, being fully advised in the premises, he finds that the plaintiff do have and recover the cash register No. 1,446,821 in suit upon tendering and paying to the defendant, John Hude, the sum of \$235, with interest to accrue from this date, and all costs accrued therein, and in default of which then it is ordered by the court that said cash register be sold at public auction to the highest bidder for cash by the sheriff of this county in compliance with the statute on execution, and the proceeds thereof said sheriff shall distribute as follows: First, the cost of this proceeding; second, satisfy, if it can, the claim of John Hude, the defendant, amounting to \$235; third, and the balance, if any, to be paid to the plaintiff. From this judgment the National Cash Register Company appeals here.

We think that the judgment in the first suit established the fact that there was no sale made, and that the defendant had rescinded and tendered back the cash register in question. We think that the clause in the contract set out above, reciting that the payments made should be retained as rent for the use of the

**Sale—provision for retention of payments as rent—defective article.** cash register, does not apply in a case where the cash register is defective and does not come

up to representations. This clause would only become applicable in case the cash register was as represented, and was retained by the defendant under conditions where the plaintiff or seller had complied with his part of the contract. We think, however,

that there was no common-law or other lien upon the cash register in favor of the buyer. To disaffirm or rescind the contract

**Lien—for recovery of payments in conditional sale contract.**

for misrepresentation, the buyer would have to tender the cash register back to the seller, and he could enter suit for any amount paid the seller under such contract. We know of no statute giving a lien in a case of this kind, and certainly none exists under the common law. The remedies of the buyer have been announced by this court in several cases. In the case of Hall Commission Co. v. Crook, 87 Miss. 445, 40 So. 20, 1006, this court announced the remedies of the buyer as follows: Where the seller of merchandise delivers goods of an inferior quality to that required by the contract, the buyer may: First, reject the goods and sue for damages; or, second, pay the contract price, take the goods, and recover the difference between their value and the value of the goods required by the contract. This rule is also announced in Westmoreland v. Walker, 25 Miss. 76, and Hambrick v. Wilkins, 65 Miss. 18, 7 Am. St. Rep. 631, 3 So. 67, and is recognized in Mobile Auto Co. v. Sturges, 107 Miss. 848, 66 So. 205.

The only method of acquiring a lien upon the property in cases of this kind that has been called to our attention, or that we have found upon careful investigation, is one created by attachment. There was, however, no attachment in the present suit, and no action by the defendant seeking or claiming any relief other than a lien under the common law. In the first suit the defendant in that suit, appellee here, did not file any offset or plea of recoupment, and his rights for money paid on the cash register were not adjudicated in that suit. We think it was error for the judge in his judgment to impose a condition of

repayment on the right to recover, and it was error for him to direct the sale of the cash register in this proceeding. Accordingly the judg-

ment in the court below is reversed.

Reversed, and judgment here for appellant.

### ANNOTATION.

#### Right of buyer of chattels to lien upon the property where he rescinds the contract.

As indicated by the title, this note is limited to the rights of the buyer of personal property, and does not include the rights of the vendee of real estate on his rescission of the contract.

##### Rescission in actions at law.

It is a general rule of law applicable to contracts for the purchase of personal property that for the buyer to rescind the contract, assuming that he has valid grounds for the rescission, he must return or offer to return the property. It is also a general rule of law that, if a lien upon personal property exists at all, it only exists in favor of the person in possession of the property. From these premises, it logically follows that ordinarily the buyer who rescinds and returns or offers to return the property has no lien thereon, at least, none which he can assert as a ground for affirmative relief. The reported case (*NATIONAL CASH REGISTER Co. v. HUDE*, ante, 990) carries this doctrine to the extent of holding that where the buyer has been sued in an action at law for the purchase price of a chattel, and successfully defends the suit on the ground that he properly rescinded the contract of purchase and tendered to the seller a return of the property, he cannot subsequently defend an action of replevin by the seller to obtain possession of the property, on the ground that he has a common-law lien upon the property for the amount he has paid on the purchase price, which entitles him to possession thereof until such amount has been paid.

In *Hackney Mfg. Co. v. Celum* (1916) — Tex. Civ. App. —, 189 S. W. 988, the buyer of machinery, who was sued upon notes given for the purchase price, defended on the ground that the

seller had made false and fraudulent representations as to the machinery, and sought a rescission of the contract and a lien on the machinery for the amount he had paid on the purchase price, and the foreclosure of this lien. This relief was given him in the trial court. Upon appeal, the judgment was reversed to the extent that it established and foreclosed a lien in favor of the buyer. The court said that the counterclaim of the buyer for the amount paid, together with the freight and expenses incurred in testing the machinery, simply represented an unsecured demand against the seller, and the case presented no aspect justifying the establishment of an equitable lien on the machinery to secure the payment. It is suggested that if the seller were insolvent, that possibly would present a case where equity would intervene and establish a lien to secure the payment of the counterclaim, and upon this ground the court distinguished *Hall v. Bank of Baldwin* (1910) 143 Wis. 303, 127 N. W. 969, which will be hereafter more particularly referred to.

While not strictly within the scope of this note, attention is called to *White Sewing Mach. Co. v. McBride* (1887) 27 Mo. App. 470. In this case it appeared that a sewing machine was sold by an agent of the manufacturer under an agreement that another machine, taken in part payment, was to be returned to the buyer if the latter, after trying the new machine for the specified period, desired to rescind the contract of purchase. Within the time stated, the buyer gave notice of rescission and demanded a return of the old machine. The seller, without returning the old machine or offering to return it, brought replevin to recover the new one. It was



held that the action could not be maintained without the seller first returning or offering to return the old machine. And see also *Hamilton v. Singer Mfg. Co.* (1870) 54 Ill. 370. In that case, the purchaser of a machine under a conditional sale refused to make the payments agreed upon, on the ground that the machine did not comply with the contract; the seller thereupon sued out a writ of replevin and retook the machine. It was held that the action could not be maintained without first tendering to the buyer the amount the latter had paid on the purchase price.

*Armstrong v. Darbro* (1899) 10 Ky. L. Rep. 984, has sometimes been cited as sustaining the right of a buyer to a lien upon the property for the amount he paid on the purchase price. The case, however, merely holds that a sale of personal property without a change of possession is void as to creditors, but the purchaser is nevertheless entitled to a lien thereon for the amount he has in good faith paid on the purchase price. It is to be noted in this connection that the note does not deal with cases involving the respective rights of the buyer and the creditors of the seller.

#### **Rescission in equitable actions.**

Where the buyer has the right to invoke equitable aid in the rescission of a contract for the purchase of personal property, the few decisions on the point are in harmony in holding that, as an incident to the granting of relief to the buyer, the court will create in his favor an equitable lien upon the property for the amount he has paid on the purchase price which the seller is required to pay as a condition of the return of the property.

For example, in *Hall v. Bank of Baldwin* (1810) 143 Wis. 303, 127 N. W. 969, the purchaser of certain securities sought in equity to rescind the contract of purchase, and predicated his right to relief upon the ground of the insolvency of the seller, as well as his fraud in falsely misrepresenting circumstances affecting the value of the securities; this relief was sought without tend-

ering a return of the securities, the purchaser in this regard asking a lien on the securities for the amount he had paid. In sustaining the purchaser's right to rescind under the circumstances, and retain the securities until the seller had repaid the amount the buyer had paid upon the purchase price, the court pointed out that the rule as to a vendee of real estate, who had been induced by fraud of the vendor to purchase it, was that upon rescission the vendee has an equitable right to a lien upon the subject of the transaction, where that is necessary for his protection, and that a court of equity will extend its jurisdiction to determine the measure of the lien, fix it upon the property, and administer the assets as justice requires in the peculiar circumstances of the case as they may be presented. And it is said that the principle is laid down generally, not with reference to any particular species of property, but rather in harmony with a boundless field of equity where legal remedies for wrongs are inadequate or do not exist at all. The question is, "Must a person, necessarily, in a case of this sort, part with control of the property in advance of receiving back his money, or may he retain it,—if in the judgment of the court justice requires that to be done,—charged with a lien to the extent of money due him, contingent upon rescission? The latter would seem to be equitable. That equity has competency to afford such a remedy, we cannot doubt. Having such competency, the court should not refuse to open its doors merely for want of a precedent. . . . From the foregoing we deduce as a principle, not suggesting but that it might be even more broadly stated, if a person in possession of a subject of purchase is so circumstanced that he has the right to rescind on the ground of fraud, and it is essential for his protection that he should be permitted to retain the subject of the transaction, holding the same as the property of the fraudulent vendor, subject to such person's equitable right, till he shall have received satisfaction for the consideration he parted with to such

vendor in the transaction, a court of equity will, without any offer to return, except conditioned upon a restoration, or protection to that end, of the consideration parted with, afford a remedy for rescission and, incidentally, for retention of such subject and treatment thereof, so as to protect such person in his right to a return of such consideration, shaping the decree so as to 'meet the very form and pressure of each particular case in all its complex habitudes.'"

In *Mycok v. Beatson* (1879) L. R. 17, 13 Ch. Div. (Eng.) 384, 49 L. J. Ch. N. S. 127, 28 Week. Rep. 319, a court of equity, in rescinding a contract for the purchase of an interest in a partnership on the ground of the fraud of the seller, decreed in favor of the buyer a lien for the amount he had paid on the purchase price to cover the surplus of the partnership assets after satisfying the partnership

debts and liabilities. In giving a lien under the circumstances, the court relied upon a case involving a vendee's lien upon real estate. Referring to these cases, it is pointed out that the only distinction between such case and the one under consideration is that the one related to the sale of land and the other to a sale of a share of partnership profit, and it is said that this distinction appears to have no substance.

In *Scott v. Clarkson* (1808) 1 Bibb (Ky.) 277, it appeared that the purchaser of a slave sought in equity to rescind the contract of purchase on the ground of false and fraudulent representations as to the age and health of the slave. In granting this relief it was ordered that the purchaser should retain a lien upon the slave until the sum paid on the purchase price was refunded, and upon such payment the purchaser should deliver the slave to the seller. A. G. S.

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**SMITH STAGE COMPANY et al., Appts.,  
v.  
WALTER ECKERT.**

*Arizona Supreme Court — November 28, 1919.*

(— Ariz. —, 184 Pac. 1001.)

**Action — against carrier and indemnity insurer — joinder.**

1. An action against one undertaking to indemnify a carrier against liability for losses due to injuries negligently inflicted upon passengers cannot be joined with one to hold the carrier liable to a passenger for such injuries.

[See note on this question beginning on page 1003.]

**Parties — joinder — carrier and insurer.**

2. One undertaking to indemnify a carrier against liability for loss through injuries negligently inflicted upon passengers cannot be joined in an action by a passenger against the carrier to recover damages for injuries so inflicted.

**Insurance — indemnity — action by injured person against insurer.**

3. One injured by a carrier's negligence cannot maintain an action directly against one who has undertaken to indemnify the carrier against liability for injuries negligently inflicted upon

passengers, if the contract provides that no action shall be brought upon it until liability of the carrier has been established, although the contract permits proceedings immediately against the indemnitor upon recovery of a judgment against the carrier.

**— construction of policy — provision for suit by person injured.**

4. A provision indorsed on a contract indemnifying a carrier against liability for negligent injury to passengers, that the policy shall inure to the benefit of all persons suffering losses and suit may be brought thereon in any court of com-

petent jurisdiction by any person suffering loss or damage, followed by a provision that in case of final judgment against the carrier the indemnitor shall

pay the judgment, does not nullify provisions in the policy that no action shall lie upon the policy until the liability of the assured has been established.

**APPEAL** by defendants from a judgment of the Superior Court for Gila County (Shute, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant stage company while its passenger. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Morris & Malott, for appellants:

The complaint sets forth in one count a cause of action in tort against the Smith Stage Company, and an entirely separate cause of action against the Western Indemnity Company on a contract of insurance, so that a misjoinder arises.

Richards v. Warnekros, 14 Ariz. 488, 131 Pac. 154; 30 Cyc. 126, 132; Phenix Iron Foundry v. Lockwood, 21 R. I. 556, 45 Atl. 546; Marshall v. Saline River Land & Mineral Co. 75 Kan. 445, 89 Pac. 905; Roehr v. Liebmann, 9 App. Div. 247, 41 N. Y. Supp. 489; International Text Book Co. v. Fox, 149 App. Div. 369, 134 N. Y. Supp. 383; Kruschke v. Quatsoe, 49 Colo. 312, 112 Pac. 769; Ayres v. West, 86 Neb. 297, 125 N. W. 583; Schultz v. Wise, 93 Neb. 718, 141 N. W. 813; Walters v. Appalachian Power Co. 75 W. Va. 676, 84 S. E. 617, 13 N. C. C. A. 99.

Carriers of passengers are not insurers against accidents, but are answerable for an injury to a passenger only when there has been a want of proper care, diligence, or skill on the part of the carrier or his servants, unless such injury was wilfully inflicted.

4 R. C. L. "Carriers," § 582.

The admission of the policy was clearly inadmissible in evidence as against the Smith Stage Company, since the policy imposed no liability on that company.

International Text Book Co. v. Fox, 149 App. Div. 369, 134 N. Y. Supp. 383; Patterson v. Adan, 119 Minn. 308, 48 L.R.A. (N.S.) 184, 138 N. W. 281.

The presumption of negligence does not arise, and a prima facie case is not made out, where the evidence shows that the accident might have been the result of the wrongful acts or negligence of third persons.

Chicago City R. Co. v. Rood, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238, 9 Am. Neg. Cas. 240.

There is no evidence in the record

showing that, had the automobile been running at a legal rate of speed or at a reasonable rate of speed, the accident would not have occurred.

Trout Auto Livery Co. v. Peoples Gaslight & Coke Co. 168 Ill. App. 56; Cox v. Chicago & N. W. R. Co. 102 Iowa, 711, 72 N. W. 301.

One who has insured an employer against loss from the liability imposed by law for damages on account of injury to an employee cannot be joined in an action to hold the employer liable for injuries resulting in the death of an employee, for which the employer is alleged to be liable.

14 R. C. L. 1371; Clark v. Bonsal & Co. 157 N. C. 270, 48 L.R.A. (N.S.) 191, 72 S. E. 954; Hensley v. McDowell Furniture Co. 164 N. C. 148, 80 S. E. 154; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212.

Mr. L. L. Henry also for appellants.

Mr. Hugh M. Foster, for appellee:

The relationship of the defendants to each other and to the plaintiff made them, under the laws of this state, if not necessary parties defendant, at least proper parties defendant.

20 Cyc. 1400; Parsons, Bills & Notes, p. 117, ¶ 2; Kramph v. Hatz, 52 Pa. 525; Dole v. Young, 24 Pick. 250; Saint v. Wheeler & W. Mfg. Co. 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 589; Kirby v. Studebaker, 15 Ind. 45; Walker v. Forbes, 25 Ala. 139, 6 Am. Dec. 489; Sacramento Lumber Co. v. Wagner, 67 Cal. 293, 7 Pac. 705; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Redelsheimer v. Miller, 107 Ind. 485, 8 N. E. 447; Plano Mfg. Co. v. Burrows, 40 Kan. 361, 19 Pac. 809; Jones v. Foster, 67 Wis. 296, 30 N. W. 697; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Tweeddale v. Tweeddale, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440; Wasson v. Smith, 19 Ariz. 431, 171 Pac. 995; Eastman Land & Invest. Co. v.

Long-Bell Lumber Co. 30 Okla. 555, 120 Pac. 276; Montgomery v. Dorn, 25 Cal. App. 666, 145 Pac. 148; Roberts v. Abney, — Tex. Civ. App. —, 189 S. W. 1001; Allen v. Traylor, — Tex. Civ. App. —, 174 S. W. 923; Spann v. Cochran, 63 Tex. 242; Schneider v. Roe, — Tex. Civ. App. —, 25 S. W. 59; Ward v. Green, — Tex. Civ. App. —, 28 S. W. 574; Gay v. Pemberton, — Tex. Civ. App. —, 44 S. W. 400; Baptist Book Concern v. Carswell, — Tex. Civ. App. —, 46 S. W. 858; Missouri, K. & T. R. Co. v. Elias, — Tex. Civ. App. —, 184 S. W. 312; Knott v. Dubuque & S. C. R. Co. 84 Iowa, 462, 51 N. W. 57; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; Johns v. Wilson, 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. Rep. 445; Malone v. Crescent City Mill. & Transp. Co. 77 Cal. 38, 18 Pac. 858.

Defendants were not prejudiced by the failure of the plaintiff to state in his complaint that the contract of carriage was an implied contract.

Nitro-Glycerine Case (Parrott v. Wells) 15 Wall. 524, 537, 538, 21 L. ed. 206, 211.

It was proper for plaintiff to set forth in his complaint the acts complained of by the Smith Stage Company, which breached the contract with plaintiff.

Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; Cregin v. Brooklyn Crosstown R. Co. 75 N. Y. 192, 31 Am. Rep. 459; Patterson v. Augusta & S. R. Co. 94 Ga. 140, 21 S. E. 283.

The admission of the policy in evidence was proper and necessary. It was not prejudicial to either of the defendants.

International Text Book Co. v. Fox, 149 App. Div. 369, 134 N. Y. Supp. 383.

Not only was the jury justified in finding that the car was being operated by the Smith Stage Company, but the evidence is almost conclusive upon this point.

Schauble v. Hedding, 138 Minn. 187, 164 N. W. 809, 31 Cyc. 1335; Western Min. Co. v. Toole, 2 Ariz. 82, 11 Pac. 119; Stern v. International R. Co. 167 App. Div. 503, 153 N. Y. Supp. 520, 9 N. C. C. A. 949; Mott Iron Works v.

Metropolitan Bank, 78 Wash. 294, 139 Pac. 36; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Gulliver v. Blauvelt, 14 App. Div. 523, 43 N. Y. Supp. 935, 1 Am. Neg. Rep. 652; McCann v. Davison, 145 App. Div. 522, 130 N. Y. Supp. 473; Langworthy v. Owens, 116 Minn. 342, 133 N. W. 866, 2 N. C. C. A. 580; Burger v. Taxicab Motor Co. 66 Wash. 676, 120 Pac. 519; Kneff v. Sanford, 63 Wash. 503, 115 Pac. 1040, 2 N. C. C. A. 422; Baker v. Maseeh, — Ariz. —, 179 Pac. 53.

The evidence was amply sufficient to justify the jury in returning a verdict in favor of the plaintiff.

Young v. Cowden, 98 Tenn. 577, 40 S. W. 1088; Adams v. Swift, 172 Mass. 521, 52 N. E. 1068, 5 Am. Neg. Rep. 607; Bierbach v. Goodyear Rubber Co. 15 Fed. 490; United States Fidelity & G. Co. v. Shirk, 20 Okla. 576, 95 Pac. 218; Stern v. International R. Co. 167 App. Div. 503, 153 N. Y. Supp. 520, 9 N. C. C. A. 949.

The burden of proof is upon the defendant to show that it acted with reasonable skill and prudence and caution, and without negligence, if it seeks to avoid liability, when the plaintiff has shown that he is a passenger and the defendant a common carrier, and that the accident happened without any negligence on the part of the plaintiff.

Rice v. Chicago, B. & Q. R. Co. 153 Mo. App. 35, 131 S. W. 374; Wiley v. Grand Trunk R. Co. 227 Fed. 127; Gleeson v. Virginia Midland R. Co. 140 U. S. 443, 35 L. ed. 463, 11 Sup. Ct. Rep. 859.

The liability of a person operating an automobile as common carrier is the same as that of any other common carrier.

6 Cyc. 595; McFadden v. Metropolitan Street R. Co. 161 Mo. App. 652, 143 S. W. 884.

Ross, J., delivered the opinion of the court:

The appellee, who was the plaintiff below, brought his action against the appellant, the Smith Stage Company, a common carrier by automobile, to recover damages for injuries he claims were negligently inflicted or caused by the stage company while he was its passenger, and joined as codefendant the Western Indemnity Company, alleging that the Western Indemnity Company insured the Smith

Stage Company, and all passengers which the said Smith Stage Company might undertake to transport, during the life of the policy, in their said automobiles, and particularly insured the Smith Stage Company and said passengers against injury while said transportation was being made in a certain Hudson car (being the car upon which plaintiff was hurt); that the said policy contained the following provision: "In consideration of the premium at which this policy is written, and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with order No. —, it is understood and agreed that, regardless of any of the conditions of this policy, same shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the state by any person, firm, association, or corporation suffering any loss or damage. If final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the company shall pay said judgment up to the limits expressed in the policy, direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of the said judgment, and that this policy may not be canceled by either party, except that written notice of the same shall have been previously given for at least ten days to said Corporation Commission, prior to the cancelation of such policy. In all other respects the terms, limits, and conditions of this policy remain unchanged."

No other provision of the policy of insurance or indemnity is set out in the complaint, except that the liability is limited to \$5,000. The cause of action alleged against the Smith Stage Company is that on July 17, 1917, it, as a common carrier, agreed and undertook—for a consideration of 35 cents, to be paid

at the end of the journey—to safely transport plaintiff in one of its automobiles from Midland City to Globe, Arizona; "that by its negligence the defendant failed to keep its said promise of safe transportation; that the said Smith Stage Company on said day so negligently drove said automobile at such an excessive rate of speed behind another automobile, and in the face of an approaching automobile, that it collided with the automobile in front of it, whereby the plaintiff was thrown from said automobile and his arm was permanently injured and its usefulness destroyed; that said the Smith Stage Company drove said automobile in excess of the statutory rate of speed allowed on said road at said place at said time; that said injuries to the plaintiff were the natural and readily foreseeable consequence of the negligence of the defendant, and the said negligence was the proximate and natural cause of said injuries; that said injury was received while the plaintiff was a passenger as aforesaid in the Hudson car while operated by the defendant the Smith Stage Company as a common carrier as aforesaid."

Following an allegation that the plaintiff was damaged in the sum of \$10,000 is a prayer that he recover against the stage company the sum of \$10,000, and the Western Indemnity Company the sum of \$5,000.

The defendant corporations moved an order of the court requiring plaintiff to state separately and in separate counts the cause of action on policy and the cause of action for negligence or breach of contract to carry; to strike certain portions of the complaint, which, if granted, would have left but one cause of action and one defendant, or, in the event said motions were denied, that the complaint be made more definite and certain, by requiring plaintiff to set forth whether the contract of carriage was express or implied, and if express, where, when, and by whom made, and that the alleged policy of insurance be set forth either in terms or effect, so that it

could be determined if it covered the alleged injury to plaintiff. The defendants filed separate demurrers to the complaint alleging: (1) Defect of parties; (2) that several causes of action are improperly united; (3) that complaint is multifarious, in that it sets forth separate and distinct causes of action on several contracts against different defendants; (4) insufficient facts to constitute a cause of action; and (5) misjoinder of parties defendant.

Both defendants pleaded the general issue. All motions and demurrers were overruled, and trial before a jury was had on general issue, which resulted in a verdict and judgment for plaintiff against both defendants for the sum of \$5,000. Both defendant companies appeal, and assign as errors the overruling of motions and demurrers, the admission in evidence, over objection, of insurance or indemnity policy, and the giving of certain instructions requested. The view taken of the demurrers will effectively dispose of the different motions, and we will therefore pass the assignments based upon the overruling of motions.

That the complaint states two causes of action, one against the stage company, and one against the indemnity company, is apparent. But it is said that both causes of action are upon contract; that against the stage company being for a breach of its agreement of safe carriage, and the one against the indemnity company upon its agreement of insurance or indemnity against loss or damage he might suffer while a passenger of the carrier company by its negligence. The indemnity company was not a party to the contract of carriage, and neither was the plaintiff a party to the contract of insurance or indemnity. The latter contract is between the stage company and the indemnity company, and to it we must look for the respective obligations and rights of the parties thereto, or any third party claiming rights thereunder. If any third person has any rights

under the contract, whether it be indemnity against loss, or liability, or insurance, it is not because of any contract of his, but because of a contract of another for his benefit. Two of the terms of the insurance or indemnity policy are as follows: The Western Indemnity Company agrees: "(1) To indemnify the assured . . . against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, including death, resulting therefrom, accidentally suffered or alleged to have been suffered, while this policy is in force, by any person or persons (except employees) by reason of the ownership, maintenance, or use of any of the automobiles enumerated in item 5. . . . (c) No action shall lie against the company to recover under any of the agreements herein contained unless brought by the assured personally to recover money actually expended by him in satisfaction of claim or liability imposed by due process of law, resulting from injuries actually caused by reason of the ownership, maintenance, and use of said automobiles."

We quote these two provisions of the policy at this time to show what kind of loss or damage the indemnity company bound itself to pay. In the first place, the loss or damage must be accidentally suffered; second, the loss must be the result of bodily injuries or death; and, third, the accident and consequent injury must have been caused by the negligence of the stage company.

The law imposes no responsibility upon a common carrier for personal injuries unless the carrier is guilty of negligence. Under the common law, which controls in this jurisdiction, a common carrier is not an insurer of the safety of the passenger. So we see the liability of the indemnity company, under the terms of the policy, is limited to losses arising out of the torts of the assured stage company. It does not assume liability for losses that may be occasioned by the stage company's

failure to keep or perform its contract of carriage. Therefore, if we construe the complaint as appellee would have us, as based upon a breach of contract of carriage, it is upon a cause of action without the terms and purview of the policy, and demurrable so far as the indemnity company is concerned. However, we are satisfied that the cause of action stated against the stage company is one sounding purely in tort, and that the loss or damage alleged falls within the terms of the obligation assumed by the indemnity company as expressed in the provision inserted in the policy at the request of the Corporation Commission; it being the provision set forth in the complaint.

But, accepting this view of the complaint that it states a cause of action against the stage company for negligence and one against the indemnity company on contract, the causes being unrelated to each

**Action—  
against carrier  
and indemnity  
insurer—  
joinder.**

other, except as indicated, are they properly united? We think not. The statute (Civil Code,

¶ 427) provides: "Actions ex contractu shall not be joined with actions ex delicto." This is the common-law rule (1 C. J. 1065, § 209), and stands unaffected by any other provisions of our statute law. In *Continental Securities Co. v. Yuma Nat. Bank*, 20 Ariz. —, 176 Pac. 572, we said: "Where the Code classifies causes of action that may not be joined, such classification is binding upon the court."

There is also a misjoinder of parties defendant. They are not jointly

**Parties—  
joinder—carrier  
and insurer.**

liable on the policy. The stage company's liability is one imposed by law for negligence. The indemnity company's liability is one arising out of contract. Their liabilities are separate and distinct. The stage company could not be sued on the policy, as it has assumed none of the obligations thereof; nor can the indemnity company be sued for the tort, as it was not a party

to it. The two causes of action do not run against or affect both of the defendants, which we have held to be necessary before they can be joined as defendants. *Richard v. Warnekros*, 14 Ariz. 488, 131 Pac. 154; *Continental Securities Co. v. Yuma Nat. Bank*, supra.

It is manifest from an inspection of the complaint that the action was brought upon the theory that the contract of the indemnity company was one for insurance. It is alleged that the indemnity company "particularly insured the said Smith Stage Company and said passengers against injury." If so, it is insurance against accidental bodily injury or death negligently caused by the carrier stage company in the operation of one of its automobiles, and solely the contract of the indemnity company. It is too clear for argument that a person insured against accident, in instituting a suit on a policy to collect from insurer, need not join the owner of the vehicle in which or by which he was injured as a codefendant. Since the policy in this case names the particular kind of accident and the person by whom it must have been occasioned, the circumstances of the accident, as that it was negligent and committed by the stage company, would have to be set forth in the complaint, but only for the purpose of showing that the accident was one of the kind insured against. The stage company, however, is neither a necessary nor a proper party defendant in a suit upon the policy by the insured person, if it be an insurance policy.

After much thought and investigation, we have concluded that the indemnity company's contract is not one of insurance, but one of conditional liability; the condition being that the injured person must first obtain a judgment against the assured stage company before he has any remedy against the indemnity company on the policy. The policy, before the provision relied upon by plaintiff was made a part thereof at the instance of the Corporation

Commission, was the usual policy of indemnity against loss by the assured. By its terms no one could sue or recover thereon, except the assured, and he only after he had settled with the injured person his claim or judgment. The latter was not a beneficiary of the policy. But, granting that the policy is one of indemnity against liability, the rule is unchanged, except that some courts, in such cases, have held the liability on the policy an asset of the estate of the assured, and as such subject, by garnishment or other proper proceeding, to the payment of the injured person's judgment. In neither

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jured person  
against insurer.**

case may the injured sue directly upon the policy. *Allen v. Aetna L. Ins.*

*Co.* 7 L.R.A. (N.S.) 958, and note (76 C. C. A. 265, 145 Fed. 881); *Fuller's Acci. & Employers' Liability Ins.* 451-468; 1 *Joyce, Ins.* §§ 27a, 27b. Mr. Fuller states, at page 464: "It must first of all be borne in mind that these policies of insurance are secured to reimburse employers for damages sustained by reason of injuries to others for which they may be legally responsible. The policies are written not for the sake of injured employees, but for the benefit of employers who have suffered loss by reason of their common-law or statutory liability. The premiums are paid by the employers, and the employers are the beneficiaries thereof. The policies now most commonly in force are contracts of indemnity against loss, and not of insurance against liability. They are not subscribed to for the benefit of injured employees, and there is no privity between them and the employers. Therefore no action will lie under such policies until a loss has actually been suffered by the assured through the liquidation of a judgment of an injured employee, and then action can be brought only for the benefit of the assured."

The rules of interpretation employed by the courts in construing

employers' indemnity are observed in the consideration of common carrier's indemnity against loss; they are governed by the same principles. 1 *Joyce, Ins.* § 27e; *Patterson v. Adan*, 48 L.R.A. (N.S.) 184 and note (119 Minn. 308, 138 N. W. 281). It is seen, then, that under these forms of indemnity the injured employee or passenger and his rights receive very little consideration. It was only when the assured was financially able to respond in damages that he could be certain of collecting his judgment for injuries. If his judgment creditor were insolvent or a bankrupt, he could not sue on the policy, and, in some cases, has been denied the right to reach the proceeds of the policy by garnishment or otherwise. *Allen v. Aetna L. Ins. Co. supra.*

When the policy in question was offered or proposed by the stage company and the indemnity company as their contract, the Corporation Commission, knowing as it did the little or no protection therein secured to a person injured, required the indemnity company to consent to the terms of the provision relied upon by the plaintiff, and the same accordingly was indorsed on the policy and became a part of the contract of indemnity. In that provision the indemnity company agrees that the policy shall inure to the benefit of any person, or all persons, suffering loss or damage, and such person or persons may bring suit thereon, and further agrees to pay, upon demand, any judgment that an injured person might obtain against the assured stage company, not to exceed the limits expressed in the policy, "whether the assured be or be not financially responsible in the amount of said judgment." In other words, under this provision of the policy, if the party claiming that he was injured establish in a suit against the carrier that he sustained loss or damage, he is not compelled to seek satisfaction of his loss or damage out of the assured, but can call directly upon the indemnity company to



liquidate his judgment, and in default "suit may be brought" upon the policy. As we have seen, the agreement in the policy, as originally drawn, was that the indemnity company would indemnify the stage company "against loss by reason of the liability imposed upon the assured for damages on account of bodily injuries, including death, resulting therefrom, accidentally suffered or alleged to have been suffered while this policy is in force."

It also appears from what we have said that the words "loss and damage" mean a real loss—one, at least so far as the indemnity company is concerned, that has been put into judgment against the assured. The injured person must not only prove loss or damage, but he must prove that the loss or damage was caused by the negligence of the stage company. If he be injured ever so seriously without fault of the assured, there would be no responsibility, no loss or damage, within the contemplation of law. It will be noted that the provision inserted in policy by direction of the Corporation Commission was not intended to supplant all the terms and conditions of the original contract. Therein it is said: "In all other respects the terms, limits, and conditions of this policy remain unchanged."

One of the terms of the policy is that the injured person must first establish his claim by suit against the assured. His damages must be liquidated before he can enforce their payment from the stage company. The policy provides for immediate notice from the assured to the indemnity company of any accident, of any claim made for damages, and of any suit brought against it. The assured agrees to assist in defending suits brought against it by securing evidence, information, and the attendance of witnesses. To require these obligations on the part of the assured, or the injured person, for that matter, to be carried out, would not conflict with the provisions of the inserted

clause, if it be held that the injured person may sue the indemnity company on the policy to recover his judgment against the assured, if he obtain one, and at the same time it will protect the indemnity company from possible collusion between the assured and the injured person, or from indifference upon the part of the assured. If the position of appellee is maintained, to the effect that the undertaking in the policy runs directly to the injured person, and is the joint and several obligation of the insured and insurer, it would follow that the injured person could sue the indemnity company thereon alone and without previous notice of the accident, or any claim of damages therefor, leaving the insurer to make his defense as best he could, without the aid of any party to the wrong out of which the cause of action arose.

This unfair, not to say unreasonable, situation in which the indemnity company would be placed, we think, was not in contemplation of any of the parties to the contract. A more just and reasonable conclusion, it would seem, would be that it was within the contemplation of the contracting parties that the injured person must first establish his claim against the wrongdoer in his action for negligence and thereafter be assured of the fruits of his victory by being permitted to collect from the indemnity company. If it is held that the general expression in the inserted provision that the policy "shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon . . . by any person, firm, association, or corporation suffering any such loss or damage," means that such suit may be brought on the policy only after such loss or damage has been established in an action against the assured, its terms are literally met, without in any way nullifying the other provisions of the contract that make it a condition precedent to the in-

—construction of  
policy—pro-  
vision for suit  
by person in-  
jured. . .

demnity company's liability that the assured be first sued by the injured party and his loss or damage established. But if the injured person is permitted to sue the indemnity company on the policy before he has proved his loss or damage against the assured, one of the most important provisions of the contract is completely nullified. It is the duty of the court to adopt that construction of a contract that will harmonize all its parts. It is only by following the plaintiff's construction of the contract that the two provisions became inharmonious. We feel that we must follow the rule which states: "Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions must be reconciled, if possible, by any reasonable interpretation; it being necessary for this purpose to consider the entire instrument and the surrounding circumstances. If one clause is at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less, or, as has been said, the clause which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other." 13 C. J. 535, § 497.

We are therefore of the opinion that the policy in question "inured to the benefit" of plaintiff, and that he "may bring suit thereon" if the indemnity company, on demand after final judgment against the

stage company, refuses to pay the same. In this view of the case it follows that the cause of action against the stage company was improperly united with the cause of action against the indemnity company, because they are separate and distinct causes of action against different defendants, and because the facts stated do not constitute a cause of action against the indemnity company, and because it resulted in a misjoinder of parties defendant. Neither the policy nor the effect of it was properly pleaded, and it should not have been admitted in evidence against the indemnity company; and it was not competent evidence against the stage company, because the stage company was no party to it.

This leaves the instructions of which complaint is made, both those given and those refused, undisposed of. We have not examined them critically, and do not pass upon them, feeling that upon a retrial, if those given are not proper, they will not be asked, and, if asked, refused, and that those requested will receive the same treatment.

For the reasons given, the judgment is reversed, and cause remanded, with directions to sustain demurrers as indicated and grant a new trial to the defendant the Smith Stage Company, with leave to the plaintiff to amend his complaint to conform herewith, if he may be so advised, and that the action against the indemnity company be dismissed.

Cunningham, Ch. J., and Baker, J., concur.

### ANNOTATION.

**Joinder of cause of action against party causing injury with cause of action against latter's insurer or indemnitor.**

The present annotation treats not only the question of the right of an injured person to join a cause of action based on the wrongful injury with a cause of action based on the contract of insurance or indemnity,

but also the closely analogous question of the right of the injured person to join as parties both the actual wrongdoer and his insurer or indemnitor.

In examining the following extracts

of the cases, the reader should bear in mind that, except where noted, the contract of insurance does not expressly inure to the benefit of any person other than the insured. This point is of considerable importance, since the inclusion of such a provision in the contract of insurance or indemnity would seem to eliminate the objection to joinder sustained in some of the cases, based upon lack of privity of contract between the injured person and the insurer.

It seems to be clear that in the absence of permissive statutory provision a cause of action for personal injuries negligently inflicted cannot be joined with a cause of action against an indemnity company on a contract of insurance. This was the rule laid down in the reported case (*SMITH STAGE CO. v. ECKERT*, ante, 995), where a statute declaratory of the common law provided that "actions ex contractu shall not be joined with actions ex delicto," and the contract of insurance purported to indemnify the insured against losses arising out of torts committed by it. It was further held in this case that the fact that the indemnity contract provided that the policy was to inure to the benefit of any and all persons suffering loss or damage did not render the indemnitor jointly liable with the indemnitee.

So, in *G. A. Duerler Mfg. Co. v. Dullnig* (1904) — *Tex. Civ. App.* —, 83 S. W. 889, affirmed in (1905) — *Tex.* —, 87 S. W. 332, where a cause of action, based on the negligence of the plaintiff's employer, was joined with a cause of action against an insurance company, based on a contract of insurance against liability for accidents, it was held that it was "clearly a misjoinder of actions to join one involving a tort with another on a contract."

And in *Bowers v. Gates* (1918) 201 Mich. 146, 166 N. W. 880, where a declaration for personal injuries contained two counts, one charging the individual defendant with malpractice, and the other declaring on a contract of insurance indemnifying him against liability for acts done as a physician, in holding that there was no privity of contract between the

plaintiff and the insurer which would authorize its joinder in the suit, the court said: "The writing obligatory, by virtue of which plaintiff seeks to make the Fidelity & Casualty Company a party defendant in this action ex delicto, is an ordinary indemnity insurance contract, headed 'Physician's liability policy,' by which the insurance company contracts with defendant Gates to indemnify him against loss from the liability imposed upon him by law for damages on account of bodily injuries or death suffered by any person or persons in consequence of any malpractice, error, or mistake made by him in the practice of his profession, or of any assistant aiding him in the administration of medical or surgical treatment, during the term of the policy. It provides in customary form and ample verbiage what, as between the contending parties, shall or shall not be done in the matter to which it relates in a schedule of stated warranties, amongst which plaintiff points out, as material to the question of his right to make the insurance company a party defendant, that it requires assured to give timely notice to the company of any prospective claim or suit against him for malpractice, with any papers which may have been served on him in that connection; co-operate with and assist it in the defense of any such suit, which the company obligates itself to defend to the court of last resort, unless previously settled; that he will not voluntarily assume liability or incur any expense without its consent, except at his own cost; nor interfere in any negotiations or legal proceedings conducted by the company on account of any such claim; also that the insured shall not assign the policy without the written consent of the insurer, and that neither party shall compromise or settle any such claim or suit without the consent of the other. As to these and all other contractual obligations in the policy, the difficulty in seriously considering plaintiff's theory is that he was in no sense a party to the contract or to the consideration for it. He was a stranger to it and there was no privity of

contract between him and the company issuing the policy. The insurer made no promises to him, did not know him in the transaction, and assumed no obligation for his benefit. Any right of action which might arise out of this engagement is vested in the person to whom and with whom the promise, or contract, was made. No statutory provision and nothing in the contract gives him any right of action in tort, or otherwise, against the insurer of the alleged tort-feasor." And in *Owens v. Gulf & S. I. R. Co.* (1918) 118 Miss. 437, 79 So. 348, where the personal representatives of an employee of defendant railroad, alleged to have died as the result of malpractice, sought in a single action to hold the company liable as for breach of a contract under which such employee contributed to the support of a company medical department and hospital, and to hold the company physician who attended his injuries, liable for malpractice, it was held that the causes of action could not be joined, since the declaration was in contract as to the railroad company, and in tort as to the defendant physician.

And where the liability of the insured is distinct from that of the insurer, as where one is imposed by law for negligence and the other arises out of a contract, they cannot be joined as parties, because neither cause of action runs against or affects both, the insured not being liable on the policy and the insurer not being a party to the tort of the insured. *SMITH STAGE CO. v. ECKERT* (reported herewith) ante, 995. And upon the ground that no privity of contract existed between an injured employee and a company indemnifying the employer, it was held in *Clark v. Bonsal & Co.* (1911) 157 N. C. 270, 48 L.R.A. (N.S.) 191, 72 S. E. 954, where a complaint for the death of plaintiff's intestate charged his employer with negligence, and joined as a defendant an indemnity company, setting out its contract with the employer which provided for the protection of the employer alone, that there was a misjoinder of parties as to the indemnity company. And

see *Bowers v. Gates* (1918) 201 Mich. 146, 166 N. W. 880, as set out supra.

In a few instances, statutes which modify the common law have been held to permit the joining of causes of action of the character under consideration:

Thus under Wisconsin Stat. 1913, § 2647, which, as amended by Laws 1915, chap. 219, provides that a plaintiff may unite in one complaint several causes of action, provided they affect all the parties to the action and do not require different places of trial, it has been held that a cause of action based on the negligence of a common carrier of passengers by automobile for hire could be joined with a cause of action against the carrier's indemnitor, based on the carrier's statutory indemnity bond which rendered the indemnitor "directly liable for" all damages negligently caused by the carrier.

And under the more specific statutory provision found in California Civ. Code, § 2777, which provides that "one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act," it has been held that a policy of insurance against liability of an employer for personal injuries to his employees inures directly to the benefit of an injured employee, so that his employer and the insurer are jointly liable, and may, at his election, be so sued. *Moore v. Los Angeles Iron & Steel Co.* (1898) 89 Fed. 73. This was upon the theory that the statute was not limited to cases where the indemnitee is bound to do some act which may result in damage to another, or to cases in which the indemnitor is regarded as a joint tort-feasor with the indemnitee, but likewise includes all cases of indemnity against future contingencies. In reaching this conclusion, the court said: "There is nothing in the section which invites or allows a narrower construction than the one indicated. Defendants, however, in their brief, argue to the contrary, as follows: 'The use of the words "act to be done" must have been inserted in this sec-

tion to distinguish the liability of the indemnitor in some cases from his liability in others; otherwise, why not have enacted that all indemnitors shall be jointly liable with the indemnitees? The plain reading of subd. 2 of the very next section (2778) makes a most solid support to our position,—that, as a general proposition, indemnitors are not jointly liable with indemnitees, but only in special cases, where the liability arises by reason of joint trespass, etc. It reads, "Upon an indemnity against claims or demands or damages," etc., "the person indemnified is not entitled to recover without payment thereof," which is tantamount to saying that indemnitor cannot be sued until the indemnitee has paid the claim, demand, or damages; that is, except in cases of joint tort-feasors, no one but the indemnitee can sue the indemnitor. It being evident that a distinction was intended, our position above taken is necessarily correct, as there are classes of cases where the indemnitor does not bind the indemnitee to do an act which may result in injury to another (the case at bar is one), and there are cases where the indemnitor is not jointly liable with the indemnitee. The words "act to be done" must be read "act required to be done,"—required in the case of a sheriff about to attach property, by his contract with the plaintiff under the law, which makes him and the plaintiff the two parties to it; the plaintiff to give the indemnity bond, in consideration of which the sheriff seizes the property, no matter who may be the owner of it. The sheriff is required to seize it, and does so because ordered to by the indemnitor.' This argument of defendants is based, it seems to me, upon an erroneous construction of the words 'act to be done.' These words are simply used to convey the opposite of the idea expressed in the words 'already done,' in § 2774 of the same Code, which provides that 'an agreement to indemnify a person against an act already done is valid,' etc. In other words, as § 2774, by using the words 'already done,' is confined to past transactions, so § 2777, by the use of

the words 'act to be done,' is restricted to future contingencies. Subd. 2 of § 2778 does not, in my opinion, furnish to defendants' argument the support which they claim therefrom, because said subdivision, and subd. 1 of the same section, which is as follows: '(1) Upon an indemnity against liability expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable,'—obviously concern only the relations of the indemnitor and the indemnitee as between themselves, and not their obligations to the injured person, these obligations being fixed by § 2777. It should be observed in this connection that, by the policy in the case at bar, said assurance corporation 'agreed to pay to the said Los Angeles Iron & Steel Company, or its legal representatives, all such sums for which the Los Angeles Iron & Steel Company shall become liable to its employees by virtue of the common law, or of any statute,' etc.; that is, the indemnity is against liability, not against claims or demands or damages or costs, . . . and therefore falls within subd. 1 of said § 2778. This subdivision, which gives to the indemnitee a right of action against the indemnitor the moment the former becomes liable to the person injured,—that is, when the injury occurs,—disposes of another argument of the defendant corporations against their joint liability, namely, that 'no action is maintainable against the indemnitor until the plaintiff's claim or debt against the indemnitee becomes legally enforceable against the indemnitee; i. e., until there has been a judicial ascertainment of the amount due for damages from indemnitee to plaintiff.' Besides, this last-mentioned argument finds a complete answer in § 2777 itself, which, by creating a joint and several liability on the part of the indemnitor and indemnitee in favor of the person injured, necessarily gives to the latter a right of action against the indemnitor as soon as the injury happens." But in connection with the Moore Case, see *Northam v. Casualty Co. of America* (1909) 177 Fed. 981, where-

in it was held under a similar statute (Mont. Rev. Code, § 5653) that the statute was merely declaratory of the common-law rule that an indemnitor is a joint tort-feasor with the indemnitee, and in which the court adopted the theory that the phrase "to be done by" as used in the statute implied a request, demand, or agreement to do the act indemnified against, but that since the statute was invoked in the

present case merely by virtue of another statute which created a right of action for wrongful death and imposed an imputed liability on employers only, the indemnitor consequently, being liable only for actual wrongdoing, could not be held originally liable under the statute, on the theory that by virtue of the statute he was a joint tort-feasor who, as such, could be sued directly at law. G. J. C.

MIDLAND VALLEY RAILROAD COMPANY, Appt.,  
v.  
JO JOHNSON.

*Arkansas Supreme Court—October 13, 1919.*

(— Ark. —, 215 S. W. 665.)

**Infant — contract for attorney's fees — how far binding.**

1. A contract between an attorney and an infant for whom he is to bring suit, for attorney's fees, is binding as one for the necessities of life if the infant was sufficiently intelligent to understand the nature and extent of the contract.

[See note on this question beginning on page 1011.]

**—right to disaffirm contract.**

2. Contracts for the necessities of life, made by infants during minority, cannot be disaffirmed by them after reaching their majority.

[See 14 R. C. L. 254.]

**Attorney and client — settlement of suit by infant — effect on attorney's fees.**

3. The settlement by a minor of a suit after reaching majority will not affect the right of his attorney to fees for

which he had contracted during the infant's minority, at a time when the infant was sufficiently intelligent to understand the nature and effect of the contract.

**—lien for expenses.**

4. If the expenses of an attorney are a part of the fee for which he contracts, they are within the purview of a statute giving a lien for his fees.

[See 2 R. C. L. 1066.]

**APPEAL** by defendant from a judgment of the Circuit Court for Sebastian County, Ft. Smith District (Little, J.), in favor of intervener in a suit brought to recover damages for personal injuries to the infant plaintiff while alighting from defendant's train. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Thomas B. Pryor for appellant.  
Mr. Allyn Smith, for appellee:

The infant could not, but did not attempt to, disaffirm the contract of employment.

Stull v. Harris, 51 Ark. 294, 2 L.R.A. 741, 11 S. W. 104; Savage v. Lichlyter, 59 Ark. 1, 26 S. W. 12; Bozeman v. Browning, 31 Ark. 364; Graham v. La Crosse & M. R. Co. 102 U. S. 148-161, 26 L. ed. 106-111; Crocker v. Bellan-

gee, 6 Wis. 645, 70 Am. Dec. 489; Gray v. Ulrich, 8 Kan. 122; Beauchamp v. Bertig, 90 Ark. 351, 23 L.R.A. (N.S.) 659, 119 S. W. 75; Gullett v. Lamber-ton, 6 Ark. 109; Elk Valley Coal Min. Co. v. Willis, 149 Ky. 449, 149 S. W. 894; Sanders v. Woodbury, 146 Ky. 153, 142 S. W. 207; Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707; Re Hynes, 105 N. Y.

560, 12 N. E. 60; *Marcum v. Terry*, 146 Ky. 145, 37 L.R.A.(N.S.) 885, 142 S. W. 209; *Greenlee v. Rowland*, 85 Ark. 101, 107 S. W. 193; *Vance v. Calhoun*, 77 Ark. 35, 113 Am. St. Rep. 111, 90 S. W. 619; *Trapnall v. State Bank*, 18 Ark. 53; *Lefils v. Sugg*, 15 Ark. 137.

**Humphreys, J.**, delivered the opinion of the court:

This suit was instituted on the 16th day of June, 1916, in the circuit court in the Greenwood district of Sebastian county, by Lizzie Murphy, as next friend for Nevada Murphy, against appellant, Midland Valley Railroad Company, to recover damages received by Nevada Murphy while alighting from a train of appellant at Tulsa, Oklahoma. Upon the filing of the complaint, a summons was issued and duly served upon appellant. On the 5th day of July following, appellant filed a demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and, on the 7th day of July, thereafter, filed an answer denying each and every allegation in the complaint. On January 8, 1917, appellant filed stipulations of agreement between appellant, on the one side, and Nevada Murphy and her lawyer, D. G. Elliott, residing in Oklahoma, on the other, for settlement and dismissal of the suit for damages.

In a few days thereafter, to wit, January 12, 1917, the attorney of record, Jo Johnson, for Nevada Murphy in the damage suit, filed a petition by way of intervention, alleging a compromise and settlement without his consent or knowledge, and asking for judgment against and lien on the property of appellant railroad company for his fees, as per his contract with plaintiff in said damage suit, under which contract it was alleged said attorney was entitled to one half of the proceeds of recovery and one half of said attorney's expenses, amounting, in toto, to \$110. By agreement of appellant and intervener, the issue on the intervention was transferred for trial to the Ft. Smith dis-

trict of Sebastian county. On December 7, 1918, a response was filed by appellant to the petition to fix attorney's fees, in which it was denied that the settlement mentioned in the stipulations for the dismissal of the case was made without the knowledge or consent of said intervener, or that said intervening attorney had any right to a lien on the proceeds of the settlement for a fee and expenses under and by virtue of any agreement or contract with Nevada Murphy. The cause was heard by the court upon the pleadings and evidence adduced, from which the court found that the intervener was entitled to recover from appellant \$122.70, including interest, and to a lien on appellant's railroad for said sum. A judgment was rendered in accordance with the finding of the court, from which an appeal has been properly prosecuted to this court.

The facts are, in substance, as follows: On the 22d day of May, 1916, Nevada Murphy's ankle was injured while alighting from the train of appellant at Tulsa, Oklahoma. She was seventeen years of age at the time. A few days thereafter, D. G. Elliott, an attorney residing at Tulsa, Oklahoma, wrote to the general attorney of appellant that he had been employed in the case of Nevada Murphy, who had been injured while stepping off of the train at Tulsa. Thereafter the intervener was employed by W. T. Murphy, father of Nevada Murphy, by and with the consent of her mother, Mrs. Lizzie Murphy, and herself, to institute a suit for damages against appellant in the Greenwood district, Sebastian county, for the injury received by Nevada Murphy at Tulsa, while alighting from appellant's train. The suit was filed on June 16th, to which appellant filed demurrer on July 5th, and answer on July 7th, following. The claim was settled by appellant with Nevada Murphy and her attorney not of record, without the consent of her attorney of record, and with knowledge that the suit was pending

and that the intervener was the attorney of record.

The claim agent, Frank J. Wieman, testified that, four or five days after the injury, after investigating the claim, he attempted to make settlement with Nevada Murphy and G. D. Elliott for \$100, and, although Mr. Elliott advised her to settle for \$100, she contended for \$200; that, after the suit had been brought at Greenwood, he agreed to pay Mr. Elliott on settlement \$200, but that the settlement itself was made through the general attorney, O. E. Swan; that at that time he asked Mr. Elliott about the suit for damages pending at Greenwood, and that he talked with Nevada Murphy about it, who informed him that no one except Mr. Elliott was authorized to represent her; that when he went to Ft. Smith he telephoned to intervener that he was negotiating a settlement of the claim through G. D. Elliott of Tulsa, Oklahoma.

O. E. Swan, general attorney for appellant railroad company, testified that on January 4, 1917, he made settlement with Nevada Murphy for the injury she received on May 22, 1916, while alighting from appellant's train at Tulsa, for the sum of \$200, took a receipt from her for the money, and obtained the stipulation for the dismissal of the suit pending in the Greenwood district of Sebastian county, wherein said Nevada Murphy, by her next friend, Lizzie Murphy, was plaintiff, and appellant was defendant; that at the time of settlement Nevada Murphy made an affidavit to the effect that she was then eighteen years of age, and that D. G. Elliott of Tulsa, Oklahoma, was at the time employed to represent her in her claim against appellant for said injury; and that he had been employed since the second or third day after she received the injury.

Lizzie Murphy, mother of Nevada Murphy, testified that, acting for her daughter, she employed intervener to institute the suit for damages against appellant in the Green-

wood district of Sebastian county. Nevada Murphy testified that intervener was employed to represent her by her mother, Lizzie Murphy, with her consent, and that said intervener was still her attorney.

Intervener, Jo Johnson, testified that the first he heard of the case was by letter from W. T. Murphy, written to him from Cotter, Arkansas, and that the correspondence continued until he was authorized to file the suit; that the contract was in writing, and that he was to receive for his fee 50 per cent of the amount recovered and one half of his expenses; that one half of his expenses amount to about \$10; that he never consented to a settlement and dismissal of the suit, and knew nothing of it until a few days before he filed a claim for attorney's fees.

Appellant does not seriously contend that Nevada Murphy did not make a contract in the state of Arkansas with the intervener to institute a suit against appellant in the Greenwood district of Sebastian county, to recover damages on account of the injury she received to her ankle at Tulsa, while stepping from appellant's train. If such contention were insisted upon, the evidence is sufficient to sustain the finding of the court that such a contract was made in this state. Learned counsel content themselves with the statement that "the only question involved in this suit is the right of the plaintiff, after becoming of full age, to disaffirm her contract, if she had one with the intervener, and to repudiate the contract made by her mother with the intervener to institute suit on behalf of the plaintiff (referring to Nevada Murphy)."

The contention of appellant, as we understand it, is that intervener cannot claim a judgment and lien, by virtue of the Attorney's Lien Statute in this state, under the contract made with Nevada Murphy, for the reason that she was a minor when she made the contract, and that her act in settling the damage suit and signing the stipulation for



dismissal thereof constituted a disaffirmance of the contract, after reaching her majority. Unless the act of settling the case and signing the stipulation for the dismissal thereof constituted a disaffirmance of her contract with her attorney, the intervener herein, the intervener was entitled, under Act 293, Acts of 1909, to a judgment against and a lien on appellant's railroad property and bed for the contractual fee. *St. Louis, I. M. & S. R. Co. v. Kirtley*, 120 Ark. 389, 179 S. W. 648; *St. Louis, I. M. & S. R. Co. v. Hays*, 128 Ark. 471, 195 S. W. 28. This court said, in the case of *St. Louis, I. M. & S. R. Co. v. Blaylock*, 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563, that "a client may dismiss his cause of action, or may settle with the opposite party without consulting his attorney; but where there are any proceeds resulting from the litigation, either through settlement or compromise, . . . the attorney has a lien on such proceeds, of which he cannot be deprived by the parties to the lawsuit by any settlement they may make."

The lien upon the subject-matter of the litigation, or the proceeds in case of a compromise and settlement, attaches when the suit is brought, and is not affected by a settlement and compromise and a dismissal of the suit. Of course, under the terms of the statute, the lien can only exist upon a valid express or implied contract between the attorney and client. If the contract in question became nugatory through a disaffirmance thereof by Nevada Murphy after reaching her majority, it might well be contended that there was no contract upon which to base a judgment and lien for attorney's fees in favor of the intervener. In this state it is well settled that contracts for the necessities of life, made by infants, during minority, cannot be disaffirmed by them after reaching their majority. At the time the contract in question was

made, Nevada Murphy was seventeen years of age. It is true she had not reached her majority, but she had attained to the age where she was sufficiently intelligent to understand the nature and effect of a contract. We think a contract made for attorney's fees between an attorney and an infant, who is sufficiently intelligent to understand the nature and extent of the contract, is binding as one of the necessities of life. The property rights of a minor, as a rule, cannot be protected without the aid and assistance of an attorney. The right to be protected involves litigation of the courts. In recognition of this principle, it was said in the case of *Vance v. Calhoun*, 77 Ark. 35, 113 Am. St. Rep. 111, 90 S. W. 619, that (quoting syllabus), "where an infant employed an attorney to bring a suit in his behalf, and afterwards sold him the judgment therein, the infant may subsequently disaffirm such sale and recover the amount collected on the judgment, less the amount owing to the attorney for his services."

As this contract was approved by the minor after she attained to the age of intelligence, it is unnecessary for us to decide whether a contract made by the next friend of a minor with an attorney, for an attorney's fee, would bind the minor. It follows from the doctrine thus announced that it was not within the power of Nevada Murphy to disaffirm her contract of employment with the intervener herein. Not being a contract subject to disaffirmance by her after reaching her majority, her settlement and stipulation for dismissal of the suit could not affect the right of intervener to his judgment under his contract against appellant and lien on its railroad property, under the construction placed upon the Attorney's Lien Statute in this state in the case of *St. Louis, I. M. & S. R. Co. v. Blaylock*, supra.

—contract for  
attorney's fees—  
how far binding.

Attorney and  
client—settle-  
ment of suit by  
infant—effect on  
attorney's fees.

Infant—right to  
disaffirm  
contract.

It is also insisted that the court erred in allowing \$10 expense money and including it in the lien. It is true the statute only allows a lien for attorney's fees based upon valid contracts of employment, express or implied; but, if the expenses contracted for are a part of the fee, they come within

—lien for  
expenses.

the purview of the statute. A contract for 50 per cent of the amount recovered and one half of an attorney's expenses, as in the instant case, must be regarded as a contract including expenses as a part of the fee.

No error appearing, the judgment is affirmed.

## ANNOTATION.

### Liability of infant for attorney's services in personal-injury actions.

For power of guardian ad litem or next friend to bind infant by his contract with attorney fixing compensation, see the annotation to *Plummer v. Northern P. R. Co.* ante, 104.

The decisions on this subject are usually to the effect that where an infant's claim for personal injuries has resulted in a recovery by action or settlement, the attorneys of the infant will be entitled to a reasonable fee; and that if the infant or his next friend has contracted to pay a certain percentage of the recovery, such contract will be carried out if it is reasonable. Perhaps this is as far as the courts can be expected to go. It will be observed that in some of the cases the courts justify the recovery on the ground that the services were a necessary, but that in one of the cases the court states that services "beneficial to the minor" are classed as necessities. If a case arose where an infant who had lost his action for personal injuries was sued by his attorney for services therein, it is conceived that there could not be a recovery if the action for injuries was an improvident undertaking. But suppose that such action was not improvident,—were the services of the attorney therein a necessary? This seems to be an open question on the authorities.

Where an infant and his father entered into a contract with an attorney for a fee of one third of the recovery or settlement on a claim for personal injuries, and an action was brought accordingly, and thereafter the infant

and his father settled the case in the absence of said attorney, it was held that the contract was valid and that the defendant was liable to the attorney for his fees, as the services were a necessary for which the infant or his next friend could contract. (The court was further of the opinion that if there was no power to make a contract as to the amount, the attorney was entitled to a reasonable fee, such as was specified.) *Haj v. American Bottle Co.* (1913) 182 Ill. App. 686. (This case was reversed in (1913) 261 Ill. 362, 103 N. E. 1000, Ann. Cas. 1915A, 220, on the ground that notice of the lien had not been given to the defendant, in compliance with the statute.)

So, in the briefly reported case of *Burns v. Illinois C. R. Co.* (1914) 190 Ill. App. 191, where a minor and his uncle had employed attorneys to prosecute a claim for personal injuries, but later employed other attorneys, who brought suit and recovered judgment on the claim, it seems to have been held that the services of the first attorneys were a necessary, and that the minor or his next friend might make a contract to pay a reasonable compensation therefor.

In *Hanlon v. Wheeler* (1898) — Tex. Civ. App. —, 45 S. W. 821, the court approved a charge to the effect that if the jury thought that the infant and his next friend made a contract with attorneys of 50 per cent of the amount that might be recovered in a suit for personal injuries, which resulted in a large recovery, and that this was a reasonable compensation,

then the infant was bound thereby; but that, if the figure was more than a reasonable compensation, then the infant was not bound, and the attorneys would be entitled to a reasonable compensation; the court observing that the contract was one for necessities.

In *Crafts v. Carr* (1902) 24 R. I. 397, 60 L.R.A. 128, 96 Am. St. Rep. 721, 53 Atl. 275, it was held that the services of an attorney in conducting a successful suit by a girl seventeen years old for indecent assault were a necessary, and the court said, the attorney having been employed by the next friend: "The daughter knew of the bringing of the suit and profited by its successful prosecution. She must have conferred with counsel and appeared as a witness, and she certainly attempted to settle such action in a manner highly injurious to her own interests. An implied promise for necessities is sufficient (*Gay v. Ballou* (1830) 4 Wend. (N. Y.) 403, 21 Am. Dec. 158), and in the case at bar the circumstances, we think, are sufficient to imply a promise on the part of the infant defendant."

In *Sutton v. Heinze* (1911) 84 Kan. 756, 34 L.R.A. (N.S.) 238, 115 Pac. 560, on rehearing (1911) 85 Kan. 332, 34 L.R.A. (N.S.) 239, 116 Pac. 614, where the facts as to the contract of an attorney in an action for personal injuries are not reported, the court said: "The appellant's contention is that the plaintiff's contract with the minor, or with the next friend for the minor, was void. Whether or not an express contract as to the attorney's compensation was enforceable according to its terms, the services having been rendered and having been beneficial to the minor, a liability exists to pay for them, on the ground that they are classed as 'necessaries.'"

It will be seen that it is held in the reported case (*MIDLAND VALLEY R. CO. v. JOHNSON*, ante, 1007) that where an attorney, employed by the father of an infant seventeen years of age, with her consent and that of her mother, to bring an action for personal injuries to the infant, on a contract for one half of the recovery and one half

of the attorney's expenses, had brought such action, and thereafter the infant had, through a different attorney, made a settlement with the defendant, that the attorney of record was entitled to recover his fees from the defendant by reason of his contract with the infant, on the ground that a contract for attorney's fees between an attorney and an infant who is sufficiently intelligent to understand the nature and extent of the contract is binding as one of the necessities of life.

But in *Plummer v. Northern P. R. Co.* (Wash.) ante, 104, it was held that an infant might disaffirm a contract made by him with attorneys in relation to the prosecution of a claim for personal injuries, whether the services were a necessary or not, the court stating that possibly the attorneys might be able to recover a reasonable compensation from the infant for their services. In this case the contract with the attorneys was signed both by the infant and his guardian ad litem, and the suit was afterwards settled through a different attorney, and the original attorneys sued the original defendant for their contract fee.

Where an attorney was employed by a mother to institute, in behalf of an infant, an action for personal injuries for a 50 per cent contingent fee, a charge of \$470, which was \$67.50 less than one half of the amount recovered, was in *Sanders v. Woodbury* (1912) 146 Ky. 153, 142 S. W. 207, approved by the court as very reasonable. The court said: "Our conclusion, then, is that the next friend of an infant may employ counsel to represent him and agree on the compensation to be paid, subject, however, to the limitation that the fee agreed upon shall be reasonable, and this is a question for the court. That being true, such a contract will be upheld if it appears that the compensation contracted for is reasonable."

Where, at the request of a father, attorneys, under a 50 per cent contingent fee contract, brought suit to recover for personal injuries suffered by an infant in a coal mine, such fee, be-

ing customary and reasonable in the community, was held valid in *Elk Valley Coal Min. Co. v. Willis* (1912) 149 Ky. 449, 149 S. W. 894; and the claim having been compromised without the attorneys' knowledge, on a money, property, and employment basis, it was held that they could recover from the defendant company not only 50 per cent of the value of the money and property received, but half of the value of the employment contract.

In *Ryan v. Philadelphia & R. Coal & I. Co.* (1911) 189 Fed. 253, the court approved an agreement (made after settlement of the action for injuries) between the guardian ad litem and the attorney for the infant plaintiff, fixing the attorney's fees at 50 per cent of the settlement, stating that a guardian ad litem could not bind the ward by any such agreement unless with the court's approval.

In *Hickman v. McDonald* (1914) 164 Iowa, 50, 145 N. W. 322, a suit by attorneys to establish a lien on securities given in settlement of an action for the seduction of an infant, counsel for defendant conceded for the purpose of the case that legal service and advice in a seduction case are a necessity, but contended that that was not true of the services in procuring the settlement, upon the theory that in that matter the plaintiffs acted as agents, and not as attorneys. The court, however, accepting this concession,—which it observed was in accord with the decisions in other jurisdictions,—repudiated the contention, observing that the plaintiffs were not divested of their character as attorneys or their relationship as such by their attempt to accomplish the settlement. The settlement was ratified by the next friend and the infant, before the latter's majority, though upon attaining majority she attempted to repudiate both the contract of employment and the settlement. In reply to the argument that even though the minor was bound for the services of her

attorneys as for necessities, she was bound only for their reasonable value, regardless of the contract amount, the court said that, as an abstract proposition, there was much to be said in support of that contention; but that, in the case at bar, the undisputed evidence showed the reasonable value of the service to be the same amount as that fixed by the contract; viz., one half of what might be collected by suit or otherwise.

In granting an application of a guardian ad litem for leave to change her attorney in a personal-injuries action, the court said: "The recovery herein, if there ever is any, will be absolutely under the control of the court, and no part of it can be paid to any attorney without the sanction and order of the court;" and the court recognized the right of the superseded attorney to have the value of his services fixed and paid out of the amount of any recovery that might be had. *Bryant v. Brooklyn Heights R. Co.* (1901) 64 App. Div. 542, 72 N. Y. Supp. 308.

In *Ex parte Smithson* (1902) 108 Tenn. 442, 67 S. W. 864, where the nature of the action does not appear, the attorneys who represented the infant, and who obtained a substantial recovery, moved the court to allow them 30 per cent of the recovery as fees for their services. The court said: "These gentlemen have unquestionably rendered their client valuable services, and for such services they are as certainly entitled to a lien on his recovery for reasonable compensation. This they may now have declared on the minutes of this court, but the amount of their fees cannot be fixed and adjudged on this ex parte application. This is a matter to be determined in some suitable proceeding in which the minor will have an opportunity to be heard; or it might probably be determined by contract with his guardian, when one shall be appointed." B. B. B.

STATE OF CONNECTICUT EX REL. CHARLES T. MCCLURE, Exr.,  
etc., of William Brewer, Deceased, et al., Appts.,  
v.

D. WARD NORTROP et al.

*Connecticut Supreme Court of Errors—July 16, 1919.*

(93 Conn. 558, 106 Atl. 504.)

**Laches — sureties on trustee's bond.**

1. Laches does not protect sureties on a trustee's bond because of inaction by distributees of the trust until conditions are such that the distributees can be ascertained.

[See note on this question beginning on page 1021.]

**Parties — action on trustee's bond — distributee of surety's estate.**

2. A distributee of a deceased surety on the bond of a defaulting trustee may be made a party to a suit upon the bond to compel the return to the estate of funds received by him for application upon the judgment against the estate of the surety.

**Limitation of actions — when runs.**

3. The Statute of Limitations begins to run as soon as the right of action has accrued.

[See 17 R. C. L. 748.]

**— necessity of parties.**

4. A right of action will not accrue so as to start the running of the Statute of Limitations until there is a person or persons capable of suing or being sued.

[See 17 R. C. L. 751.]

**— appointment of new trustee.**

5. The appointment of a successor to a defaulting trustee is not sufficient to start the running of the Statute of Limitations against the liability on his bond.

**— establishment of breach of trust.**

6. The Statute of Limitations does not run against the beneficiary of a trust in favor of the defaulting trustee until the trusteeship is terminated and a breach of trust established.

[See 17 R. C. L. 710, 796.]

**— concealment of breach of trust.**

7. Fraudulent concealment by a trustee of his breach of trust prevents the running of the Statute of Limitations against liability on his bond.

[See 17 R. C. L. 852, 856.]

**— on probate bond.**

8. The statute limiting the time for actions on probate bonds to a certain time after final settlement and acceptance of the account is not applicable if no account is ever rendered.

**Trust — act of life tenants — effect on remaindermen.**

9. Distributees of a remainder of a trust cannot be held responsible for the acts and omissions of the life tenants in failing to compel the trustee to account.

**Laches — when applies.**

10. The defense of laches exists only where there has been such a delay in the assertion of a claim as naturally to prejudice him against whom the claim is set up.

[See 10 R. C. L. 396.]

**Appeal — absence of findings — laches.**

11. In the absence of a special finding, an appellate court cannot hold, as matter of law, that a delay of nearly four years in asserting a claim against a defaulting trustee prejudiced the sureties on his bond so as to defeat the claim on the ground of laches.

**Principal and surety — release of principal — effect on surety.**

12. A surety is discharged by an unqualified release of the principal debtor.

[See 21 R. C. L. 1065.]

**— necessity of consideration.**

13. To effect a discharge of surety by release of the principal debtor, the release must be unconditional and upon good consideration.

**— conditional release.**

14. An agreement by a beneficiary to release the trustee from liability to him upon the trust upon payment of a part of the amount due, being conditional and without consideration, does not release the surety.

**— absence of consideration.**

15. An agreement without consideration to release a debtor does not prevent the creditor from pressing his

claim, and cannot operate to discharge the surety.

— words of present discharge.

16. To release a surety on an agreement to discharge the principal for payment of less than is due, the agreement must contain words of present discharge.

**Decedent's estate — nonclaim — to what applies.**

17. An order of the probate court for presentation of claims against a decedent's estate does not apply to liability upon a bond which may or may not thereafter accrue so as to bar for nonclaim a claim which accrues after the period limited in the order.

[See 11 R. C. L. 205.]

**Executor and administrator — nonclaim — liability of surety on trustee's bond.**

18. The statute requiring presentation of claims against a decedent's estate within a specified time after they accrue applies to claims to recover from the estate of a surety on a trustee's bond the amount of the trustee's defalcation in his trust.

— proceeding to compel return of assets to estate.

19. The Statute of Nonclaim does not apply to a proceeding to compel a distributee of the estate of a surety to return to the estate funds sufficient to satisfy a claim which has been duly established against the estate.

**APPEAL** by plaintiffs from a judgment of the Superior Court for Middlesex County (Case, J.) in their favor, against defendant Northrop and in favor of the other defendants in an action on a probate bond. *Reversed in part.*

**Statement by Wheeler, J.:**

One Northrop was on July 30, 1884, appointed, after several successive trusteeships, trustee of a trust created by the will of Charles Brewer in favor of sundry beneficiaries as life tenants, with provision that upon the death of the last life tenant the trustee should pay over, convey, and deliver the trust estate remaining to all of the children of the sons of Charles Brewer and their issue then surviving. Northrop gave a bond, the sureties upon which were Clarissa L. Northrop, Ettie M. Northrop, and Arthur B. Calef, deceased, under whose will defendant J. Francis Calef is the sole surviving executor; said J. Francis Calef was also a distributee of the estate of Arthur B. Calef, his brother.

On July 24, 1911, Northrop was removed by the court of probate for failure to file his account, and the Middletown Trust Company was appointed in his stead.

Those entitled to the principal of the fund upon the termination of the trust on February 26, 1913, were: The children of Henry, who was a son of Charles; the children of Frederic, a son of Charles; and William Brewer, a son, and Jennie W. Blinn, a daughter of Samuel, the

son of Charles. Charles T. McClure, the executor of William Brewer, who died March 6, 1916, and Jennie W. Blinn, are the plaintiffs in this case.

The defendant Northrop failed and neglected to turn over the funds of this trust estate to his successor, or to pay any part thereof to either of the plaintiffs.

The entire trust fund of \$8,800 had been misappropriated by Northrop by the close of the year 1897.

Arthur B. Calef, one of the sureties upon Northrop's bond, died August 17, 1900, leaving a will and a substantial estate which was duly distributed.

The court of probate allowed six months from August 27, 1900, within which claims should be presented. No claim for breach of this bond was presented against the estate of Arthur B. Calef within this period or subsequently.

Before this action there had been no judicial ascertainment that Northrop had misappropriated the funds, or that they had been wholly or partially lost, or to what extent, if any, Northrop was able to make good his default.

Jennie W. Blinn, one of the plaintiffs, and William Brewer, on or prior to July 30, 1911, knew that

these funds had been misappropriated by Northrop and were wholly lost.

On March 4, 1914, Jennie W. Blinn and William Brewer entered into an agreement with Northrop to release him from all obligation to them by reason of his default as trustee, provided he would pay to them \$2,000 before May 1, 1914, and accrued interest on their portion of the trust fund to that date.

Jennie W. Blinn, with full knowledge of the default of Northrop, and after his removal, and during the years 1914 and 1915, continued to accept payments from him equal in amount to what her portion of the income would have been had this fund remained intact, and, in consideration of these payments and promises, she refrained from taking action against Northrop or any of the sureties, and refrained from giving the sureties or their representatives any notice of the breach of trust of the trustee.

Neither the surety, Ettie M. Northrop, nor J. Francis Calef, executor and distributee of another surety, Arthur B. Calef, had any notice of the breach of trust of Northrop until the commencement of this action.

On December 31, 1908, Northrop, trustee, filed an account, and this was the only account filed by him as trustee. He concealed from the beneficiaries of this fund, up to the time of his removal as trustee in 1911, the fact that he had misappropriated the fund.

Messrs. Charles T. McClure and George W. Crawford, for appellants:

The liability on the trustee's bond is joint and several against the principal sureties, and therefore survives and may be enforced against their estates, and, by the aid of equity, against their distributees.

Booth v. Starr, 5 Day, 419; Davis v. Vansands, 45 Conn. 604, Fed. Cas. No. 3,655; Mathewson v. Wakelee, 83 Conn. 79, 75 Atl. 93.

There was absolutely no evidence, and there is no finding, which charges relators with laches since the death of Susan Brewer. Indeed, they could not

be chargeable with laches before that date.

Haven v. Haven, 181 Mass. 579, 64 N. E. 410; State v. Howarth, 48 Conn. 213; Adams v. Butts, 9 Conn. 80; Watterman v. A. & W. Sprague Mfg. Co. 55 Conn. 574, 12 Atl. 240; Hartford v. Mechanics Sav. Bank, 79 Conn. 41, 63 Atl. 658.

This action is not barred by any general or special Statute of Limitation.

Prindle v. Holcomb, 45 Conn. 121; State v. Howarth, 48 Conn. 212; State v. Hunter, 73 Conn. 442, 47 Atl. 665; McKim v. Glover, 161 Mass. 419, 37 N. E. 443; Eising v. Andrews, 66 Conn. 63, 50 Am. St. Rep. 75, 33 Atl. 585; Reihl v. Likowski, 33 Kan. 515, 6 Pac. 886; Snyder v. McComb, 39 Fed. 292; Backus v. Cleaveland, Kirby, 36; Griswold v. Bigelow, 6 Conn. 263; Mann v. Everts, 64 Wis. 372, 25 N. W. 209; Sargent v. Kimball, 37 Vt. 320; Hantzch v. Massolt, 61 Minn. 364, 63 N. W. 1069; Mathewson v. Wakelee, 83 Conn. 79, 75 Atl. 93; Spaulding v. Warner, 52 Vt. 29; Herrick v. Belknap, 27 Vt. 698; Olmsted v. Olmsted, 38 Conn. 322; Hayes v. Ward, 4 Johns. Ch. 132, 8 Am. Dec. 54.

The court erred in sustaining the demurrer of the defendant J. Francis Calef in his personal capacity, to the complaint.

Booth v. Starr, 5 Day, 419; Davis v. Vansands, 45 Conn. 604, Fed. Cas. No. 3,655; Mathewson v. Wakelee, 83 Conn. 79, 75 Atl. 93; Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co. 63 Conn. 564, 25 L.R.A. 856, 29 Atl. 76.

Mr. Gustaf B. Carlson for appellees other than D. Ward Northrop.

Wheeler, J., delivered the opinion of the court:

This action seeks to hold the principal and one surety, Ettie M. Northrop, upon a probate bond, and J. Francis Calef, the executor of the will of another surety, Arthur B. Calef, who was also a distributee of such surety. All of these parties are properly in court, and all the steps requisite to be taken to hold the principal, the living surety, and the representative and the distributee of the estate of the deceased surety, have been taken. An adjudication of the entire matter may be had in a single action, each step can be kept distinct, and when this is done the

distributee of the deceased surety may be compelled by an appropriate decree to reconstitute to the extent of the share received by him, and this sum is then available to meet the judgment against the estate of the deceased surety. *Davis v. Vansands*, 45 Conn. 604, Fed. Cas. No. 3,655; *Mathewson v. Wakelee*, 83 Conn. 79, 80, 75 Atl. 93.

From this it follows that the court was in error in sustaining the demurrer to the complaint of the defendant J. Francis Calef, in his personal capacity as distributee of Arthur B. Calef.

The superior court rendered judgment against the principal on the bond, and in favor of one surety and the representative and the distributee of a deceased surety upon this bond.

The appeal of the plaintiffs, aside from the correction of the finding, attacks the judgment in favor of the sureties. It is clear that the sureties upon this bond are equally liable with the principal, unless the sureties can avail themselves of one of the Statutes of Limitation, or the Statute of Nonclaim, or a general claim of laches.

Counsel for the sureties argue that the cause of action accrued against the trustee and the sureties on this bond in 1897, when the trustee had lost or misappropriated all of the funds of the estate in his hands; that the breach occurred when the trust fund was converted, and hence an action could have been brought at that time; and that this set in operation the general Statute of Limitation which provided that an action shall not be brought on contracts under seal but within seventeen years. Gen. Stat. § 6151.

We think the argument fails to take into account the distinction between the creation of a liability upon a bond and the accrual of a cause of action thereon.

It is undoubted that the Statute

of Limitation begins to run as soon as the right of action has accrued. *Limitation of actions—when runs.* *Eising v. Andrews*, 66 Conn. 58, 65, 50 Am. St. Rep. 75, 33 Atl. 585. But the right of action will not accrue until there is a person or persons capable of suing and being sued. 25 Cyc. 1067.

The trustee Northrop was the only legal custodian of this fund. The beneficiaries of the life estate and of the remainder estate could institute proceedings to secure his removal; but, until a trustee was named in his stead, there was no one against whom the statute could run.

Further, until Northrop failed on demand to pay over the trust fund to his successor it could not be known that he would not meet this obligation.

The cestui que trust is entitled to have the entire trust fund paid over upon the settlement of the trust, and the Statute of Limitation cannot run against him and in favor of the principal upon the bond, the trustee of the trust fund, until his trusteeship is terminated and his breach of trust then established. *McKim v. Glover*, 161 Mass. 418, 421, 37 N. E. 443; *Prindle v. Holcomb*, 45 Conn. 121; *State v. Howarth*, 48 Conn. 212.

There is another conclusive reason why the Statute of Limitation has not run the requisite seventeen years. The trustee fraudulently concealed his breach until about the time of his removal, the court finding that Northrop had "concealed from the claimants of the fund, up to the time of his removal in 1911, the fact that he had misappropriated the fund."

The fraudulent concealment by the trustee of the cause of action arrested the running of the statute until the time "when the person entitled to sue

*Limitation of actions—when runs.*

*—necessity of parties.*

*—appointment of new trustee.*

*—establishment of breach of trust.*

*—concealment of breach of trust.*

*Parties—action on trustee's bond—distributee of surety's estate.*



thereon shall first discover its existence." Gen. Stat. 1918, § 6175.

The effect of this statute is that no cause of action came into existence by reason of Northrop's misappropriation until it was discovered in 1911, and the Middletown Trust Company was appointed trustee in his stead. *Eising v. Andrews*, 66 Conn. 58, 64, 50 Am. St. Rep. 75, 33 Atl. 585.

The sureties do not pursue in their brief the claim that this action is barred by the statute limiting actions against sureties on probate bonds to those brought within six years from the final settlement and acceptance of the account of the principal. Gen. Stat. 1918, § 6156.

The trustee Northrop has never rendered a final account, and hence this statute never began to run.

The defendants assert in their brief, but do not there argue, their defense of laches. Our reasons for not thinking this defense available to these defendants are these:

No obligation rested upon the distributees of this trust fund to protect the sureties on this bond

Laches—  
sureties on  
trustee's bond.

against the act of the principal prior to the death of the last life tenant, Susan Brewer, on February 26, 1913. Until then the distributees could not be known. And in the absence of fraud on their part prejudicial to the sureties, they cannot be held in any degree responsible for the acts or omissions of this testamentary trustee. *State v. Howarth*, 48 Conn. 213. Nor can the distributees be

Trust—act of  
life tenants—  
effect on  
remaindermen.

held responsible for the acts or omissions of the life tenants. Remaindermen and life tenants are not in privity. There is thus no possible basis for a claim of laches on the part of these distributees who are the plaintiffs herein until after the decease of the life tenant, for their right to enforce a final distribution began then. Before that time a

charge of laches on their part could not be sustained.

The finding does not disclose that these defendants or any of them have been prejudiced by the delay of the plaintiffs in asserting their claim between February 26, 1913, the date of decease of the last life tenant, and December 18, 1916, the date of the writ in this action.

"There is no merit

in the defense of laches. That exists

only where there has been such a delay in the assertion of a claim as naturally to prejudice him against whom the claim is set up." *Hartford v. Mechanics' Sav. Bank*, 79 Conn. 38, 41, 63 Atl. 659; *Waterman v. A. & W. Sprague Mfg. Co.* 55 Conn. 554, 574, 12 Atl. 240.

We cannot hold as matter of law that the delay for this period has "naturally prejudiced" these defendants; that is, that this delay was for such a period and under such circumstances as to lead to the natural conclusion that it must have prejudiced these defendants. Nothing short of a specific finding would warrant such a conclusion.

Appeal—absence  
of findings—  
laches.

Our consideration of the case has led us to examine one question not raised by counsel; viz., whether the agreement to release Northrop discharged the sureties on the bond.

The finding recites that Mrs. Blinn and William Brewer entered into an agreement with Northrop, the principal upon the bond, to release him from all obligation to them by reason of his default as trustee, provided he would pay to them \$2,000 before May 1, 1914, and accrued interest on their portion of the trust fund to that date.

Two additional facts are of significance:

(1) The amount of the trust fund which was the share of Mrs. Blinn and Mr. Brewer at the time of this agreement exceeded the sum of \$2,000 and the accrued interest due on their share.

(2) There was no consideration

for this agreement. An unqualified release of a principal debtor will discharge the surety. Rockville Nat. Bank v. Holt, 58 Conn. 526, 531, 18 Am. St. Rep. 293, 20 Atl. 669.

To effect the discharge the release must be unconditional and upon good consideration.

In Boardman v. Larrabee, 51 Conn. 39, 43, the purchaser of land which was subject to a mortgage assumed the mortgage note. After it became due the creditor gave the purchaser time for payment.

It was held that the purchaser became in his relation to the mortgage debtor the principal debtor, and the original debtor in his relation to him a surety, but that this relation existed only between themselves and did not affect the mortgage creditor. And where, after the mortgage note has become due, time is given the purchaser for payment, it does not discharge the original debtor on the ground that he has become a surety.

In the course of its discussion the court, by Pardee, J., said: "Moreover, if we should concede to Larrabee the rights of a surety, he would be met by the well-settled rule that the surety is only released when there is a positive contract by the holder to give time to the principal—a contract upon good consideration susceptible of enforcement." Ibid. See also Phoenix Mut. L. Ins. Co. v. Holloway, 51 Conn. 310, 50 Am. Rep. 21.

These decisions are authoritative that the agreement to release Northrop from his default did not discharge the surety, since there was no consideration for the agreement, and since the release was not unqualified but was conditional upon the payment of the sum agreed upon.

An agreement without consideration is a mere indulgence and unenforceable. It does not prevent the

creditor from pressing his claim, hence it cannot operate to discharge the surety.

In this case the amount to be paid was less than the amount due, and the interest promised to be paid was the interest accrued.

Northrop did not agree to pay anything which he was not already bound to pay.

In Wilson v. Powers, 130 Mass. 127, the court says: "The indorser or the surety upon a note is discharged by an agreement made, without his consent, between the holder and the maker, to give time to the maker. But, to have this effect, it must be a valid agreement founded upon a good consideration, such as can be enforced either at law or in equity. . . . Walsh did not promise to do anything which he was not already bound by his note to do. . . . There is no advantage to Wilson nor disadvantage to Walsh . . . which can constitute a consideration. . . . It was therefore not binding upon him. Notwithstanding the agreement, he could at any time have sued Walsh upon the note, and the sureties could at any time have paid the note and have prosecuted their remedy against Walsh." Ibid. See also Olmstead v. Latimer, 158 N. Y. 313, 48 L.R.A. 685, 53 N. E. 5; Miller v. Hatch, 72 Me. 481, 484, 39 Am. Rep. 346; M'Lemore v. Powell, 12 Wheat. 554, 6 L. ed. 726; Clark v. Gerstley, 204 U. S. 504, 51 L. ed. 589, 27 Sup. Ct. Rep. 337.

One other reason takes this case out of the general rule. The agreement to release Northrop was conditioned upon his payment of a part of the sums owed.

So long as this condition was unperformed, the agreement was executory and the obligation upon the original debt existed. The agreement of discharge must be absolute and unqualified. It must contain words of present discharge.

Judge Wells states the principle as well as we have seen it stated, in his opinion in Blake v. Blake, 110

Principal and surety—release of principal—effect on surety.

—necessity of consideration.

—conditional release.

—absence of consideration.

—words of present discharge.

Mass. 202: "The agreement to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction, or discharge. . . . The instrument, being under seal, may operate as a discharge if its terms so provide; but not otherwise. It contains no words of present discharge. The only provision for a future discharge is that upon payment in full of the lesser sum, stipulated to be paid in lieu of the whole, 'the said note shall then be canceled and surrendered.' Until that condition is complied with, the original debt remains unaffected by the executory agreement for a discharge." Ibid. See also *United States v. Nicholl*, 12 Wheat. 505, 6 L. ed. 709; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Thorn v. Pinkham*, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718.

The agreement of release did not discharge the sureties. The defendant J. Francis Calef, as executor of Arthur B. Calef, one of the sureties, further defends upon the ground that this action is barred against him for the reason that the claim on which it is based was not presented to the estate of Arthur B. Calef within the time allowed by the court of probate for the presentation of claims. The time thus allowed was six months from the 27th day of August, 1900.

The order of the court of probate in terms applied to existing claims. It did not contemplate contingent or after-accruing claims which had no present existence. A liability upon a bond which may or may not thereafter accrue is not affected by an order such as this when it accrues after the period limited in the order.

The liability against Northrop accrued when demand was made upon him by his successor in the trust in 1911 for the funds which had been misappropriated by him in 1897.

His failure to turn these over fixed his liability and its extent.

There was nothing in the probate order which required these plaintiffs to then or thereafter present their claim against the estate of Arthur B. Calef.

But General Statutes 1902, § 326, provide that "when a right of action shall accrue after the death of the deceased, it shall be exhibited within four months after such right of action shall accrue;" and the question recurs whether the claim of the plaintiffs, as against the estate of Arthur B. Calef or J. Francis Calef, executor, is not barred by their failure to present it within four months from the time it accrued. This statute, except as to the period of limitation, has remained substantially as first enacted in 1821. Prior to that time there was no specific limitation as to the presentation of claims that accrued subsequent to the death of the deceased, but a claim was barred by unreasonable delay. *Griswold v. Bigelow*, 6 Conn. 258, 265. This statute has been held to mean that if a right of action accrued after the death of a decedent it is barred unless presented within four months after its accrual. *Pease v. Phelps*, 10 Conn. 62, 67; *Bacon v. Thorp*, 27 Conn. 251, 260. Unless the character of the claim excludes it from the bar of the statute, it cannot now be an enforceable claim against the estate of Arthur B. Calef or J. Francis Calef, executor. The claim against the sureties is an ordinary money claim for breach of a bond. If the estate were still in process of settlement, the executor could unquestionably have pleaded the bar of the statute. The action against the estate would have been a legal one for a money demand, just as if the surety had been alive. Neither action would have called for equitable relief. Had the claim been duly presented, an action would have lain against the estate and a judgment for damages could

Decedent's  
estate—non-  
claim—to  
what applies.

Executor and  
administrator—  
nonclaim—li-  
ability of surety  
on trustee's  
bond.

have been obtained. The estate having been distributed, equity provides a means of enforcing the judgment by compelling the distributees to refund to the estate such portion thereof as they had received and which would be required to satisfy the judgment. The action against the distributees is an equitable remedy. But it must be founded upon the adjudication of a legal claim against the estate; and the statute operates against such a claim. If the claimant establishes his claim, then there is no bar to the equitable remedy against the distributees, except that of laches. We pursue in one action the legal remedy against the estate and the equitable remedy against the distributees, but they remain in reality two independent actions. "Two successive steps," as they were called in *Mathewson v. Wakelee*, 83 Conn. 75, 79, 75 Atl. 93, the first to judicially establish that the plaintiff has a valid claim enforceable against the estate; the second, an equitable action to reclaim the assets of the

estate so that they may satisfy the claim. The first step is a legal action and within the bar of the statute; the second is an equitable action and without the bar of the statute.

—proceeding to compel return of assets to estate.

The sustaining of the demurrer in favor of J. Francis Calef requires a rescript reversing the judgment in his favor, although the conclusion reached will ultimately require a judgment in his favor.

There is error, the judgment in favor of the defendants Ettie M. Northrop and J. Francis Calef in his personal capacity is reversed, and the judgment in favor of J. Francis Calef, executor, is sustained, and the cause is remanded with direction to the Superior Court to assess the damages against Ettie M. Northrop and render judgment in accordance with the foregoing opinion, and that the cause against J. Francis Calef in his personal capacity be proceeded with according to law.

In this opinion the other Judges concur.

### ANNOTATION.

#### Remainderman of trust fund as chargeable with laches regarding trustee's misconduct during life of life tenant.

There are but few cases in which the courts have passed on the effect of the equitable defense of laches in an action by the remaindermen of a trust fund, for the misconduct of the trustee, where the lapse of time on which the claim of laches was predicated occurred during the life of the life tenant. But the decisions seem in accord in holding that a claim of laches cannot be based on mere acquiescence on the part of the remaindermen of an express trust during the life of the life tenant, since he had then no right to enforce his claim to the fund. *Sedgwick v. Taylor* (1888) 84 Va. 820, 6 S. E. 226; *Stewart v. Conrad* (1902) 100 Va. 128, 40 S. E. 624; *Inglis v. Beaty* (1878) 2 Ont. App. Rep. 453. And see the reported case

(STATE EX REL. MCCLURE v. NORTHPROP, ante, 1014).

In *Sedgwick v. Taylor* (Va.) supra, wherein the remainderman of a trust fund sought to recover the corpus of the property from the estate of the trustee who had illegally disposed of the fund, the court held that a defense that the claim was stale would not avail the defendant where the lapse of time during which the remainderman had taken no action occurred during the life of the life tenant, since the right of the remainderman to demand payment of the fund did not accrue until the death of the life tenant.

In *Stewart v. Conrad* (1902) 100 Va. 128, 40 S. E. 624, an action by the remaindermen of a trust fund for an accounting thereof, it appeared that for

a long period of years following the alleged misconduct of the trustee, and during the life of the life tenant, no action had been taken by the remaindermen to prevent or remedy the violation of the trust and preserve the fund. The defendant maintained that this omission amounted to laches, and was a complete defense to the action, but the court held that the remainderman could not be charged with laches during the life of the life tenant, saying: "The remaindermen, under the terms of the will creating the trust, are not entitled to the possession of any part of it until the death of the life tenant, who was a party to the suit, and who, so far as this record shows, is still living. Until her death the appellants would have no standing in court except to ask a court of equity to prevent or remedy a violation of the trust, and to preserve the trust fund. They had the right to invoke the aid of a court of equity for those purposes, but they were under no legal obligation to do so, and the objection of laches or acquiescence will not lie for their failure to assert rights which have not yet accrued."

In *Inglis v. Beaty* (Ont.) *supra*, the remainderman of a trust fund objected to the amount of the fund returned on the accounting, it appearing that a considerable sum had been retained by the trustee after his settlement of the trust. The trustee maintained that the remainderman was estopped from objecting thereto, since her inaction for a long period amounted to an acquiescence in the settlement. It appeared that the lapse of time with which the defendant sought to charge the remainderman had occurred while the latter's interest was only a reversionary one, and the court held that a failure to act previously to the descent of the estate would not be sufficient to

charge the remainderman with acquiescence.

And see *Kennedy v. Winn* (1885) 80 Ala. 165, wherein the life tenants and cestuis que trust of a trust fund which had been lost through the misconduct of the trustee filed a bill in equity for a settlement of the trust. It appeared that the alleged misconduct had occurred nine years previously to action brought, and on this ground the defendant sought to charge the plaintiffs with laches. The court held that the life tenants could not be estopped by laches from collecting the interest on the fund, and added that the remaindermen could not be charged with laches predicated on this delay during the life of the life tenant.

But it has been held that the defense of laches may arise during the life of the life tenant where the trust is one arising by implication of law, as distinguished from an express trust. *McLaffin v. Jones* (1895) 155 Ill. 539, 40 N. E. 330, wherein it appeared that a trust arose by implication of law, and the remaindermen delayed for thirteen years after knowledge of a misappropriation by the trustee, before following up the fund. The court held that they were chargeable with laches, and precluded thereby from a recovery, although the life tenant was still living and joined with them in the action. The appellate court (1894) 55 Ill. App. 518, in disposing of the plaintiff's contention that laches could not be interposed as a bar in an action on a trust fund, said: "It is not an express trust, but if a trust, it is so merely by implication of law, and in such cases we understand the rule to be that laches will bar relief." Affirming the decision, the supreme court quoted and adopted the foregoing language.

R. E. B.

PEOPLE OF THE STATE OF ILLINOIS

v.

GEORGE I. DANKS, Exr., etc., of William Gillmore, Deceased, et al.,  
Appts.

*Illinois Supreme Court — October 27, 1919.*

(289 Ill. 542, 124 N. E. 625.)

**Tax — gift in contemplation of death.**

1. A gift will be deemed to have been made in contemplation of death within the meaning of the tax law if it is apparent that the donor's condition was such that he might reasonably have expected death at any time, and the disposition of his property is such as he had contemplated making in that event, or such as he might reasonably be supposed to have desired in the event of his death, and no other motive is apparent for making the transfer at the time it was made.

[See note on this question beginning on page 1028.]

**Evidence — gift in contemplation of death.**

2. Upon the question whether or not a gift was made in contemplation of death, evidence may be considered as to the donor's age, his physical condition, and any action contemplated to be taken by him with respect to his health, as well as the length of time he survived the making of the transfer.

**Tax — concrete case — gift in contemplation of death.**

3. A gift by a man eighty-eight years

old, to his daughter, will be held to have been in contemplation of death within the meaning of the tax law, although he lived two years after making it, if he knew that he was afflicted with an incurable disease, and the gift was part of a disposition of the bulk of his property, while his will, made contemporaneously, sought to confirm the disposition made, and the gift to the daughter was not to take effect until after his death.

APPEAL by defendants from a judgment of the Effingham County Court (Overbeck, J.) in favor of plaintiff in a proceeding to assess and collect an inheritance tax alleged to be due from the estate of William Gillmore, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George I. Danks and Paul Taylor, for appellants:

The object of the Inheritance Tax Act is not to prevent a parent from giving the whole or any portion of his property to his children during his lifetime, if he so desires, but only to subject such property to an inheritance tax if the gift is made in contemplation of death.

People v. Kelley, 218 Ill. 509, 75 N. E. 1038.

Where transfers and gifts of property take effect in possession and enjoyment during the lifetime of the grantor, they are not subject to an inheritance tax unless the grantor's contemplation of death was the impel-

ling motive which caused him to make them.

People v. Burkhalter, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379.

The words "in contemplation of death," used in the Inheritance Tax Statute, mean an apprehension of death, arising from some existing infirmity or impending peril.

People v. Carpenter, 264 Ill. 400, 106 N. E. 302; Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; State v. Pabst, 139 Wis. 561, 121 N. W. 351.

The Inheritance Tax Law imposed a special tax, and in case of doubt the language must be construed strictly against the government and in favor of the taxpayer.

Re Ullman, 263 Ill. 528, 51 L.R.A. (N.S.) 1075, 105 N. E. 292, Ann. Cas. 1915C, 321; Re Vassar, 127 N. Y. 1, 27 N. E. 394; Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; Re Fayerweather, 143 N. Y. 119, 38 N. E. 278; Re Miller, 77 App. Div. 478, 78 N. Y. Supp. 930.

Where the grantor reserves the income from a part of the property conveyed before his death, and gives the balance to his heirs absolutely, in fixing the inheritance tax upon his estate, the court may fix the tax as to such part as an interest was reserved in, and should not assess it against the part given absolutely, unless it affirmatively appears from the evidence that such conveyance was made in contemplation of death.

People v. Kelley, 218 Ill. 515, 75 N. E. 1038; People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905.

Messrs. Edward J. Brundage, Attorney General, and Floyd E. Britton and Harry S. Parker, Assistant Attorneys General, for the People:

The question whether a gift is in contemplation of death is one of fact, and must depend upon the circumstances of each particular case.

Re Benton, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107; People v. Kelley, 218 Ill. 509, 75 N. E. 1038; Re Mahlstedt, 67 App. Div. 176, 73 N. Y. Supp. 818.

An irrevocable absolute gift *inter vivos*, if in contemplation of death, is taxable, though not *causa mortis*.

Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; Merrifield v. People, 212 Ill. 400, 72 N. E. 446; Re Benton, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107.

A gift is made in contemplation of an event when it is made in expectation of that event and having it in view; and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute.

Rosenthal v. People, *supra*.

In determining whether a gift has been made in contemplation of death it should be considered what the impelling motive was that caused the gift to be made; and where there is no other moving cause than the expectation of death, the gifts are in contemplation of death.

*Ibid.*; People v. Burkhalter, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379.

In the eye of the law, transfers of

real estate may be absolute and vest the fee in the grantee, and yet be in contemplation of death, and liable to an inheritance tax.

Merrifield v. People, 212 Ill. 405, 72 N. E. 446.

"In contemplation of death" means an apprehension of death arising from existing infirmity or impending peril.

People v. Carpenter, 264 Ill. 400, 106 N. E. 302.

Advanced age is a circumstance to be taken into consideration in determining whether a gift is in contemplation of death, and may even raise a presumption that it was made in contemplation of death.

Re Dunne, N. Y. L. J. May 25, 1914; Gleason & O. Inheritance Taxn. p. 82.

Thompson, J., delivered the opinion of the court:

This is an appeal from a judgment of the county court of Effingham county fixing a tax of \$3,213 under the Inheritance Tax Law (Hurd's Rev. Stat. 1917, chap. 120, §§ 366-388h) against Maude B. Danks on account of property transferred to her by her father, William Gillmore. No question is raised as to the regularity of the proceedings by which the tax was assessed, so the only question in controversy is the liability for such tax of certain real estate conveyed to Maude B. Danks by deeds made by William Gillmore, deceased, two years prior to his death. The county court held the transfers were taxable as gifts made "in contemplation of death," and accordingly entered an order assessing the tax. From this decision George I. Danks, as executor, and Maude B. Danks, have prosecuted their appeal to this court.

The facts were stipulated in the trial court, and so far as they are material to be considered here may be stated as follows: William Gillmore, a resident of Edgewood, Effingham county, this state, departed this life testate on May 9, 1917, leaving him surviving Maude B. Danks and James L. Gillmore, his children and only heirs at law. He left an original will, dated November 13, 1907, to which were attached two codicils, one dated December 3, 1912, shortly after the death of his

wife, and the other November 13, 1915, a week after the execution of the last deed here in question. The will and codicils were duly admitted to probate and letters testamentary issued. The appraised value of his estate, other than the land on which the tax in controversy was assessed, was \$89,421.30. Maude B. Danks, as residuary legatee under such will, received notes and personal property aggregating \$67,567.16. She also received from her father, by assignment made on November 6, 1915, notes and mortgages aggregating \$44,000, on which he reserved the interest or income during his life. It is admitted this property was subject to an inheritance tax. In addition to the above property, deceased in his lifetime conveyed to his daughter, Maude, real estate valued at \$69,083. March 26, 1915, he executed three deeds, conveying to her a tract of 1,355.41 acres, valued at \$31,834, and November 6, 1915, he executed four deeds, conveying to her 1,024.23 acres, valued at \$37,249. All of this land is situated in Effingham county, this state. The deeds were intended as absolute conveyances of the property described therein, and were duly executed, acknowledged, and delivered at the time made. The consideration stated in each deed is "love and affection and \$1." At the time the deeds were made the land was under lease to George I. Danks, son-in-law of the deceased, at an annual rental of \$1. The lease was made January 1, 1914, and runs for the period of the natural life of the lessor, William Gillmore. At the time the deeds were made Gillmore was affected with heart trouble and arteriosclerosis of some two or three years' standing, and was continually under treatment and care of a physician. He had consulted a specialist, and was fully advised as to the nature of his trouble. He was taking medicine daily for his heart. During the last two or three years of his life he was constantly attended by a maid. He was not, however,

confined to his bed, but was up and around the house, and nearly every day went to his store, a short distance from his home. At the time the deeds were made his condition of health was fairly good, considering his age and the nature of the disease with which he was afflicted, and it is not claimed his condition was then any different from what it had been for some months before. No serious attacks of heart trouble are shown to have occurred until a few days before his death. Some years before he died he gave to his son, James L. Gillmore, a tract of 160 acres of land in Clay county, in this state, and \$1,000 in cash. This deed is dated May 1, 1905. At the same time he took from his son a receipt, in which it was recited that the father had previously given the son money and other property, and that in consideration of such gifts and conveyances made it was agreed that the son had received his full share in the estate, and that in the event his father preceded him in death he would not be entitled to any share in the estate, nor would he have any claim or demands of any kind or nature whatever, against it. The value of the property previously given to the son is not shown. On September 6, 1912, he also made a gift of a tract of 62 acres of land in Effingham county to a nephew, Erastus S. Gillmore, by executing a deed to the same, which was placed in a sealed envelop and left with a bank at Edgewood, to be delivered to the grantee at the grantor's death. No gifts or transfers of property of any kind are shown to have been made to Maude B. Danks prior to the conveyances in question, unless the lease of this land to her husband on January 1, 1914, can be so considered. About ten years before his death the deceased induced his daughter and her husband, George I. Danks, to give up their home in the West and come and reside with him. At the time this was done George I. Danks took upon himself the management of the business of



deceased, and in return received a grocery store located at Edgewood and \$1,000 worth of stock in the First National Bank of Effingham, and later a lease to the land subsequently conveyed to the daughter, and a gift of the horses, cattle, and farm tools which the deceased then owned. It is also stipulated that deceased on several occasions told the officer who took the acknowledgment to the deeds that he was going to give his land to his daughter, and that on the day the last deed was executed he told the officer he was giving all his land to Maude. By his original will, executed November 13, 1907, he gave the bulk of the property he then owned, including the property against which the tax in question was assessed, to his daughter, and by the codicil executed December 3, 1912, shortly after the death of his wife, he gave to his daughter the property he had previously devised to his wife, and by the second codicil, made November 13, 1915, he directed that his daughter pay to her brother, James L. Gillmore, \$30 a month so long as he lived, with the further provision that should the son attempt in any way to contest the will or any disposition made by him of his property, the son should forfeit his right to such monthly payment.

The sole question presented by this record is whether or not, under the facts as stipulated, with all legitimate inferences to be drawn therefrom, the conveyances in question are to be deemed to have been made "in contemplation of death" as those words are used in the statute. The Inheritance Tax Law was not intended to prevent a person from disposing of his property in any legitimate way he sees fit (*People v. Burkhalter*, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379), nor to prevent a parent, in his lifetime, from giving to his children the whole or any part of his estate, so long as the gift was not intended as a testamentary disposition of his property, or made in contemplation of the donor's death (*People v.*

*Kelley*, 218 Ill. 509, 75 N. E. 1038). The law merely imposes a tax upon the right of succession to the ownership of property through the operation of the laws relating to descent and devise. *Kochersperger v. Drake*, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; *Re Benton*, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107. The purpose of the provisions imposing a tax upon gifts and transfers intended to take effect in possession or enjoyment after the death of the donor, or made in contemplation of his death, was to prevent an evasion of such laws by a distribution of property just before or in anticipation of the owner's death. Its manifested purpose was to include all gifts or transfers made prior to the donor's death which were similar in their nature and effect to a testamentary disposition of property, or accomplished the same object, under circumstances which imparted to it the characteristics of a devolution of property made in anticipation of the donor's death. *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121.

A gift is made "in contemplation of death" when it is made in expectation of that event, or with that event in view. *Ibid.* The term does not mean that general expectation which all rational persons have that they must die some time, but refers more particularly to that apprehension of death which arises from some existing infirmity of such a character as would prompt an ordinarily prudent person to make a disposition of his property and bestow it upon those whom he regarded as most entitled to be the recipients of his bounty. *People v. Carpenter*, 264 Ill. 400, 106 N. E. 302. What prompts the making of such a conveyance rests upon the facts and circumstances surrounding each particular case. No general rule can be formulated which will fit all cases, but each case must be examined and determined on its own facts and circumstances, in the light of the experience which the courts have gained in dealing with

such matters. For this purpose the donor's age, physical condition, and any action contemplated to be taken by him with respect to his health, as well as the length of time he survives the making of the transfers, are all proper matters to be considered in determining whether or not the act was done in contemplation of death. If, upon a consideration

**Evidence—**  
gift in con-  
templation of death.

of all the surrounding facts and circumstances, it is ap-

parent the donor's condition was such that he might reasonably have expected death at any time, and the disposition made of his property is such as he had contemplated making in that event, or such as he might reasonably be supposed to have desired to be made at his death, and no other moving cause is apparent for making the transfer at the time

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contemplation  
of death.

it was made, the gift will be deemed to have been made

in contemplation of death, even though the transfer is absolute in form, and such as would invest the donee with the absolute right to the property during the lifetime of the donor. *Rosenthal v. People*, supra; *Merrifield's Estate v. People*, 212 Ill. 400, 72 N. E. 446; *People v. Porter*, 287 Ill. 401, post, 1041, 123 N. E. 59.

In the instant case the donor was past eighty-eight years of age, in poor health, under a specialist's care, and constantly in charge of an attendant or maid. He was affected with an incurable disease, was fully advised of that fact, and was no longer taking any active interest in his business affairs. His whole environment was that of a man who realized that he had not long to live, and his thoughts seemed centered upon making provision for those who were to enjoy his property after his death. This is shown by the transfer of his store and farm property to his son-in-law; the execution of a lease of the land in ques-

tion, at a nominal rental, for the period of his natural life; the gift of certain of his property to his son; the taking from the son of an acknowledgment that he had received his share of his father's estate; the execution of the deed for certain lands to his nephew, to be delivered at his death; the execution of the deeds in question; the assignment of the notes and securities to his daughter, in which he reserved the interest or income during his life; and the almost simultaneous execution of the codicil to his will, by which he endeavored to make the prior gifts to his daughter doubly secure to her. All of these are the acts of a man who realizes that his death is apt to occur in the near future and is making preparation for that event. In this respect the case at bar is clearly distinguishable from *People v. Kelley*, supra, the case mainly relied upon by appellants. In that case the trust deed was executed because the donor felt his sons were not making as much money in their business as their stations in life required, and the object of the trust deed was to place them in the present enjoyment of the income of the property and supply them with ample means for their stations in life. No such object prompted the making of the transfers in question here. By the deeds in question no estate in present enjoyment was created in the daughter, and she was not presently enriched by the conveyances. The land conveyed was still subject to a lease to her husband at a nominal rental, and she would not come into the enjoyment of it until after her father's death. The conveyances by deed merely confirmed in her what her father had already provided she should take under the will.

—concrete case—  
gift in con-  
templation of death.

The judgment of the County Court of Effingham County was right, and it is affirmed.

### ANNOTATION.

#### When transfer deemed to be one in contemplation of death, within the meaning of the Inheritance Tax Law.

- I. In general, 1028.
- II. Theory limiting meaning to gifts causa mortis, 1030.
- III. Joint tenancies, 1032.
- IV. Antenuptial agreements, 1033.
- V. Application to various states of facts, 1034.

##### *I. In general.*

When there is a gift or transfer in contemplation of death within the meaning of the succession or inheritance taxing statutes is a question that cannot be answered in any general way, for the answer to the question depends upon the facts in the individual case. Whether there is a gift in contemplation of death is almost uniformly treated as a question of fact. *Spreckels v. State* (1916) 30 Cal. App. 363, 158 Pac. 549; *McDougald v. Wulzen* (1917) 34 Cal. App. 21, 166 Pac. 1033; *People v. Kelley* (1905) 218 Ill. 509, 75 N. E. 1038; *Re Crary* (1900) 31 Misc. 72, 64 N. Y. Supp. 560. In *Nickel v. State* (1918) — Cal. —, 175 Pac. 641, an action by the transferee of property, against the state, to quiet title against the claim for inheritance taxes by the state, alleging that the transfer was made in contemplation of death, and was therefore taxable, it was claimed that the complaint by inference and presumption affirmatively showed that the transfer was made in contemplation of death. The court states that it was conceded by both parties that ordinarily the question of whether or not a gift is made in contemplation of death, and for that reason is liable to tax, is one of fact, to be determined by the trial court from the nature and character of the instrument of conveyance, and from all the circumstances surrounding its execution.

In *State v. Pabst* (1909) 139 Wis. 561, 121 N. W. 351, the question whether there has been a transfer in contemplation of death seems to be treated as one of law; at least the

court states that, as a conclusion of law, the trial court found that there had been a transfer in contemplation of death.

In some cases in New York the words, "in contemplation of death," have been limited by a rule of law to gifts causa mortis; and a question of law is presented as to whether the placing of property in a particular form of ownership, such as a joint tenancy, results in a gift in contemplation of death because of the succession to the entire property by the survivor upon the death of one of the tenants. There is apparently a rule of law announced also in some of the cases dealing with antenuptial contracts. But generally, as above stated, a determination of whether there is a transfer in contemplation of death presents a question of fact.

Whether a transfer is in contemplation of death, being a question of fact, no general rule can be formulated that will determine when there has been such a transfer. There are, however, some general rules that assist in determining the question.

Under the ordinary form of statute taxing transfers by deed, grant, bargain, sale, or gift in contemplation of the death of the transferrer, it is well settled that not every transfer of property by way of gift is intended to be subjected to a tax. *Spreckels v. State* (1916) 30 Cal. App. 363, 158 Pac. 549; *Rosenthal v. People* (1904) 211 Ill. 306, 71 N. E. 1121; *People v. Kelley* (1905) 218 Ill. 509, 75 N. E. 1038; *People v. Burkhalter* (1910) 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379. "It is not the object of the statute," says the court in *People v. Kelley* (1905) 218 Ill. 509, 75 N. E. 1038, "to prevent a parent from giving the whole or any portion of his property to his children during his lifetime, if he so desire. The only effect of the statute as a revenue measure is to subject said property to an inheritance tax if the

gift is made in contemplation of the death of the donor." "An owner may give away or otherwise dispose of his property or any part of it, in any manner he sees fit, and if such disposition takes effect in possession and enjoyment during his lifetime it will not be subject to an inheritance tax unless made in contemplation of his death." *People v. Burkhalter* (1910) 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379.

It is only when such a transfer is in contemplation of the death of the transferrer, as clearly expressed in the statute, that the taxing law operates thereon. The question thus narrows down to what constitutes a transfer in contemplation of death. The phrase, "contemplation of death," does not refer to the general expectation of death that is entertained by all persons (*Spreckels v. State* (1916) 30 Cal. App. 363, 158 Pac. 549; *PEOPLE v. DANKS* (reported herewith) ante, 1023; *Conway's Estate v. State* (1918) — Ind. App. —, 120 N. E. 717; *State v. Pabst* (1909) 139 Wis. 561, 121 N. W. 351; see *Re Baker* (1903) 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed in (1904) 178 N. Y. 575, 70 N. E. 1094, *infra*);—death must be impending. The language used by the courts defines the term better than any composite statement can do. See the reported case (*PEOPLE v. DANKS*). It has been stated that a gift is made in contemplation of death if made when the donor is looking forward to his death as impending, and in view of that event. *Rosenthal v. People* (1904) 211 Ill. 306, 71 N. E. 1121. The court in *Re Roach* (1905) 10 Ont. L. Rep. 208, states that the words "in contemplation of death," as used in the Inheritance Tax Statute, "must be held to refer to an actual impending death, and not to a case in which death was an event which was not expected to take place immediately or within a measured time." The contemplation of death must be the impelling motive without which the conveyance would not be made, in order to subject a transfer of property to the tax. *People v. Burkhalter* (Ill.) *supra*. "Contemplation of death" means an apprehension of death which arises from

some existing infirmity or impending peril. *People v. Carpenter* (1914) 264 Ill. 400, 106 N. E. 302. It has been stated that "the meaning of the words 'in contemplation of death,' as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of testamentary dispositions. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty." *State v. Pabst* (1909) 139 Wis. 561, 121 N. W. 351. The words "in contemplation of death," as used in Inheritance Tax Statutes, refer "to that expectation of death which arises from such bodily or mental conditions, irrespective of the cause in any particular case, which prompts persons to dispose of their property to those they deem entitled to their bounty." *Conway's Estate v. State* (1918) — Ind. App. —, 120 N. E. 717. It is only when the transfer is immediately and directly prompted by the expectation of death,—in other words, when contemplation of death is the motive without which the transfer would not have been made; the expectation of death must be the direct, specific, and immediate animating cause of the transfer, which is in the nature of a testamentary disposition. *Spreckels v. State* (1916) 30 Cal. App. 363, 158 Pac. 549.

Advanced age of itself is not sufficient to prove that a gift was made in contemplation of death. *State v. Thompson* (*Re Dessert*) (1913) 154 Wis. 320, 46 L.R.A. (N.S.) 790, 142 N. W. 647, Ann. Cas. 1915B, 1084. The court here states that "an act is not

done in contemplation of death when the feeling that dissolution is approaching is absent, and is not the cause which impels or prompts the doing of the act. An aged person in good health, who has acquired a competency, and who desires to retire from active life, may desire to distribute a portion of his accumulations among his children without any thought of impending death. He may derive genuine enjoyment from seeing them enjoy the fruits of his accumulations if they put them to good use, and may take pleasure in giving his advice or counsel as to how the business or property turned over should be managed or handled. The question of whether such a person may have a few years or many years to live is not a consideration that has entered into or affected the transaction. He does not give because he is anticipating death, but because it affords him a pleasure in life. . . . We do not think the court can fix any particular age limit and say that after it is reached a party can give his property away only in contemplation of death."

The words "contemplation of death" are defined in some statutes to include that expectancy of death which actuates the mind of a person on the execution of his will, and not to be limited to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*. *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268; *Re Minor* (1919) — Cal. —, 4 A.L.R. 456, 180 Pac. 813; *Cole v. Nickel* (1919) — Nev. —, 177 Pac. 409, affirmed on rehearing in (1919) — Nev. —, 185 Pac. 565 (no question under this provision of the statute arose in this case). It was held in *Re Reynolds* (Cal.) *supra*, that this statutory definition merely serves the purpose of elucidating without changing the law by giving fuller expression to the legislative intent and meaning.

Other statutes make a gift or transfer within a stated period prior to death a transfer in contemplation of death. See note to *Re Ebeling*, 4 A.L.R. 1523, as to the constitutionality, construction, and effect of such a legislative definition.

The character of a transfer is not wholly determined by the terms of the written instrument employed to accomplish it. Parol evidence of the real agreement is permitted with a latitude similar to that indulged to show a resulting trust, or to transform a deed absolute on its face into a mortgage. *Kelly v. Woolsey* (1918) 177 Cal. 325, 170 Pac. 837. The state may attack the consideration expressed in the transfer. *Abstract & Title Guaranty Co. v. State* (1916) 173 Cal. 691, 161 Pac. 264, sustaining the finding of the trial court that a transfer expressed to be in consideration of the care and support of the transferer, and of a small cash payment, was not a transfer upon a valuable consideration.

If the transfer is in contemplation of death, it is subject to the tax though no evidence of that motive appears in the instrument effecting the transfer. *People v. Porter* (Ill.) *post*, 1041. The burden of showing that a transfer is subject to a collateral inheritance tax is upon the state. *Re Wadsworth* (1917) 100 Misc. 439, 166 N. Y. Supp. 716, affirmed without opinion in (1918) 185 App. Div. 944, 172 N. Y. Supp. 924.

## II. Theory limiting meaning to gifts *causa mortis*.

A theory advanced by some of the New York courts is to the effect that the phrase "contemplation of death" includes only gifts *causa mortis*, and excludes gifts *inter vivos*. Accordingly only gifts *causa mortis* are held taxable; a gift *inter vivos* is not taxable unless made and received with the intent and for the purpose of evading the tax. *Re Seaman* (1895) 147 N. Y. 69, 41 N. E. 401 (*dictum*); *Re Edgerton* (1898) 35 App. Div. 125, 54 N. Y. Supp. 700, affirmed without opinion in (1899) 158 N. Y. 671, 52 N. E. 1124; *Re Spaulding* (1900) 49 App. Div. 541, 63 N. Y. Supp. 694, affirmed without opinion in (1900) 163 N. Y. 607, 57 N. E. 1124; *Re Cornell* (1901) 66 App. Div. 162, 73 N. Y. Supp. 32, modified in (1902) 170 N. Y. 423, 63 N. E. 445, see *infra*; *Re Bullard* (1902) 76 App. Div. 207, 78 N. Y. Supp. 491; *Re Hendricks*

(1914) 163 App. Div. 413, 148 N. Y. Supp. 511; *Re Graves* (1907) 52 Misc. 433, 103 N. Y. Supp. 571; *Re Stebbins* (1907) 52 Misc. 438, 103 N. Y. Supp. 563. In some of the New York cases, the phrase "contemplation of death" is not expressly confined to gifts causa mortis, but it is stated in cases involving gifts inter vivos that the transfer is not taxable unless it was made in contemplation of death, and for the purpose of defrauding the state of the transfer tax. *Re Mahlstedt* (1901) 67 App. Div. 176, 73 N. Y. Supp. 818, affirmed without opinion in (1902) 171 N. Y. 652, 63 N. E. 1119.

In *Re Cornell* (1902) 66 App. Div. 162, 73 N. Y. Supp. 32, transfers of securities by an elderly bachelor, one transfer taking place at about two years before his death, another about six months before, to his medical adviser, when the donor apprehended no immediate danger of death, although suffering from a serious disease, was held not to be a transfer in contemplation of death, since the absolute property was vested in the donee, and there was nothing to show that the gift was made to avoid the payment of the transfer tax. The donor reserved the income from the securities for his life, and the court of appeals in (1902) 170 N. Y. 423, 63 N. E. 445, held the transfers subject to the tax because of this fact, but there is no discussion in the opinion of the court of appeals as to transfers in contemplation of death, and it seems more likely that the theory of the court of appeals is that it was a transfer to take effect in possession or enjoyment at death, and for this reason was taxable, although nothing is stated as to the theory. The decision of the surrogate, taxing the transfers, was affirmed by the court of appeals.

A transfer of property under conditions which made it clear that "if the transaction was not a mere pretext to evade the payment of the transfer tax, at least the gift was one not intended to become complete in either enjoyment or possession until after the death of the donor," was held subject to the tax in *Re Ball* (1914) 161 App. Div. 79, 146 N. Y. Supp. 499, apparent-

ly on the theory that if it was a transfer intended to evade the payment of the transfer tax, it was taxable as a transfer in contemplation of death.

But the view confirming the meaning of the words to gifts causa mortis has not been uniformly followed in New York. Some of the New York decisions define the words in the terms of the general rule above stated, although relying on the above New York cases, which confine the meaning to a gift causa mortis. For example, in *Re Baker* (1903) 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed without opinion in (1904) 178 N. Y. 575, 70 N. E. 1094, it is said that "this court has held that the words 'in contemplation of the death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body, or some impending peril (*Re Spaulding* (1900) 49 App. Div. 541, 63 N. Y. Supp. 694, affirmed in (1900) 163 N. Y. 607, 57 N. E. 1124); and this we believe is now the generally accepted definition of the phrase." In *Re Hess* (1906) 110 App. Div. 476, 96 N. Y. Supp. 990, affirmed in (1907) 187 N. Y. 554, 80 N. E. 1111, where there was a conveyance of a farm to one in consideration of his agreement to support the grantor and his wife, it is stated that there was no suggestion that the conveyance was in contemplation of death; that "the apprehension of the impending dissolution which this clause signifies did not exist."

In other New York cases the New York statute is held not to be confined to gifts causa mortis, but to be applicable to gifts inter vivos if made in contemplation of death. *Re Birdsall* (1897) 22 Misc. 180, 49 N. Y. Supp. 450, affirmed without opinion in (1899) 43 App. Div. 624, 60 N. Y. Supp. 1133; *Re Price* (1909) 62 Misc. 149, 116 N. Y. Supp. 283; *Re Klein* (1915) 92 Misc. 318, 156 N. Y. Supp. 585; *Re Dee* (1913) 148 N. Y. Supp. 423, affirmed without opinion in (1914) 210 N. Y. 625, 104 N. E. 1128. In *Re Palmer* (1907) 117 App. Div. 360, 102 N. Y. Supp. 236, Chase, J., denies that only gifts causa mortis

are included in the term "contemplation of death." The other members of the court who concur in the decision concur only in the result; see *infra*. Without expressly stating any general rule, other courts from this state have held gifts *inter vivos* to be in contemplation of death, and therefore taxable. *Re Hodges* (1915) 215 N. Y. 447, 109 N. E. 559; *Re Thompson* (1914) 85 Misc. 291, 147 N. Y. Supp. 157, affirmed in (1915) 167 App. Div. 356, 153 N. Y. Supp. 164, affirmed without opinion in (1916) 217 N. Y. 609, 111 N. E. 1101; *Re Von Bermuth* (1913) 143 N. Y. Supp. 672. The later cases in New York have not generally followed the rule which confines the meaning of the words "in contemplation of death" to gifts *causa mortis*, but have held gifts *inter vivos* subject to the tax in a proper case.

The view confining the meaning of the phrase "in contemplation of death" to a gift *causa mortis* has been repudiated in other states. *Rosenthal v. People* (1904) 211 Ill. 306, 71 N. E. 1121; *Re Benton* (1908) 234 Ill. 366, 18 L.R.A.(N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107; *Conway's Estate v. State* (1918) — Ind. App. —, 120 N. E. 717; *State v. Pabst* (1909) 189 Wis. 561, 121 N. W. 351. In *Merrifield's Estate v. People* (1904) 212 Ill. 400, 72 N. E. 446, a gift *inter vivos* was held subject to taxation if made in contemplation of death. A gift *inter vivos* if made in contemplation of death is subject to the tax without regard to any intent to evade the payment of the tax. *Rosenthal v. People* (1904) 211 Ill. 306, 71 N. E. 1121.

### III. Joint tenancies.

In the case of joint tenancies there are two transfers that have been urged as taxable. There is (a) the transfer of the property to the joint tenants, and (b) the succession to the whole estate by the survivor upon the death of one of the joint tenants. It seems clear that there is no transfer in contemplation of death, in the succession to the entire property by the survivor upon the death of one of the tenants. Whatever transfer or succession takes place at this time is a

transfer or succession at death, and not in contemplation of death. It is stated in *Re Tilley* (1915) 166 App. Div. 240, 151 N. Y. Supp. 79, affirmed without opinion in (1915) 215 N. Y. 702, 109 N. E. 1094, that "no right passes by the death of one of the parties, for where the deposit is in the joint names of the parties and the intent appears—as it now must under the statute—to create the joint tenancy, its effect is to vest title in the entire fund in the survivor. . . . The right of survivorship vests in the creation of the joint tenancy, and the only question determined by death is which shall take the entire estate. Under such circumstances, it is clear that there is no succession to be taxed, for it was not 'made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death.' The possession is given upon the creation of the estate; the rights are absolutely and conclusively fixed, and the only question which is contingent is, Which of two or more joint tenants shall eventually own the entire estate?"

But the transfer to the joint tenants stands on the same ground as any other transfer; if it is a gift and made in contemplation of the death of the transferor, it is taxable. Whether a gift to a joint tenancy is or is not a gift in contemplation of death is a question of fact. As shown above, the rule is adhered to in some New York cases that a gift *inter vivos* is not subject to the tax unless made with the intent to evade the tax. This theory is adhered to in *Re Stebbins* (1907) 52 Misc. 438, 103 N. Y. Supp. 563, followed in *Re Graves* (1907) 52 Misc. 433, 103 N. Y. Supp. 571, in holding that joint bank accounts payable to husband or wife or the survivor were not taxable as gifts in contemplation of death. See *Re Tilley* (1915) 166 App. Div. 240, 151 N. Y. Supp. 79, affirmed without opinion in (1915) 215 N. Y. 702, 109 N. E. 1094, *infra*. But, under the general rule that gifts *inter vivos* may be made in contemplation of death, within the meaning of the taxing law, no ques-

tion of fraud or intent to evade the tax is involved, but merely a question of fact.

The question of presumption arises in this connection. No presumption that a transfer is in contemplation of death arises from a transfer to a joint tenancy. In *Re Tilley* (N. Y.) *supra*, the court, in holding that the survivor of a joint tenancy existing in a bank account was not liable to pay a tax in respect to one half the account, states that "while there might be a joint tenancy created which would be so obviously fraudulent in its inception as to take it out of the general rule, we are persuaded that where an account is created in the manner permitted by the Banking Law, with all of its incidents known and recognized in the law, it cannot be presumed that there was any other intention than that which the law ascribes to such an act, and that property thus disposed of is not 'made in contemplation of . . . death,' as that language is understood in the jurisprudence of this state." The Banking Law of this state referred to made a joint bank deposit in form to be paid to either of the depositors or the survivor of them, the property of such persons as joint tenants, and provided that the same, together with all interest thereon, should be held for the exclusive use of the depositors, and might be paid to either during the lifetime of both, or to the survivor after the death of one of them, and such payment, and the receipt or acquittance of the one to whom such payment is made, is made a valid and sufficient release and discharge to the bank. At least, there is no conclusive presumption from a transfer to a joint tenancy that there is a transfer in contemplation of death. In one part of the opinion in *Re Gurnsey* (1918) 177 Cal. 211, 170 Pac. 402, the creation of a joint tenancy (which in this case was a joint bank account) is stated of itself to raise no inference or presumption that it was done in contemplation of death; in another part of the opinion it is stated that the creation of a joint bank account and the addition to it of deposits made by way of gifts from

the community property to the joint estate do not constitute conclusive evidence that the gifts were made in contemplation of death. In this case a finding of the trial court that the transfer was not made in contemplation of death was sustained.

Even if a joint tenancy is created in contemplation of death, it is not subject to the tax if created for a valuable and adequate consideration. *McDougald v. Boyd* (1916) 172 Cal. 753, 159 Pac. 168.

Upon the general question of consideration, see note to *People v. Porter*, post, 1041.

#### IV. Antenuptial agreements.

A transfer in pursuance of an antenuptial agreement is generally held not to be a transfer in contemplation of death. In *Re Minor* (1919) — Cal. —, 4 A.L.R. 456, 180 Pac. 813, there was held to be no transfer in contemplation of death where, upon the marriage of a man seventy-eight years of age, but in good health and physically and mentally active in the successful management of extensive business interests, to a woman twenty-nine years of age, an oral antenuptial agreement was entered into by and between them whereby it was agreed that the woman should receive the sum of \$100,000 as a marriage settlement, an agreement that was partially performed on the day of the marriage by the payment of \$50,000 in cash, and over three years after the marriage by the execution of a written instrument whereby she acknowledged the prior payment of \$50,000 in cash for and on account of the antenuptial agreement, and also the transfer and indorsement to her by her husband on the day of the execution of the written instrument, in full and final performance of the oral antenuptial agreement, of a fully secured promissory note in the sum of \$50,000 originally executed and made payable to the husband, which instrument contained a further clause wherein and whereby the wife promised on behalf of herself, her heirs, etc., in consideration of the full performance of the antenuptial agreement, to relieve and forever discharge



the husband, his heirs, executors, and administrators, from any claim to an interest in his estate; this agreement was executed over three years before the death of the husband, and about three years before he executed his last will and testament, in which he referred to the amount given his wife under the antenuptial agreement as her share of his estate; these facts were held by the supreme court not to support the finding of the trial court that the transfers in controversy were made in contemplation of death. The court, in distinguishing other cases in which transfers in pursuance of an antenuptial agreement were held to be in contemplation of death, states that in the case at bar the parties primarily contemplated matrimony, and a marriage settlement as a condition precedent thereto; that the controlling consideration of the transfer was the marriage,—a circumstance which necessarily excluded the idea that a desire to make a testamentary disposition was in any substantial sense a direct cause of the transfer.

That a transfer under an antenuptial agreement is not a transfer in contemplation of death is further supported in the following decisions: A transfer to the intended wife under an antenuptial agreement of securities which, on the following day, were retransferred to the intended husband under a trust agreement that the securities were to become the absolute property of the survivor,—a transaction which was confirmed by the will of the husband,—was held not to be a transfer in contemplation of death, in *Re Miller* (1902) 77 App. Div. 473, 78 N. Y. Supp. 930. Property which passed to the wife upon the death of her husband under an antenuptial contract by the terms of which the intended wife was paid a sum in cash, and the husband agreed to provide for her from his estate in case she should survive him, a further sum, in pursuance of which agreement the sum in question was paid, was held not to be taxable as a transfer in contemplation of death, in *Re Baker* (1903) 83 App. Div. 530, 82 N. Y. Supp. 890, affirmed without opinion in (1904) 178

N. Y. 575, 70 N. E. 1094. The provision thus made in the antenuptial contract was to be accepted by the wife in lieu of her dower rights in the decedent's estate and all other rights as his widow. The decree of the surrogate court was affirmed in this case. In *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 893, the court, in dealing with an antenuptial agreement under which the husband agreed to bequeath certain property to the wife provided she should survive him, states, generally, that the agreement was not made in contemplation of death.

See *Re Wadsworth* (1917) 100 Misc. 439, 166 N. Y. Supp. 716, affirmed without opinion in (1918) 185 App. Div. 944, 172 N. Y. Supp. 924, cited in II. b, 2, of note to *People v. Porter*, post, 1061.

The general question of the applicability of inheritance or succession tax law to antenuptial contract is discussed in the note to *Re Minor*, 4 A.L.R. 456.

#### *V. Application to various states of facts.*

As shown in the introduction to this note, the question whether a transfer is in contemplation of death is one of fact. Some appellate courts, upon appeals from decisions upon the existence of a transfer in contemplation of death, have applied the rule of procedure that if there is any evidence to sustain the finding of the trial court upon a question of fact, that finding must be affirmed. The finding of the trial court that there was no gift in contemplation of death was affirmed in the case of a transfer of shares of stock in a corporation which the transferor had organized to care for large properties which had been left her upon the death of her husband, the transfer taking place less than one month before her death, at the age of seventy-nine years, where it appeared that at the time of the transfer the donor had no thought of death, but intended taking a trip to Europe, and was having a large mansion repaired preparatory to her own reoccupancy of it. *Spreckels v. State* (1916) 30 Cal. App. 363, 158 Pac. 549. The finding of the

trial court that there was no transfer in contemplation of death was sustained in *McDougald v. Wulzen* (1917) 34 Cal. App. 21, 166 Pac. 1033, where the transfer was made by a man eighty-three years of age, in reasonably good health for one of his years, to his wife, the transferrer stating that he did not wish to be longer bothered with the property, and that he would give it to his wife to do with as she wished. It is stated that it may be conceded that if the trial court had found that the transfers were made in contemplation of death, the appellate court would have sustained such finding; still, the trial court having found otherwise, and its function being to place a construction upon the evidence before it, and it appearing that the construction so given is not unreasonable, its finding cannot be disturbed. The finding of the appraiser that there was no transfer in contemplation of death was affirmed in *Re Crary* (1900) 31 Misc. 72, 64 N. Y. Supp. 566, under the rule of practice as to the effect of finding the fact by a trial court, where it appeared that the transfers in question were made within two months prior to the decease of the donor, and constituted about one fifth of a large estate, and where it further appeared that the donor had contemplated the transfers for about one year prior to their being made, and that he had been accustomed to making considerable gifts from time to time, to members of his family.

On this theory of procedure findings that there was a transfer in contemplation of death have also been affirmed. The finding of the trial court that a transfer of property was made in contemplation of the death of the grantor is sustained by evidence showing that the grantor was seventy-nine years of age when he made the conveyance, which was one year and five days before his death; that the conveyances were made to his children at a time when the grantor was in normal health, never having consulted a physician except for rheumatism, and that one purpose, at least, of the conveyances, was to relieve the grantor of the care of the property. The court

states that while there is no direct evidence warranting the trial court's inference that the conveyances were made in contemplation of death, when the age, condition of health, statements, conduct, and surroundings of the deceased are considered in connection with the conveyances made by him, it appears that the trial court may reasonably have drawn such inference, though it may be said that other and contrary inferences may, with equal or greater certainty, be drawn from the facts and circumstances shown by the evidence. *Conway's Estate v. State* (1918) — Ind. App. —, 120 N. E. 717. A transfer by a man about seventy-five years of age, suffering from a cancer and in such physical condition that he must have realized that his death within a comparatively short period of time was inevitable, of all the real estate which he owned, and consisting of the larger part of his entire estate, to his daughter, two months before his death, was held to be a transfer in contemplation of death in *Re Fitzgibbon* (1919) 106 Misc. 130, 173 N. Y. Supp. 898. The evidence in this case was held to sustain the finding of the appraisers that the transfer was made in contemplation of death.

The majority of courts, however, have not applied this rule of procedure; at least not expressly, but have seemingly decided the question as an original one. In the great majority of these cases, however, the decision of the trial court is affirmed.

Facts which were held to show gifts or transfers in contemplation of death appear in the following cases:

See the reported case (*PEOPLE v. DANKS*, ante, 1023).

A gift by one suffering from sarcoma, made a few days before an operation therefor, which was the last of several operations which had been performed for the same purpose, but without checking the disease, another gift about six months thereafter, when the donor had again begun to fail from the disease in question, both of which were made to the wife of the donor, were held to be transfers in contemplation of death, and there-

fore taxable under the statute. *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268. Trial court affirmed.

A transfer by one who had undergone several operations for sarcoma, without success, about four months before his death, to his son, of a department store owned by him, was held to be a gift in contemplation of death in *Re Reynolds* (Cal.) supra.

A conveyance by a donor eighty years of age to a corporation the membership of which was limited to his son, when the donor's physical condition was such that, if a reasonable man, he must have apprehended that death was likely to occur at any time, and when, without any material change or improvement in his physical condition, death did occur a little more than six months after the execution of the deed which operated as a transfer of all the property owned by the donor at the time, and which was made for a stated consideration of \$10 and the support of the grantor for life, was held to be a transfer in contemplation of death, and taxable as such, in *Abstract & Title Guaranty Co. v. State* (1916) 173 Cal. 691, 161 Pac. 264. Trial court affirmed.

A gift of the value of \$150,000, made by a man sixty-one years of age, to his wife, thirty-three days before his death, and after he had developed symptoms indicating a fatal disease, was held to be a gift in contemplation of death, although the physician did not tell the donor that he was going to die, nor did he ask the physician what was the matter with him, but talked about going abroad to recuperate, and said nothing about his death. *Rosenthal v. People* (1904) 211 Ill. 306, 71 N. E. 1121. About the time of the gift, a will was prepared by the donor. The court states that the preparation of the will under the circumstances and in view of the rapid progress of the disease is strong evidence that death was expected, and no other moving cause than the expectation of death is apparent; and that while the widow and physician testified that the deceased did not expect to die, they also said that it was not the subject of conversation at all, and in view of

his condition, it is a fair inference that he was not so dull of comprehension as to suppose that he would get well. The order of the county court, assessing a transfer tax, was affirmed.

A gift of practically all the donor's property to his wife and children, immediately preceding a surgical operation for a disease with which he had suffered for some time, was held to be a gift in contemplation of death in *Merrifield's Estate v. People* (1904) 212 Ill. 400, 72 N. E. 446. The decision of the trial court, levying an inheritance tax, was affirmed.

A gift of personal property by an old man suffering from an incurable disease, to avoid its falling into the hands of a person who might otherwise get it in case of his death, is a gift in contemplation of death, within the meaning of a statute taxing such gift. *Re Benton* (1908) 234 Ill. 366, 18 L.R.A.(N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107. The judgment of the county court levying a tax was sustained.

A transfer of property by trust deed by a man who had suffered from diabetes for fifteen years, and had made various unsuccessful efforts to check the disease, the transfer being made when he was declining rapidly, so that a frequent consultation of physicians was necessary, was held to be a transfer in contemplation of death, in *State v. Pabst* (1909) 139 Wis. 561, 121 N. W. 351.

An assignment of a large estate in trust by the owner, who was suffering from locomotor ataxia, of which disease he was aware, was held to be a transfer in contemplation of death, although made six years before his death, in *Bullen's Estate* (1910) 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109. The owner had reserved the right to revoke and vacate the trust at any time during his lifetime, and had made some changes in the trust after it was first created, but the securities constituting the trust had remained with the trustee.

A transfer by a woman past seventy-nine years of age, afflicted with consumption, from which she knew she could never recover, of a large

part of her property to nieces, who were the residuary legatees under her will, and to whom the property would have passed under the will, was held to be a transfer in contemplation of death, in *Re Birdsall* (1897) 22 Misc. 180, 49 N. Y. Supp. 450, affirmed without opinion in (1899) 43 App. Div. 624, 60 N. Y. Supp. 783. The surrogate states that it is true "that at the time the deeds were delivered, nothing was said by the testatrix with respect to her decease or the probability of life, but the circumstances lead us irresistibly to the conclusion that she was contemplating this event at the time of making said transfer, and that the same was made in view of that event." The court then points out the age of the donor, and that she had been under the constant and almost daily care of her physician, who had informed her that she could not be cured, that the only thing he could do for her was to make her feel better, that she knew she was liable to be taken worse and die at any time, or, upon the contrary, that she might live for a considerable period of time, and concludes that "taking all these facts and circumstances into consideration, it seems to us that no other conclusion can be reached than that the testatrix, in making this transfer of property, was considering, thinking of, and contemplating the fact that she was approaching the end of her lease of life, and that her act in making such transfer was in contemplation of that event."

A transfer of real estate of considerable value, by a man seventy-six years of age, who was suffering from an illness concerning which he stated, in making the transfer, that he did not know when it would take a turn for the worse, to his adopted son, was held to be a transfer in contemplation of death in *Re Price* (1909) 62 Misc. 149, 116 N. Y. Supp. 283. There was evidence that the motive which prompted the transfer in this case was to save the transferee from the possible annoyance and trouble which the decedent contemplated might ensue when a will made by him was presented for probate; but the court concludes from all the circum-

stances that he must have contemplated the probability of his own death within a very short time. As a matter of fact, it occurred ten days after the execution and delivery of the deed.

A transfer of real estate by a man seventy-nine years of age, in failing health, and suffering from an attack of la grippe, to his wife seven days before his death, is held to be a transfer in contemplation of death in *Re Thompson* (1914) 85 Misc. 291, 147 N. Y. Supp. 157, affirmed in (1915) 167 App. Div. 356, 153 N. Y. Supp. 164, which is affirmed without opinion in (1916) 217 N. Y. 609, 111 N. E. 1101. The finding of the appraisers that this transfer was subject to the tax was affirmed. The decedent stated at the time of making the conveyance that his attorney had been instructed to prepare the conveyance "so that his wife would take the property when he died."

A transfer of securities by a husband when confined to his bed by sickness, to his wife, the husband stating that he was not satisfied with the provisions contained in his will for her benefit, and wanted to make her a present of some of his securities, was held to be a transfer in contemplation of death in *Re Hodges* (1914) 86 Misc. 367, 148 N. Y. Supp. 424, affirmed in (1915) 168 App. Div. 913, 152 N. Y. Supp. 1117, which is affirmed in (1915) 215 N. Y. 447, 109 N. E. 559. The court states that as the decedent had been growing weaker for about six months prior to the date of this transfer, and as his enfeebled condition about the time of the transfer rendered it impossible for him to leave his home, he must have been conscious of the probability of his early death. It is further stated that the fact that he apprehended his early dissolution is manifest from his expressed dissatisfaction with the provisions of his will for the benefit of his wife, and his desire to supplement such provisions with gifts of substantial value.

A gift made by a physician who was, on the same evening, making a stethoscopic examination of his own chest, and who, seven hours there-

after, was found dead, to a donee for whom he had long intended to make provision to take effect on his death, and for whom, except for such gift, he had made no such provision, has been held to be a gift in contemplation of death in *Re Dee* (1913) 148 N. Y. Supp. 423, affirmed without opinion in (1914) 210 N. Y. 625, 104 N. E. 1128.

Facts which were held not to show gifts or transfers in contemplation of death appear in the following cases:

A conveyance of a little less than one half of a large estate to a trustee by a man about sixty-nine years of age, when not under any apprehension of immediate death, although subject to attacks of heart disease, was held not to be a transfer in contemplation of death, in *People v. Kelley* (1905) 218 Ill. 509, 75 N. E. 1038. The trust in this case was made for the benefit of the grantor's sons, and for the purpose of enabling them to live in the manner called for by their station in life. The judgment of the county court finding the gift not made in contemplation of death, and therefore denying the tax, was affirmed.

A gift of money made by a wife five days before her death, but when, so far as appears, she had no reason to apprehend her death, is not a gift in contemplation of death, and therefore not taxable. *Re Von Bernuth* (1913) 143 N. Y. Supp. 672. The gift in this case was accomplished by the wife authorizing the husband to draw the money out of a joint account which the husband and wife had in a bank. It is assumed that the money belonged to the wife, and that the gift was made to the husband at the time he was so authorized to draw it. A former order entered on the appraiser's report, fixing the tax on this gift, was reversed.

Gifts of money extending over a long period of years, made not when the donor was ill or at or near the time of his death, were held not to have been made in contemplation of death, in *Re Klein* (1915) 92 Misc. 318, 156 N. Y. Supp. 585.

The court in *Re Masury* (1898) 28 App. Div. 580, 51 N. Y. Supp. 331, affirmed without opinion in (1899) 159 N. Y. 532, 53 N. E. 1127, states that

it would not be contended that a series of transfers beginning back a number of years, made in favor of adopted sons of the creator of the trust, were made in contemplation of the death of the grantor in any legal sense.

A gift of a homestead by a man in comparatively good health, a year before his death, to his daughter, with whom he was living on the homestead, was held not to be a gift in contemplation of death, in *Re Roach* (1905) 10 Ont. L. Rep. 208. The conveyance was at once registered, but no change of possession took place, and the donor and donee continued to live together in the house until the donor's death. The court states that there was no reason to expect a fatal termination to any existing disorder in case of the donor; that, although he was an old man, he was not at the time under actual medical treatment, and may well have expected to live, as he did, for a considerable time after making the conveyance in question.

A transfer of all of an estate valued at about \$125,000, a few years before the owner's death, to one who was not related to him either by blood or marriage, in pursuance of his agreement with the donee to so convey the property in consideration of her care of an invalid daughter of the donor, is not a transfer in contemplation of death, within the meaning of the Inheritance Tax Act. *People v. Burkhalter* (1910) 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379. The court, after stating that the transferrer realized that he could live but a few years longer, and expected his invalid daughter would outlive him, and that the care of her future was an object of great solicitude to him, states that in this sense his act in transferring his property may be said to have been made in contemplation of his death, but he did not transfer his property to his daughter, or in trust for her; "instead, he sold it in consideration of a contract for her care, the performance of which began and was completed in his lifetime. The property itself was not devoted to the use of his daughter except indirectly as it would enable the appellee [the transferee of the property] to

carry out her personal contract. It was not his impending death which was the impelling motive for making this disposition of his property, but his desire to provide for his daughter's future, whether he lived or died." *Ibid.* The judgment of the county court, that the property was not subject to the provisions of the Inheritance Tax Law, was affirmed. It seems that this conveyance might have been held free from the tax on the theory that it was for a valuable consideration.

As pointed out above, some cases in New York take the view that only gifts *causa mortis* are included in the meaning of transfers in "contemplation of death," that a gift *inter vivos* is not subject to a tax under this provision unless it was made and received with the intent and for the purpose of evading the tax. Although the courts which take this view have emphasized the necessity of the conditional character of the gift to bring it within the meaning of the words, "contemplation of death," no very strong test of this theory appears in the decided cases, such as an absolute gift of property by a person a short time before his death, and when he was in immediate fear of death. Upon the facts appearing in a majority of the cases decided under this theory, it is a matter of speculation whether the results that have been reached would not have been the same under the general theory. Seemingly the result in some of the cases would have been the same. The tendency, however, is to hold the transfer not to be in contemplation of death. Facts appeared in the following cases which were held not to show a transfer in contemplation of death:

A transfer of securities, by a man seventy-two years of age, not in good health, but then recovering from an illness, with the intention of ridding himself of the care of the property, to one who agreed to pay him an annuity and to secure such payment by depositing the securities with a trust company which was authorized to collect the dividends on the securities

or sell in default of payment of the annuity, was held not to be a transfer in contemplation of death, where there was no power of revocation reserved. It was provided in the agreement that the transferee should be at liberty, with the consent of the transferor, to sell any of the named securities and substitute others in their place, to be held by the trust company in the same manner as the original securities. *Re Edgerton* (1898) 35 App Div. 125, 64 N. Y. Supp. 700, affirmed without opinion in (1899) 158 N. Y. 671, 52 N. E. 1124. The transfer in this case was made about five years before the death of the transferor. The decision of the surrogate was affirmed.

A transfer of one third of a large estate by a father nearly eighty-seven years of age, but in possession of his mental faculties unimpaired, although enfeebled physically because of old age, to his children, for the express purpose of relieving himself from the burden of caring for the property, has been held not to be a transfer in contemplation of death, where it was not made for the purpose of evading the tax. *Re Spaulding* (1900) 49 App. Div. 541, 68 N. Y. Supp. 694, affirmed without opinion in (1900) 163 N. Y. 607, 57 N. E. 1124. The court states that "it may be assumed, considering the age of the deceased at the time of his death, his enfeebled condition, the steady and continuous failing of his physical powers, what he said to his son at the time the gifts were made, that the deceased knew he would not long continue to live; that death at most was not many years distant, and that he wished his three children to be the absolute owners and possessed of a part of his property before that event should take place; but there is no evidence tending to show that the gifts were made when the donor was in extremis, when he was dangerously ill, in danger of immediate death, in peril, afflicted with an acute disease, or anything of the kind. He was simply an old man, feeble as the result of old age, and he must have known that he could not live many years longer; but whether a few months, one, two, or five years, was

not known to him, and could not be determined with any degree of accuracy. . . . As a matter of fact he lived a year and six months after the first gift was made, and ten months after the second gift was made, and up to within two months of his death had never called or required the services of a physician." The order of the surrogate, reversing the appraiser's report, was affirmed.

Transfers of corporate stock to the daughter and grandson of the transferor, made three years before his death, and when he was in vigorous health, and acting as president of one of the corporations the stock of which was transferred, and as director of another, were held not to be transfers in contemplation of death, in *Re Bul-lard* (1902) 76 App. Div. 207, 78 N. Y. Supp. 491. The dividends from the stock were paid to the transferor during his lifetime, but there was no agreement that they should be so paid. The decision of the surrogate, reversing the appraiser's report, was affirmed.

A transfer of corporate stock by a husband who was in general good health, to his wife, after the husband had reached a time in life when he desired some rest from the cares and responsibilities of business, but when, so far as the evidence shows, there was no immediate danger of death, was held not to be a transfer in contemplation of death, in *Re Graves* (1907) 52 Misc. 433, 103 N. Y. Supp. 571. The transfer in this case took place three years before the death of the donor, and at a time when he was attending to business, although troubled with a disabled hand. A former order of the surrogate, made upon the report of the appraiser, assessing the tax, was reversed.

A transfer of all but one share of stock in a corporation in which the transferor was president, to his wife, at a time when he was sick, and after his physician had assured him that upon his recovery it would be necessary for him to take a long vacation, was held not to be a transfer in contemplation of death, in *Re Mahlstedt* (1901) 67 App. Div. 178, 73 N. Y.

Supp. 818, affirmed without opinion in (1902) 171 N. Y. 652, 63 N. E. 1119. At the time of making the transfer the transferor expressed a desire that he might transfer his property to his wife, so that she could become a member of the corporation at once and transact the business in his place. The fact that the transferor retained one share of stock so that he might be a member of the corporation is regarded as an important fact by the court. The question is discussed as follows: "It may be that the transfer of the property was made in contemplation of death in the sense that many men who have accumulated property make some disposition of it in contemplation of the fact that they must die at some time, but the fact that Mr. Mahlstedt retained one share of the stock, which could be of no possible use to him as property if he was about to die, and which would pass by the will he had just executed to his wife, seems to us strong evidence that he did not believe that he was going to die of his present illness, but that he expected to live, and wanted to retain his right to vote in the corporation, perhaps as a mere matter of sentiment. The fact that he did die within about three weeks of the transfer, and that he died of the same illness with which he was afflicted at the time, has no bearing upon the question. The only point to be determined is whether the transfer was made in the then belief that he was not going to get well,—that it was made in contemplation of his impending death, and for the purpose of defrauding the state of the transfer tax." The decision of the surrogate, affirming the tax, was reversed.

In *Re Hendricks* (1914) 163 App. Div. 413, 148 N. Y. Supp. 511, affirmed without opinion in (1915) 214 N. Y. 663, 108 N. E. 1095, a transfer of stock reserving a life income by a husband seventy-four years of age, in good health, was held not to be a taxable transfer. The stocks in this case were not transferred on the corporate books until after the husband's death, and he exercised control over them; but of this it is stated that the

source of the donor's control was an agreement subsequent to the gift, and not a condition attached to it. The court does not clearly indicate whether the transfer in this case was sought to be held taxable as a transfer in contemplation of death, or as one intended to take effect in possession or enjoyment at or after death. The decision of the surrogate, affirming the tax apparently on both grounds, was reversed by the appellate division.

A deed of real estate which contained a provision that the grantee should not mortgage or encumber the property without the consent of the grantor, and that, on the death of the grantor, the property would become the sole and exclusive property of the grantee, which was delivered to the grantee, but not recorded until after the death of the grantor, about four years after the execution of the deed, was held not to be a gift in contemplation of death, in *Re Reynolds* (1916) 163 N. Y. Supp. 803.

See *Re Cornell* (1901) 66 App. Div. 162, 73 N. Y. Supp. 32, modified in (1902) 170 N. Y. 428, 63 N. E. 445, *supra*, I.

The cases under the New York theory confining the meaning of the words "in contemplation of death," to gifts *causa mortis*, which have taxed

the transfer, are not satisfactory authority upon whether there was a transfer in contemplation of death. A transfer by a man who was sick, of a large part of his property to his son, was held taxable in *Re Palmer* (1907) 117 App. Div. 360, 102 N. Y. Supp. 236, where the transfer, although in form absolute, in fact was in trust for the heirs of the transferer. Smith, J., took the view that there was a transfer in contemplation of death, but the other members of the court, who concurred in the result, did so on another theory. Partnership property passing to a son from his father, who was his copartner, under an agreement between them, by which the son assumed active control and management of the partnership business, and agreed to pay the father a certain per cent, was held to be taxable in *Re Van Cott* (1917) 180 App. Div. 814, 168 N. Y. Supp. 95, on the theory that the transfer was intended to take effect in possession or enjoyment at or after death. It was urged in this case that the transfer was not a transfer in contemplation of death, within the meaning of the Transfer Tax Law, and hence not taxable; but the court does not consider this provision of the tax law.

W. A. E.

## PEOPLE OF THE STATE OF ILLINOIS, Appts.,

v.

ALVIN PORTER, Admr., etc., of J. Thatcher Porter, Deceased.

*Illinois Supreme Court—April 15, 1919.*

(287 Ill. 401, 123 N. E. 59.)

### Tax — conveyance to son for services.

1. A conveyance of land by a man in contemplation of death, to his son, for services rendered by the son, with no contract for compensation therefor, which is not to take effect in possession until after the father's death, is subject to an inheritance tax.

[See note on this question beginning on page 1046.]

— inheritance — conveyance — to take effect after death.

2. A conveyance intended to take effect in possession or enjoyment after

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the death of the grantor is subject to an inheritance tax, though the intention of the parties is not evidenced in writing.



— when gift within statute.

3. A gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute imposing the inheritance tax.

— failure of motive to appear — effect.

4. A transfer the impelling motive of which is contemplation of death is subject to the inheritance tax, although no evidence of such motive appears in the deed.

**Evidence — presumption — character of service rendered by member of family.**

5. Services rendered by one member of a family to another are presumed to be gratuitous.

**Contract — to pay for service — implication.**

6. A member of a family rendering

services to another member of the same household can recover therefor only upon proof of express contract, or circumstances from which a reasonable inference will arise that such a contract was in fact made.

[See 6 R. C. L. 672.]

**Deed — consideration — moral obligation.**

7. A moral obligation which was never a legal one is not a consideration for a conveyance of real estate.

[See 6 R. C. L. 667.]

— conveyance to son — consideration.

8. A conveyance of land by a father to his son merely because the latter has rendered services for him, with no contract as to payment therefor, is without consideration.

[See 8 R. C. L. 964.]

**APPEAL** by the people from an order of the County Court for Warren County (Murphy, J.) fixing the inheritance tax upon the estate of J. Thatcher Porter, deceased. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Edward J. Brundage, Attorney General, and Floyd E. Britton and George C. Hillyer, Assistant Attorneys General, for appellants:

The question whether a gift is made in contemplation of death is one of fact, and must depend upon the circumstances of each particular case.

Re Benton, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107; People v. Kelley, 218 Ill. 509, 75 N. E. 1038; Re Mahlstedt, 67 App. Div. 176, 73 N. Y. Supp. 818.

An irrevocable absolute gift inter vivos, if in contemplation of death, is taxable, though not causa mortis.

Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; Merrifield v. People, 212 Ill. 400, 72 N. E. 446; Re Benton, supra.

In "contemplation of death" is construed to mean an apprehension of death arising from existing infirmity or impending peril.

People v. Carpenter, 264 Ill. 400, 106 N. E. 302.

Advanced age is a circumstance to be taken into consideration in determining whether a gift is in contemplation of death, and may even raise a presumption that it was made in contemplation of death.

Re Dunne, N. Y. L. J. May 25, 1914, cited in Gleason & O. Inheritance Taxn. p. 82.

A transfer intended to take effect in possession at or after death is taxable though not made in contemplation of death.

People v. Carpenter, supra; People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905.

If the actual intention of the parties to a deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer will be subject to the inheritance tax, even though such intention is not evidenced in writing.

People v. Moir, supra; People v. Burkhalter, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379.

Where a part of the gift is to take effect in possession or enjoyment after death, and a part is not, the part intended to so take effect may be subject to the inheritance tax, and the remainder of the gift be not subject thereto, and this though the subject-matter of the gift, both as to that part intended to take effect in possession and enjoyment after death and that part not so intended, may constitute parts of the same thing.

People v. Moir, supra; People v. Kelley, 218 Ill. 509, 75 N. E. 1038.

A transfer by will in consideration of services rendered is taxable.

Re Gould, 156 N. Y. 423, 51 N. E. 287; Gleason & O. Inheritance Taxn.

pp. 54, 55; State v. Mollier, 96 Kan. 514, L.R.A.1916C, 551, 152 Pac. 771.

In a case of an alleged transfer in contemplation of death, the fact of consideration goes only to the question of impelling motive or moving cause.

People v. Burkhalter, *supra*.

Where the consideration is inadequate or past, it does not relieve the transfer from the operation of the statute.

Re Skinner, 45 Misc. 559, 92 N. Y. Supp. 972; Re Dobson, 73 Misc. 170, 132 N. Y. Supp. 472; Re Reynolds, 169 Cal. 600, 147 Pac. 268; State Street Trust Co. v. Treasurer, 209 Mass. 373, 95 N. E. 851.

When a child remains with a parent, or person standing in the relation of parent, after arriving of age, and remains in the same apparent relation, the presumption is that the parties do not contemplate payment of wages for services.

Miller v. Miller, 16 Ill. 296; Brush v. Blanchard, 18 Ill. 46; Myers v. Malcom, 20 Ill. 621; Bond v. Lockwood, 33 Ill. 212; Malony v. Scanlan, 53 Ill. 122; Meyer v. Temme, 72 Ill. 574; Faloon v. McIntyre, 118 Ill. 292, 8 N. E. 315; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Finch v. Green, 225 Ill. 304, 80 N. E. 318; Legate v. Legate, 249 Ill. 359, 94 N. E. 498.

Messrs. J. N. Thomas and E. P. Field for appellee.

Stone, J., delivered the opinion of the court:

This is an appeal by the people from the order of the county court of Warren county, fixing the inheritance tax on the estate of J. Thatcher Porter, deceased. The principal question involved is whether the conveyance in the lifetime of the deceased of 200 acres of real estate to Alvin Porter, his son, is subject to an inheritance tax under the laws of the state.

J. Thatcher Porter died intestate on September 13, 1917. At the time of his death he was seised and possessed of real estate and personalty, over and above indebtedness, amounting to about \$97,000, on which the county court assessed an inheritance tax as provided by law. The court held the 200 acres deeded to Alvin Porter were transferred as

compensation for services rendered by him to the deceased, and that the conveyance was based upon a full and valuable consideration, and that the property, and the conveyance thereof, are not subject to the assessment of an inheritance tax. The transfer of the 200 acres to Alvin Porter is dated April 6, 1916.

Appellant contends, first, that the conveyance was made in contemplation of death, and that this was the impelling motive causing the grantor to make the conveyance in spite of the fact that it may have been made to compensate the grantee for services rendered, and that while the sense of obligation contributed to the gift, such was not the impelling motive; second, that the conveyance was intended to, and did, take effect after the death, and that such consideration as was present was but a moral obligation, and not a legal one, and did not take the transfer out of the terms, spirit, or meaning of the statute.

It appears from the evidence that the grantor at the time of this conveyance was about seventy-five years of age, feeble, afflicted with disease, and subject to sinking spells, presumed to be the result of heart trouble. The testimony tends to show that for two years previous to his death his health was such that death might be expected to occur at any time; that at the time of the conveyance in question, and for some time previous thereto, he was under the care and treatment of a physician; that his health gradually failed until his death, on September 13, 1917. The evidence further tends to show that Alvin Porter, who was forty-seven years of age, had remained at home with his parents and managed the farm of some 480 acres, including the land in question, for his father up to the time of his father's death. There was no change in possession of the 200 acres in question until after the death of the grantor. The grantee stated that in his opinion this conveyance was made in contemplation of death, and not to take effect in

possession until after the death of the grantor, but that the conveyance was made for the purpose of compensating him for services rendered to the grantor in his lifetime. Alvin received none of the proceeds from this land until after the death of his father, although the management of the land was under his control and direction, with the other lands then owned by his father. The father received the profits and paid the taxes and operating expenses from the proceeds. The testimony further tends to show that it was the understanding between Alvin and his father that the business should be conducted just the same as it had been prior to the conveyance, until the death of the grantor. The evidence fails to show any specific agreement or understanding between Alvin and his father concerning any compensation to be paid to Alvin for his services, he testifying that at the time he performed the services he believed his father would do the right thing under the circumstances. The evidence shows the value of the land to be \$36,000. There is evidence showing, or tending to show, at least, that the fair value of services rendered by Alvin to his father since his majority to the date of the conveyance approximates the fair cash market value of the land in question at the time of the conveyance.

That portion of § 1 of the statute concerning tax on gifts, legacies, inheritances, transfers, etc., is as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom, in trust or otherwise. . . ."

"3. When the transfer is of property made by a resident . . . by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death." Hurd's Rev. Stat. 1917, p. 2500.

The general rule with relation to

the assessment of an inheritance tax is, that where the conveyance is intended to take effect in possession or enjoyment

after the death of the donor, it is subject to an inheritance tax, and this

**Tax—inheritance—conveyance—to take effect after death.**

even though the intention of the parties is not evidenced in writing. *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905. "A gift is made in contemplation of an event when it is made in expectation of that event and having it in view; and a gift

made when the donor is looking

**—when gift within statute.**

forward to his death as impending, and in view of that event, is within the language of the statute." *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121. So, also, it was held in *Merrifield v. People*, 212 Ill. 400, 72 N. E. 446, that where property is conveyed without consideration, though by an absolute deed, followed by enjoyment and possession by the grantee during the grantor's life, such transfer is taxable under § 1 of the Inheritance Tax Law if the transfer was made in the contemplation of the death of the grantor. It was held in *Re Benton*, 234 Ill. 366, 18 L.R.A. (N.S.) 458, 84 N. E. 1026, 14 Ann. Cas. 107, that a gift made in contemplation of death, as expressed in the Inheritance Tax Law, is not restricted to a gift *causa mortis*, but includes gifts *inter vivos* if they are made when the donor is looking forward to his death as impending, and made in view of that event, for the purpose of placing his estate, or some part thereof, in the hands of the person whom he desires to enjoy it after his death. In the case of *People v. Carpenter*, 264 Ill. 400, 106 N. E. 302, the words, "in contemplation of death," used in the Inheritance Tax Statute, are held to mean, not the general expectation of all rational mortals that they will die some time, but an apprehension of death arising from some existing infirmity or impending peril. In

People v. Burkhalter, 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379, the rule is laid down that where transfers of property take effect in possession and enjoyment during the lifetime of the grantor, they are not subject to an inheritance tax unless the grantor's contemplation of death was the impelling motive which caused him to make such transfer. If such was the impelling motive, the

—failure of motive to appear —effect.

transfers are subject to the tax, and this though no evidence of that motive appears in the deed. In the case at bar the county court found that there was a full and adequate consideration for the transfer in question, and held that, by reason of such full and adequate consideration, the Inheritance Tax Statute is not applicable. In People v. Orendorff, 262 Ill. 246, 104 N. E. 656, the rule is laid down that only the beneficiary's interest passing from the decedent to the heir as a result of the death is taxable, and that an absolute transfer of property, made in good faith, for a valuable consideration, and not made in contemplation of death, is not subject to the inheritance tax.

It is contended on the part of the appellee that the transfer in question was for a valuable consideration, and that, even though made in contemplation of death, and the enjoyment and possession thereof postponed until the death of the grantor, such transfer is, nevertheless, not subject to an inheritance tax. Were such to be held to be the rule, we can see no application of it where there does not appear to have been a valuable consideration moving from the grantee to the grantor. The rule is that where parties live together as members of one family the law does not imply a contract on the part of one to pay

Evidence—presumption—character of service rendered by member of family.

for the services rendered by another, but the presumption arising from the relation is that such services are rendered

gratuitously. In such a case there can be a recovery only by proving the making of an express contract, or circumstances from which a reasonable inference

Contract—to pay for service—implication.

would arise that such a contract was in fact made. A moral obligation does not suffice for a consideration unless the

Deed—consideration—moral obligation.

moral obligation was once a legal one. Finch v. Green, 225 Ill. 304, 80 N. E. 318.

Appellee relies on the case of Legate v. Legate, 249 Ill. 359, 94 N. E. 498. That case was a bill in chancery reforming a deed executed by Israel Legate to Sarah Legate, his sister. The opinion in that case is based on the finding of the court that Israel intended to convey certain property, and that the property was left out of the deed through a mistake of the scrivener, and that there was a valuable consideration for the conveyance. The rule is, however, laid down in that case, that where members of a family reside together and some of them render services for others, the presumption of law arising from the relation is that such services are rendered gratuitously, and that no recovery can be had for such services without proving an express contract, or circumstances from which the law would imply a contract. In this case the evidence of the appellee shows

—conveyance to son—consideration.

that there was no contract that he should receive either the property in question or any other financial gain for his services, and we are of the opinion that no consideration based upon a legal obligation existed. This being true, and it appearing from the statements of the appellee himself, as well as from other evidence in the record, that the transfer was made in contemplation of death, and the enjoyment and possession thereof postponed until the death of the grantor, such transfer and the property

Tax—conveyance to son for services.

therein involved are subject to an inheritance tax.

The county court found the fair cash market value of the 200 acres of land to be, at the time of the transfer, \$36,000. Upon a review of the evidence we are of the opinion that said finding was justified.

The cause will therefore be re-

manded to the County Court, with directions to enter an order assessing an inheritance tax against the property on the basis of the value of the same found by the court, and in accordance with the statute in such case made and provided.

Reversed and remanded, with directions.

## ANNOTATION.

### Consideration as affecting the liability to a succession or inheritance tax.

#### I. Transfers by will:

- a. Rule that transfer is taxable, 1046.
- b. Rule that transfer is not taxable, 1051.

#### II. Transfers by deed, grant, gift, or contract:

- a. In general, 1053.
- b. What constitutes a consideration:
  1. In general, 1058.
  2. Marriage, 1061.
  3. Joint tenancies and survivorship agreements, 1063.
  4. Annuities and fixed charges, 1065.
  5. Support of transferor of property, 1066.

#### *I. Transfers by will.*

##### *a. Rule that transfer is taxable.*

There is a difference of opinion whether property which passes under a will is free from an inheritance tax where it is devised or bequeathed in pursuance of a contract, upon a consideration, entered into by the testator in his lifetime. It will be observed that some jurisdictions have not been consistent, sometimes adhering to one rule and sometimes to the other. This question has frequently arisen in case of devises or bequests in payment for services rendered the testator. One line of authorities holds that the fact that a devise or bequest is made in payment of services, as agreed by the testator, does not free it from the inheritance or succession tax where the statute itself makes no exception. *State v. Mollier* (1915) 96 Kan. 514, L.R.A.1916C, 551, 152 Pac. 771; *Clarke v. Treasurer* (1917) 226 Mass. 301, L.R.A.1917D, 800, 115 N. E. 416; *Cart-*

*er v. Craig* (1914) 77 N. H. 200, 52 L.R.A.(N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179; *Re Gould* (1898) 156 N. Y. 423, 51 N. E. 287; *Tyson's Appeal* (1849) 10 Pa. 220. (But see Pennsylvania cases in I. b.) In *State v. Mollier* (Kan.) *supra*, a transfer by will in pursuance of an agreement in the lifetime of the testator, with the transferee, that if she would make a home with him, act as his housekeeper, and look after his welfare as long as he lived, he would make a will and bequeath to her all his property, an agreement which the transferee fully performed on her part, was held subject to the transfer tax. A bequest to one in pursuance of a contract entered into between the decedent and the legatee to bequeath to her a stated sum in consideration of her services as his housekeeper was held to be taxable in *Clarke v. Treasurer* (1917) 226 Mass. 301, L.R.A.1917D, 800, 115 N. E. 416. A bequest to one upon condition that he make no charge or demand against the estate of the testatrix for boarding or services rendered her was held to be subject to the collateral inheritance tax in *Tyson's Appeal* (1849) 10 Pa. 220. See facts set out in *Carter v. Craig* (1914) 77 N. H. 200, 52 L.R.A.(N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179, and *Re Gould* (1898) 156 N. Y. 423, 51 N. E. 287, *infra*.

Some doubt is thrown upon the authority of *Re Gould* (N. Y.) *supra*, by the decision in *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 893, *infra*. And see *Re Orvis* (1918) 223

N. Y. 1, 3 A.L.R. 1636, 119 N. E. 88, *infra*, III. The surrogate in *Re Vanderbilt*, 102 Misc. 497, 169 N. Y. Supp. 201, in distinguishing the two cases, said that the amount of the bequest in *Re Gould* was "not an amount determined by previous agreement, but was the valuation placed by the decedent upon his son's services. It might be excessive or it might be inadequate, but if the beneficiary refused to accept it, he would be compelled to establish the value of his services in an action brought for that purpose." This seems to be contrary to the assumption of the court of appeals in *Re Gould*. It is true that the court of appeals does not expressly say that the legatee might have rejected the legacy and recovered the same amount as a creditor of the estate, but the court does say: "If Jay Gould did owe his son George \$5,000,000 for services, and we must assume that he did, he selected a method of payment which brought the transaction within the taxing provisions of the statute." The appellate division in *Re Vanderbilt* makes no attempt to harmonize that case with or distinguish it from *Re Gould*.

This theory under which transfers by will in payment of an obligation of the testator are taxable has also been applied to bequests and devises in satisfaction of contracts other than those for services. Thus, a bequest in satisfaction of the testator's obligations under an antenuptial contract has been held taxable. *Hill v. Treasurer* (1917) 227 Mass. 331, 116 N. E. 309; *Atty. Gen. v. Murray* (1886) Ir. L. R. 20 C. L. 124; and see *Re Kidd* (1907) 188 N. Y. 274, 80 N. E. 924, *infra*, II. b, 2. In *Hill v. Treasurer* (Mass.) *supra*, the provision in the will was more in the nature of a direction to the executors to pay the widow the sum provided in the antenuptial contract; the testator there recognized his antenuptial contract in his will, and provided that the sum called for by the contract should be paid his widow, but authorized her to take securities instead of cash, and the widow elected to take the securities (as to a mere direction to pay, see *Re Burhans*

(1917) 100 Misc. 646, 166 N. Y. Supp. 1027, *infra*). The residue of an estate which the testator devised to the trustees of his marriage settlement, in accordance with the terms of the settlement, was held not to be a debt due by him, and, therefore was subject to probate duty. *Atty. Gen. v. Murray* (1886) Ir. L. R. 20 C. L. 124. Where there had been no deed of settlement, an appointment of a legacy, by one authorized to charge an estate for the benefit of any woman he might marry, to his wife in full of her jointure and in bar of dower, was held to be subject to legacy duty, as it could not be considered as a purchase of the wife's right of dower, but as a gift. *Henniker v. Atty. Gen.* (1852) 8 Exch. 257, 155 Eng. Reprint, 1843, 22 L. J. Exch. N. S. 41, 16 Jur. 1143.

Where a donee of a power of appointment exercised the power by directing her executors to pay all her debts, including a debt for which she had given a bond, it was held in *Re Rogers* (1902) 71 App. Div. 461, 75 N. Y. Supp. 835, affirmed without opinion in (1902) 172 N. Y. 617, 64 N. E. 1125, that the creditor who accepted payment in this way was subject to the tax. It is stated that the creditor was not obliged to accept this provision of the will for the payment of his debt, but if he did accept it, there was no way to avoid the payment of the tax which the state imposes as a condition of receiving a transfer under the will of the decedent.

In *Ransom v. United States* (1879) Fed. Cas. No. 11,574, a devise by a wife to her husband of real estate which had been purchased and paid for by him, but conveyed to her upon the understanding that she should make her will devising the property to him, in case she died before he did, was held to be subject to the tax, under the Internal Revenue Act of 1864, which subjected dispositions of real estate by will to a tax. The court states that the fact that the will was made on account of an agreement to that effect by the wife when she took her title rendered it none the less an instrument creating a beneficial interest in the husband on her death, and that,

under the statute, is a succession to be taxed. The question of consideration is not expressly discussed in this case. Compare with *Re Galot* (1919) 106 Misc. 310, 174 N. Y. Supp. 492, *infra*, I. b, and *Nelson v. Schoonover* (1913) 89 Kan. 779, 132 Pac. 1183, Ann. Cas. 1915A, 147, *infra*, II. b, 1.

Under the theory now under discussion, not only is a bequest or devise in payment of a past consideration taxable where the legatee or devisee accepts the same instead of filing his claim as a creditor, but a bequest in payment of a future consideration is held taxable. A bequest in consideration of services to be rendered by the legatee as executor and trustee is held subject to the tax. *Re Huber* (1903) 86 App. Div. 458, 83 N. Y. Supp. 769; *Re Thorley* [1891] 2 Ch. (Eng.) 613, 60 L. J. Ch. N. S. 537, 64 L. T. N. S. 515, 39 Week. Rep. 565. In England, however, an executor or trustee is not entitled to any compensation for his services in the absence of an expressed provision to the contrary; accordingly, a legacy to a trustee in payment of his services in carrying on testator's business is held to be a pure gift, and as such subject to the legacy tax. *Re Thorley* (Eng.) *supra*; see statute *infra*. See *Turner v. Martin* (1857) 7 De G. M. & G. 429, 44 Eng. Reprint, 168, 3 Jur. N. S. 397, 26 L. J. Ch. N. S. 216, 5 Week. Rep. 277, *infra*.

But see *Clark's Estate* (1901) 10 Pa. Dist. R. 378, *infra*, I. b.

A provision that the testator's son should receive a stipulated sum while he was managing testator's business in conjunction with trustees appointed by the testator was held to be a legacy and taxable under § 4 of the Act 8 & 9 Vict. chap. 76, which provides that "every gift by any will or testamentary instrument . . . which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or movable estate of such person . . . shall be deemed a legacy . . . and shall be subject and liable to the said duties." *Re Thorley* (Eng.) *supra*.

See generally the Pennsylvania cases, which for convenience have

been grouped together, *infra*, I. b, beginning with *Walters's Estate* (1887) 3 Pa. Co. Ct. 447, as to bequests for future services.

The statutes involved in the foregoing cases make no exception of transfers for a valuable consideration, in subjecting transfer by will to an inheritance tax. The statute involved in *Carter v. Craig* (1914) 77 N. H. 200, 52 L.R.A.(N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179, provides that "all property within the jurisdiction of the estate, real or personal, or any interest therein . . . which shall pass by will . . . shall be subject to a tax of 5 per cent of its value for the use of the state." See statute involved in *Re Gould* (1898) 166 N. Y. 423, 51 N. E. 287, *infra*.

An exception in some statutes of transfers for a consideration has been held to apply only to transfers in the lifetime of the testator. Thus, a statute which provides that "all property . . . which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor," was construed in *Clarke v. Treasurer* (1917) 226 Mass. 301, L.R.A.1917D, 800, 115 N. E. 416, as meaning that only when the property passed by "deed, grant, or gift," was it excepted when upon a full consideration, and not where it passed by will or by the laws regulating intestate succession. A similar construction was put upon the statute involved in *State v. Mollier* (1915) 96 Kan. 514, L.R.A.1916C, 551, 152 Pac. 771, which imposed an inheritance or succession tax upon all property "which shall pass by will or by the laws regulating intestate succession, or by deed, grant, or gift made in contemplation of death, or made or intended to take effect in possession or enjoyment after the death of the grantor, to any person absolutely or in trust,—except in case of a bona fide purchase for full consideration in money or money's worth." The exemption mentioned in this statute

of certain transfers which were made for full consideration in money or money's worth was held to apply solely to transfers by deed or grant, made in the lifetime of the transferrer, and to have no application to the transmission of property by will.

The theory of the foregoing cases is that since the statutes involved made no exception of transfers for a consideration, the courts can make no such exception. If the legatee or devisee accepts the bequest or devise in satisfaction of his debt, the transfer is subject to the tax. In *Carter v. Craig* (1914) 77 N. H. 200, 52 L.R.A. (N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179, there was held to be a taxable transfer where property was devised to one in pursuance of a contract between the testator and the devisee, entered into in the testator's lifetime, that the devisee should care for the testator and his wife during their lives and the life of the survivor, in consideration of which the property in question would be bequeathed and devised to him. The court states that "the contract was to bequeath and devise the property to Stone. It was not a contract to convey, but to make a will in his favor; and French having made the will and Stone having accepted its provisions and taken title to the property thereunder, the transmission was by will and is subject to the tax. . . . It can make no difference that there was a valid consideration for the contract to transfer the property by will. The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property' so passing. If the legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but by providing that all property passing by will should be subject to the tax, it manifested an intention not to so limit it." A bequest by a testator to his son in consideration of services rendered by the son under an agreement with his father, the sum bequeathed having been agreed upon by the parties, was held to be taxable in *Re Gould* (1898) 156 N. Y. 423, 51 N. E. 287, where the

son accepted the bequest in payment of his services. The statute involved in this case provided that "a tax shall be and is hereby imposed upon the transfer of any property . . . when the transfer is by will." The court states that "it will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. . . . If Jay Gould did owe his son George \$5,000,000 for services, and we must assume that he did, he selected a method of payment which brought the transaction within the taxing provisions of the statute. Whether this action was taken by Jay Gould for the purpose of absolutely securing to the state the tax, or because he wished to retain possession of all his property during his life, or for some other satisfactory reason, we need not inquire. The question of motive on the part of the testator is not for our consideration. We are not dealing with the taxing statute which undertakes to tax all property transferred by will and which is applicable to every transaction of that kind, whether advisedly or mistakenly entered upon and carried out. . . . So far in the progress of this proceeding, the question as to the right of the state to collect a tax upon the property has been disposed of by the court below as if the statute provided in terms that only property 'gratuitously given by will' should be taxed. But the statute does not so provide, and the duty of the court is to read it as it is written."

There is a suggestion in *Re Gould* (N. Y.) *supra*, that the legatee might have refused to accept compensation under the will, and could have recovered against the estate under the agreement with his father, in which event the amount recovered would not have been taxable. There is a similar suggestion in *Hill v. Treasurer* (1917) 227 Mass. 331, 116 N. E. 509, that the widow might refuse to take the legacy and insist on her rights under the antenuptial contract in the statement that "the tax is due because, by his will, Mr. Hill gave his wife the option of taking a legacy in satis-



faction of her rights as a creditor, and she elected to do so." And see *Re Doty* (1893) 7 Misc. 193, 27 N. Y. Supp. 653; *Re Burhans* (1917) 100 Misc. 646, 166 N. Y. Supp. 1027, *infra*. See *Re Schmoll* (1919) 108 Misc. 492, 177 N. Y. Supp. 670, *infra*, II. b, 2.

In some cases involving legacies in payment of services, the court, in holding the transfer subject to the tax, has expressly based the decision upon what appeared to be the fact, that there was no legal liability to the legatee, hence the legacy was a voluntary gift. In *Re Doty* (1893) 7 Misc. 193, 27 N. Y. Supp. 653, the court states that the "existence of a claim which the testator might be honorably but not legally bound to pay is insufficient; it must be one to which there is no legal defense, and which the creditor can enforce by legal proceedings. If this were not the legal rule, a testator might either designedly or otherwise defeat the object of the statute, and render it practically useless by simply reciting in his will that the legacy is in consideration of care, attention, kindness, favors received from, or services performed by, the legatee at some period of the testator's life." The decision in *Re Doty* rests in part, at least, upon the acceptance of the provisions made in the will by the legatee, and failure to prove any legal right he may have had against the estate of the testatrix. The rule holding the transfer by will taxable is especially applicable where there is no legal liability which is canceled by the bequest or devise. A direction to the executors and trustees of a decedent who, years previously to his decease, had been a bankrupt, to pay to creditors which were not paid in full a certain sum, was held to be a direction to pay a legacy, and therefore subject to the legacy duty. *Turner v. Martin* (1857) 7 De M. & G. 429, 44 Eng. Reprint, 168, 3 Jur. N. S. 397, 26 L. J. Ch. N. S. 216, 5 Week. Rep. 277. See *Re Thorley* [1891] 2 Ch. (Eng.) 613, 60 L. J. Ch. N. S. 537, 64 L. T. N. S. 515, 39 Week. Rep. 565, and *Henniker v. Atty. Gen.* (1852) 8 Exch. 257, 155 Eng. Reprint, 1343, 22 L. J. Exch. N. S. 41, 16 Jur. 1143, su-

*pra*. See *Gibbon's Estate* (1883) 13 W. N. C. (Pa.) 99, *infra*, I. b. Compare with the reported case (*PEOPLE v. PORTER*, ante, 1041) as to moral obligation.

A distinction has been made between a bequest in payment of obligations of the testator and a direction to the executor to pay the debt; the mere mention of a debt in the will, and direction of the executors to pay it, is held not to subject it to the tax, where the creditor presents his claim and has it allowed as a debt. *Re Burhans* (1917) 100 Misc. 646, 166 N. Y. Supp. 1027. The debt involved in this case was a promissory note which the testator had given to one who acted as his housekeeper, and a condition was written in the note, that the note was payable only on condition that the payee remain and continue to serve and act as his housekeeper until the date of his death, otherwise to be of no force and effect. The will contained a direction to his executors to use and expend the amount called for in the note in the payment of the note, and also such amount as would pay the interest accrued and due thereon at the time of payment. The court, in distinguishing the case from *Re Gould* (1898) 156 N. Y. 423, 51 N. E. 287, *supra*, states that "in the case at bar there is a valid obligation for a good and valuable consideration, executed by the obligor, naming the exact amount the obligee is entitled to receive. There is no proof of any conversation or agreement with the testator, to receive payment by will, nor any proof of any knowledge by Miss McNeil [the payee of the note] during the lifetime of the testator of the provisions of the will. Nor is there any proof that she has accepted or agreed to the provisions of the will as to the payment of her claim. On the contrary, there is proof that she presented her claim by virtue of the note in question, and that the executor allowed it as a debt." Compare with *Hill v. Treasurer* (1917) 227 Mass. 331, 116 N. E. 509, *supra*.

Where the legatee has not accepted anything under the will, there is no taxable transfer although the will con-

tains some directions as to the method of paying the testator's obligation. Thus, where the husband in his will recites a separation agreement previously entered into between himself and his wife, by the terms of which she was to receive a life annuity, with the right to a gross sum in satisfaction of the annuity payment in case she survive her husband, and provides for the methods of meeting the payments of the annuity, or the gross sum in case she elects to take, and the wife makes no election to take a gross sum, the annuity due her is not taxable. *Re Daniell* (1903) 40 Misc. 329, 81 N. Y. Supp. 1033. Compare with *Re Vanderbilt* (N. Y.) *infra*, I. b.

Property transferred by executors of a will under direction by the decedent, who was a trustee, to set apart out of his estate a sufficient sum of money to meet the obligations of the trust, or to pay the beneficiaries a sum agreed upon in compromise, is not a taxable transfer. *Re Hamilton* (1917) 100 Misc. 61, 164 N. Y. Supp. 938. In distinguishing *Re Gould* (N. Y.) *supra*, the court states that in the case at bar there was no debt, and, therefore, no claim or interest which was soluble out of the general assets of the decedent; that "here the right of the two beneficiaries had no concern with any property of which the decedent died seised, but, far from that, it impinged only upon a fund which was separated from the decedent's estate both before and after his death."

*b. Rule that transfer is not taxable.*

It is the theory of some cases that a legacy or devise in payment of a debt or in discharge of an obligation of the testator is not subject to a succession tax. *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 893; *Re Stebbins* (1907) 52 Misc. 438, 103 N. Y. Supp. 563 (obiter); *Re Rogers* (1890) 2 Connolly, 198, 10 N. Y. Supp. 22; *Re Hulse* (1890) 39 N. Y. S. R. 402, 15 N. Y. Supp. 770; *Re Underhill* (1890) 2 Connolly, 262, 20 N. Y. Supp. 134; *Re Galot* (1919) 106 Misc. 310, 174 N. Y. Supp. 492; *Clark's Estate* (1901) 10

Pa. Dist. R. 378; *Quin's Estate* (1880) 18 Phila. (Pa.) 840.

This rule has been applied to devises or bequests in payment of services. In *Re Hulse* (1890) 39 N. Y. S. R. 402, 15 N. Y. Supp. 770, a gift by a testatrix of all her property to her nephew "in consideration of a home for me at his house during my life," made in pursuance of an agreement to furnish the home for the testatrix, was held not to be taxable. It is stated that although the property is given to the legatee as a legacy, he is really to receive it in satisfaction of a claim which he might enforce as a creditor against the estate of the deceased. See *Re Underhill* (N. Y.) *infra*.

This rule has been applied to bequests or devises in payment of testator's debts without making the source of the debt to appear. A bequest of a specified sum to the testator's foreman on condition that he should accept the same in full of all unsettled accounts and claims was held to be free from the transfer tax where it appeared that the amount of the foreman's claims was in excess of the sum bequeathed, but that he was willing to accept the legacy in full. *Re Underhill* (1890) 2 Connolly, 262, 20 N. Y. Supp. 134. The court argues that had no bequest been made in this form, but the foreman's claims been left in a class of debts which a testator usually directs the executors to pay, it would certainly have been exempt from taxation; "if he had simply bequeathed \$4,000 without the mention of any claim, then it would have been taxable. Where a testator chooses to provide in the form of a bequest for the payment of a just debt, with a view possibly of obviating any question in the mind of his executors as to its amount or validity, he could do so with great propriety, but by doing it he could not clothe it with the character of a gift. Under the circumstances it will readily be seen that by this provision of the will, no property is 'transferred by deed, grant, sale, or gift,' as contemplated by the first section of this act," to the foreman. In *Quin's Estate* (Pa.) *supra*, a gift by testator to a creditor, and in satis-

faction of his claim, of the precise sum due, with interest, is held to fall neither within the letter nor spirit of the Inheritance Tax Act; such fund or property cannot be said to pass to the creditor under the will any more than in case of a general testamentary direction to pay debts. In *Re Rogers* (1890) 2 Connoly, 198, 10 N. Y. Supp. 22, the bequest was not absolute, but was a bequest to the creditor "so far as his interests may appear and be proved." The court states that whether he takes anything under the will depends upon his being able to prove a debt; that he takes nothing if there is no debt, so that while he may be entitled to receive something by virtue of the will, he does not get it as a gift in payment of the debt. The bequest in this case was of an interest in an insurance policy, and it is stated that it may be that unless the creditor had been provided for in this way by the will he would not have been able to collect the debt, by reason of the terms of the contract of insurance. Still, whatever he may get even by virtue of the will, is simply the payment of a debt.

A transfer by the will of a decedent of real estate which had been conveyed to him in his lifetime upon his agreement to transfer and convey to the grantors upon his death, free and clear of encumbrances, is not a taxable transfer, since it is not a gift or gratuity, but founded on a contract made for a valuable and adequate consideration. *Re Galot* (1919) 106 Misc. 310, 174 N. Y. Supp. 492. Compare with *Ransom v. United States* (Fed.) supra, I. a, and *Nelson v. Schoonover* (1913) 89 Kan. 779, 182 Pac. 1183, Ann. Cas. 1915A, 147, infra, II. b, 1.

The rule has been applied to bequests in payment of sums provided by antenuptial contracts. In *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 893, there was held to be no taxable transfer although the widow accepted securities, as authorized by will, in lieu of the payment of money provided for in the antenuptial contract. The court states that the

widow's right to receive the securities did not grow out of the will; that its source was in the antenuptial agreement, and the obligation would have been enforced against the estate had there been no will; that the agreement rested upon a valuable consideration which was executed by the marriage, and the mere fact "that the method of payment and satisfaction of the obligation was directed by the will did not change the inherent character of the obligation." The testamentary provision in the *Vanderbilt Case* was not merely a direction to pay, but was a bequest of the sum called for in the antenuptial agreement in cash, or, in the discretion of the executors, in securities to be selected by them from the personal property. The executors transferred securities in payment of the bequest and these were accepted. Compare with *Re Kidd* (N. Y.) infra, II. b, 2. It is not clear that the transfer in *Re Miller* (1902) 77 App. Div. 473, 78 N. Y. Supp. 930, was urged as taxable because of having been made under the will of the deceased husband. The court, however, holds the transfer in that case was not made under the will, as there had been a previous and absolute transfer of the property mentioned in the will to the wife at the time of the marriage. The decision in *Re Vanderbilt* and its affirmation by the court of appeals throws considerable doubt upon the decision in *Re Gould* (N. Y.) supra, I. a, for it seems that the language used by the appellate division cannot be reconciled with the theory of *Re Gould*. See further comment, supra, I. a.

A direction to executors to pay the creditor a sum equal to the debt, but without mentioning the debt, was held to be a direction to pay the debt, and not subject to the tax. *Smith's Estate* (1912) 22 Pa. Dist. R. 464. Compare with *Re Burhans* (1917) 100 Misc. 646, 166 N. Y. Supp. 1027, supra, I. a.

Under the rule now under discussion, the obligation must be a legal one. *Gibbon's Estate* (1883) 13 W. N. C. (Pa.) 99, holding a bequest to one "as an acknowledgment of her valuable services in my family, covering

a period of thirty years," subject to the tax, the court saying that the principle in the foregoing cases cannot apply where, as in the case at bar, "no claim such as could have been enforced by suit exists, and where the legacy is a pure gratuity, based upon the faithful performance of services which, if not already compensated, must have been rendered without expectation of reward, and without liability on the part of the person receiving them." Compare with the cases cited in I. a, supra, as to the necessity of the obligation being a legal one.

It has been held in Pennsylvania that a bequest to a named person on condition that he act as executor and trustee of the testator's estate is not taxable. In *Clark's Estate* (1901) 10 Pa. Dist. R. 378, it is stated to have been conceded that collateral inheritance taxes are chargeable only against gratuities, and that legacies by way of compensation are exempt. Compare with cases cited under I. a, as to the taxability of bequests in payment of the services of an executor or trustee.

The Pennsylvania cases have not been consistent as to whether a bequest or devise in payment of future services is subject to a tax. As just stated, a bequest to an executor and trustee is not taxable; but a bequest to a church of a stated sum, in consideration of which the testator expresses a desire that the church shall care for the family cemetery lot of the testator, has been held subject to a tax. *Walters's Estate* (1887) 3 Pa. Co. Ct. 447. The court here makes a distinction between a legacy given in payment of a debt which is a legal obligation in the lifetime of the testator and a legacy given for the faithful performance of services, where there was no legal liability on the part of the testator therefor. The court states that "in the case in hand the church had not kept these graves in repair, there was no contract with the church in regard to them, and no indebtedness by the testator to the church therefor, and the legacy cannot be treated as a payment of a debt, for none existed. The church,

if they accept the bequest, can probably be required to perform the condition annexed to it, and it does not matter in this regard whether it be treated as a trust or as a liability caused by the acceptance of the bequest. Probably no technical trust exists here and the obligation is one simply imposed upon and accepted by the beneficiary, and to be enforced as such." A bequest to a church on condition that the church bell shall be rung at stated periods is subject to the inheritance tax. *Gilpin's Estate* (1887) 14 Pa. Co. Ct. 122. Money paid out by executors under a provision in a will directing the executors to spend a specified sum for masses is held taxable in Pennsylvania. *Nead's Estate* (1914) 55 Pa. Super. Ct. 578. A bequest for masses has been held taxable where it was in the form of a bequest to the pastor of a specified church. *Seibert's Appeal* (1886) 3 Sadler (Pa.) 412, 18 W. N. C. (Pa.) 276, 6 Atl. 105.

## *II. Transfers by deed, grant, gift, or contract.*

### *a. In general.*

Many statutes subjecting to an inheritance or succession tax property transferred by the owner in his lifetime, or passing at his death, under an agreement entered into by him in his lifetime, except from their operation transfers upon a consideration. These statutes are discussed infra. Other statutes make no such exception. It is a general principle, however, announced in many cases involving transfers of property within the lifetime of the owner, or under contract entered into in his lifetime, that the inheritance or succession tax statutes are not intended to tax transfers for a valuable consideration, even though the language of the statutes makes no exception of such transfers. *Blair v. Herold* (1907) 150 Fed. 199, affirmed in (1908) 86 C. C. A. 64, 158 Fed. 804; *Abstract & Title Guaranty Co. v. State* (1916) 173 Cal. 691, 161 Pac. 264; *Re Orvis* (1918) 223 N. Y. 1, 3 A.L.R. 1636, 119 N. E. 88; *Re Miller* (1902) 77 App. Div. 473, 78 N. Y. Supp.

930; *Re Baker* (1903) 83 App. Div. 530, 82 N. Y. Supp. 290, affirmed without opinion in (1904) 173 N. Y. 575, 70 N. E. 1094; *Re Stebbins* (1907) 52 Misc. 438, 103 N. Y. Supp. 563; *Re Heiser* (1913) 85 Misc. 271, 147 N. Y. Supp. 557; *Re De Escoriaza* (1914) 87 Misc. 515, 149 N. Y. Supp. 796; *Re Borden* (1916) 95 Misc. 443, 159 N. Y. Supp. 346; *Re Wadsworth* (1917) 100 Misc. 439, 166 N. Y. Supp. 716, affirmed without opinion in (1918) 185 App. Div. 944, 172 N. Y. Supp. 924; *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 893; *Re Dalsimer* (1914) 148 N. Y. Supp. 914, reversed on other grounds in (1915) 167 App. Div. 365, 153 N. Y. Supp. 58, which is affirmed in (1916) 217 N. Y. 608, 111 N. E. 1085; *Re Klatzl* (1914) 149 N. Y. Supp. 794, reversed on other grounds in (1915) 216 N. Y. 83, 110 N. E. 181; *Hagerty v. State* (1897) 55 Ohio St. 613, 45 N. E. 1046. The court in *Re Orvis* (1918) 223 N. Y. 1, 3 A.L.R. 1636, 119 N. E. 88, after stating that the language of the New York statute, literally adopted and applied, would subject to a tax transfers upon a valuable consideration, continues that "the nature of the tax . . . and the language of the statute, considered in its entirety, have convinced us that the legislature did not, however, intend that conclusion. Transfers resting upon a valuable and adequate consideration, although within the classification of the statute, are not within the intendment of it, and are not taxable. . . . The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax beside."

The rule that a transfer upon a consideration is not subject to the inheritance or succession tax is further supported, at least impliedly, by all cases cited in II. b, *infra*, which consider the sufficiency of the consideration. Some of the cases cited in that subdivision, however, were decided under statutes providing that a consideration frees the transfer of a tax.

A contrary opinion is expressed obiter in *Carter v. Craig* (1914) 77 N. H. 200, 52 L.R.A.(N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179, where the court, after holding that a transfer by will, in pursuance of a contract, is subject to the tax, continues that the same intention is manifested in the further provisions of the Inheritance Tax Statute, which subjected to the tax, "all property . . . which shall pass . . . by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor." The court states that "the terms 'deed' and 'grant' do not indicate that the transfers must be gratuitous to be subject to the tax. Transfers by such methods of conveyance are usually based upon a consideration, and a 'sale' always is. The only limitation on the imposition of the tax upon such transfers, gratuitous or otherwise, would seem to be when they are not made or intended to take effect in possession or enjoyment after the death of the grantor, bargainor, or donor."

A transfer of property by judgment of the court specifically enforcing an antenuptial contract entered into by the decedent, by the terms of which he agreed—in consideration of the marriage and the promise of the intended wife to turn over to him, for use in his business, the sum of \$40,000—to will his property to the plaintiff in the specific performance action, a daughter of his intended wife, was held to be taxable in *Re Kidd* (1907) 188 N. Y. 274, 80 N. E. 924. The court states that the antenuptial contract was not a contract to convey, but a contract to make a will in plaintiff's favor; that had the deceased performed his agreement and given her his property by will, the estate would have been subject to the tax; that the question is not affected by the failure of the testator to carry out his promise, and the necessity of resorting to a court for relief. The court in *Re Kidd* does not expressly consider the effect of a consideration upon the taxability of the transfer, and states that its decision is distinguishable from *Re Baker* (1903) 83 App. Div. 530, 82 N.

Y. Supp. 390, affirmed without opinion in (1904) 178 N. Y. 575, 70 N. E. 1094. In *Re Baker* sums paid to a widow from the estate of her deceased husband, in satisfaction of the provisions made for her in an antenuptial contract, were held not taxable, on the theory that this was a contract "entered into between the decedent and the claimant, which was founded upon a perfectly good and valuable consideration, and one which is regarded with favor by the law." The court concludes that "the tax imposed by the statute in question is a tax on the right of succession . . . 'and a payment of an obligation dependent upon a valuable consideration is not a succession in any sense.' " On the effect of consideration, it is difficult to reconcile the decision in *Re Kidd* with the decision in *Re Baker*. The theory of *Re Baker*, however, is consistent with *Re Vanderbilt* (1918) 194 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 688, 123 N. E. 893, and *Re Orvis* (N. Y.) *supra*, so that if there is any conflict between *Re Baker* and *Re Kidd*, the former is the law, as established by the latest decisions.

As stated above, under some statutes it is expressly provided that transfers on a consideration are not subject to the tax. Some statutes, in taxing transfers in contemplation of the death of the transferor and transfers intended to take effect in possession or enjoyment at or after such death, limit the "transfers" to those made without valuable and adequate consideration. *United States v. Hart* (1880) 4 Fed. 292; *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268; *McDougald v. Boyd* (1916) 172 Cal. 753, 159 Pac. 168; *Nickel v. State* (1918) — Cal. —, 175 Pac. 641. See *State v. Mollier* (1915) 96 Kan. 514, L.R.A.1916C, 551, 152 Pac. 771, and *Clarke v. Treasurer* (1917) 226 Mass. 301, L.R.A.1917D, 800, 115 N. E. 416, *supra*, I. a. Under such a statute it is stated in *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268, that the words, "made without valuable and adequate consideration," which were added to the California statute, served but to clarify, and not

to change, the pre-existing law, for it had long and uniformly been held that transfers made upon valuable and adequate considerations were not within the purview of the Inheritance Tax Act.

Other statutes provide that when the transfer is "a bona fide purchase for full consideration in money or money's worth," a tax shall not be levied. *State Street Trust Co. v. Treasurer* (1911) 209 Mass. 373, 95 N. E. 851. The Massachusetts statute is held to require not only a valuable, but an adequate, compensation. *Ibid*.

There are a number of death duties in England. The two duties involved in the question under annotation herein have been the succession duty and the estate duty. Section 17 of the Succession Duty Act (16 & 17 Vict. chap. 51) provides that "no bond or contract made by any person bona fide for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor," etc. This has been held to apply to other cases than those in which the relation of debtor and creditor subsists. *Oldfield v. Preston* (1861) 3 De G. F. & J. 398, 45 Eng. Reprint, 932, 31 L. J. Ch. N. S. 256, 5 L. T. N. S. 650, 8 Jur. N. S. 107, 10 Week. Rep. 257. The court in *Fryer v. Morland* (1876) L. R. 3 Ch. Div. (Eng.) 675, states that "looking, therefore, at the act as a whole, it is in fact an act to grant a duty on successions to property by persons succeeding to estates by gratuitous title. That is its meaning. It assumes that a man gets something on the death of the prior owner, either by way of settlement or by way of gift or descent, and thereby gets a profit. The only exception that I can find to that on principle is that a marriage consideration is treated as if it were a gratuitous title for this purpose. That kind of contract which is made on marriage to provide for the issue is treated as succession. That seems the general notion of the thing. It is opposed to that notion to imagine that a purchaser for value who has paid

the full value of the property is to pay the duty besides."

The Customs & Inland Revenue Act of 1881 (44 & 45 Vict. chap. 12), § 38, imposed a stamp duty on accounts of personal property, and by subsec. 2 provided that personal property should include "(c) any property passing under any past or future voluntary settlement made by any person dying on or after such day [viz., 1st June, 1881], by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor." Subsection 2 (a) of the Customs & Inland Revenue Act of 1881 (44 & 45 Vict. chap. 12), § 38, provides that "any property taken as a donatio mortis causa, made by any person dying on or after the 1st day of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been bona fide made three months before the death of the deceased. . . ." This was amended by the Customs & Inland Revenue Act of 1889 (52 & 53 Vict. chap. 7, § 11, subsec. 1, as follows: "Subsection 2 of § 38 of the Customs & Inland Revenue Act 1881 is hereby amended as follows: The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." The term "voluntary settlement," as used in this act, has generally been held to mean a settlement without consideration; a settlement upon a consideration is not taxable thereunder. The consideration, however, must not only be valuable,

but it must be adequate. *Crossman v. Reg.* (1886) L. R. 18 Q. B. Div. (Eng.) 256, 56 L. J. Q. B. N. S. 241, 55 L. T. N. S. 848, 35 Week. Rep. 303 (considering subsec. 2 (c) of § 38 of the Customs & Inland Revenue Act of 1881 (44 & 45 Vict. chap. 12)). A statute taxing property "voluntarily" transferred as a donatio mortis causa has been held to tax only such property as is transferred without consideration. *Atty. Gen. v. Brown* (1903) 5 Ont. L. Rep. 167. In *Atty. Gen. v. Ellis* [1895] 2 Q. B. (Eng.) 466, 64 L. J. Q. B. N. S. 813, 15 Reports, 584, 73 L. T. N. S. 190, 350, 44 Week. Rep. 13, 59 J. P. 774, a different theory was advanced as to the meaning of the term "voluntarily." Under the provision of the Customs & Inland Revenue Act of 1881, amended in 1889, which expressly taxed property which has been "voluntarily" transferred to or vested in the decedent and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person, the court holds that the word "voluntarily" is not used in the sense of "without consideration," but in its ordinary sense of freely, without compulsion, and "not under any obligation." It is accordingly held that so much of personal property as had been bought by the decedent and transferred to a joint tenancy was subject to the tax. But in *Atty. Gen. v. Smyth* [1905] 2 Ir. R. 553, the court, in discussing *Atty. Gen. v. Ellis*, states that that case was decided upon the authority of *Art Union v. Savoy* [1894] 2 Q. B. (Eng.) 609,—a decision which, after it had been followed in *Atty. Gen. v. Ellis* (Eng.) supra, was reversed by the House of Lords in [1896] A. C. 296, 65 L. J. Mag. Cas. N. S. 161, 74 L. T. N. S. 497, 45 Week. Rep. 34, 60 J. P. 660. And it is stated that the latter case deprives *Atty. Gen. v. Ellis* (Eng.) supra, of all authority, and justifies, if it does not require, "voluntarily" being read as the adverb derived from "voluntary," and as meaning, "without consideration."

The Finance Act of 1894, which is termed an Estate Duty Act, imposes upon executors the obligation of paying an estate duty, but provides that an allowance shall be made for debts, but that no allowance shall be made for debts incurred by the deceased "unless such debts were incurred bona fide for full consideration in money or money's worth, wholly for the deceased's own use and benefit." *Re Gray* [1896] 1 Ch. (Eng.) 620, 74 L. T. N. S. 275, 60 J. P. 814, 65 L. J. Ch. N. S. 462, 44 Week. Rep. 466.

It thus appears that, either by construction or by express statutory provision, transfers of or succession to property in the lifetime of the owner or upon his death, by virtue of some contract, are not taxable where there has been a consideration. This rule is further supported—impliedly, at least—by the cases cited in II. b, which consider the sufficiency of the consideration. A sum of money which was a part of the purchase price of land, and which, by the terms of the sale, was payable after the purchaser's death, and was charged on his estate, was held not taxable in *Fryer v. Morland* (1876) L. R. 3 Ch. Div. (Eng.) 675, 45 L. J. Ch. N. S. 817, 35 L. T. N. S. 458, 25 Week. Rep. 21. In *Re Baker* (1910) 67 Misc. 360, 124 N. Y. Supp. 827, there was held to be no transfer tax upon cash received by executors of a decedent as the purchase price of the land, which the decedent in her lifetime had contracted to sell, and had left a conveyance thereof, which was delivered on the day after her death.

Sections 1 and 2 of the English Statute of 16 & 17 Vict. chap. 51, expressly subjects to a tax money "payable under any engagement." The exception of property payable by virtue of a contract, upon a consideration, is contained in § 17. Some cases have held taxable property passing upon death, under a contract of the decedent, without discussion of the question of consideration. In fact, although it is spoken of in these cases as being paid under an agreement or a contract, it is not altogether clear that there was a consideration. In

*Atty. Gen. v. Montefiore* (1888) L. R. 21 Q. B. Div. (Eng.) 461, 59 L. T. N. S. 364, 37 Week. Rep. 237, a transfer of bank stock by executors, to the trustees of a synagogue and college, in pursuance of the decedent's agreement, was held subject to the tax.

It thus appears that either by express statutory provisions or by judicial construction a transfer of, or succession to, property, is not subject to a transfer or succession tax if there is a consideration. An interesting question as to the burden of proof arises in this connection. This question is merely touched upon in the present discussion, without any attempt to exhaust the decisions thereon. It is a general principle of inheritance or succession tax law that the burden is on the state to show the existence of the conditions under which the tax is leviable. This principle is applied in relation to consideration, and it is held that the burden is on the state to show that there was not a consideration for the transfer. *Re De Eschoriaza* (1914) 87 Misc. 515, 149 N. Y. Supp. 796. In order to establish liability for the tax under a statute imposing a tax only upon such transfers as are made "without valuable and adequate consideration," it has been held essential for the state to allege and prove that the consideration for such transfer was not "valuable and adequate." *McDougald v. Boyd* (1916) 172 Cal. 753, 159 Pac. 168; *Nickel v. State* (1918) — Cal. —, 175 Pac. 641. The state must show that there was a gift. A gift will not be presumed from possession that is as consistent with the theory that a valuable consideration was paid as with the theory that the property was received by way of a gift. *Re Wallace* (1914) 149 N. Y. Supp. 534. It has been held, however, in a case in which there was no evidence of any pecuniary consideration for the conveyance, that the failure of the executor to adduce such testimony may be taken as conclusive proof that there was no such consideration. *Re Price* (1909) 62 Misc. 149, 116 N. Y. Supp. 288.

Under a statute levying a tax upon



all property transferred, etc., "except in cases of a bona fide purchase for full consideration," etc., it has been stated that "to have the benefit of the exemption, they (the legatees) must bring themselves within its terms." *State Street Trust Co. v. Treasurer* (1911) 209 Mass. 373, 95 N. E. 851. Under the English Finance Act of 1894, which levies a tax upon estates generally, but provides that the tax shall not be payable in certain cases, the burden is upon one who would free himself from the payment of the tax to bring his case within the exception. *Atty. Gen. v. Smith-Marriott* [1899] 2 Q. B. (Eng.) 595, 69 L. J. Q. B. N. S. 59, 74 J. P. 54, 48 Week. Rep. 12, 81 L. T. N. S. 359, 15 Times L. R. 497.

*b. What constitutes a consideration.*

*1. In general.*

As shown above, a consideration frees a transfer of or succession to property by deed, grant, or contract, of the inheritance tax. The consideration, however, must, under the uniform rule of the cases, be not only valuable, but adequate. Not every consideration prevents a transfer from being voluntary, or from being a gift. As stated in *Atty. Gen. v. Johnson* [1903] 1 K. B. (Eng.) 617, 72 L. J. K. B. N. S. 323, 67 J. P. 113, 51 Week. Rep. 487, 88 L. T. N. S. 445, 19 L. T. N. S. 324, it is intended "that property shall be treated as taken under a 'gift,' although such gift may have been made under a contract by which the donor takes a benefit." "The fact that something was given in exchange by the donee does not prevent the transaction from being a gift if one can see from the nature of it that it was intended as a gift." *Atty. Gen. v. Holden* [1903] 1 K. B. (Eng.) 832, 72 L. J. K. B. N. S. 420, 67 J. P. 185, 51 Week. Rep. 685, 88 L. T. N. S. 729, 19 Times L. R. 385. It has been urged that a consideration which will support a contract between the parties, or as against subsequent purchasers, is sufficient to free the transfer from the succession tax; that so long as the consideration is a good one, the quantum or adequacy of it is immaterial.

But these contentions have been denied. The court in *Crossman v. Reg.* (1886) L. R. 18 Q. B. Div. (Eng.) 256, states that a settlement is voluntary within the meaning of the act, "even though, on the face of the deed, and in fact, we may find that there was sufficient consideration to support a contract between the parties, and to take it out of the operation of the Statute of 27 Eliz. as regards a subsequent purchaser. In other words, it does not, in our opinion, follow of necessity that because a settlement may be valid as against a subsequent purchaser, it cannot be a voluntary settlement within the meaning of the Act of 1881. The character and amount of consideration for the settlement are, no doubt, very important elements to be taken into account, as also are the relations of the parties. Nobody would dream of calling that a voluntary deed which was executed upon substantial pecuniary or other consideration moving from the transferee, whether such transferee were a son of the settlor or a stranger; but a totally different view might reasonably be taken if the amount of consideration, though sufficient to support a contract, was palpably inadequate to the value of the property transferred, and the transferee was a near and dear relative of the settlor." The court in *Re Orvis* (1918) 223 N. Y. 1, 8 A.L.R. 1636, 119 N. E. 86, after stating that the intention of the statute there involved was to tax transfers which were in their nature and character instruments or sources of bounty or benefaction, and which can be classed as similar in nature and effect with transfers by will or the intestate laws, because they accomplish a transfer of property donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the testator's death, continues: "In all cases in which the value of the consideration for the property transferred under the statutory conditions is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary intelligence and judgment, beneficent

and donative, the transfer is taxable. The taxability does not depend upon fraud or an attempt to evade the statute, nor does it depend upon the purpose or inducement of the transfer, nor does it depend upon the form given the transfer. The law searches out the reality, and is not altered or controlled by the form. . . . If, in truth, it in effect bestows under the statutory conditions a bounty or benefaction, and is not a transfer for money's worth, it is taxable."

The general purpose of the English statutes relating to succession duties, and the effect of consideration thereon, is well stated in *Lethbridge v. Atty. Gen.* [1907] A. C. (Eng.) 19. The court was dealing with § 2, subsec. 1 (d) of the Finance Act of 1894, but what is said with reference to the effect of consideration applies generally. Lord Loreburn, L. C., states: "The general purpose of this subsection is to prevent a man escaping estate duty by subtracting from his means, during life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death. Now it is not subtracting from his means if the deceased has received a full equivalent in return for whatever he has laid out."

What constitutes a valuable and adequate consideration within the meaning of the above rule, freeing transfers for a valuable and adequate consideration from the tax, depends largely upon the facts in the individual case, although the sufficiency of certain considerations, such as marriage, is a question of law. A recital of consideration in a deed from a mother to her sons, "of the love and affection that I have for my sons, and the further consideration of the assistance they have rendered me since the death of my husband," imports a consideration sufficiently valuable and adequate to take the case out of the category of a deed of gift. *United States v. Hart* (1880) 4 Fed. 292. An allegation in a petition to quiet title against the state's lien for inheritance taxes, that the claim of the state is "without right," is in effect an allegation that

there was a valuable and adequate consideration for a transfer which recites that it was made "in consideration of \$10 and other good and valuable considerations." *Nickel v. State* (1918) — Cal. —, 175 Pac. 641.

A moral obligation to the transferee is not sufficient to relieve a transfer made in contemplation of death, from the tax. *PEOPLE v. PORTER* (reported herewith) ante, 1041. Compare with the cases of transfers by will upon a moral obligation, *supra*, I.

A sum paid by the father to a son about to be married, in consideration of the agreement of the bride's father to settle on the bride a specified sum, was held to be taxable under the Finance Act of 1894 in *Atty. Gen. v. Holden* [1903] 1 K. B. (Eng.) 832. The payment involved in the *Holden Case* was made within twelve months prior to the death of the father. The court refers to the facts of the case and continues: "There was no obligation which existed under which the defendant's father was bound to pay the money, but he made a gift to his son, in exchange for which he received nothing. . . . Though the father received nothing, his daughter-in-law received a settlement upon her. It appears to me that, by parity of reasoning with the case of *Atty. Gen. v. Worrall* (Eng.) *infra*, II. b, 4, that fact must be regarded as not preventing what the father-in-law had done from being a gift. It might, indeed, prevent the transaction from being a pure and simple gift, although in this case I think it was in fact a pure and simple gift because the consideration did not proceed to the defendant's father. But, however that may be, I am unable to find that there is anything in the circumstances of this case to distinguish it from the former decision."

A promise to make a gift, in binding form because under seal, after the death of the person so agreeing, is not a consideration for the making of the gift in the person's lifetime by a deed executed and expressed to be instead of the gift to be made after death, and the amount of the gift is taxable under § 2, subsec. 1 (c) of the Finance

Act of 1894, where the donor died within twelve months from the making of the gift. *Atty. Gen. v. Cobham* (1904) 90 L. T. N. S. (Eng.) 816, 20 Times L. R. 337.

The expectant interest which a devisee has in the estate of the devisor does not furnish a consideration for a conveyance in the lifetime of the devisor, within the meaning of the Internal Revenue Act of 1864, taxing a deed or gift or other assurance of title made without valuable or adequate consideration. *United States v. Banks* (1883) 17 Fed. 322.

The benefit accruing or arising to an owner of property charged with the payment of an annuity by the cesser of the annuity is not freed from estate duty under the provision of the Finance Act of 1894, that "estate duty shall not be payable . . . in respect of the determination of any annuity for life where . . . such annuity . . . was granted for full consideration in money or money's worth paid to the . . . grantor for his own use or benefit," because of the fact that by agreement with the annuitant in her lifetime certain property on which the annuity had been a charge was released, and the annuity made a charge upon other property. *Atty. Gen. v. Smith-Marriott* [1899] 2 Q. B. (Eng.) 595. The court states that it is unable to see anything which fairly comes within the words "full consideration in money or money's worth." That the arrangement by which the annuity was shifted was not the creation of a new annuity, but was a mere transfer of the burden thereof, which was always upon the owner of the property, from one portion of his property to another.

A transfer obtained in an action in the nature of specific performance, brought by a husband against the estate of his deceased wife, to obtain title to the property, was held not subject to a transfer tax, where the land had originally been bought by the husband, who paid for it with his own means, but title had been taken in the name of his wife under an agreement that she was to make a will devising it to him,—an agreement

which she did not keep. *Nelson v. Schoonover* (1913) 89 Kam. 779, 132 Pac. 1183, Ann. Cas. 1915A, 147.

See *Ransom v. United States* (1879) Fed. Cas. No. 11,574, supra, I. a, and *Re Galot* (1919) 106 Misc. 310, 174 N. Y. Supp. 492, supra, I. b.

See *Re Demers* (1903) 41 Misc. 470, 84 N. Y. Supp. 1109, infra, II. b, 2.

In the following cases, there has been held on the facts to be no consideration sufficient to relieve the transfer of the tax:

A transfer of a store in value exceeding \$100,000, made to the son of the donor upon his agreement to assume an indebtedness of \$30,000, and the further agreement to pay \$600 a month during the donor's life, was held not to be a transfer for an adequate consideration, and was therefore held taxable in *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268. At the time of the transfer in question, the donor was suffering from an incurable disease, and it was known that the days of his life were numbered. The court states that if there was any element of a valuable consideration in this transfer, it was not adequate from any commercial point of view.

A succession upon the death of a life tenant to a sum of money which a tenant in tail in the remainder charged upon the reversionary estate in consideration of an annuity which the life tenant paid him was held taxable in *Re Jenkinson* (1857) 24 Beav. 64, 58 Eng. Reprint, 281, 26 L. J. Ch. N. S. 241, 3 Jur. N. S. 279, 5 Week. Rep. 301, but there was little discussion of the question of consideration.

In the following cases there has been held to be a sufficient consideration:

A transfer of a note of doubtful value to one in consideration of his agreement to pay the transferer the interest thereon so long as he lives was held not to be a taxable transfer, in *Garman's Estate* (1885) 3 Pa. Co. Ct. 550.

In *Lethbridge v. Atty. Gen.* [1907] A. C. (Eng.) 19, 76 L. J. K. B. N. S. 84, 95 L. T. N. S. 842, 23 Times L. R. 123, there was held to be a consideration which prevented an inheritance

tax upon the payment of life insurance policies to the son upon the death of his father, the insured, where the son, within the lifetime of his father, mortgaged his inheritance, in consideration of which the insurance policies were assigned to him, with an annuity amounting to a specified sum, plus a sum equal to the amount of the premiums on the insurance policies. Under the agreement it was optional with the son whether to keep up the policies or surrender them; if he elected to surrender them or any of them, he could not only retain the surrender value for his own purposes, but his annuity of a specified sum would be augmented by a sum equal in amount to the premiums on the policies surrendered. The court reviews the fact and states that the son undoubtedly gave full value in money or money's worth for all the benefit he received.

## 2. Marriage.

In the American cases marriage is generally regarded as a consideration which will relieve a transfer of the tax. *Re Miller* (1902) 77 App. Div. 473, 78 N. Y. Supp. 930; *Re Baker* (1908) 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed without opinion in (1904) 178 N. Y. 575, 70 N. E. 1094. See *Re Vanderbilt* (1918) 184 App. Div. 661, 172 N. Y. Supp. 511, affirmed without opinion in (1919) 226 N. Y. 638, 123 N. E. 803, *supra*, I. b.

It is held in *Re Demers* (1908) 41 Misc. 470, 84 N. Y. Supp. 1109, that a transfer of the property of an intestate by the judgment of a court enforcing a contract between the intestate and the mother of the plaintiff, by the terms of which the plaintiff, then a child, and natural daughter of the intestate, was to be surrendered to him, and was to have all his property upon his death, was not taxable. The court states that the contract was upon a valuable consideration, hence the transfer was not a gift; that it was not a transfer under the intestate laws, as the plaintiff was not the next of kin to the decedent.

Where the husband failed to make provision in the will according to the terms of the antenuptial agreement,

and upon his death his widow disregarded the provisions of the will and claimed under the antenuptial agreement, the property transferred to her under such agreement is held not subject to the transfer tax. *Re Schmoll* (1919) 108 Misc. 492, 177 N. Y. Supp. 670.

An agreement to marry the transferor of property is a valuable consideration which will prevent a transfer in pursuance thereof being taxable, even though made in contemplation of death, and even though the marriage does not take place. *Re Wadsworth* (1917) 190 Misc. 499, 166 N. Y. Supp. 716 (obiter), affirmed without opinion (1918) 185 App. Div. 944, 172 N. Y. Supp. 924.

Assuming that *Re Kidd* (1907) 188 N. Y. 274, 80 N. E. 924, *supra*, II. a, is authority upon the effect of consideration, that decision is based upon the theory that a consideration did not relieve the transfer there involved of the tax, and does not deny the proposition that marriage is a consideration. See discussion of this case, *supra*, II. a.

But in England, notwithstanding marriage is recognized as a valuable consideration for contracts generally, it is uniformly held that it is not such a consideration as will free a transfer of property from death duties under the peculiar wording of the English statutes. This has been held under the Succession Duty Act above set out. *Floyer v. Bankes* (1863) 3 De G. J. & S. 306, 46 Eng. Reprint, 654, 9 Jur. N. S. 1255, 9 L. T. N. S. 353, 3 New Reports, 16, 33 L. J. Ch. N. S. 1, 12 Week. Rep. 28. See obiter in *Fryer v. Morland* (1876) L. R. 3 Ch. Div. (Eng.) 675, 45 L. J. Ch. N. S. 817, 35 L. T. N. S. 458, 25 Week. Rep. 21, *supra*. The court in *Floyer v. Bankes* (Eng.) *supra*, states that the description of contracts which are excepted as those made bona fide, "in consideration of money or money's worth," excludes the consideration of marriage. That marriage is not such a consideration as relieves a transfer of the tax has also been held under the Finance Act of 1894. *Re Gray* [1896] 1 Ch. (Eng.) 620. The court, in holding the payment by executors of a

sum which the testator covenanted to pay to the trustees of his son's marriage settlement subject to the tax, says of the obligation: "The debt was, no doubt, created for full consideration, but not a consideration in money or money's worth, and therefore it is a debt for which no allowance is to be made in determining the value of the testator's estate for the purpose of estate duty, though in general such an allowance must be made for debts."

Applying this rule to the case of an antenuptial contract by which certain hereditaments, part of settled estates, held under a power of appointment, were limited to the use of the intended wife in case she survived her intended husband, for and during the term of her natural life, for her jointure and in lieu of and in satisfaction of dower, it was held that property arising under the contract in favor of the wife upon the death of the husband was taxable. *Floyer v. Bankes* (1863) 3 De G. J. & S. 306, 46 Eng. Reprint, 654, 9 Jur. N. S. 1255, 9 L. T. N. S. 353, 3 New Reports, 16, 38 L. J. Ch. N. S. 1, 12 Week. Rep. 28, supra. The succession of a wife, upon the death of her husband, to insurance money under policies which the husband had covenanted to maintain and assign to trustees of their marriage settlement, was held not freed from estate duty by virtue of the provision of the Finance Act of 1894, that estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes. *Atty. Gen. v. Dobree* [1900] 1 Q. B. (Eng.) 442, 69 L. J. Q. B. N. S. 223, 64 J. P. 24, 43 Week. Rep. 413, 81 L. T. N. S. 607, 16 Times L. R. 80. See *Re Gray* (Eng.) supra.

There was held to be a taxable succession under the Finance Act of 1894 upon the death of one who, within twelve months prior to his death, had conveyed real estate to trustees of a marriage settlement upon the marriage of his son, in *Atty. Gen. v. Smyth* [1905] 2 Ir. R. 553.

There is held to be taxable succession in *Lord Advocate v. Roberts* (1858) 10 Sc. Sess. Cas. 2d series, 449, upon the payment by executors of a decedent of the amount called for by a marriage settlement in which the decedent, upon the marriage of his daughter, bound himself to pay the sum to the trustees of the marriage settlement at the first term after his death. This decision was rendered under the 16th and 17th Vict. chapter 51. The court considers the 17th section, and holds that the transfer does not come within the exception.

A settlement in consideration of marriage and the payment of money was held not exempt from the succession duty, even to the value of the money consideration, in *Atty. Gen. v. Rathdonnell* (1893) Ir. L. R. 32 C. L. 575. But, under the Finance Acts of 1894 and 1896, a transfer of property under a settlement in consideration of marriage and the payment of money was held free from the estate duty to the extent of the money consideration. *Re Lombard* [1904] 2 Ir. R. 621.

Children of a wife by a former marriage were held not to be within the consideration of the marriage, and therefore a provision for them in the marriage settlement was held a voluntary disposition, in *Atty. Gen. v. Smith* [1895] 2 Q. B. (Eng.) 341.

The Finance Act of 1894 required the consideration for a debt to be for the deceased's own use and benefit in order that the debt be free from estate duty. In *Re Gray* [1896] 1 Ch. (Eng.) 620, 74 L. T. N. S. 275, 60 J. P. 314, 44 Week. Rep. 406, 65 L. J. Ch. N. S. 462, a sum which the testator had covenanted to pay to the trustees of his son's marriage settlement was held to be a debt which was not incurred for testator's use and benefit, and was therefore taxable on this ground in addition to the ground that marriage did not constitute a consideration.

See *Atty. Gen. v. Holden* [1903] 1 K. B. (Eng.) 832, 88 L. T. N. S. 729, 72 L. J. K. B. N. S. 420, 67 J. P. 135, 51 Week. Rep. 685, 19 Times L. R. 385, supra, II. b, 1.

*3. Joint tenancies and survivorship agreements.*

In the case of property passing to the survivor of a joint tenancy, some cases have merely announced the general rule without considering what amounts to a consideration. Thus, the interest passing to the survivor of a joint tenancy created by contribution from both tenants has been held to pass upon a valuable consideration, and is therefore not taxable, even though made in contemplation of death. *Re Heiser* (1913) 85 Misc. 271, 147 N. Y. Supp. 557; *Re Dalsimer* (1914) 148 N. Y. Supp. 914. That there is no taxable transfer in the succession to real property by a surviving joint tenant where the property had been conveyed by the deceased joint tenant to herself and the survivor as joint tenants upon a valuable consideration is held in *Re De Eschoriaza* (1914) 87 Misc. 515, 149 N. Y. Supp. 796; *Re Klatzl* (1914) 149 N. Y. Supp. 794, reversed on other grounds in (1915) 216 N. Y. 83, 110 N. E. 181. See *Atty. Gen. v. Ellis* [1895] 2 Q. B. (Eng.) 466, 64 L. J. Q. B. N. S. 813, 15 Reports, 584, 73 L. T. N. S. 190, 350, 44 Week. Rep. 13, 59 J. P. 774, *supra*, II. a.

A transfer of property to a joint tenant upon the death of one of the tenants was held taxable in *United States v. Robertson* (1910) 106 C. C. A. 149, 183 Fed. 711, without any discussion of the question of consideration.

In the case of survivorship agreements, as in the case of joint tenancies, some cases decide the general principle rather than determine what amounts to a consideration within that principle. The interest passing to a son under a partnership agreement with his father by which the son, upon the death of the father within the term of the partnership, became vested with the father's interest for a recited consideration, was held not taxable in *Blair v. Herold* (1907) 150 Fed. 199, affirmed in (1908) 86 C. C. A. 64, 158 Fed. 804. A partnership agreement that, upon the death of one partner, the "good will" should belong to the survivors, is stated in *Re Bor-*

*den* (1916) 95 Misc. 443, 159 N. Y. Supp. 846, to have been made upon a valuable consideration, and therefore the transfer of the good will to the surviving partners by virtue of the agreement was not taxable.

Other cases have considered whether the consideration was sufficient. In the three following cases the consideration there appearing was held sufficient:

A succession by the surviving partners to the good will of the partnership upon the death of one of their number was held not taxable under the Finance Act of 1894, because made for a full consideration in money or money's worth, where the transfer took place under a provision in the partnership agreement that if the decedent, who was the father of the surviving partners, should die or otherwise cease to be a partner, his share should accrue to his sons in equal shares, subject only to their paying the value of the share, ascertained by a special general account, to be made without any valuation of or allowance for good will, which good will should accrue to the sons in equal shares, where it appeared that the partnership was advantageous to the father, in that he was to have his capital employed as long as he lived in a lucrative business where the profits were earned by the efforts of his two sons, he not being bound to give any more attention to the business than he chose, and where he had the absolute control and right of final decision in case there was any difference of opinion among the partners as to its management, and where the good will, of which little was thought, was to pass with the rest of the corpus of the father's interest on payment of a price which was liberal in itself. *Atty. Gen. v. Boden* [1912] 1 K. B. (Eng.) 539, 105 L. T. 247, 81 L. J. K. B. N. S. 704. A transfer of money and notes secured by a mortgage by way of a *donatio mortis causa*, in pursuance of an agreement between the transferor and the transferee whereby they were to combine their chattel property and their personal energies in the working of a farm owned by

the transferrer, upon a mutual obligation that the survivor should become possessed of the whole personality resulting from this co-operation of goods and labor, was held not to be a taxable transfer, in *Atty. Gen. v. Brown* (1908) 5 Ont. L. Rep. 167. Where a tontine insurance contract provides that the subscribers may subscribe on their own or any other life or lives, and that when the number of nominees is reduced to a certain number, the fund shall be divided among the subscribers whose nominees are living, the succession of the various subscribers to this fund when the conditions upon which it is to be divided occur is not taxable under the succession duty tax, since this interest is derived by contract bona fide, for a valuable consideration in money. *Oldfield v. Preston* (1861) 8 De G. F. & J. 398, 45 Eng. Reprint, 932, 31 L. J. Ch. N. S. 256, 5 L. T. N. S. 650, 8 Jur. N. S. 107, 10 Week. Rep. 257.

In other cases the consideration has been held insufficient:

In *Brown v. Atty. Gen.* (1898) 79 L. T. N. S. (Eng.) 572, 15 Times L. R. 109, there was held to be a taxable transfer under the Succession Duty Act (16 & 17 Vict. chap. 51) on the theory that the father intended a gift to the son where the son succeeded to a partnership valued at about £60,000 upon the death of his father, upon giving bond to the father's executors for the payment of £10,000, although there was a provision in the partnership agreement that in the event of the son's death during the term, the father was to have back the business capital, but was to pay to the son's executors \$15,000.

It seems to be the theory of some cases that the mutual promises of the parties to a mutual survivorship agreement do not furnish a sufficient consideration. A transfer to the survivor under a contract between two partners by which a fund was established to belong to the partners jointly during life, and to the survivor upon the death of either, for the continuation of the business, was held to be a transfer in effect beneficent and donative, and therefore not free from the tax, as having been made upon a

valuable consideration. *Re Orvis* (1918) 223 N. Y. 1, 3 A.L.R. 1636, 119 N. E. 88. A transfer of partnership stock to the surviving partner by executors of a deceased partner under a provision in the will of the decedent, reaffirming an agreement made between him and the surviving partner by the terms of which the survivor of the partnership should have the right to purchase the partnership stock of the deceased member at an arbitrary price agreed upon, was held a transfer taxable at the actual value of the stock thus transferred, and not limited to the arbitrary price agreed upon. *Re Cory* (1917) 177 App. Div. 871, 164 N. Y. Supp. 956, affirmed in (1917) 221 N. Y. 612, 117 N. E. 1065. There is a strong dissenting opinion in the appellate division, which takes the view that the agreement between the partners is one for a valuable consideration, that the transfer was under this agreement, and not taxable. In the majority opinion it is stated that the contract was purely executory, and no consideration passed from one party to the other except the mutual promises, and no debt was created from one party to the other. It has been held that the interest of a deceased member of a partnership in the good will, which passed to the surviving members of the copartnership upon the death of the decedent, under an agreement that in the event of the dissolution of the copartnership by reason of the death of any member, the good will and the right to use the firm name, etc., were to belong to and become the property of the survivors without compensation, is taxable at its value, and it is stated that this is true, even though the agreement is for a valuable consideration. *Re Hellman* (1918) 172 N. Y. Supp. 671. The statute under which this transfer is taxable is not set out. It does not appear that the court in *Re Hellman* uses the expression "valuable consideration" to mean both "valuable" and "adequate." So far as the case lends any support to the proposition that a transfer for a valuable and adequate consideration is subject to a tax, it is contrary to the practically uniform rule.

The general question of whether personal property passing under a mutual survivorship agreement is subject to a transfer or succession tax is discussed in the note to *Re Orvis*, 3 A.L.R. 1640.

#### 4. Annuities and fixed charges.

Whether an annuity to the transferor is sufficient consideration to free the transfer from the tax depends upon the facts of the individual case.

An absolute covenant by the son of the owner of shares of stock, to whom the owner transferred the stock, to pay the father interest at 4 per cent per annum during his lifetime, irrespective of the company's earnings, and annuities to the widow and another son, was held not to be a sufficient consideration to prevent the transfer from being a voluntary one within the meaning of Customs and Inland Revenue Act of 1881. *Crossman v. Reg.* (1886) L. R. 18 Q. B. Div. (Eng.) 256, 56 L. J. Q. B. N. S. 241, 55 L. T. N. S. 848, 35 Week. Rep. 303. The transfer involved in this case was under an indenture dated the 12th of July, and was to take place as from the 1st of October following, "or as from the death of him, the said Robert Crossman, which shall first happen." The said Crossman died one week after the indentures of appointment were made, and before any payment of an annuity had been made.

A gift made more than twelve months prior to the donor's death is free from the tax if it is absolute, but not if the donor reserves any interest.

A transaction by which the son of a mortgagee purchased the equity of redemption of the mortgagor, whereupon his father, the mortgagee, conveyed to him the mortgage upon his agreement to pay his father an annuity, was held to be a taxable transfer within the amendment of 1889 to the Customs and Inland Revenue Act of 1881. Lord Esher, M. R., states that the transaction amounted to "a 'gift' within that enactment. I have already said what was given was the mortgage debt, which was personal property. Also, I think that possession of the property was not assumed and retained by the donee 'to the entire ex-

clusion of any benefit to the donor by contract or otherwise.' It appears to me that the covenant by the son to pay an annuity to the father prevented this from being a pure and simple gift, and therefore it comes within the statute." *Atty. Gen. v. Worrall* [1895] 1 Q. B. (Eng.) 99.

The payment in lieu of a legacy to a missionary society of a sum of money in consideration of a life annuity to the person making the payment and his wife was held to be a gift within the meaning of § 2, subsection 1 (c) of the Finance Act of 1894, which incorporated the provisions of § 11 of the Customs and Inland Revenue Act of 1889, and therefore taxable. *Atty. Gen. v. Johnson* [1903] 1 K. B. (Eng.) 617. The court, speaking of the particular transaction in the case at bar, states that if the substance of the transaction be looked at "it seems to us that it was intended not to be a matter of pure business, but one of bounty on the part of Mr. Burton. The facts that the payment was made 'in lieu of a legacy,' and that the amount paid largely exceeded the market value of the annuities agreed to be paid to Mr. and Mrs. Burton, are sufficient to establish this." Accordingly the entire amount of the sum paid was held subject to the tax, and not merely the difference between the actual value of the annuity and the sum paid.

There was held to be a taxable transfer under § 7 of the Succession Duty Act of 1853, under the facts stated in *Atty. Gen. v. Johnson* (Eng.) *supra*.

A transfer of shares of stock by a father to his sons, upon their covenant to pay him 4 per cent per annum on the value of the shares, during his lifetime, was held in effect to reserve to the father a life interest in the shares, and therefore to be within the meaning of this provision of the Customs and Inland Revenue Act of 1881 (44 and 45 Vict. chap. 12), § 38, declaring taxable any property passing "by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either ex-



prssly or by implication to the settlor." *Crossman v. Reg.* (Eng.) *supra*.

Under the amendment of 1889 it is not necessary that the benefit to the donor be by way of reservation out of the subject-matter of the gift. *Atty. Gen. v. Worrall* (Eng.) *supra*.

*5. Support of transferor of property.*

Whether an agreement to support the donor is a valuable and adequate consideration depends upon the facts of the individual case. An agreement to support the transferor was coupled with an assumption of debts in *Re Reynolds* (1915) 169 Cal. 600, 147 Pac. 268; at the time of the agreement the transferor was in failing health, and knew that he was afflicted with a fatal disease which would soon result in his death. The court referred to the assumption of indebtedness, and states that this agreement, together with "the further agreement to pay \$600 a month during the donor's life (which agreement itself does not seem to have been observed), certainly do not measure up to the requirements of the law of a valuable and adequate consideration."

An agreement to support the donor, who was eighty years of age and very feeble, a sufferer from Bright's disease, whose circulatory organs were in a state of arterial sclerosis, resulting in a functional derangement of all the organs, and who was unable to care for himself, was held to support a finding of inadequate consideration for a conveyance of 2,000 acres of land. *Abstract, Guaranty & Title Co. v. State* (1916) 173 Cal. 691, 161 Pac. 264. The value of the land was not shown, but the court assumed it to have been of considerable value.

An agreement by a man fifty-four years of age, to give up a position worth about \$8,500 per annum, and, with his wife, care for and support an elderly woman in feeble health, was held not to be an adequate consideration for the transfer to him of property worth between \$90,000 and \$100,000, in *State Street Trust Co. v. Treasurer* (1911) 209 Mass. 378, 95 N. E. 851.

An agreement by one woman to give such care to another as may suit her

convenience was held to be a consideration in no manner commensurate with the transfer of property worth \$80,000, in *Re Dobson* (1911) 73 Misc. 170, 132 N. Y. Supp. 472.

In the following cases there was held to be a consideration:

An agreement by a woman to care for and support a man during the period of his natural life, and to marry him when he is legally free to marry, has been held a valuable consideration which will prevent a transfer in consideration thereof being taxable, even though made in contemplation of death. *Re Wadsworth* (1917) 100 Misc. 439, 166 N. Y. Supp. 716, affirmed without opinion (1918) 185 App. Div. 944, 172 N. Y. Supp. 924.

An agreement to care for and maintain an elderly husband and wife was held to be good consideration for the conveyance of property worth about \$70,000, in *Re Hess* (1906) 110 App. Div. 476, 96 N. Y. Supp. 990, affirmed in (1907) 187 N. Y. 554, 80 N. E. 1111, but the transfer in this case was held not taxable because it was not made in contemplation of death, nor was it a transfer intended to take effect in possession or enjoyment at or after death, so the matter of consideration was not important.

A conveyance of property to one who agrees to support the grantor for life was held not subject to an inheritance tax, in *Lamb v. Morrow* (1908) 140 Iowa, 89, 18 L.R.A. (N.S.) 226, 117 N. W. 1118, but there is no discussion of the question of consideration.

A conveyance was made in *People v. Burkhalter* (1910) 247 Ill. 600, 139 Am. St. Rep. 351, 93 N. E. 379, to one upon her agreement to take care of and support the daughter of the transferor. The court, however, does not discuss the effect of consideration for this transfer, but holds it was not one in contemplation of death, and therefore not taxable, for that reason.

A transfer by an elderly bachelor, of real estate by deed which recited a consideration of \$1 cash, natural love and affection, and other good and valuable considerations, to his sister, who had taken care of him, and to whom he had recognized himself as in-

debted, was held not to be a taxable transfer, in *Lawall's Estate* (1918) 55 Pa. Super. Ct. 228, but this is based by the court upon the theory that it was not a transfer intended to take effect in possession or enjoyment after the death of the grantor, and not upon the fact that it was upon an adequate consideration.

Where the consideration consists of services, it is the theory of some courts that the value of the services may be inquired into and ascertained, and where they equal or exceed the fair value of the property transferred, no tax can be imposed; but if they fall below such value, in the absence of a

statute making provision for a reduction and the taxing of the excess only, the entire amount is taxable. *State Street Trust Co. v. Treasurer* (Mass.) *supra*.

See *Atty. Gen. v. Johnson* [1903] 1 K. B. (Eng.) 617, 72 L. J. K. B. N. S. 323, 67 J. P. 113, 51 Week. Rep. 487, 88 L. T. N. S. 445, 19 Times L. R. 324, *supra*, II. b, 4; *Atty. Gen. v. Worral* [1894] 1 Q. B. (Eng.) 99, 64 L. J. Q. B. N. S. 141, 14 Reports, 1, 71 L. T. N. S. 807, 43 Week. Rep. 118, 59 J. P. 467, and *Crossman v. Reg.* (1886) L. R. 18 Q. B. Div. (Eng.) 256, 56 L. J. Q. B. N. S. 241, 55 L. T. N. S. 848, 35 Week. Rep. 308, *supra*. W. A. E.

ROY R. STIMPSON

v.

FREDERIC N. HUNTER.

*Massachusetts Supreme Judicial Court — November 24, 1919.*

(— Mass. —, 125 N. E. 155.)

**Parent and child — liability of father for dental work for son.**

1. To hold a man liable for dental work done for his minor son plaintiff must show that the work was authorized by the father, or that it was necessary for the health and comfort of the son, and that the father negligently failed to provide him with means for procuring the work to be done.

[See note on this question beginning on page 1070.]

**Trial — submission to jury — unsupported issue.**

2. An issue unsupported by evidence should not be submitted to the jury.

**Account — rendition of bill to father.**

3. The sending to a father of a bill against his minor son is not notice that a claim has been or is then made against the father for payment.

**Parent and child — ratification of contract by son.**

4. A father's reply to a bill against his son sent to him that there would be no payment for some time yet is not a ratification of the procuring of the service by the son.

**Contract — by son for father — ratification.**

5. Failure of a man to reply to a bill against himself for work done for his son, which is sent to the son, is not evidence of ratification of the con-

tract in the absence of evidence that it came to his attention.

**Evidence — failure of defendant to testify — effect.**

6. Failure of defendant to testify does not supply the want of affirmative evidence to make out a case.

**Parent and child — failure to provide service — absence of knowledge.**

7. A father cannot be charged with liability for dental work done for his son because of neglect to provide it, in the absence of anything to show knowledge on his part that it was necessary.

[See 20 R. C. L. 624.]

**Evidence — as to amount of bill — failure to dispute.**

8. The jury is not bound to allow the amount of a bill rendered for dental service, although there is no evidence to dispute that of plaintiff as to its correctness.

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County (Keating, J.) made during the trial of an action brought to recover for dental services rendered by plaintiff to defendant's son which resulted in a verdict for plaintiff. *Sustained*.

The facts are stated in the opinion of the court.

Mr. Arthur Monroe, for defendant: There was no evidence of authorization or ratification by defendant.

Lamson v. Varnum, 171 Mass. 287, 50 N. E. 615.

To show neglect on the parent's part, some evidence of refusal to supply necessities or notice that they were needed by the child is essential.

Farmington v. Jones, 36 N. H. 271.

The direction of a verdict for plaintiff was wrong because there was no evidence of credit given to defendant, or that the bill was charged to him.

Gordon v. Potter, 17 Vt. 348; Bartels v. Moore, 9 Daly, 235.

Mr. Charles S. Murphy for plaintiff.

Jenney, J., delivered the opinion of the court:

Harold Hunter, the minor son of the defendant, came to the plaintiff, a dentist, for professional work. There was evidence that he was then between seventeen and eighteen years of age; that "his teeth needed attention very much;" and that, while there was not "any immediate suffering on his part," the condition of his teeth could not have continued long without injury to his health. The plaintiff testified that he "put in . . . eight amalgam fillings, two cement fillings, eleven enamel and three porcelain teeth, and treated the roots of four." The work commenced October 27, 1917, and continued from time to time until May 4, 1918. It was not contracted on the father's credit, but was charged to the son personally, nothing being said about payment by his father, or, indeed, by anyone. The father's name then was unknown to the plaintiff. Shortly after the completion of the work, a bill was sent to the son and, no response being made, the plaintiff ascertained the name of the father and sent bills to him. The evidence justified a finding that some of the bills sent to the father were made to the son. One of the bills made to the son and sent to the

father had indorsed thereon: "Will you kindly let me have the above amount this month?" This was returned by the defendant to the plaintiff, with the following words written thereon by him:

You won't get any money on this bill for quite some time yet.

Fred N. Hunter.

December 1, 1918, a bill which might have been found to have been made to the defendant was mailed to the son. It did not appear when this bill was called to the attention of the defendant, but he produced it in a mutilated condition at the trial. The writ was dated December 10, 1918.

There was no evidence that the defendant knew that his son was receiving the services, and it did not appear that the son was living at home, was in school, or at work. There was nothing to show that the father had not been willing to have his son's teeth cared for in a reasonable manner, or that he had not amply provided for such attention as he was reasonably able to pay for. On the other hand, there was no evidence that in fact the father knew of the condition of the teeth, or that his lack of knowledge was caused by any negligence on his part.

This action was brought in the central district court of Worcester, and the father and son both testified in that court. They were present at the trial in the superior court, but did not testify, the defendant resting his case on the plaintiff's evidence.

In order to maintain the action, it was necessary for the plaintiff to establish "either that the work done was authorized by the defendant, or that it was necessary for the health and comfort of the defendant's mi-

Parent and child—liability of father for dental work for son.

nor son, and that the defendant negligently failed to provide for him a dentist, or means to procure the services of a dentist, to do the work." *Lamson v. Varnum*, 171 Mass. 237, 238, 50 N. E. 615.

The judge submitted three questions to the jury which are printed in the margin.<sup>1</sup> These questions embraced all the issues involved in the question of liability, but did not require any finding as to amount. The defendant excepted to the submission of questions one and three, but did not except to the second issue, or to the instructions given relative thereto. The affirmative answer to this question established the necessity of the work for the health of the son. *Strong v. Foote*, 42 Conn. 203.

The evidence did not warrant the submission of the first issue to the jury. It did not appear that the defendant was apprised that the work was contemplated or knew of it while in progress; it was not performed on his credit; and there was no special exigency rendering the interference of a third party reasonable and proper. On the facts stated, it could not be found properly that the defendant authorized the work. *Dodge v. Adams*, 19 Pick. 429; *Angel v. McLehan*, 16 Mass. 28, 8 Am. Dec. 118. *Lamson v. Varnum*, *supra*, is not an authority for the plaintiff. In that case, the minor directed the charge to be made to his father in whose family he then lived, and statements of the charge were sent to the father. No reply thereto having been made, it was held that the jury might consider whether the father would have been likely to have made some

**Trial-submission to jury—unsupported issue.**

answer if the bill had been contracted without his authority. The plaintiff also relies on *Auringer v. Cochrane*, 225 Mass. 273, 114 N. E. 355, but in that case the finding for the plaintiff was upheld as to goods furnished after notice that his wife and daughter were dealing with the plaintiff on his credit, because the silence of the defendant after such notice authorized an "implied understanding . . . that he would be responsible." In this case no such facts appeared. Neither does *Vaughan v. Mansfield*, 229 Mass. 352, 118 N. E. 652, help the plaintiff, as there was evidence warranting a finding that the defendant knew of the services which were being performed and made no objection.

The first issue also related to ratification. Apart from the question whether there is any consideration for a promise, express or implied, to pay for services rendered to a son on his own credit (see *Dodge v. Adams*, *supra*; *Dearborn v. Bowman*, 3 Met. 155), and apart from the difficulty as to the ratification of an act not purporting to be done, and, so far as the evidence shows, not in fact performed in behalf of the father or on his credit (see *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 361, 21 N. E. 947), there was no sufficient evidence of ratification. The only testimony bearing on this subject was that a bill made to the son and sent to the father, with a request thereon for payment, was returned by him with his indorsement that ~~the plaintiff would not get any payment~~ "for quite some time yet," and the fact of his silence as to a bill made to him but mailed to the son nine days before the institution of this action, it not appearing that he saw or knew of the bill before the action was commenced. The sending of the bill to the father was not notice that a claim had been or was then made against

**Account—rendition of bill to father.**

<sup>1</sup> "1. Was the work done by the plaintiff authorized or ratified by the defendant?"

"2. Was the work done by the plaintiff necessary for the health and comfort of the defendant's minor son?"

"3. Did the defendant neglect to furnish his son the dental service that he needed?"

him. Therefore, his answer was neither an admission of liability nor evidence of ratification. Clearly, too, the bill made to the father but not sent to him, or, so far as shown, brought to his attention before suit, was inadmissible to prove liability or ratification, and although admitted without exception or restriction did not in any way support the plaintiff's case. *Kumin v. Fine*, 229 Mass. 75, — A.L.R. —, 118 N. E. 187; *Callahan v. Goldman*, 216 Mass. 234, 103 N. E. 687. The failure of

**Evidence—  
failure of de-  
fendant to  
testify—effect.**

the defendant and of his son to testify although present in court was not equivalent to affirmative proof of facts necessary to maintain the action. The defendant was not bound to offer any evidence unless and until evidence was offered by the plaintiff warranting the submission of the case to the jury. The exceptions to the submission of the first question, to so much of the charge as related to authorization and ratification and to the effect of the bill of December 1, must be sustained.

The exceptions relating to the issue as to the defendant's neglect must be sustained as there was no evidence that the father knew or ought to have known of the condition of his son's teeth or that he neglected to provide for their care. The work was done without any inquiry and without notice to

the father although it extended over many months. As *Dewey, J.*, in *Dodge v. Adams*, supra, at page 432, of 19

**Parent and child  
—failure to pro-  
vide service—  
absence of  
knowledge.**

*Pick.*, says: "There is an entire absence of all those circumstances that would create such an obligation as would furnish a legal consideration for an express promise. The proof of such facts must come from the plaintiff. The burden is on him to show that there existed a necessity for furnishing these supplies, and that this necessity was occasioned by the defendant. The plaintiff, having failed to do so, has furnished no sufficient evidence to maintain his action."

After the answers had been returned, the court directed a verdict for the plaintiff in the full amount claimed and the defendant excepted. This situation is not likely to exist at another trial, but even though there was no evidence to meet that of the plaintiff as to the amount of his charge, the jury were not obliged to

**Evidence—as to  
amount of bill—  
failure to  
dispute.**

find in his favor for that sum. *McDonough v. Metropolitan L. Ins. Co.* 228 Mass. 450, 117 N. E. 836; *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 8, 85 N. E. 877; *Walsh's Case*, 227 Mass. 341, 344, 6 A.L.R. 567, 116 N. E. 496, 15 N. C. C. A. 345. The remaining exception has been waived.

Exceptions sustained.

## ANNOTATION.

### Liability of parent for dental services to minor child.

It will be seen that the reported case (*STIMPSON v. HUNTER*, ante, 1067) quotes the principle laid down in *Lamson v. Varnum* (1898) 171 Mass. 237, 50 N. E. 615, *infra*, that to succeed the plaintiff must establish "either that the work done was authorized by the defendant, or that it was necessary for the health and comfort of the defendant's minor son, and that the defendant negligently failed to

provide for him a dentist, or means to procure the services of a dentist, to do the work."

In *Sullivan v. Liggins* (1914) 149 N. Y. Supp. 517, the facts are reported only in the court's opinion, reversing a judgment in favor of a dentist against the infant's father, which is as follows: "There may be circumstances where services or commodities of which a child stands in immediate

need render the previous assent of the parent unreasonable or inexpedient to seek. In such a case the person procuring the supply is the agent of the parent *ex necessitate*. *Ketchem v. Marsland* (1896) 18 Misc. 452, 42 N. Y. Supp. 7. That cannot be said of this case, where the suit is by a dentist to recover on a bill for \$85 for dental work in filling the teeth of the defendant's eighteen-year-old son without the knowledge or consent of the parent. For a bill of such character the assent of the parent cannot be implied, particularly when the dentist never before performed work for the parent, or any member of his family, and where the parent was not shown to have had any knowledge of the performance of the services until after their completion. Where an infant goes to a strange dentist, by whom no member of his family has ever been treated before, and has dental work performed upon a representation that his father will pay, the dentist should first ascertain whether or not the father has authorized the work to be done, and if he fails to do so he cannot hold the father upon the theory of implied contract for necessities."

In *Ketchem v. Marsland* (N. Y.) *supra*, the court sustained a verdict for the plaintiff in an action for the fair and reasonable value of services rendered by the plaintiff as a dentist in filling and regulating the position of the teeth of the defendant's infant daughter while she was temporarily residing apart from her parents with their assent during the summer, in the care of a woman at whose direct request the dental services were alleged

to have been performed. It was held that, the services not being of sudden and urgent necessity, the child's custodian had exceeded her power in requesting them, but that the defendant had ratified the act. It was considered that ratification was to be inferred from the defendant's silence, the court pointing out that here the ratification attached to an agency which had been exceeded; the facts being that the plaintiff sent a bill to the defendant for these services and received no answer, and during the ensuing three years, up to the time of the commencement of the action, several communications of his to the defendant with regard to his claim met with no better response.

In *Lamson v. Varnum* (1898) 171 Mass. 237, 50 N. E. 615, the defendant's son, a boy nineteen or twenty years of age, living in his father's family, suffering with toothache, applied to the plaintiff for treatment. After the services were rendered he told the plaintiff to make the charge to his father. There was evidence that twice during the lifetime of the son the plaintiff sent a statement of his charge for the services to the defendant, and received no reply. It was held to be a question for the jury whether the work was authorized by the defendant, and their verdict against him was not disturbed.

Compare the reported case (*STIMPSON v. HUNTER*, ante, 1067).

For a case sustaining a judgment against an infant of considerable estate, for dental services, see *Strong v. Foote* (1875) 42 Conn. 203.

B. B. B.

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BELLE CITY MALLEABLE IRON COMPANY et al., Appts.,

v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Respts.

*Wisconsin Supreme Court—December 2, 1919.*

(— Wis. —, 174 N. W. 899.)

**Workmen's compensation — injury to employee by fire — course of employment.**

1. The foreman of the pattern department of an iron company may be found to be performing service arising out of and incidental to his em-

ployment in turning back to extinguish an incipient fire in the plant which he discovers while leaving the property long after termination of the regular working hours.

[See note on this question beginning on page 1078.]

**Master and servant — course of employment — extinguishment of fire.**

2. The foreman of the pattern department of an iron foundry cannot, as matter of law, be regarded as a stranger in turning back when leaving the plant after working hours to extinguish an incipient fire which he has discovered, although he has not been directed by any superior officer to perform such duty.

**Workmen's compensation — wife living with husband — keeping house for son.**

3. A woman cannot be said not to be living with her husband within the meaning of the Workmen's Compensation

Act from the fact that owing to ill health she is, by agreement with her husband, keeping an apartment for her son because of the lighter work than would be required at her husband's home, if she intends to return to her husband as soon as she is able.

**— dependence on husband for support.**

4. That a woman has sufficient property to maintain her does not prevent the operation of the provision of the Workmen's Compensation Act, that a woman living with her husband is presumed to be solely and wholly dependent upon him for support.

**APPEAL** by plaintiffs from a judgment of the Circuit Court for Dane County (Stevens, J.) affirming an order of the Industrial Accident Commission awarding compensation to defendant as guardian of the wife of deceased. *Affirmed.*

Statement by Eschweiler, J.:

An award was made by the Industrial Commission of Wisconsin to the defendant, John D. Rowland, as guardian of Marie J. Hansen, an incompetent person, of the sum of \$2,907.24 as compensation by reason of the death of Louis Hansen, husband of said Marie J. Hansen, against the plaintiff Belle City Malleable Iron Company, as employer, and the Wisconsin Mutual Liability Company, as insurer.

The deceased for a long period of years had been employed by the plaintiff employer as millwright and foreman of the pattern department. He had charge and supervision of the patterns used by the employer in its work. His duties required him to be at the plant of the plaintiff employer, not only during the customary working hours, but at other times. On Saturday, January 5, 1918, the plant shut down as usual, so far as the rest of the employees were concerned, at noon; but Hansen was in the premises during all of the afternoon, engaged in checking over the patterns and working with an inspector from out

of town. This work ceased at 5 o'clock, and the deceased then started for home. Just as he was leaving the plant, and at about 5 minutes past 5, it was discovered that fire had broken out in the basement of one of the buildings of plaintiff. Deceased immediately turned back, requested another employee to get a pail of water to assist him in putting out the fire, and was last seen just outside one of the buildings. His body was discovered on the following Wednesday morning in the basement of one of the destroyed buildings, some 75 feet away from the part of the plant in which the pattern department was located.

Deceased and applicant were married in January, 1900; in 1913 she had a serious operation, and her physical and mental health was substantially impaired from that time. She suffered from delusions, and at times was very violent. In the fall of 1913 she went to a sanatorium at Oconomowoc, Wisconsin, returned to Racine about February, 1914, and lived with deceased until the following November, when, after making a trip to California, she returned to

the sanatorium, remaining there until May, 1915. In January, 1915, on application of her husband, a guardian was appointed for her property. In July, 1915, she returned to the sanatorium, remaining there until September. From that date until November, 1916, she lived with her husband. She then went as a voluntary patient to the state hospital at Mendota, from there to Waukegan, Illinois, and in January, 1917, again to the sanatorium at Oconomowoc, remaining there until May. In the summer or fall of 1917 she went to Chicago, and kept house for her adult son by a former marriage in a three-room flat furnished by him. She did not live in the same house with her husband at any time after September, 1916. She had consulted an attorney concerning the bringing of a divorce action in 1914 or 1915, but none was started.

At the time of her marriage in 1900 she had some property of her own. The earnings of her husband from that time on were kept subject to the control and disposition of the two jointly. The homestead, a good-sized house of eight to ten rooms in Racine, was in her name, and worth from \$4,000 to \$5,000. She had invested in interest-bearing securities about \$15,000. The income from such investments, together with small amounts of the principal at times, were used for her care, and the deceased advanced but slight amounts during the last two years of his life for her support, but appears to have paid for the expenses of her trip to California. No call appears to have been made upon him by her or her guardian for funds during this period; at least, none to which he failed to respond. In her own testimony before the commission she said, in substance, among other things:

"We were very happy together. He was a good man; he always used to provide for me. I agreed with him to live in Chicago with my son until I got well. My staying in

Chicago was a sort of visit with my son."

Shortly before the death, she told her son of her intention of going back to her husband. From the testimony of the son, as well as others, it appears that at times she expressed herself as not wanting to live with her husband, and at other times as desirous of doing so. The commission found that applicant was living with Louis Hansen at the time of his death, within the meaning of subdivision 3 of § 2394-10, Stat., and therefore entitled to a death benefit.

The plaintiff employer and insurer brought this action in the circuit court for Dane county to review the determination of the commission in such award, and from the judgment of the circuit court, affirming such award, this appeal is taken.

Messrs. Roehr & Steinmetz, for appellants:

The burden of proof is upon the applicant to show that the deceased met with an industrial accident and that at the time the deceased was performing services growing out of and incidental to his employment.

John A. Roebling's Sons Co. v. Industrial Acci. Commission, 36 Cal. App. 10, 171 Pac. 987; Proctor v. Serbino, 10 N. C. C. A. 630, note.

Mrs. Hansen was not living with her husband at the time of his death within the meaning of the statute, and she was not dependent upon him for support.

Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, L.R.A.1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; Kalcic v. Newport Min. Co. 197 Mich. 364, 163 N. W. 962; Ludwig v. American Car & Foundry Co. 194 Mich. 613, 161 N. W. 835; Nelson's Case, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694; Finn v. Detroit, Mt. C. & M. C. R. Co. 190 Mich. 112, L.R.A.1916C, 1142, 155 N. W. 721, 13 N. C. C. A. 187; Brusha v. Board of Education, L.R.A.1916A, 248, note; Gallagher's Case, 219 Mass. 140, 106 N. E. 558; McDonald's Case, 229 Mass. 454, L.R.A.1918F, 498, 118 N. E. 949; Roberts v. Whaley, 192 Mich. 133, L.R.A.1918A, 189, 158 N. W. 209; Lin-



nane v. *Ætna Brewing Co.* L.R.A. 1917D, 157, note; *Newman's Case*, 222 Mass. 563, L.R.A.1916C, 1145, 111 N. E. 359.

Messrs. John J. Blaine, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for respondents:

The evidence supports the finding that Louis Hansen was performing services growing out of and incidental to his employment at the time of the accident.

*Hellman v. Manning Sand Paper Co.* 176 App. Div. 127, 162 N. Y. Supp. 335; *Hendricks v. Seeman Bros.* 170 App. Div. 133, 155 N. Y. Supp. 638; *Chicago Dry Kiln Co. v. Industrial Bd.* 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Mechanics Furniture Co. v. Industrial Bd.* 281 Ill. 530, 117 N. E. 986; *De Mann v. Hydraulic Engineering Co.* 192 Mich. 594, 159 N. W. 380; *Reithel's Case*, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; *McPhee's Case*, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; *Nevich v. Delaware, L. & W. R. Co.* 90 N. J. L. 228, L.R.A. 1917E, 847, 100 Atl. 234; *Devine v. Caledonian R. Co.* 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877; *Anderson v. Balfour* [1910] 2 Ir. R. 497, 44 Ir. L. T. 168, 3 B. W. C. C. 588; *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; *Johnston v. Mountain Commercial Co.* 1 Cal. Industrial Acci. Dec. 100; *Henning v. Henning*, 2 Cal. Industrial Acci. Dec. 724; 1 *Honnold, Workmen's Comp.* pp. 437-439; *Atolia Min. Co. v. Industrial Acci. Commission*, 175 Cal. 691, 167 Pac. 148; *Munn v. Industrial Bd.* 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; *Perdew v. Nufer Cedar Co.* 201 Mich. 520, 167 N. W. 868; *Grieb v. Hammerle*, 222 N. Y. 382, post, 1075, 118 N. E. 805; *Ewig v. Chicago, M. & St. P. R. Co.* 167 Wis. 597, 167 N. W. 442, 169 N. W. 429; *Southern Surety Co. v. Stubbs*, — Tex. Civ. App. —, 199 S. W. 343; *Bischoff v. American Car & Foundry Co.* 190 Mich. 229, 157 N. W. 34; *Brightman's Case*, 220 Mass. 17, L.R.A.1916A, 321, 107 N. E. 527, 8

N. C. C. A. 102; *Alexander v. Industrial Bd.* 281 Ill. 201, 117 N. E. 1040; *Rist v. Larkin*, 171 App. Div. 71, 156 N. Y. Supp. 875.

Mrs. Hansen was living with her husband at the time of his death.

*Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, L.R.A.1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; *Muncie Foundry & Mach. Co. v. Coffee*, — Ind. App. —, 117 N. E. 524; *Re Hosanar*, 1 Ohio Ind. Comm. 87; *Tomasi v. Mazzoti & Butini*, 2 Cal. Industrial Acci. Dec. 543; *Chulata v. Ransome-Crummey Constr. Co.* 2 Cal. Industrial Acci. Dec. 952; *State Compensation Ins. Fund v. Breslow*, 1 Cal. Industrial Acci. Dec. 194; *Lopez v. Fremont Consol. Min. Co.* 3 Cal. Industrial Acci. Dec. 31; *Petrucchi v. Red River Lumber Co.* 3 Cal. Industrial Acci. Dec. 40; *Salvatore v. Andreani*, 1 Conn. Comp. Dec. 169; 1 *Honnold, Workmen's Comp.* pp. 259, 260; *State ex rel. G. J. Grant Constr. Co. v. District Ct.* 137 Minn. 283, 163 N. W. 509.

Eschweiler, J., delivered the opinion of the court:

The appellants contend on this appeal, first, that Hansen was not within the course of his employment in entering the burning building where he met his death; second, that the applicant, Marie J. Hansen, was not living with her husband at the time of his death within the provisions of § 2394-10, subd. 3, Stat.; and, lastly, that she was not a dependent upon him within the meaning of the same statute.

We are satisfied that the evidence supports the conclusion of the commission that at the time of his death Louis Hansen was

performing service growing out of and incidental to his employment within the meaning of § 2394-3, subd. 2, Stat. He must have entered the building voluntarily, and knowing the possibility of danger in so doing from its being then on fire. But it is a reasonable inference that he did so for either one or both of these purposes: (1) Under the specific duty

Workmen's compensation—  
injury to employee by fire—  
course of employment.

(— Wis. —, 174 N. W. 899.)

devolving upon him to have charge of and look after the valuable patterns essential for the work being done by his employer; (2) from the sense of obligation to use a reasonable amount of care to save his employer's property at a time of such emergency.

As to each of these it needed no specific instructions from any superior to perform such services or voluntarily assume such responsibility while making an effort within the field of reasonable care to save the property of his employer. While so doing he cannot be considered, as a matter of law, to be a stranger. *McPhee's Case*, 222 Mass. 1, 4, 109 N. E. 638, 10 N. C. C. A. 257; *Munn v. Industrial Bd.* 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652. We do not think that either the letter or the spirit of the Workmen's Compensation Act requires that such employee should be penalized for obeying such a natural and commendable instinct on his part.

On the third point urged by appellants, we hold that under the testimony of Mrs. Hansen, to the effect that she was living with her son only temporarily rather than with her husband, and by reason of an agreement between the deceased and herself on account of her ill health, and that the work required in the apartment furnished by the son was much less of a strain upon her than at the homestead, and that

she expected to return to her husband,—all furnish ample warrant for the finding that she was living with her husband at the time

Workmen's compensation—wife living with husband—keeping house for son.

of his death. *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, 101, L.R.A.1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877.

Having properly held that she was living with her husband at the time of his death, then § 2394-10, subd. 3 (a), establishes a conclusive presumption that she was solely and wholly dependent upon him for support. That she had property of her own, even were the income therefrom sufficient to, and for a time actually had been alone used for, her support, would be entirely immaterial.

—dependence on husband for support.

Judgment affirmed.

#### NOTE.

The question of the right to compensation for injuries received while performing service for an employer before or after hours as arising out of and in the course of the employment is discussed in the annotation on page 1078. It will be noticed that the court upheld this right in the reported case (*BELLE CITY MALLEABLE IRON CO. v. INDUSTRIAL COMMISSION*, ante, 1071) where the injuries were sustained by a foreman who turned back, when leaving long after working hours, to extinguish a fire.

HELEN E. GRIEB et al., Respts.,

v.

WILLIAM H. HAMMERLE et al., Appts.

STATE INDUSTRIAL COMMISSION, Respt.

*New York Court of Appeals—January 29, 1918.*

(322 N. Y. 382, 118 N. E. 805.)

Workmen's compensation — injury after working hours — course of employment.

Injury to a cigar packer who at times delivered ordered cigars, by falling

down a stairway when on his way, at his employer's request, to make a delivery, is within the course of and arises out of his employment within the meaning of the Workmen's Compensation Act, although the injury occurred after he had returned to the factory which he had left at the termination of his day's work.

[See note on this question beginning on page 1078.]

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award of the Industrial Commission to claimants in a proceeding by them under the Workmen's Compensation Act to recover compensation for the death of their decedent. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Olmsted, Van Bergen, & Searl, for appellants:

Decedent was not engaged in a hazardous employment at the time of his injury within the meaning of the Workmen's Compensation Law.

Newman v. Newman, 218 N. Y. 325, 118 N. E. 382; Glatzl v. Stumpp, 220 N. Y. 71, 114 N. E. 1053; De Voe v. New York State R. Co. 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed in 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256; Sickles v. Ballston Refrigerating Storage Co. 171 App. Div. 108, 156 N. Y. Supp. 864; Brown v. Richmond Light & R. Co. 173 App. Div. 432, 159 N. Y. Supp. 1047; Saenger v. Locke, 220 N. Y. 556, L.R.A.1918F, 225, 116 N. E. 367; Pope v. Merritt & C. Derrick & Wrecking Co. 177 App. Div. 69, 163 N. Y. Supp. 655; McCabe v. Brooklyn Heights R. Co. 177 App. Div. 107, 162 N. Y. Supp. 741; Kehoe v. Consolidated Teleg. & Electrical Subway Co. 176 App. Div. 84, 162 N. Y. Supp. 481; Mandel v. A. Steinhardt & Bro. 178 App. Div. 515, 160 N. Y. Supp. 2; Manor v. Pennington, 180 App. Div. 120, 167 N. Y. Supp. 424.

Messrs. William F. Quinn and Matthew R. Quinn for respondents.

Mr. E. C. Aiken, with Mr. Merton E. Lewis, Attorney General, for respondent Commission:

The accident arose out of and in the course of the employment.

Lowry v. Sheffield Coal Co. 24 Times L. R. 142, 1 B. W. C. C. 1; Molloy v. South Wales Anthracite Colliery Co. 4 B. W. C. C. 65; Riley v. W. Holland & Sons [1911] 1 K. B. 1929, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155.

Cardozo, J., delivered the opinion of the court:

The award is for death benefits

to the widow and minor child of one Grieb, an employee. Workmen's Compensation Law (Consol. Laws, chap. 67) § 16. The employee was a cigar packer in the city of Syracuse. He was a piece worker, receiving \$1.25 for packing a thousand cigars. When not busy packing, his custom was to deliver cigars to customers if so requested by his employer. He did this frequently during working hours. Sometimes he did it after working hours, and then his employer gave him car fares and the price of a drink.

On Saturday, September 30, 1916, Grieb left the factory in the afternoon about 4 o'clock. In the evening, he passed by with two friends, who had been fellow employees. They saw a light in the factory, and went upstairs. They found the employer tying up two boxes of cigars. He had called that evening at the Amos Hotel, had been asked by the proprietor to deliver some cigars, and had gone to the factory to get them. After some talk about other matters, the employer asked Grieb to deliver the boxes at the hotel, and to take the bill with him, presumably for collection. Grieb consented, and received the boxes and the bill. He left his employer and his two friends in the factory. On his way downstairs, he fell, and was killed.

The argument is made that the injury did not arise out of or in the course of the servant's employment. I think that is too narrow a view. If Grieb had been injured during working hours, it would make no

difference that his service was gratuitous. If the service was incidental to the employer's business and was rendered at the employer's request, it would be part of the employment within the meaning of this statute. Any other ruling would discourage helpful loyalty. *Hartz v. Hartford Faience Co.* 90 Conn. 539, 97 Atl. 1020. In that case a shipping clerk, whose duty was to keep the books, lent a hand of his own motion in the delivery of merchandise. His claim for compensation was sustained. We do not need to go so far. We cannot doubt that in the case cited the claim would have been valid if custom or special request had established the approval of the employer. To hold otherwise would lead to strange conclusions. It cannot be that an employer may ask a clerk to assist mechanics in repairing dangerous machinery, and then be heard to say that because the service was gratuitous, the employee, if injured, is outside the pale of the employment. *Pro hac vice*, by force of custom or request, the employment is enlarged. *Lane v. Lusty* [1915] 3 K. B. 230 [1915] W. N. 252, 84 L. J. K. B. N. S. 1342, 113 L. T. N. S. 615, 8 B. W. C. C. 518; *Mann v. Glastonbury Knitting Co.* 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368. We have already held that in determining the relation of employer and employee, the payment of wages is not the sole test. *De Noyer v. Cavanaugh*, 221 N. Y. 273, 116 N. E. 992. We should hold the same thing now.

It is plain, therefore, that Grieb's service, if it had been rendered during working hours, would have been incidental to his employment.

Workmen's  
compensation—  
injury after  
working hours—  
course of  
employment.

To overturn this award, it is necessary to hold that the service ceased to be incidental because rendered after hours. That will never do. The law does not insist that an employee shall work with his eye upon the clock. Services rendered in a spirit of helpful

loyalty, after closing time has come, have the same protection as the services of the drone or the laggard. *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, 308, L.R.A.1916E, 584, 97 Atl. 320. But the argument is that because the employee had left for the day, and had then returned, his rights are different. Why he returned, we do not know. Perhaps it was idle curiosity. Perhaps the unexpected light which he saw in the factory after closing made him feel that investigation was due in the interest of his employer. At all events, when he reached there, he found business in progress. His employer had prepared cigars for delivery, and was writing out the bill. What Grieb then undertook to do with his employer's approval was just as much a part of the business as if it had been done in the noonday sun. He was not only to deliver the cigars. He was also to collect the money. That is the plain implication of the request that he should take the bill with him. Moreover, it is a fair inference that he expected to return, and bring the money back, for he did not take his companions with him, but left them behind. How far he had to go we do not know. There is no evidence where the Amos Hotel is situated. There is nothing to show that the employee would have passed it in going to his home. I do not say that the case would be different if such things had been proved. It is enough to say that they are not here. This case is not one where the servant goes out primarily on his own business or for his personal convenience, and only incidentally and by the way does something for the master. All the circumstances point to the conclusion that Grieb left the factory on the fatal errand for the sole purpose of helping the master in the transaction of the master's business. It was not mere friendship, it was the relation of employer and employee, that led the one to request the service and the other to render it. If such a serv-

ice is not incidental to the employment within the meaning of this statute, loyalty and helpfulness have earned a poor reward.

I do not think our law commits us to so harsh a holding. A service does not cease to be part of an employment because it is occasional or trivial. The Master of the Rolls said in *McDonald v. The Banana* [1908] 2 K. B. 926, 929: "If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house," there will be a liability under the English statute.

The statement, when made, was a dictum, but a recent case in the House of Lords (*Dennis v. White* [1917] A. C. 479, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 38 Times L. R. 484, 61 Sol. Jo. 558, 10 B. W. C. C. 280, Ann. Cas. 1917E, 325, 15 N. C. C. A. 294), reviewing all the precedents, and sweeping aside many finespun distinctions, makes it clear that the dictum was sound and just. See also *Hughes v. Batt* [1915] S. C. 150, 52 Scot. L. R. 93, 8 B. W. C. C. 362, cited in *Dennis v. White*, supra, at page 484. We should interpret and apply our own statute in the same large spirit. I cannot doubt that, if it is thus

read, the claimant's case will be found within it.

To reach this conclusion, there is no need to attempt a precise or comprehensive definition of the term "employment." One must leave such problems to be worked out by the process of exclusion and inclusion in particular cases, rather than by "a fixed standard of measurement." *John Stewart & Son v. Longhurst* [1917] A. C. 249, 258, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 38 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196. It is enough that here the employee was in the general service of the employer; that the service rendered was incidental to the business; that it was one which this employee had been accustomed to render upon request; and that the errand was the cause of his presence on the stairway. The inference is legitimate that it was not the comradeship of friends, but the tacit sanctions of a relation of power and dependence, which prompted the master's request and the servant's acquiescence.

The order should be affirmed, with costs.

*Hiscock, Ch. J., and Cuddeback, Pound, Crane, and Andrews, JJ., concur. Collin, J., not voting.*

### ANNOTATION.

**Workmen's compensation: injuries received while performing service for employer before or after hours as arising out of and in the course of employment.**

Where an employee was injured before or after hours while performing some service for the benefit of his employer, it has been held that the injuries occurred in the course of and arose out of his employment within the meaning of the Workmen's Compensation Acts. *Atolia Min. Co. v. Industrial Acci. Commission* (1917) 175 Cal. 691, 167 Pac. 148; *Munn v. Industrial Bd.* (1916) 274 Ill. 70, 118 N. E. 110, 12 N. C. C. A. 652; *Mueller Constr. Co. v. Industrial Bd.* (1918) 283 Ill. 148, L.R.A.1918F, 891, 118 N.

E. 1028, Ann. Cas. 1918E, 808; *Meyers v. Michigan C. R. Co.* (1917) 199 Mich. 184, 165 N. W. 708; *GRIEB v. HAMMERLE* (reported herewith) ante, 1075.

It will be observed that in *GRIEB v. HAMMERLE* (reported herewith) ante, 1075, an injury to a cigar packer by falling down a stairway when on his way to make a delivery of cigars at his employer's request, was held to have been received within the course of, and to have arisen out of, his employment, notwithstanding the fact that the request to deliver and the injury

occurred when he had returned to the factory at night after having left it at the end of his day's work.

And in *Mueller Constr. Co. v. Industrial Bd.* (1918) 283 Ill. 148, L.R.A. 1918F, 891, 110 N. E. 1028, Ann. Cas. 1918E, 808, an injury to a foreman of construction of a building by being struck by an automobile while on his way to telephone for lumber was held to have arisen out of and in the course of his employment, although it appeared that according to his custom he was at the building where he was working some time before the workmen were due, and that the injury occurred about twenty minutes before the hour he was paid to begin work. The court said: "The statute makes the employer liable for all accidental injuries sustained, 'arising out of and in the course of the employment.' The words, 'arising out of,' and the words, 'in the course of,' are used conjunctively. In order to satisfy the statute, both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words, 'arising out of,' refer to the origin or cause of the accident, and are descriptive of its character, while the words, 'in the course of,' refer to the time, place, and circumstances under which the accident takes place. . . . As a part of defendant in error's duties, he was required to order materials as needed, and it may fairly be said, as an incident to such employment, that he would have occasion to use and did use a telephone. As none was provided, he would go to some near-by place to use a telephone as occasion required. In going to and returning from such a place, we think he was as much in the course of his employment as he would have been in going to and returning from a telephone, if one had been installed on the premises. In such case there can be no question but that, had he been injured, the injury would have occurred in the course of his employment. In the instant case, as was his custom, he had reported at the building in advance of his men, and at the

time of the accident was on his way to telephone about a matter which was a part of his employer's business, in the usual course of his employment. Under these facts there can be no serious question but that the accident occurred in the course of the employment. That it occurred before the actual time for the commencement of work is not controlling. Too great stress cannot be placed on the exact time when the earning of wages commenced and ended, but a reasonable time must be allowed before and after such time, and included within such period of employment, where the employee is at a place where he might reasonably be expected to be at such time, and is injured in the course of the duties of his employment. What would be a reasonable time in such case must, to a large extent, depend upon the particular facts and circumstances of each case."

And in *Atolia Min. Co. v. Industrial Acci. Commission* (1917) 175 Cal. 691, 167 Pac. 148, a miner was held entitled to compensation under the Workmen's Compensation Act, where after his hours of labor, in accordance with a prevalent custom, he revisited the mine to make sure that there was no danger to other workers from an unexploded charge, and was shot by a guard, such injuries being held to have grown out of and to have occurred in the course of his employment.

And in *Meyers v. Michigan C. R. Co.* (1917) 199 Mich. 134, 165 N. W. 703, it was held that a locomotive fireman, a part of whose duty it was to see that his engine was properly equipped, might be found to have suffered an injury arising out of his employment where it appeared that he went to his engine about two hours before his regular time, having put on his working clothes, and that some time thereafter he was found dead, with grease on his hands and face.

And it has been held that an injury to a casual laborer who had been employed by a farmer to assist in threshing arose out of and in the course of his employment by the farmer, although the injury occurred after the

threshing had been finished and the laborer paid, and while the latter was assisting in moving the machine from the premises, it being usual and customary for casual laborers following threshing machines to help get the machine from road to the stack and back to the road. *Newson v. Burstall* (1915) 84 L. J. K. B. N. S. (Eng.) 535, 112 L. T. N. S. 792, 59 Sol. Jo. 204, 8 B. W. C. C. 21.

And in *Southern Surety Co. v. Stubbs* (1917) — Tex. Civ. App. —, 199 S. W. 343, it was held that an employee was acting in the course of his employment and that the accident resulting in his death arose out of the employment where it appeared that he was employed as assistant engineer on a dredge, and lived on it; that they stopped dredging on account of a storm; that after stopping such work he was drowned while assisting in an attempt to save the dredge, which finally capsized and sank.

And in *BELLE CITY MALLEABLE IRON CO. v. INDUSTRIAL COMMISSION* (reported herewith) ante, 1071, an employee was held to have been performing service growing out of and incidental to his employment within the Wisconsin Workmen's Compensation Act, when he met his death, it appearing that he was employed as a millwright and foreman of the pattern department of a factory; that his duties required him to be at the plant after the customary hours for other workers; that on the day of his death he remained at the factory on Saturday afternoon after it had shut down at noon and worked until 5 o'clock, and had just started for home when he discovered that a fire had broken out in the plant, and he turned back to put out the fire and was killed while so doing.

And in *Milwaukee v. Fera* (1917) — Wis. —, 174 N. W. 926, it was held that an employee was performing service growing out of and incidental to his employment where it appeared that he was employed to collect garbage, and that after having taken his last load was driving his horse and wagon, which belonged to his employer, to the barn to put them up until the next

day, when the horse became frightened and injured him.

And in *Munn v. Industrial Bd.* (1916) 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 662, the industrial board's decision that an injury to a janitor arose out of, and was received in the course of, his employment, was affirmed upon the board's finding of facts to the effect that the deceased was employed as a janitor whose duty it was to operate an elevator and fire the boilers; that one of the tenants in the building accumulated large amounts of film scraps which were left in bags, and that the deceased took these away, receiving a small sum from the tenant for this service; that on the day in question about an hour after his day's work was over, he, not having left the premises, discovered fire in the basement and attempted to put it out, but was overcome with fumes of smoke; that after he was restored he went back into the boiler room and moved some boxes containing film scraps; that he said that someone had set the film scraps on fire and that he must get what remained out of the rooms or he would lose his job; that he returned home and in a short time died as a result of inhaling the gases. The recital of facts was held not conclusive that the fire was caused by the film scraps clandestinely brought on the premises by the deceased in his own interest, and that the fire would not otherwise have occurred. The court said: "The mere fact that at the time of the accident Caspersen's day's service, according to the terms of his employment, had ended, is not sufficient to authorize a reversal of the finding that the accident arose out of and was received in the course of his employment. The industrial board found that upon his return to the boiler room the second time he put in some coal. An employee should not be penalized for working overtime if he wishes to do so, or for endeavoring to save his master's property."

In *Re Cele* (1919) 189 App. Div. 306, 178 N. Y. Supp. 451, where an employee was killed while helping extinguish a fire in his employer's plant,

which started about twenty minutes after he had ceased work, it was held that the accident causing his death did not arise out of or in the course of his employment, it appearing that he was an associate member of the village fire department, and that the village had paid the statutory sum provided for in case an active member of the department died from injuries received in the performance of duties as a fireman. The decision in *GRIEB v. HAMMERLE*, supra, was distinguished on the ground that the employee in that case was performing a service specially requested by the employer, whereas in the case at bar the employee was rendering services as a fireman at the time of the accident, and was subject to the direction of the chief of the fire department, and not of his employer. The court said: "The fact that the fire occurred on the premises of his employer was a coincidence. If it had occurred elsewhere, the legal aspect of the case would not be different. Cole may have responded more willingly because the fire was on his employer's premises. It is impossible to determine whether he did or not. It is immaterial. No duty required him to act. No request to do so came from his employer. His allegiance and duty were to the organization with which he was acting,

and to the orders, direction, and control of its chief engineer alone he was subject. We do not hold that if the deceased, pursuant to a request of his employer, had acted as a fireman, with the acquiescence of the chief engineer of the fire department and subject to his orders, liability would not exist on the part of the appellants. But such request by the employer was not expressed, and the circumstances clearly are not such as to justify an inference of an implied request, even assuming that an implied request would create liability against the appellants."

And it has been held that a rodman in the employ of a county road authority whose employment was solely to sweep and put blinding on the road was not injured by accident arising out of and in the course of his employment where he was injured when stepping down from a steam road roller belonging to his employers, upon which he had gone for the purpose of breaking up the boiler fire so as to get up steam by 7 A. M. under an arrangement with the engineman to break up the fire so as to save the engineer and fireman, who had gone home for the night, from returning before 7 A. M. *M'Allan v. Perthshire County Council* (1906) 8 Sc. Sess. Cas. 5th series, 783.

J. T. W.

MILL CREEK COAL & COKE COMPANY et al., Appts.,

v.

PUBLIC SERVICE COMMISSION.

*West Virginia Supreme Court of Appeals — October 7, 1919.*

(— W. Va. —, 100 S. E. 557.)

Commerce — regulation of electric rates.

1. The regulation of the rates at which electric current, transported or transmitted from one state to another, shall be sold in the latter state, is, so long as the rate fixed is not confiscatory or discriminatory against citizens of another state, a matter essentially local in its nature, and not of such national importance as to require a general system and uniformity of regulation.

[See note on this question beginning on page 1094.]



**Public service corporation — what is — hydro-electric company.**

2. A hydro-electric company, organized in Virginia to engage in the business of a general electric lighting and power company and for the sale and disposal of its electric power to the public, and selling its product to customers in this state, is, as to its business transacted within this state, a "public service corporation," within the terms of chapter 150, Code of West Virginia.

[See 9 R. C. L. 1192.]

**— public service — furnishing electricity.**

3. Where a hydro-electric company, a public service corporation within the terms of chapter 150, Code, by its charter expressly engages to serve the public, and subjects itself unreservedly to the laws and regulations of the governmental power having jurisdiction in the place where it proposes to conduct its business, and its prolonged subsequent conduct is entirely consistent therewith, the electric service rendered by the company to industrial concerns, to be used by them for private profit, is a "public service," within the provisions of the Public Service Commission Act, and subject to regulation by the Commission.

**Commerce — transportation of electricity.**

4. The transportation or transmission of electric current from state to state through appropriate instrumentalities is "commerce" between the states.

**— interstate — character of movement.**

5. In determining when commerce ceases to be interstate and becomes intrastate, the essential character or unity of the movement is decisive.

[See 5 R. C. L. 712.]

**— stopping to change voltage.**

6. The transportation or transmission of electric current direct from the seller in one state to the consumer in another, for immediate or practically immediate use, subject only to a temporary stop en route for the purpose of reducing the current to a commercial voltage, remains "interstate commerce" until the commodity has reached its goal, unless theretofore sold to independent distributing companies in the latter state for resale to local consumers.

[See 5 R. C. L. 707.]

**— exclusiveness of Federal power.**

7. As to those forms of interstate commerce which are of national importance, and require a general system and uniformity of regulation, the Federal power is exclusive, and the state may not act, even if Congress has not exerted its paramount legislative authority as to them.

[See 5 R. C. L. 699.]

**— power of state.**

8. But where the subject is of local rather than national importance, admitting of diversity of treatment according to the special requirements of local conditions, the state may exercise its regulatory authority within reasonable limits till Congress acts.

[See 5 R. C. L. 701.]

**Contract — impairment — public welfare.**

9. Private contract rights must yield to the public welfare, where the latter is appropriately declared and defined, and the two conflict.

[See 6 R. C. L. 707.]

**Constitutional law — due process — fixing rates.**

10. Reasonable rates for electric energy, prescribed by a state in the exercise of its police power through the instrumentality of its Public Service Commission, are not repugnant to the contract or due process of law clauses of the Federal Constitution (art. 1, § 10, cl. 1, and Amendment 14), merely because, if given effect, they will supersede the rates designated in a private contract between the company and a customer, entered into prior to the enactment of the law creating the Commission.

[See 6 R. C. L. 483; 9 R. C. L. 1191.]

**Public Service Commission — finding of facts — review.**

11. Findings of fact by the Public Service Commission, based upon evidence to support them, generally will not be reviewed by this court.

**Constitutional law — what is police power.**

12. The police power of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of the public health, morals, and safety.

[See 6 R. C. L. 183.]

Commerce — police power of the state  
— validity of exercise.

13. A state's exercise of police  
power affecting interstate commerce

is not valid if a direct or undue  
burden is imposed upon such com-  
merce.

[See 6 R. C. L. 200.]

APPEAL by protestants from an order of the Public Service Commission directing the continuance of a former increase of 20 per cent and allowing a further increase of the same amount in existing rates of the Appalachian Power Company, in an application by it for leave to increase its industrial power rates to its customers. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. G. Fox, and Sanders & Crockett, for appellants:

Applicant is engaged in interstate commerce, hence is not subject to any regulation of rates by the authorities of the state of West Virginia.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 8 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 38 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1183.

The order of the Public Service Commission, allowing the applicant to increase its rates as to certain of its wholesale consumers, impairs the obligation of certain contracts made by the applicant with the protestants.

Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Richmond v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Ives v. South Buffalo R. Co. 201 N. Y. 271, 84 L.R.A.

(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; Republic Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

The Public Service Commission erred in taking past investment rather than present value as a basis for fixing the rates of the applicant in this state.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 82, 46 L. ed. 815, 22 Sup. Ct. Rep. 585; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Mr. W. B. Kegley, for appellant Carter Coal Company:

Even though the state may lawfully declare the status of a business and by legislative act fix such status as to future transactions, such legislation cannot have the effect to retroactively impart a character or status to the business or transaction which did not exist, from its essential nature, prior to such legislation.

Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; White v. Hart, 13 Wall. 646, 20 L. ed. 685.

There is no public interest requiring that one shall be protected against loss from an unprofitable investment, even in a public utility.

Columbus R. Power & Light Co. v. Columbus, 258 Fed. 499; Muscatine Lighting Co. v. Muscatine, 256 Fed. 929.

Where the transaction is, in its character, essentially interstate, the absence of legislation by Congress is,

in effect, a declaration by Congress that commerce shall be free, and in such case even the police power of the state cannot intervene to regulate.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Messrs. George W. Johnson and R. Dennis Steed for respondent.

Messrs. R. E. Scott, and Price, Smith, Spilman, & Clay, for Appalachian Power Company:

The right of the legislature to regulate the rates of public service corporations doing business in the state is one of the inherent police powers of the state; and is a right which can be properly delegated to a body such as the Public Service Commission of West Virginia.

Benwood v. Public Service Commission, 75 W. Va. 129, L.R.A.1915C, 261, 83 S. E. 295; State ex rel. Public Service Commission v. Baltimore & O. R. Co. 76 W. Va. 399, P.U.R.1915D, 558, 85 S. E. 714; Baltimore & O. R. Co. v. Public Service Commission, 81 W. Va. 457, L.R.A.1918D, 268, P.U.R.1918B, 608, 94 S. E. 545; United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571, 80 S. E. 931.

The Public Service Commission of West Virginia is invested with full power to regulate and fix the rates of all public service corporations doing business in the state.

Benwood v. Public Service Commission, *supra*; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 944.

The business in which the Appalachian Power Company is and has always been engaged is a public service, and its rates are all subject to be fixed by the Public Service Commission of West Virginia.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Union Dry Goods Co. v. Georgia Pub. Service Commission, 248 U. S. 372, 63 L. ed. 899, — A.L.R. —, P.U.R. 1918C, 60, 29 Sup. Ct. Rep. 117; Wingrove v. Public Service Commission, 74 W. Va. 190, L.R.A.1918A, 210, 81 S. E. 734.

The fixing by the Commission, after hearing, of the rates of a public service corporation in excess of those prescribed by contract previously entered into, does not impair the obligation of said contract nor deprive the party holding such contract of its property without provision of law.

Shrader v. Steubenville, E. L. & B.

Valley Traction Co. — W. Va. —, P.U.R.1919D, 895, 99 S. E. 207.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Northern P. R. Co. v. Puget Sound & W. H. R. Co. 250 U. S. 332, 63 L. ed. 1013, 39 Sup. Ct. Rep. 474; Union Dry Goods Co. v. Georgia Pub. Service Commission, 248 U. S. 372, 68 L. ed. 309, — A.L.R. —, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117.

If the business of the Appalachian Power Company in West Virginia be considered interstate commerce, it is of such a nature that, in the absence of congressional action, the state's power of regulation remains unimpaired.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 944; Shrader v. Steubenville, E. L. & B. Valley Traction Co. *supra*.

A public service corporation has a right to a fair return upon the fair value of that which it devotes to the public service. This includes a proper allowance for going value and working capital.

Coal & Coke R. Co. v. Conely, 67 W. Va. 129, 67 S. E. 613; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Re Glenville Natural Gas Co. (W. Va.) P.U.R.1915F, 848; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 849, 56 L. ed. 466, 32 Sup. Ct. Rep. 271; Springfield v. Springfield Gas & E. Co. (Ill.) P.U.R.1916C, 283; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811; Bluefield v. Bluefield Waterworks & Improv. Co. (W. Va.) P.U.R.1917E, 22; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Denver v. Denver Union Water Co. 246 U. S. 191, 192, 62 L. ed. 661, 662, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278.

The findings of the Commission made in the exercise of legislative power properly conferred by the legislature, and based upon competent and sufficient evidence, are binding in this court.

Norfolk & W. R. Co. v. Public Service Commission, 82 W. Va. 408, —

A.L.R. —, P.U.R.1918E, 737, 96 S. E. 62; Baltimore & O. R. Co. v. Public Service Commission, 81 W. Va. 457, L.R.A.1918D, 268, P.U.R.1918B, 608, 94 S. E. 549; Houston, E. W. & T. R. Co. v. United States, 254 U. S. 358, 58 L. ed. 1351, 34 Sup. Ct. Rep. 833; United Fuel Gas Co. v. Public Service Commission, 78 W. Va. 571, 80 S. E. 931; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940; State ex rel. Public Service Commission v. Baltimore & O. R. Co. 76 W. Va. 399, P.U.R. 1915D, 558, 85 S. E. 714.

Lynch, J., delivered the opinion of the court:

The questions presented upon this appeal originated in an application made by the Appalachian Power Company, a Virginia corporation doing business in this state as well as in Virginia, to the Public Service Commission of West Virginia for an increase of 30 per cent in the rates in force December 31, 1918. Thirteen months prior to that date the Commission had ordered an increase of 20 per cent in the rates theretofore existing, pursuant to an agreement between the power company and its customers, and as an emergency measure made necessary by the war, though many of such customers, including appellants, held unexpired contracts with the company, fixing lower rates to be paid for its service. The increase of 20 per cent presumably not proving sufficient to enable the company to meet the additional costs incident to war conditions, application was made for the additional 30 per cent increase. After full investigation and hearing, the Commission, by an order of April 28, 1919, directed the continuance of the former increase of 20 per cent, and allowed a further increase of the same amount, effective April 1, 1919. It is from that order that the present appeal was taken by numerous coal companies served by the power company in this state.

The Appalachian Power Company was organized in 1911 for the purpose of engaging in the business of a general electric lighting and power company, "for the production of

electric power intended to be used for public service." Hydro-electric stations of great capacity were constructed on New river, in Virginia, and the current there generated carried into West Virginia by two high-tension transmission lines, to three substations in this state, where it is transformed or reduced from 88,000 volts to commercial voltages ranging from 13,200 to 110, and from these points distributed, measured, and sold to the company's West Virginia consumers. These three transforming or reducing substations alone, one at Switchback, one at Bluefield, and one at Coalwood, represent an investment, exclusive of generating machinery, of \$400,000, \$80,000, and \$60,000, respectively. The Commission found that the fair value of the power company's investment as a rate base upon which it was entitled to earn a reasonable return, as of September 30, 1918, was approximately \$9,860,000. It further found that the company had not, during any year of its history, earned a return sufficient to pay its fixed charges and to enable it to set aside a fund to cover accrued depreciation, and that the operations of the company since it commenced business had resulted, as of September 30, 1918, in a deficit of "something in excess of \$1,000,000."

At the time of the applications for increased rates and of the orders of the Commission allowing them, many of the customers of the power company were using its current under unexpired contracts having several years yet to run. These contracts definitely fixed the rates chargeable for the service rendered. The Commission, however, in effect annulled the provisions of these agreements in so far as they related to rates, by authorizing a total and aggregate increase of 40 per cent, finding that the new rates were necessary in order to enable the company to earn a fair return on its investment.

In support of their contention that the Commission exceeded its

jurisdiction and powers in authorizing the increase, in the face of specific rates fixed by contracts having several years yet to run, protestants rely upon four propositions: (1) That the Appalachian Power Company, disposing in West Virginia of electric power generated outside of this state, is not within the purview of the West Virginia Public Service Commission Act, chapter 150 of the Code; (2) that, as the electric power furnished in West Virginia originates at the power company's developments in Virginia, its business in this state is interstate commerce, and the Public Service Commission, therefore, has no jurisdiction in the premises; (3) that protestants' rates are fixed by contracts entered into prior to the passage of the act creating the Commission, and any interference now with such contracts would impair the obligations thereof, and deprive protestants of their property without due process of law; (4) that the rates fixed are unreasonable.

With respect to the first ground relied on by petitioners there can be no reasonable doubt. The charter of the Appalachian Power Company states that the purposes of its organization, among others, are: "To do the business of a general electric lighting and power company, with works to be purchased, leased, or constructed, maintained, and operated for the production of electric power intended to be used for public service, and for the sale and disposal thereof to the public."

The charter authorizes the company to transmit, use, or dispose of its electrical power or energy in the states of Virginia, West Virginia, Tennessee, and North Carolina. While it is given full power to contract with the public "for such price or prices, and on such terms and conditions, as to this corporation may seem proper," yet in the same connection it is provided expressly that "said company shall be bound to furnish at reasonable rates any person, company or corporation

along its lines with electric energy, and to charge uniformly therefor to all persons, companies, or corporations using the same, under like conditions as to cost of supply; *all subject to the laws and regulations of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted.*" (Italics ours.)

A certified copy of its certificate of incorporation was duly filed with the secretary of state of this state, and properly recorded, as required by § 30, chap. 54 (§ 2929), Code of West Virginia. It was under such provisions as these that the power company commenced, and has continued, to transact its business in this state.

Not only is the public character of the service to be rendered by the Appalachian Power Company expressly asserted in the articles of incorporation, but its subsequent acts pursuant thereto have partaken distinctly of the same characteristics. The findings of fact of the Public Service Commission sufficiently disclose that fact: "The applicant is now serving as a public utility with light, heat, and power," twelve towns in Virginia, six in West Virginia, twenty-five coal-mining plants in Virginia, seventy-six in West Virginia, and the street railway systems of the Bluestone Traction Company and the Princeton Traction Company. "It furnishes 60 per cent of the power used in coal mining in the Norfolk & Western and Pocahontas territory, and all the power used in mining in the Mullens district on the Virginian Railroad, and 90 per cent of the power used in coal mining in the Clinchfield district."

Its charter requires it to serve the public along its lines at reasonable and uniform rates, and subjects all phases of its business to the laws and regulations "of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted." The scope of its activities in West Virginia shows the generality

of the service performed here, and state officials having occasion to deal with it, including the Public Service Commission, have recognized and treated it as a public service corporation. Moreover, a like service furnished by electric power, heat, and light companies is of such a public nature as warrants the bestowal upon them of the power of eminent domain. *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L.R.A. (N.S.) 602, 73 S. E. 86.

Furthermore, the power company involved here falls within the express language of the West Virginia Public Service Commission Act, chapter 150, Code. Section 3 (§ 638) provides: "The jurisdiction of the Commission shall extend to and include: . . . (c) Gas companies, electric lighting companies and municipalities furnishing gas or electricity for lighting, heating or power purposes; and (d) hydro-electric companies for the generation and transmission of light, heat or power. . . . The words 'public service corporation' used in this act shall include all persons, . . . firms, corporations, municipalities and agencies engaged or employed in any business herein enumerated, or in any other public service business whether above enumerated or not, whether incorporated or not."

There can be no doubt that the power company is a public service corporation within the scope of that act. *Wingrove v. Public Service Commission*, 74 W. Va. 190, L.R.A.1918A, 210, 81 S. E. 734.

But protestants raise the further jurisdictional question that, granting certain phases of applicant's business to be public in nature, such as the service rendered to domestic consumers and traction companies, the furnishing of electric current to industrial concerns to be used by them for private profit is not of such a public character as to subject such service to regulation by the Commission. They contend that

such service is purely a matter of private concern, to be regulated by individual contract between the power company and the management of the industrial enterprise, and that, if the legislature did include that phase of applicant's business within the scope of the Public Service Commission Act, it had no constitutional authority to exercise its regulatory power with respect thereto. This question is not argued at length by protestants, nor do they cite authority on the point. But the particular facts of the case do not necessitate an extensive consideration of the constitutional question involved, for here the company, by its charter, has dedicated all of its activities to the service of the public and to regulation by it. When, through the years of its existence, it has subjected and still is subjecting itself voluntarily, in all phases of its business, "to the laws and regulations of the governmental power having jurisdiction in the place or places in which such business or businesses are conducted," does it lie with this court, or with those who have dealt with the company subsequent to its organization, to say that the extent of its public service is more limited than the company, through its recorded charter, admits it to be? It has never questioned the authority of the Public Service Commission to regulate all phases of its business, and when it thus dedicates itself unreservedly to the service of the public, it is hardly fitting that this court, or any minority of the public which it serves, should say that the company has overstepped its powers in subjecting itself to public regulation. It is generally the privilege of the dedicator of property or service to public use or regulation to determine, subject to the sanction of the unit of government under which it acts, the extent of that dedication. When such dedication has been made and has received official sanction, it is conclusive against an attack of this

Public service corporation—what is hydro-electric company.

—public service  
 —furnishing  
 electricity.

nature. The converse of this situation is presented in the decision rendered to-day in *Clarksburg Light & Heat Co. v. Public Service Commission*, — W. Va. —, P.U.R.1920A, 639, 100 S. E. 551, in which the question was squarely presented whether the service of natural gas, the supply of which is limited by nature, to industrial concerns, to be used by them for private profit, is or is not of such a public character as to subject such service to regulation by the Commission.

With respect to the second point raised by protestants, we concur in their conclusion that the business of the power company is interstate

Commerce—  
transportation  
of electricity.

commerce, but cannot agree that the

Public Service Commission, therefore, has no jurisdiction in the premises. No longer can there be any doubt that the transportation or transmission of electric current from state to state, through appropriate instrumentalities, is commerce between the states. *West v. Kansas Natural Gas Co.* 221 U. S. 229, 55 L. ed. 716, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564; *Pipe Line Cases* (*United States v. Ohio Oil Co.*) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438; *Pennsylvania Gas Co. v. Public Service Commission*, 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260. But the more difficult question arises when it becomes necessary to determine at what point the shipment loses its interstate character and becomes merged with the general property of the state, and fully subject to exclusive regulation by that state. In the present case the power used by West Virginia consumers is generated in Virginia, transmitted across the state line by high-tension wires to substations in this state, where the voltage is reduced to commercial form, and thence distributed to the various consumers using such power. There is no break in the es-

sential unity of the transaction—the interposition of no intermediary which would change the essential character thereof. There is no cessation or break in the force of the current; merely a change in its form, that it may be available for use according to the needs of the consumers.

It is settled beyond all doubt by repeated decisions of the Supreme Court of the United States that it is the essential character of the commerce which determines whether it is interstate or intrastate. *Western Oil Ref. Co. v. Lipscomb*, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623. There an Indiana corporation, for the purpose of filling orders taken by its salesmen in Tennessee, shipped into that state a tank car of oil billed to the shipper to a point in Tennessee where part of the orders were filled, and thence rebilled to the shipper to another point in that state where the remaining orders were filled. It was held that the movement of the goods to the first point and its continuance thence to the second, the second shipment being between points within the state, were connected parts of a continuing interstate commerce movement, when considered in its entirety. The place of the rebilling was termed a "temporary step en route."

So it has been held that a telegram forwarded by the stock exchange in New York City to a telegraph company in Boston, with the intention that the latter should transmit it to selected brokers in that city, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices. *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438. The continuity of the transaction was not broken by the translation of the code message into English, and its transmission, thus translated, to tickers in the offices

of the approved brokers. As said by Justice Holmes in that case: "If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages."

In this case the transmission from hydro-electric generators in Virginia to consumers in West Virginia was as expeditious and continuous as science could make it. So far as these appellant coal companies are concerned, this is not a case where the current transported into West Virginia is sold to independent distributing companies for resale to local consumers, as was the situation in *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, but a direct transmission from seller to buyer, with an incidental and temporary stop en route for the purpose of transformation into a commercial voltage. As held in the case last cited, the interposition of such independent local distributing companies breaks the chain of interstate commerce. Nor is there present any evidence indicating a storage of the current in this state for later distribution to consumers, which might, though we do not decide the question, require us to hold that the interstate commerce feature of the transmission terminated at the place of storage.

We are not unmindful that the court of appeals of Maryland, in a recent decision (*West Virginia & M. Gas Co. v. Towers*, — Md. —, P.U.R.1919D, 332, 106 Atl. 265), has held that where gas is transported from West Virginia to Maryland in high-pressure mains, and at various points in the latter state reduced to a lower pressure for local consumption, such reduction terminates the interstate commerce portion of the transportation. At the time that opinion was written the Supreme Court of the United States had not yet decided the case of *Public Utilities Commission v. Landon*, supra. We are, therefore,

not disposed to adopt the conclusion reached in the *Towers* Case, but rather to follow what we understand to be the rule laid down in *Public Utilities Commission v. Landon*, supra, and *Pennsylvania Gas Co. v. Public Service Commission*, 225 N. Y. 397, 122 N. E. 260, affirming 184 App. Div. 556, P.U.R.1919A, 372, 171 N. Y. Supp. 1028, namely, that the transportation or transmission of such commodities as gas or electricity across state lines, direct from seller to consumer, for immediate or practically immediate use, remains interstate commerce until the commodity has reached its goal, unless theretofore sold to independent distributing companies for resale to local consumers, or, possibly, unless stored in the state of distribution for a period of such length that it can fairly be said to have lost its original character and to have become merged with the general property of the state.

But, though interstate commerce is involved, the state is not necessarily deprived of the right to regulate and supervise under its police power. That which is attempted here is the regulation of the rates at which electric power, produced in Virginia, shall be sold in West Virginia. It is settled law that the police power of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of the public health, morals, and safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; *Chicago & A. R. Co. v. Transbarger*, 238 U. S. 67, 77, 59 L. ed. 1204, 1211, 35 Sup. Ct. Rep. 678. And it is clear that the regulation of the rates of public utilities is for

—stopping to change voltage.

Constitutional law—what is police power.



the public convenience and general welfare, and hence a proper exercise of the police power of the state. *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *Virginia-Western Power Co. v. Com.* — Va. —, — A.L.R. —, P.U.R.1919E, 766, 99 S. E. 723. See also *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

But not every exercise of the police power affecting interstate commerce is valid. No direct or undue burden may be imposed.

Since the clarifying opinion of the United States Supreme Court in the *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, much of the vagueness and ambiguity as to the respective powers of state and Federal governments over interstate commerce have been removed. At page 399 of the opinion in 230 U. S., the court says: "It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

Again at page 402 of 230 U. S., it is said: "But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitu-

tional grant an intention that they should go uncontrolled pending Federal intervention. . . . Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."

Congress has never asserted its paramount power over interstate transmission of electric power; hence it only remains to consider whether the regulation of rates at which electric current shall be sold is essentially local, or of such national importance as to require a general system or uniformity of regulation. The vital distinction should be noted between regulation of rates of transportation, and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance, requiring uniformity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject-matter, conflicting state regulations respecting rates ordinarily would result in discord and chaos. There are instances, however, where even in such cases the regulatory power of the state has been sustained. *Port Richmond & B. P. Ferry Co. v. Hudson County*, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821. See also *Shrader v.*

Commerce—  
police power of  
the state—  
validity of  
exercise.

—exclusiveness  
of Federal  
power.

—power of state.

Steubenville, E. L. & B. Valley Trac-tion Co. — W. Va. —, P.U.R.1919D, 895, 99 S. E. 207.

In fixing the rates of sale, how-ever, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was one owed both to citizens of Virginia and to the public in this state. But the two duties do not overlap, as they do where rates of transporta-tion are concerned. The price at which a commodity is sold is essen-tially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the community. So long as the rate fixed is not discriminatory or confiscatory, but yields a fair re-turn upon the valuation of the prop-erty, it throws no burden upon citizens of other communities or states. As said in *Pennsylvania Gas Co. v. Public Service Commis-sion*, 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260, respecting the regulation of the sale of gas im-ported from another state: "It is idle to speak of the need of uni-formity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are in-adequate in another. The local needs are best known to local agen-cies of government. No central au-thority, acting for the nation as a whole, will readily discern them."

—regulation of electric rates.

A similar conclusion was reached in *Manufacturers' Light & Heat Co. v. Ott* (D. C.) 215 Fed. 940. The local regulation stands until Con-gress occupies the field. But protestants further claim that their rates are fixed by con-tracts entered into prior to the pas-sage of the Public Service Commis-sion Act, and any interference with such contracts would impair the ob-ligations thereof and deprive peti-

tioners of their property without due process of law. Even as to this point we are unable to concur in their contention. Pursuant to its police power, the state, through its legislature, bestowed upon the Pub-lic Service Commission in § 5, chap. 150, Code (§ 640), power to "change any intrastate rate, charge or toll which is unjust or unreason-able and may prescribe such rate, fare, charge or toll as would be just and reasonable, and change or pro-hibit any practice, device or method of service in order to prevent undue discrimination or favoritism as be-tween persons, localities or classes of freight."

In addition, § 22 (Code Supp. 1918, § 656a) empowers the Com-mission to "enforce, originate, es-tablish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all pub-lic service corporations, . . . and whenever the Commission shall, aft-er hearing, find any existing rates, tolls, . . . unjust, unreasonable, *insufficient* or unjustly discrimina-tory or otherwise in violation of any of the provisions of this act, the Commission shall by an order fix rea-sonable rates . . . to be followed in the future in lieu of those found to be unjust, unreasonable, *insuf-ficient*. . . ." (Italics ours.)

Clearly these sections bestow up-on the Commission authority to change rates that are unjust, unrea-sonable, or *insufficient*, as it has found these rates to be, unless bound by the contracts previously entered into between applicant and protestants.

If the point were not so seriously pressed, it would be thought un-necessary to enter into any extended discussion of the question. In *Manigault v. Springs*, 199 U.S. 478, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127, the court said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal,

or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

In *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77, 59 L. ed. 1204, 1210, 1211, 35 Sup. Ct. Rep. 682, it is said: "It is established by repeated decisions of this court that neither of these provisions [the contract and due process clauses] of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. . . . And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety."

We have held in the case of *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 88 S. E. 295, that the rate-making power is an incident of the police power of the state, and may be exercised without impairing the obligation of contracts, or

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depriving of property without due process of law, within the meaning of the Federal and state Constitutions. Is it not proper that it be so? Surely it is in the interest of public convenience and of the general welfare that rates of public utilities be subject to regulation, both as a protection against extortionate charges and at the same time for the pur-

pose of safeguarding to a utility so restricted a reasonable return upon its investment. It must, of course, be recognized that a peculiar sanctity inheres in contracts entered into between parties competent to contract, and that the obligations thereby imposed will not lightly be disturbed. But the same policy that forbids to a utility total freedom of action likewise limits the extent to which contracts with a utility will be recognized when the public need necessitates a partial or total annulment. The duty of the utility to subordinate its right of control over rates in the interest of the public welfare is balanced by a corresponding duty on the part of individuals contracting with such utility to subordinate their rights of contract to the same public welfare. The police power of the state is impartial between utility and contractors, requiring both to surrender rights for the general weal. The public need to preserve the utility in strong financial condition, in order that it may better serve, is frequently as important as the need to guard the public against extortion. The right of the utility to protection must not be permitted to grow dim, in the presence of that other and more popular right of exercising a control over its functions. Both subserve the same public purpose. From the findings of the Commission, showing the unfavorable financial condition of the power company, it is apparent that the public interest will be better served by permitting a fair return on the property valuation over and above ordinary expenses, than by requiring the company to serve without return, to the possible ruin of those who have invested therein, and to the discouragement of others from embarking upon similar enterprises.

A case quite analogous to this was recently decided in *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 248 U. S. 372, 63 L. ed. 309, — A.L.R. —, 39 Sup. Ct. Rep. 117, affirming 145 Ga. 658, 89 S. E. 779. There the state of Georgia, through

its Railroad Commission, fixed reasonable rates to be charged by a utility for supplying electricity to the inhabitants of a city, which superseded lower rates agreed upon in an existing time contract made previously between the company and a consumer. That result, however, was held to be a legitimate effect of a valid exercise of the police power, not impairing the obligation of contract or depriving the consumer of property without due process of law. See also *Portland R. Light & P. Co. v. Railroad Commission*, 229 U. S. 397, 412, 57 L. ed. 1248, 1258, 33 Sup. Ct. Rep. 820; *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 591, 80 S. E. 931; *Baltimore & O. R. Co. v. Public Service Commission*, 81 W. Va. 457, L.R.A.1918D, 268, 94 S. E. 545; *Raymond Lumber Co. v. Raymond Light & Water Co.* 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 133; note to *Pinney & B. Co. v. Los Angeles Gas & E. Corp.* L.R.A.1915C, 282.

But it is said the contracts in this case were entered into before the Public Service Commission Act was enacted, and, therefore, are on a different and higher plane than those of subsequent date. To adopt such a holding would be to permit private contracts to dispossess the state of a portion of its police power, where the statute enacted pursuant to that power was subsequent to such contracts. That would result in discrimination of the worst type, when the service rendered by a utility required law to be without discrimination. The Commission might authorize a rate which, according to its estimate, would yield a reasonable return, but those who were so fortunate as to possess contracts with the utility would be entirely without the scope of such order, and would pay for the service at a rate lower than is paid by those subject to the Commission's order. The resulting difference between the estimated and actual yield would necessarily be made up by a still higher rate to

be paid by those not holding such contracts. In other words, the effect would be to recognize the contract action of individuals as of superior dignity to the police power of the state, a result tantamount to a denial of sovereignty in the state in the exercise of one of its most sacred and sovereign powers. Such an argument is untenable. *Benwood v. Public Service Commission*, supra, where the franchise agreement involved was entered into prior to the enactment of the Public Service Commission Act; *Shrader v. Steubenville, E. L. & B. Valley Traction Co.* — W. Va. —, P.U.R.1919D, 895, 99 S. E. 207; *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158.

There is presented here no question involving the capacity of the state to contract away its right to the proper exercise of its police power, such as was presented in *Interurban R. & Terminal Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831, and *Virginia-Western Power Co. v. Com.* — Va. —, — A.L.R. —, P.U.R.1919E, 766, 99 S. E. 723. Nor is any such question raised as was before the Supreme Court of the United States in *Columbus R. Power & Light Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 660, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 849, recently decided.

The last ground upon which protestants attack the order of the Commission is that the rates allowed are unreasonable. The Commission found as a fact that the fair value of the power company's investment as a rate base, upon which it was entitled to earn a reasonable return, as of September 30, 1918, was approximately \$9,860,000. It further found that the company had not earned during any year of its history, a return sufficient to pay its fixed charges and to enable it to set aside a fund to cover accrued depreciation, and that the operations of the company since it commenced business had resulted, as of September 30, 1918, in a deficit something in

excess of \$1,000,000. Under the rates allowed by the Commission it is estimated that the company will be enabled "to pay its operating expenses, and in addition thereto earn a net return of approximately 8 per cent upon the value of its investment." There being evidence to support this finding, it will not be reviewed by this court. Norfolk &

Public service  
commission—  
finding of facts—  
review.

W. R. Co. v. Public Service Commission, 82 W. Va. 408, — A.L.R. —, P.U.R.1918E, 737, 96 S. E. 62. The general subject of the conclusiveness of orders of the Public Service Commission in this court is more fully discussed in *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 582, 583, 80 S. E. 931.

For the reasons stated, we affirm the order of the Commission.

### ANNOTATION.

#### State regulation of rates to consumers of gas or electricity transported across state lines for light or power purposes.

The present annotation is confined, in the main, to a treatment of the question of the right of a state to regulate the rates charged to consumers by companies transporting gas or electricity to or from such state, as distinguished from its right to exercise its police power or other sovereign rights over companies so engaged, with respect to the right so to import or export such commodities, and to regulate rates of transportation, etc. Illustration of the class of cases thus excluded is afforded by *West v. Kansas Natural Gas Co.* (1911) 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 81 Sup. Ct. Rep. 564, which is cited in the reported case (*MILL CREEK COAL & COKE Co. v. PUBLIC SERVICE COMMISSION*, ante, 1081), and which involved the question of the right of a state to forbid the exportation of natural gas.

It seems to be well settled that the transportation itself from one state to another of electricity (*Washington Water Power Co. v. Montana Power Co.* (Idaho) P.U.R.1916E, 144; *Re Appalachian Power Co.* (W. Va.) P.U.R.1916D, 286; *MILL CREEK COAL & COKE Co. v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 1081) and natural gas, when reduced to possession (*Public Utilities Commission v. Landon* (1919) 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, decree modified on another point in (1919) 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. Rep. 389; *State ex rel. Casster v. Flannelly* (1915) 96 Kan. 372,

P.U.R.1916C, 810, 152 Pac. 22; *West Virginia & M. Gas Co. v. Towers* (1919) — Md. —, P.U.R.1919D, 332, 106 Atl. 265; *Pennsylvania Gas Co. v. Public Service Commission* (1919) 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260 (judgment entered pursuant to mandate affirmed by the United States Supreme Court in [U. S. Adv. Ops. 1919-20, p. 306] — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. —); *Traders & Labor Council v. Fayette County Gas Co.* (Pa.) P.U.R.1918B, 165), is "commerce" between the states, within the meaning of the commerce clause of the Federal Constitution.

And while a company transporting natural gas from one state to another may sell and deliver the gas so transported to local distributing companies, free from unreasonable interference by the state (*Public Utilities Commission v. Landon* (U. S.) supra), it has been held that the sale and delivery of gas to customers at burner tips, by local distributing companies operating under special franchises, and the payment of two thirds of the receipts to the gas company furnishing the same through interstate pipe lines, do not constitute any part of interstate commerce and the interstate operator cannot complain of state regulation of the local rates as confiscatory and unduly burdensome on interstate commerce, under the 14th Amendment, neither the operation of the local company under special franchise, nor the payment of a definite percentage of the product of their sales, being an

integral part of the interstate business of the company furnishing the gas from another state (*ibid.*, reversing on this point (1916) P.U.R.1917A, 120, 234 Fed. 152; (1917) P.U.R.1918A, 31, 242 Fed. 658; and (1917) 245 Fed. 950).

And it has been held that the fixing by the state where sold, of rates of sale for gas and electricity transported from another state, as distinguished from rates of transportation, is a matter which affects chiefly those in the community where it is sold, and that, so far as it is neither discriminatory nor confiscatory, it throws no burden upon the citizens of the producing state, and is not an unlawful regulation of interstate commerce. *Washington Water Power Co. v. Montana Power Co.* (Idaho) P.U.R.1916E, 144; *Pennsylvania Gas Co. v. Public Service Commission* (1919) 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260; *Traders & Labor Council v. Fayette County Gas Co.* (Pa.) P.U.R.1918B, 165; *MILL CREEK COAL & COKE CO. v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 1081. In the *Washington Water Power Co. Case*, the Idaho Utilities Commission, in ruling that the interstate distribution of electricity transmitted from another state was not interstate commerce so that state regulation thereof was valid, at least in the absence of the actual taking of control by Congress, said: "The Commission assumes that such transmission of electrical energy is a transaction of interstate commerce, but it does not follow therefrom that the distribution of such energy within the state of Idaho is a transaction of interstate commerce, although the regulation of such distribution may affect interstate commerce. The electrical energy which, after having been delivered to the distributor, is being distributed in Idaho to the users, has ceased to be an article of trade between Montana and Idaho, regardless of whether the distributor is or is not the transmitter. The electrical energy purchased in Montana and transmitted in bulk into Idaho is a subject of interstate commerce while it retains that character. The act of breaking up this energy by its owner for the pur-

pose of distribution is not commerce in and of itself, but the sale of the broken-up energy, or the resale of the energy in its original form, is commerce, and, if such sale or resale is wholly within the state of Idaho, it is not interstate commerce. In the absence of any discrimination against electrical energy generated in or transmitted from another state, and in the absence of any action by Congress indicating that Federal supervision has been assumed, this Commission cannot see how the impartial state regulation of the distribution of such energy within the state can be repugnant to the provisions of the Federal Constitution, as affecting interstate commerce in any essential or vital part, or as preventing or unreasonably burdening interstate commerce. The local distribution of electrical energy is peculiarly a subject of local concern, and is not a subject requiring uniformity of regulation as between states; and this Commission believes that the state has a right to enact reasonable laws governing such distribution within its borders, in the absence of Federal control. Whenever Congress shall act so as to place the matter under exclusive Federal control, the state, under the provisions of § 79 of the Public Utilities Act, at once surrenders its right to regulate. The Commission assumes that Congress has not so acted. To hold that electrical energy generated in Montana, or transmitted from Montana, can by reason of that fact be distributed in Idaho for compensation without regulation, while the local distribution of electrical energy generated in Idaho is subjected to regulation, would be contrary to public policy. . . . If a distributor of electrical energy could, by reason of having his generating station located without the state, without state regulation, enter a field located within the state of Idaho, adequately served by an electrical corporation having its entire plant located within the state of Idaho, and operating under a schedule of reasonable rates and under rules and regulations prescribed by the state, in competition with such electrical corporation, such unregu-

lated distributor could, if possessed of sufficient financial resources, destroy the investment of the electrical corporation subject to state control, unless the state should give up the exercise of its right to regulate such electrical corporation, and thus open the field to unregulated and 'cutthroat' competition,—a condition which bitter experience has taught the people of Idaho is economically unsound, and not desired. If the state of Idaho cannot regulate the local distribution in Idaho carried on by the competitor, a portion of whose generating and transmission system happens to be located beyond the boundary line of the state, it would, in order to do justice to the competitor whose plant happens to be located wholly within the state, and in order not to hamper the development of the material resources of the state, be compelled to give up its right to regulate electrical corporations, which would operate to deprive the state of its right to so regulate under its police power in the interest of the welfare of its people." And in *Pennsylvania Gas Co. v. Public Service Commission* (1919) 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260 (judgment entered pursuant to mandate affirmed by the United States Supreme Court in [U. S. Ads. Ops. 1919-20, p. 306] — U. S. —, 64 L. ed. —, 40 Sup. Ct. Rep. —), the court of appeals affirmed (1918) 184 App. Div. 556, which held that, in the absence of congressional action, a state may regulate the price of natural gas imported from another state, and sold within its borders, and reversed (1918) 103 Misc. 37, P.U.R.1918D, 501, 169 N. Y. Supp. 820, where the court held that the state Commission had no power to regulate the rates in question because the sales made by the company constituted interstate commerce, in consequence of which regulation of the rates would be in the nature of a burden or restriction, even though no discrimination existed, and irrespective of whether or not Congress had legislated on the subject, and granted a writ of prohibition directed to the New York State Public Service Commission, second district, restraining the fixing of rates under

a decision by it (*Davis v. Pennsylvania Gas Co.* (1917; N. Y. 2d Dist.) P.U.R.1917F, 611), to the effect that the fact that the natural gas in question was brought from Pennsylvania did not, in the absence of congressional action, deprive the Commission of jurisdiction to fix a proper rate to be charged therefor. The court of appeals again distinguished between state regulation of the price of gas transported from another state, and regulation of the rates of such transportation, saying: "We deal here with a different situation [from regulation of transportation rates]. There is here no regulation of transportation. . . . There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. . . . The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage, or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one's else. The power may be displaced; but, until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas, and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local. . . . It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No

central authority, acting for the nation as a whole, will readily discern them. The case comes, then, to this: We have a sale of a single commodity. We have a pre-existing duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please. . . . The local regulation stands until Congress occupies the field."

And the rule that the sale of imported natural gas is no part of interstate commerce, and, therefore, that such distribution is subject to state regulation, would seem to be especially applicable where the gas has lost its interstate character by being mingled with gas produced locally. For instance, in *State ex rel. Caster v. Flannelly* (1915) 96 Kan. 372, P.U.R. 1916C, 810, 152 Pac. 22, it was expressly held that it was no part of interstate commerce to sell natural gas to the consumers thereof in Kansas, where the gas sold was produced in both Kansas and Oklahoma, and that produced in Oklahoma, after being conveyed to Kansas, was so commingled in the pipe lines carrying the same, with the gas produced in Kansas, that it was impossible to separate or distinguish the two. In other words, the imported gas had become so mixed with the common mass of property in the state that it had, under the "original package" doctrine, become subject to state legislation. And a similar conclusion was reached in *Manufacturers' Light & Heat Co. v. Ott* (1914) 215 Fed. 940, where, in holding that a West Virginia regulation fixing a reasonable price to be charged by a gas company doing business in three states for the natural gas furnished by it to consumers in West Virginia, was not an unlawful regulation of interstate commerce, notwithstanding the fact that some of

the gas came from other states, especially so long as Congress had not enacted any controlling legislation, Woods, Circuit Judge, said: "We are unable to agree that the fixing of the rates to be charged by complainants to their customers in West Virginia is an unlawful regulation of interstate commerce. The regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the Interstate Commerce Statute. Neither the West Virginia statute, nor the orders of the Commission, purport to interfere in any manner with the transportation of natural gas from West Virginia to other states. Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia to be charged by corporations operating in West Virginia, under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania, in pumping gas into a common system of pipes supplying customers in the three states, may produce the result that some gas from Ohio and Pennsylvania comes into West Virginia, although it is undisputed that a much larger quantity of gas goes out of West Virginia into Ohio and Pennsylvania than can possibly come in from these states. But this interflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs, cannot affect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. . . . It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well-known rule the court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public service corporation is within the



police power of the state until the Congress sees fit to act." And see to the same effect, *Traders & Labor Council v. Fayette County Gas Co.* (Pa.) P.U.R.1918B, 165, which involved the question of the right of a state to regulate the rates charged for gas, a part of which was imported from another state. However, the Supreme Court of the United States has held that the interstate commerce, arising from the transporting of natural gas procured in one state, to another state for sale, is not affected by the fact that a small amount of domestic natural gas is inseparably mingled with it in the latter state, and, consequently, that the transporting company can complain of a confiscatory rate therefor fixed by a state Commission, as violative of the commerce clause of the Federal Constitution. *Landon v. Public Utilities Commission* (1916) P.U.R.1917A, 120, 234 Fed. 152; *Landon v. Public Utilities Commission* (1917) P.U.R.1918A, 31, 242 Fed. 658, both of which were reversed on other grounds in (1919) 249 U. S. 236, 63 L. ed. 577, P.U.R. 1919C, 834, 39 Sup. Ct. Rep. 268, the decree in which was vacated and the judgment modified on another point in (1919) 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. Rep. 389. Nor is the interstate character of the transportation affected by the fact that the gas is stored in the state to which it has been transported, where such storing is merely a necessary incident to its proper and efficient transportation. *Landon v. Public Utilities Commission* (1917) 245 Fed. 950, reversed on other grounds in (1919) 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, the decree in which was vacated and the judgment modified on another point in (1919) 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. Rep. 389. But the Maryland court of appeals, in applying the "original package" doctrine to the importing and selling of natural gas, has held that where the gas was transported under such pressure that it had to pass through regulators so as to reduce the pressure and permit domestic consumption, and pass through pipes in streets under permission from local

authorities, as well as pipes owned by the ultimate consumer, such delivery constituted such a breaking of the original package as to make the service rates subject to state regulation. *West Virginia & M. Gas Co. v. Towers* (1919) — Md. —, P.U.R.1919D, 332, 106 Atl. 265. The court seems to have based its conclusion upon grounds somewhat at odds with the *Landon* Case. Among other things, it said: "In determining the question whether the gas here involved was sold by the defendant corporations in the original package or form in which it was transported into this state, we must consider the effect upon it when it leaves the main line of its travel and enters into the intermediate lines for sale and distribution, and whether, thereafter, it is national in its nature. It is admitted that at such time its pressure is reduced, and it is reduced because the pressure in the main pipe is too high for service to the consumers. At this point it is separated from the other gas in the main pipe and forced into the intermediate lines, from whence it cannot return to the main line, but remains in such intermediate pipe lines to be consumed when needed. Whether the gas is separated from the general bulk of gas and confined in the intermediate pipe lines, where it cannot return to the main pipe line, and where it must remain until consumed, or whether it is so separated and stored in tanks awaiting consumption, the effect is the same, in our opinion, in determining the question whether the original package has been broken and the gas mixed with the common mass of property in this state. There may be a constant movement of the molecules of the gas, but we do not see how this movement, because of the peculiar properties of the article, can affect the question to be determined. It also, before reaching the consumer, has to pass not only through pipes laid in the streets of the towns or villages, which is done under rights acquired from local authorities, but through pipes belonging to the owner of the premises upon which the gas is consumed. These facts all aid in charac-

terizing the transaction as being of a local, and not of a national, nature. The gas when it leaves the main lines, where it is separated from the bulk of gas in such lines and forced into the intermediate lines and the pipes of the individual consumers, where it cannot return to the main line, and where it remains until used, is, we think, such a breaking of the original package as to remove it from interstate commerce and to make it subject to state legislation, and consequently a subject of regulation by the Public Service Commission of this state, in respect to the powers granted the Commission." It will also be remembered that this decision is criticized in the reported case (*MILL CREEK COAL & COKE CO. v. PUBLIC SERVICE COMMISSION*, ante, 1081). And in *Re Appalachian Power Co. (W. Va.)* P.U.R.1919D, 286, the West Virginia Public Service Commission held that it had power—at least, in the absence of congressional action—to regulate the rates charged by an electric company for current generated outside of the state, brought into the state at a high voltage, and therein transformed to lower voltages and transmitted by local distributing lines to its several customers. It also appeared in this case that a relatively small part of the current was generated within the state, but this fact evidently did not in any way influence the decision.

And even assuming that the sale of imported electricity or natural gas is interstate commerce, it has been held that it is subject to reasonable state control until Congress acts. *Manufacturers' Light & Heat Co. v. Ott* (1914) 215 Fed. 940; *Washington*

*Water Power Co. v. Montana Power Co. (Idaho)* P.U.R.1916E, 144; *State ex rel. Caster v. Flannelly* (1915) 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22. And see *Pennsylvania Gas Co. v. Public Service Commission* (1919) 225 N. Y. 897, P.U.R.1919C, 663, 122 N. E. 260 (judgment entered pursuant to mandate affirmed by the United States Supreme Court in [*U. S. Adv. Ops.* 1919-20, p. 306] — *U. S. —*, 64 L. ed. —, 40 Sup. Ct. Rep. —), affirming (1918) 184 App. Div. 556, P.U.R. 1919A, 372, 171 N. Y. Supp. 1028, which reversed (1918) 103 Misc. 37, P.U.R.1918D, 501, 169 N. Y. Supp. 820, as set out and quoted supra. See also *Trades & Labor Council v. Fayette County Gas Commission (Pa.)* P.U.R.1918B, 165. This is upon the theory that natural gas and electricity are characteristically and peculiarly local products, and that, being neither national in their nature nor admitting of one uniform system of regulation, they are not that kind of interstate commerce which requires exclusive legislation by Congress. See *State ex rel. Caster v. Flannelly* (1915) 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22, supra.

In *Washington Water Power Co. v. Montana Power Co. (Idaho)* P.U.R. 1916E, 144, the Idaho Public Utilities Commission expressly ruled that the fact that the transmission into that state of electrical energy for distribution to the public, for compensation, is subject to regulation by it, does not impose a burden on interstate commerce, although, under the Idaho statutes, mining companies may import electricity for their own use without regulation by the Commission.

G. J. C.

WILLIAM R. HARRIS, Impleaded, etc., Plff. in Err.,

v.

THOMAS KEEHN et al.

*New Mexico Supreme Court—September 24, 1919.*

(— N. M. —, 184 Pac. 527.)

**Landlord and tenant — right of dispossessed tenant.**

A tenant in possession under an unexpired lease, who has not abandoned the premises, although not upon them when entry thereon is made, has a

Headnotes by REYNOLDS, J.

right to the possession of said premises against the world, and may recover damages from one who disturbs or deprives him of such possession.

[See note on this question beginning on page 1103.]

**ERROR** to the District Court for Lincoln County (Richardson, J.) to review a judgment in favor of plaintiffs in a suit to recover damages for alleged conspiracy to deprive plaintiffs of the benefit of a lease to them from defendants Harper. *Affirmed.*

Statement by Reynolds, J.:

This case arose out of the following facts: The defendants in the court below, Monroe Harper and Mary Harper, were the owners of 160 acres of land known as the Bar Circle Z ranch in Lincoln county. On September 13, 1913, said defendants executed a five-year lease to the plaintiffs, Thomas Keehn and William Keehn, and the plaintiffs went into possession thereunder and remained in possession until December 1, 1913, or April, 1914; the exact date not being material for the purposes of this case. Some time in February or March, 1914, the two defendants, the Harpers, sold the ranch in question to Harris, the plaintiff in error herein, and gave him a warranty deed dated April 9, 1914, under which he took possession about that time. On August 25, 1914, plaintiffs began suit against the three defendants, the two Harpers and Harris, alleging in their second amended complaint a conspiracy to deprive them of their possession and various acts of the defendants the Harpers, and further alleging that they were evicted by the defendants as the result of this conspiracy. The plaintiffs claimed damages from the said three defendants in the sum of \$28,800.

The defendants the Harpers filed their answers; but, as neither of them joined in the writ of error sued out by the defendant Harris, it is not necessary to consider the case except as to the last-named defendant.

The demurrer of the defendant Harris to the second amended complaint was overruled, and the latter filed an amended answer which was in effect a general denial of the ma-

terial allegations of the second amended complaint.

The case was tried without a jury, and judgment was rendered for the plaintiffs against the two defendants, Mary S. Harper and William Harris, for the sum of \$2,000; the other defendant, Monroe Harper, having died prior to the rendition of the judgment.

At the request of the defendant Harris, the trial court found the facts as follows:

"(1) Said defendant requests the court to find as a matter of fact that the said defendant William R. Harris did not evict the plaintiffs from the premises covered by the lease involved.

"Answer: The court so finds in this case.

"(2) The defendant requests the court to find as a matter of fact that he, the said defendant, had no part and took no part in the acts of the defendants Harper, which the court has found amounted to an eviction of said plaintiffs.

"Answer: The court so finds in this case.

"(3) The said defendant requests the court to find as a matter of fact that, at the time this defendant took possession of said premises under the deed received by him of said Harpers, the plaintiffs had already abandoned said premises either by reason of the acts of said defendants Harper, or otherwise, and that this defendant took peaceable possession of said premises.

"Answer: The court so finds that the plaintiffs were not on the premises in question at the time the defendant Harris went into possession; that Harris took peaceable possession of the premises; and that the plaintiffs had not actually

abandoned the premises, but were not thereon when the defendant Harris went into possession.

"(4) The said defendant requests the court to find as a matter of fact that at the time this defendant took possession of said premises he did not have actual notice of the lease existing between the plaintiffs and the defendants Harper, but had only such constructive notice of same as was imparted by the record of said lease in the office of the county clerk of Lincoln, New Mexico.

"Answer: The court finds that the defendant Harris had both actual and constructive notice of the lease in question in this case at the time he took possession of the premises in question; that the constructive notice was imparted by the record of said lease in the office of the county clerk at Carrizozo, Lincoln county, New Mexico."

From the judgment of the trial court the defendant, Harris, sued out a writ of error to this court and assigned six errors which may all be included in the general assignment, that the court erred in rendering judgment against the defendant, Harris, contrary to the findings of fact.

Mr. R. D. Bowers for plaintiff in error.

Mr. G. B. Barber, for defendants in error:

An averment that the acts were done in pursuance of a conspiracy does not change the nature of the action or add anything to its legal force and effect. If the plaintiff fail in the proof of a conspiracy or concerted design, he may yet recover damages against such of the defendants as are shown to be guilty of the tort without such agreement.

Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Martin v. Leslie, 93 Ill. App. 44; Garing v. Fraser, 76 Me. 37; Boston v. Simmons, 150 Mass. 461, 6 L.R.A. 629, 15 Am. St. Rep. 230, 23 N. E. 210; Bush v. Sprague, 51 Mich. 41, 16 N. W. 222; Buffalo Lubricating Oil Co. v. Standard Oil Co. 42 Hun, 153.

The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it.

Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Hunt v. Simonds, 19 Mo. 588; First Nat. Bank v. Stephens, 19 Tex. Civ. App. 560, 47 S. W. 882; Clark v. Exchange Printing Co. 148 N. Y. 721, 42 N. E. 417; Fox v. Mackay, 123 Cal. 582, 56 Pac. 435; Bowman v. Lickey, 86 Mo. App. 47.

Where, although concert of action is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.

Hillman v. Newington, 57 Cal. 56; Mashburn v. Danneberg Co. 117 Ga. 567, 44 S. E. 97; Nordhaus v. Vandalia R. Co. 242 Ill. 166, 89 N. E. 974; Economy Light & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Kansas City v. Shagstrom, 53 Kan. 431, 36 Pac. 706; Osage City v. Larkin, 40 Kan. 206, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; Probst v. Hinesley, 133 Ky. 64, 117 S. W. 889; Corey v. Havener, 182 Mass. 250, 65 N. E. 69, 13 Am. Neg. Rep. 108; Berry v. St. Louis, M. & S. E. R. Co. 214 Mo. 593, 114 S. W. 27; Strauhal v. Asiatic S. S. Co. 48 Or. 100, 85 Pac. 230, 20 Am. Neg. Rep. 465.

Where a duly acknowledged lease is recorded in the proper county, it is notice to everybody of the existence of the lease, and a subsequent bona fide encumbrancer or purchaser takes subject to the lease, and is charged with notice of its existence.

Lewis v. Klotz, 39 La. Ann. 259, 1 So. 599; Reid v. Long Lake, 44 Misc. 370, 89 N. Y. Supp. 998; Westchester Trust Co. v. Hebbly Bottling Co. 102 App. Div. 464, 92 N. Y. Supp. 482.

Raynolds, J., delivered the opinion of the court:

As shown by the statement of facts, this is a suit to recover damages in tort against three defendants for conspiracy to deprive the plaintiffs of the benefit of a lease from the defendants Harper to the plaintiffs. The trial court found as a fact that the defendant Harris did not conspire with the other two defendants, nor did he take any part

in what the court found to be an eviction of the plaintiffs by the Harpers. The court further found that the defendant Harris took possession of the premises, and that the plaintiffs were not on the premises when such possession was taken. Under this state of the findings by the court, the plaintiff in error, Harris, contends that the court below erred in finding against him. No specific findings of fact were asked by the defendants in error in the court below, and none were made by the court, except in a short written opinion in which the court "finds that the ranch property did not produce the income annually as claimed by the plaintiffs," and further he "finds the issues in favor of the plaintiffs and fixes the damages at \$2,000, based upon the alfalfa crop, the apples, and the general crops grown on the place."

It will be noted that the court in the third finding found that the plaintiffs had not actually abandoned the premises, but were not thereon when the defendant went into possession, and in the fourth finding that the defendant Harris had actual and constructive notice of the lease from the Harpers to the plaintiffs at the time he took possession. It further appears from the transcript of the testimony that Harris admitted that the plaintiffs came upon the property and demanded possession from him on August 28, 1914, as is alleged in the plaintiffs' second amended complaint.

There also appears in plaintiffs' second amended complaint the allegation that the defendant Harris entered upon the plaintiffs' property without plaintiffs' consent. Counsel for defendants in error, plaintiffs below, argued in his brief that Harris became a joint tortfeasor together with the Harpers in evicting plaintiffs, and asks for an affirmance of the judgment below upon that ground. But the court specifically found that Harris did

not conspire in the eviction of the plaintiffs by the Harpers, nor did he have anything to do with the acts which the court below held amounted to an eviction of the plaintiffs. The decision below cannot be sustained upon that ground. The action, as stated before, is an action in tort, and the decision below may be sustained upon the ground of the well-known principle of law that a tenant in possession has the right to such possession against the world during the continuance of his lease and may maintain an action for damages for the disturbance or deprivation of such possession. *Jones, Land. & T.* § 349; 24 Cyc. 1056; Decen. Dig. subject "Landlord and Tenant," § 132, and cases cited. That the defendants in error could have sued Harris in ejectment to regain possession and for damages does not deprive them of the right to sue in tort for interference with their possession. The plaintiffs below might have also waived the tort and sued the defendant Harris on the lease of his grantors, the Harpers, under the well-known principle that a covenant of quiet enjoyment runs with the land and binds the transferee of the reversion. *Glidden v. Second Ave. Invest. Co.* L.R.A.1915C, 220, and cases cited. The plaintiffs chose to sue in tort for the disturbance of their possession. The complaint contains allegations of entry by the defendant Harris without right and refusal to vacate. The trial court found that the plaintiffs had not abandoned the premises at the time Harris entered, and that Harris had actual and constructive notice of the outstanding lease, and awarded damages against Harris on the basis as stated in his written opinion of the value of the outstanding leasehold estate in the plaintiffs of which they were deprived. The proof in the case sustained these allegations in the complaint, and although the court found that the defendant Harris had no part in the conspir-

acy or wrongful acts of the defendants Harper, he nevertheless held the defendant Harris liable for his entry and retention of the plaintiffs' outstanding leasehold. The decision of the lower court is sustained by the evidence and the findings, and its decision is the correct

Landlord and tenant—right of dispossessed tenant.

legal conclusion from the facts so found.

The decision of the lower court is therefore affirmed and it is so ordered.

Parker, Ch. J., and Roberts, J., concur.

Petition for rehearing denied October 24, 1919.

## ANNOTATION.

**Right of tenant to treat interference with his possession as an eviction and recover damages for loss of unexpired term.**

I. Liability of third person, 1103.

II. Liability of landlord, 1104.

III. Measure of damage:

a. Actual damage:

1. In general, 1105.
2. Business property, 1106.
3. Tenancy at will, 1109.

b. Exemplary damages, 1106.

I. Liability of third person.

As a general rule, a third person who wrongfully interferes with or disturbs a tenant in the possession or enjoyment of leased premises is liable in tort, or in case action, for the injury resulting to the latter therefrom, and where such interference constitutes an eviction, actual or constructive, a tenant may abandon the premises and hold the wrongdoer for his damage, based upon his loss of the unexpired term.

United States.—American Ice Co. v. Poconto Spring Water Ice Co. (1910) 105 C. C. A. 625, 183 Fed. 193; Boston Elev. R. Co. v. Paul Boyton Co. (1914) 128 C. C. A. 338, 211 Fed. 812, writ of certiorari denied in (1915) 238 U. S. 618, 59 L. ed. 1492, 35 Sup. Ct. Rep. 418.

Alabama.—Catterlin v. Spinks (1849) 16 Ala. 467.

Arkansas.—Crane v. Patton (1893) 57 Ark. 340, 21 S. W. 466.

Georgia.—Bass v. West (1900) 110 Ga. 698, 36 S. E. 244; Daniel v. Perkins Logging Co. (1911) 9 Ga. App. 842, 72 S. E. 488.

Illinois.—Sanborn v. Marquette Bldg. Co. (1899) 86 Ill. App. 681.

New Mexico.—HARRIS v. KEEHN (reported herewith) ante, 1099.

New York.—Snow v. Pulitzer (1894) 142 N. Y. 263, 36 N. E. 1059.

Oregon.—Zellig v. Blue Point Oyster Co. (1912) 61 Or. 541, 118 Pac. 852, 122 Pac. 756.

Pennsylvania.—Behrens v. Mounts (1908) 37 Pa. Super. Ct. 326.

In Daniel v. Perkins Logging Co. (Ga.) supra, the rule is stated that where an intruder illegally interferes with or evicts a tenant, the tenant can recover the rental value of the premises for the remainder of the term.

In Boston Elev. R. Co. v. Paul Boyton Co. (1914) 128 C. C. A. 338, 211 Fed. 812, certiorari denied in (1915) 238 U. S. 618, 59 L. ed. 1492, 35 Sup. Ct. Rep. 418, after pointing out that a declaration in tort in an action against a third person to recover damage for the unlawful eviction of the plaintiff from leased premises is not to be regarded as based wholly on the injury to the plaintiff's possession involved in a direct, momentary, unlawful entry upon the premises, the court said: "Not merely the defendant's unlawful entry, but also its assumption and maintenance of possession, its eviction of the plaintiff thereby, and the subsequent continued exclusion of the plaintiff are complained of. For such an unlawful expulsion of the plaintiff from possession as tenant, followed by continued exclusion from such possession and resulting in consequential damage to the plaintiff, we see no reason to believe that an action on the case would not be a proper remedy; notwithstanding that on the same facts trespass q. c. f. might have been

brought, or an action of contract upon the covenants in the lease. Instances are not wanting wherein such actions in tort for consequential damages, by tenant against landlord, and based upon unlawful eviction or exclusion during the term of the lease, have been sustained, without regard to the rules applying when the injury to be redressed is a mere momentary invasion of the plaintiff's possession and the action therefore strictly one of trespass *q. c. f.* . . . We find no controlling authority and no controlling reason in principle which obliges us to hold that unless it sues on the covenants in its lease, or first resorts to a real action for recovery of its possession, it is debarred from recovering indemnity for its loss of that right to use and occupy the premises during the remainder of the term, upon which it was entitled to rely. We find no conclusive reason why it may not treat the landlord's entry and subsequent occupation as having terminated the lease, and, if the termination was wrongful, obtain indemnity in an action of tort. We therefore overrule those exceptions which complain of refusals to instruct that the declaration stated no cause of action in case, that there could be no recovery in tort without proof of injury to the reversion and that there was no evidence of such injury. As will appear, other exceptions to instructions given or refused upon the subject of damages must be, for similar reasons, disposed of in the same manner."

In *Catterlin v. Spinks* (Ala.) *supra*, it is held that where a third person takes possession of the leased premises under circumstances that make him a trespasser, the lessee may elect to surrender the unexpired term to the trespasser and maintain assumpsit against him for the value of the use and occupation of the premises. In *Bass v. West* (Ga.) *supra*, an adjoining landowner was held liable to a tenant for loss to the latter, by being compelled to vacate the leased premises, due to excavations made by the former upon his land, which rendered unsafe the buildings occupied by the tenant. And in *Snow v. Pulitzer* (N.

Y.) *supra*, the facts were that a tenant of a suite of offices in a business block was compelled to vacate because of the act of the purchaser of the block in removing a stairway and an adjoining supporting wall. Under these circumstances the latter was held liable to the tenant for his eviction.

In *Crane v. Patton* (Ark.) *supra*, the lessee of land with the right to remove timber therefrom is held entitled to recover from a subsequent purchaser of the land his damage, where the latter prevented him from removing timber.

In *American Ice Co. v. Pocono Spring Water Ice Co.* (Fed.) *supra*, the action was against the lessor and third persons, and one of the items of damage it was sought to recover for was the loss of the value of the unexpired portion of the term. This claim was held to have been properly disallowed in the absence of any evidence of fraud on the part of the lessor. The court, however, pointed out that if any of the defendants were guilty of fraud the lessee had a remedy against them to recover damages based upon the fraud. In the instant case the action was to recover damages for breach of covenant for quiet enjoyment. Hence, the case as to the form of action is not within the scope of the note.

## II. Liability of landlord.

It is to be observed that the question what amounts to a constructive eviction by the landlord is not within the scope of this note, except so far as it arises in connection with an attempt by the tenant to recover damages for loss of unexpired term.

It is also the rule that where a landlord interferes with the possession and enjoyment of the premises by his tenant, the latter may recover, in an action in tort or case, the loss resulting to him from such interference. And where the interference amounts to actual or constructive eviction of the tenant, he may abandon the premises and recover as his damage compensation for the loss resulting to him,

based upon the unexpired term of the lease.

Arkansas.—Reeves v. Romines (1918) 132 Ark. 599, 201 S. W. 322.

Illinois.—Chapman v. Kirby (1868) 49 Ill. 211.

Maine.—Brown v. Linn Woolen Co. (1915) 114 Me. 266, 95 Atl. 1037.

Massachusetts.—Ashley v. Warner (1858) 11 Gray, 43; Kostopoulos v. Pezzetti (1911) 207 Mass. 277, 98 N. E. 571, Ann. Cas. 1912A, 359.

Michigan.—Allison v. Chandler (1863) 11 Mich. 542.

Missouri.—Straael v. Lubeley (1914) 186 Mo. App. 638, 172 S. W. 434.

New York.—Elias v. Hammer (1918) 102 Misc. 665, 169 N. Y. Supp. 571.

Oklahoma.—New State Brewing Asso. v. Miller (1914) 43 Okla. 133, 141 Pac. 1175.

South Carolina.—Saine v. Hertzog (1916) 106 S. C. 591, 91 S. E. 859.

Texas.—Williams v. Yoe (1900) 22 Tex. Civ. App. 446, 54 S. W. 614.

Washington.—Ridsen v. Hotel Savoy Co. (1918) 99 Wash. 616, 170 Pac. 146.

In Ashley v. Warner (Mass.) supra, it is held that where the landlord unlawfully evicts a tenant before the expiration of the latter's term, the tenant may recover, in a tort action, compensation for his loss, based upon the unexpired term.

In Elias v. Hammer (N. Y.) supra, it was held that the tenant may recover of the landlord damages based upon his eviction, on the ground that the landlord was a trespasser and a wrongdoer.

In New State Brewing Asso. v. Miller (Okla.) supra, the tenant was held entitled to recover damages from the landlord, based upon his constructive eviction from the leased premises.

In Brown v. Linn Woolen Co. (Me.) supra, the sublessee of premises was held entitled to recover damages from the landlord, in an action of trespass *quare clausum* based upon his unlawful eviction from the premises.

In Chapman v. Kirby (Ill.) supra, the landlord disconnected a steam pipe running from his boiler to premises of

the tenant, which furnished power to the latter to conduct his business. And inasmuch as the operation of his business was dependent upon receiving this power, the tenant was held entitled to surrender the premises and recover damages as for an eviction.

In Allison v. Chandler (Mich.) supra, where the landlord tore the roof off of a store occupied by a tenant, the latter was held entitled to surrender the premises and recover damages based upon the unexpired term of the lease.

### III. Measure of damage.

#### a. Actual damage.

##### 1. In general.

In general the measure of damage recoverable by a tenant for his unlawful eviction from the leased premises is compensation for the loss resulting to him as a consequence thereof. The items to be taken into account in assessing the damage necessarily depend upon the character of the leasehold and the purpose for which it was used by the tenant. The object, however, is to compensate the tenant for his loss, without reference to the gain to the wrongdoer. Generally the loss to the tenant may be compensated for by basing the damage upon the rental value of the unexpired term. But this is not the limit of the recovery, for there may be included therein any special damage suffered by the tenant which is susceptible of proof and computation, and exemplary damages may also be assessed in proper cases. The cases hereinafter referred to illustrate the character of special damage which may be included.

In Zelig v. Blue Point Oyster Co. (1912) 61 Or. 541, 113 Pac. 852, 122 Pac. 756, the lessee was held entitled to recover damages for the unlawful use and occupation by the defendant of the leased premises, to be based upon the rental value of the property for the period it was occupied by the defendant, apparently the unexpired term.

In Behrens v. Mountz (1908) 37 Pa. Super. Ct. 326, where a third person evicted a tenant from leased prem-



ises, the court said that the damages were not to be measured "by the benefits accruing to the defendant, but by the injuries sustained by the plaintiffs. If there were upon the land from which the plaintiffs were evicted fruits and vegetables which were about to ripen, and crops which were matured or were about to mature, and which did ripen and mature prior to September 21, 1901, when the title passed to the defendant, and if the plaintiffs were by the eviction deprived of the opportunity to gather those fruits and crops, then they were in this action entitled to recover the value thereof. If there were sweet corn, beans, and other vegetables growing in the garden, which were ready for present use or which the evidence established would have been ready for use prior to the time defendant actually acquired title to the land, the plaintiffs were entitled to compensation for the loss of such vegetables. If the furniture of the plaintiffs were thrown out of the house while it was raining, or when the weather conditions were such that they ought to have foreseen that it was about to rain, and if it was actually injured by the rain, the defendant is just as responsible for that injury as if he had thrown the furniture into the water."

In *Saine v. Hertzog* (1916) 106 S. C. 501, 91 S. E. 859, no special damages were proven as a result of the plaintiff's eviction except that he was obliged to secure other quarters; nevertheless, on appeal the court sustained a judgment in favor of the plaintiff for \$1,000 actual damage, reduced by the trial court to \$500.

In *Crane v. Patton* (1893) 57 Ark. 340, 21 S. W. 466, where the lessee of land, having the right to remove timber therefrom, was prevented by a third person from removing the timber, his damage was held to be what the timber would have been held to be worth less the expense of removing it.

While not strictly within the scope of the note, attention is called to *Stebbins v. Demorest* (1904) 138 Mich. 297, 101 N. W. 528, in which case a person who took possession of a portion of

leased premises and sowed thereon a crop of grain and subsequently removed the crop was held liable in an action of tort by the tenant for the value of the grain he removed from the premises. And see *Childers v. Verner* (1879) 12 S. C. 1, in which it was held that the tenant was entitled to recover the value of a crop wrongfully removed from the leased premises by a third person. In *Reeves v. Romines* (1918) 182 Ark. 599, 201 S. W. 822, however, it was held that where the lessee of land for a share of the crop sued the landlord for damages for his unlawful eviction, the measure of recovery was the difference between the fair rental value of the leased premises for the unexpired term, and the amount the lessee was to pay, together with any special damage which might be alleged and proved, but not the loss of the profits which the tenant would have realized from the crop he would have raised. And where he based his sole right to recover on loss of profits, he was not entitled to recover even nominal damages.

In *Hull v. Vaughan* (1818) 6 Price, 157, 146 Eng. Reprint, 771, it is held that where the original vendor of an estate wrongfully evicted a subvendee from possession thereof, the latter was entitled to maintain an action for use and occupation, based upon the time during which the defendant held possession of the premises.

## 2. Business property.

As to the measure of damages for unlawful eviction from business property, it is said in *Allison v. Chandler* (1868) 11 Mich. 542, that "the evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were

of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises in any manner not forbidden by the lease was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of \$1,000 per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but 6 cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so ob-

viously contrary to the common experience of the facts, as to make the injustice of the rule gross and palpable."

Upon this point, in *Kostopelos v. Peszetti* (1911) 207 Mass. 277, 98 N. E. 571, Ann. Cas. 1912A, 859, the court said that "the plaintiff's damages were not necessarily limited to the value of his leasehold interest. He had been ejected by force from premises of which he was rightfully in possession, and the business which he was there carrying on had been interrupted. He was entitled to such damages as directly resulted from the wrong done to him. He could show the nature and extent of his business and the extent to which it had necessarily been interrupted and the expense which he had been obliged to incur to re-establish his business in another shop; but he ought not to have been allowed to testify to the amount of his weekly profits for the time immediately preceding his eviction. Those profits may have been unusually large, or may have been affected by exceptional circumstances. There was nothing to indicate that they afforded a fair measure of the value of his business for the future."

In *Chapman v. Kirby* (1868) 49 Ill. 211, the landlord having committed acts which were held to entitle the tenant to regard the interference as an eviction, the court said that the "appellants, having committed a wrong, must be held liable for all losses that flow from it. And if the loss on these various articles was the necessary and proximate result of the act,—and of that the jury must judge from the evidence,—they must be held liable. It cannot be said that when the lease has been destroyed or rendered valueless, the buildings, machinery, and stock in trade have been depreciated, and a lucrative business destroyed by the wrongful act of another, the sufferer shall only receive nominal damages, or the mere damages equal only to the value of the lease over and above the rent. The person thus wronged is entitled to recover for all of the injury he has sustained.

"As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well-founded objection. We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it then be said that a party deprived of it has no remedy, and can recover nothing for its loss when produced by another? It has long been well-recognized law, that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that, by depression in trade or other causes, they would have been less? Nor can we expect that, in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty."

In *Sanborn v. Marquette Bldg. Co.* (1900) 86 Ill. App. 681, *supra*, a lessee of a portion of a block sued in case to recover damages of a third person for alleged interference with the plaintiff's possession of the leased premises, which amounted to an eviction. Among the items of damage it was sought to recover for was the loss occasioned by the expense of securing new stationery, of moving into new offices, a difference in rent he was compelled to pay between the two places, and also for a loss of profits to his business. It was held that the action should not be sustained upon the theory of a breach of covenant or upon any contractual ground whatever, but only upon the ground of an unwarranted interference with the possession of the plaintiff; and since there

was no evidence of any act on the part of the lesser or a third person which could be construed as an interference with the possession of the plaintiff, it was proper for the trial court to direct a verdict in his favor. But such a direction was held to be error as to a subsequent lessee whose lease was made subsequent to the plaintiff's lease, and who so interfered with the plaintiff's possession as to constitute an eviction of the latter.

In *Bass v. West* (1900) 110 Ga. 698, 36 S. E. 244, the court said that "in case of a wrongful eviction of a lessee he can recover of the wrongdoer for the injury he has sustained. In such a case the general rule is that his measure of damages is the value of the premises for rent during the remainder of the term. If a person is wrongfully deprived of the use and occupancy of premises in which an established business is being carried on, he may recover damages for the injury done his business. He cannot, however, even in such a case, recover for loss of profits and the value of the good will of his business as such, but evidence as to these may be introduced to throw light on the value of his leasehold estate. Where the amount of the profits lost and the value of the good will of the business can be ascertained with a reasonable degree of certainty, they should be allowed in estimating the value of the lease for the purpose for which it was being used. In cases, however, where these elements are merely speculative and conjectural and cannot be ascertained with reasonable certainty, no allowance should be made therefor. This does not mean that the amounts of these elements of damage should necessarily be reduced to an exact calculation before a recovery could be had, but there must be sufficient data to enable a jury with a reasonable degree of certainty and exactness to ascertain the loss."

In *Risdon v. Hotel Savoy Co.* (1918) 99 Wash. 616, 170 Pac. 146, the measure of damages recoverable by a tenant was held to be the value of the use of the leased premises for the operation of his business for the un-

expired term, including such items as property lost or destroyed, unearned rent, loss of customers and business profits, and loss of good will.

A tenant at sufferance merely, who is ejected from the leased premises, cannot recover for the loss of profits which would have accrued from continuance by him in possession of the premises. *Clark v. Groger* (1918) 102 Wash. 188, 172 Pac. 1164.

In *New State Brewing Assn. v. Miller* (1914) 43 Okla. 183, 141 Pac. 1175, where a tenant was constructively evicted by the landlord from leased premises upon which the tenant operated a business, it was held that in considering the damage of the latter, his loss of profits was to be taken into consideration.

In *Snow v. Pulitzer* (1894) 142 N. Y. 263, 36 N. E. 1059, where a tenant of a suite of offices in a business block was evicted by the act of the purchaser of the block in removing a stairway and an adjoining supporting wall, the tenant was held entitled to recover as his damage compensation for his loss, including the expenditures he made in fitting up the leased premises for his business, damage to and depreciation of the stock kept in the building, and loss of profits for the time intervening between the eviction and the termination of the lease.

### 3. Tenancy at will.

It has been held that ordinarily the measure of damage is based upon the difference in the market value of the term before and after the trespass, but where the tenancy is at will or for any other reason it has no market value, actual damages must be determined by the jury in the light of

relevant facts and circumstances. *Daniel v. Perkins Logging Co.* (1911) 9 Ga. App. 842, 72 S. E. 438, *supra*. Where the tenancy is at will, the actual damages recoverable are merely nominal, although exemplary damages are also recoverable. *Strauel v. Lubeley* (1914) 186 Mo. App. 638, 172 S. W. 434.

### b. Exemplary damages.

In *Strauel v. Lubeley* (1914) 186 Mo. App. 638, 172 S. W. 434, a landlord is held liable for actual or punitive damages for the unlawful eviction of a tenant; and where the tenancy was for no definite term, the measure of recovery for actual damages will be merely nominal.

In *Walterscheid v. Crupper* (1909) 79 Kan. 27, 100 Pac. 623, where a subsequent purchaser of the leased premises, in order to evict a tenant, unlawfully tore the roof off of the house occupied by the tenant, it was held that the damage recoverable by the tenant might include exemplary and also all actual damages suffered. The items of damage allowed do not appear other than that the tenant and his wife were exposed to the elements by the act of the defendant, and at the time the wife was confined to her bed; and it does not appear that any actual damage was based upon the loss of the balance of the term by the tenant.

In *Williams v. Yoe* (1900) 22 Tex. Civ. App. 446, 54 S. W. 614, the landlord was held liable for actual and exemplary damages for illegally and wrongfully fastening the doors of a building occupied by the tenant, thereby preventing the latter from entering the same. A. G. S.

J. S. COWART  
v.  
E. P. STRICKLAND.

*Georgia Supreme Court — September 27, 1919.*

(— Ga. —, 100 S. E. 447.)

**Witness — extent of cross-examination — formal point.**

1. Where a witness is voluntarily called by a party and examined, even though to a formal point only, the court cannot restrict the right of cross-examination of the witness to the formal point upon which the party has examined him; but the opposite party has the right to cross-examine the witness as to all points in the case.

(a) Nevertheless, where the trial judge requires a party to call a witness on whom the party has caused a subpoena duces tecum to be served, and at the time announces that the examination will be restricted to the sole question of the witness's ability to produce the original document called for by the subpoena, and the examination is limited to that question alone, it is not error to refuse to allow the opposite party to cross-examine the witness generally on the merits of the case.

(b) Nor is it error requiring a new trial to permit the witness to be examined, in the presence of the court, but in the absence of the jury, on the sole question of his ability to produce the original of the document described in the subpoena.

[See note on this question beginning on page 1116.]

**Ejectment — new trial for mesne profits.**

2. Where, in an ejectment case, the plaintiff recovers a verdict for the premises, with mesne profits, the trial judge may grant a new trial on the issue of mesne profits alone for errors of law, or if he disapproves the verdict on that issue, and the judgment being divisible, refuse a new trial on the issue of title, if that issue was adjudicated without error of law, and if the trial judge approves the verdict.

**Evidence — forgery — burden of proof.**

3. Where, on the trial of an ejectment case, a deed is attacked as a forgery, the burden is on the party asserting the affirmative of the issue to establish his contention by a preponderance of the testimony. He is not required to prove the forgery of the deed beyond a reasonable doubt.

[See 9 R. C. L. 906.]

**New trial — refusal to charge on circumstantial evidence.**

4. In the absence of a request, the

failure of the judge on the trial of an ejectment case to give in charge to the jury the rule of circumstantial evidence as applicable to civil cases is not cause for a new trial, even though the evidence upon a single and controlling issue is entirely circumstantial.

[See 9 R. C. L. 919; 14 R. C. L. 726.]

**Evidence — sufficiency.**

5. The evidence authorized the verdict, and none of the assignments of error show cause for reversal of the judgment to which exception is taken in the main bill of exceptions.

**Appeal — disturbing grant of new trial.**

6. The judgment granting a new trial on the issue of mesne profits alone, assigned as error in the cross bill of exceptions, is within the rule that the first grant of a new trial will not be disturbed, unless the evidence demands the verdict rendered.

[See 2 R. C. L. 217; 20 R. C. L. 318 et seq.]

**CROSS WRITS** of error to the Superior Court for Calhoun County (Harrell, J.) to review a judgment in favor of plaintiff in an action brought to recover possession of certain land, and for mesne profits; defendant excepting to so much of the judgment as denied his motion for new trial as to the recovery of the land; and plaintiff excepting to so much as granted a new trial on the issue of mesne profits. *Affirmed.*

Statement by Fish, Ch. J.:

Miss Eunice Price (now Mrs. Eunice Price Strickland) brought an action of ejectment against J. S. Cowart for the recovery of two lots of land and for mesne profits. The plaintiff relied for recovery upon a demise from herself as the sole heir at law of her father, J. N. Price. She contended: (1) That her father died in possession of the land. (2) That the defendant claimed under a chain of title which originated in Margaret Williams, running (a) from Margaret Williams to J. C. Price; (b) from J. C. Price to J. N. Price; (c) from J. N. Price back to J. C. Price; (d) from J. C. Price to J. L. Boynton; (e) from J. L. Boynton to the defendant. The plaintiff attacked the alleged deed from J. N. Price to J. C. Price as a forgery. The trial of the case resulted in a verdict and judgment for the plaintiff for the premises in dispute, and for \$1,960 mesne profits. The defendant filed a motion for new trial, which was subsequently amended. The court denied the motion "in so far as the recovery of the land is concerned," but granted the defendant a new trial "on the issue as to mesne profits," and "as to the issue of mesne profits only," for the following reasons, as set out in the order: "This judgment of the court granting a new trial on the issue of mesne profits is based solely on the ground that the plaintiff could not recover mesne profits, except for such time as the plaintiff might by evidence show that the defendant was in possession of the premises in dispute; and plaintiff having failed to show that defendant was at any time in possession of the premises, the recovery for mesne profits was without any evidence to support it."

To this judgment the defendant excepted, assigning error thereon in the main bill of exceptions. The

plaintiff filed a cross bill of exceptions, in which she complains that the court erred in granting to the defendant a new trial on the issue of mesne profits.

Messrs. Pope & Bennet and B. W. Fortson, for defendant:

The rule permitting reviewing courts to limit the issues in granting a new trial would seem to be inapplicable in an ejectment suit, where the issues as to the recovery of the land and the recovery of mesne profits are so interwoven and dependent one upon the other.

Irwin v. Riley, 68 Ga. 605; Vance v. Gamble, 95 Ga. 730, 22 S. E. 576; James v. Steele, 147 Ga. 598, 95 S. E. 11.

The evidence did not show that plaintiff's ancestor, J. N. Price, died in possession of the land.

Turner v. Tubersing, 67 Ga. 161; Robert Portner Brewing Co. v. Cooper, 116 Ga. 174, 42 S. E. 408, 12 Am. Neg. Rep. 227; Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260.

There is not even a presumption that Cowart claimed under J. N. Price, and even if there were, the presumption is rebutted.

McConnell v. Cherokee Min. Co. 114 Ga. 84, 39 S. E. 941.

The deed having been introduced as a duly registered deed, the mere fact of its registry proved prima facie its genuineness, and therefore the burden of proof was upon the plaintiff to produce sufficient evidence to authorize a finding to the contrary.

Eady v. Shiver, 40 Ga. 684; Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287; Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Sims v. Scheussaler, 2 Ga. App. 466, 58 S. E. 693; Powell, Actions for Land, § 205; Haithcock v. Sargent, 145 Ga. 87, 88 S. E. 550; Georgia R. & Electric Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; 17 Cyc. 817; Wheelan v. Chicago, M. & St. P. R. Co. 85 Iowa, 167, 52 N. W. 119; Asbach v. Chicago, B. & Q. R. Co. 74 Iowa, 248, 37 N. W. 182.

Evidence tending to show that plaintiff's ancestor died in possession

of the land in controversy was wholly hearsay and should have been ruled out.

*Turner v. Tubersing*, 67 Ga. 161; *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 174, 42 S. E. 408, 12 Am. Neg. Rep. 227.

It was error to refuse to allow defendant to cross-examine plaintiff's witness Isler as to facts other than the loss of the deed.

*Aiken v. Cato*, 23 Ga. 154; *White v. Dinkins*, 19 Ga. 285; *Dawson v. Callaway*, 18 Ga. 573; *Lunday v. Thomas*, 26 Ga. 537; *Barker v. Blount*, 63 Ga. 423; *News Pub. Co. v. Butler*, 95 Ga. 559, 22 S. E. 282.

It is the absolute duty of the trial judge to instruct the jury on the rules governing their deliberations under circumstantial evidence, and as to how strong it must be in order to authorize a verdict.

*Andrews v. State*, 145 Ga. 14, 88 S. E. 194.

Even if an affidavit of forgery had been filed attacking said deed, the issue as to the factum of the deed would be the only one to be tried; and certainly the plaintiff had no greater right where she did not dare to file the affidavit of forgery, but sought to make a general charge of forgery, without filing such affidavit.

*Smith v. Stone*, 127 Ga. 433, 56 S. E. 640; *James v. Steele*, 147 Ga. 598, 95 S. E. 11; *Paxton v. Boyce*, 1 Tex. 317.

In order for the plaintiff to recover mesne profits for any time, she must show that the defendant was in possession for and during the time when such recovery is sought.

*Powell, Actions for Land*, § 410; *Gardner v. Granniss*, 57 Ga. 539.

*Mr. Samuel H. Sibley* also for defendant.

*Messrs. W. V. Custer and P. C. Bell*, for plaintiff:

The evidence of B. H. Askew, to which exception was made, was neither immaterial nor hearsay. It may have been weak, but was relevant, and it was proper for it to go to the jury.

*Deen v. Williams*, 128 Ga. 265, 57 S. E. 427; *Garbutt Lumber Co. v. Wall*, 126 Ga. 172, 54 S. E. 944; *Walker v. Steffes*, 139 Ga. 520, 77 S. E. 580; *Gable v. Gable*, 130 Ga. 689, 61 S. E. 595; *Corker v. Stafford*, 125 Ga. 423, 54 S. E. 92; *Jackson v. DuBose*, 87 Ga. 761, 13 S. E. 916.

The examination of the witness Isler by plaintiff was only as a basis for

secondary evidence of a lost deed. Such proofs are for the court only.

*Powell, Actions for Land*, § 193, p. 241; *Bailey v. Barnelly*, 23 Ga. 582.

The cross-examination of a witness should be confined to matters which have been brought out on the direct examination; and if the cross-examining party wishes to obtain the testimony of the witness as to other matters, he must do so by calling the witness to the stand as his own, and subjecting him to direct examination in regard thereto.

40 Cyc. 2500; *Rosum v. Hodges*, 1 S. D. 808, 9 L.R.A. 817, 47 N. W. 140; *Anheuser-Busch Brewing Asso. v. Hutmacher*, 127 Ill. 652, 4 L.R.A. 575, 21 N. E. 626; *Chicago, R. I. & P. R. Co. v. Beatty*, 34 Okla. 321, 42 L.R.A. (N.S.) 984, 118 Pac. 367, 126 Pac. 736; *Wills v. Russell*, 100 U. S. 621, 25 L. ed. 607.

The court was right in charging that "the question as to whether the deed referred to was a forgery involved the question of fraud."

19 Cyc. 1373; *Hoffer v. Gladden*, 75 Ga. 532; *Higginbotham v. Campbell*, 85 Ga. 640, 11 S. E. 1027.

It was not error to exclude the jury while evidence as to loss of papers was being given.

*Langley v. State*, 126 Ga. 100, 54 S. E. 821; *Russell v. Mohr-Weil Lumber Co.* 115 Ga. 35, 41 S. E. 275; *Georgia R. & Bkg. Co. v. Hurt*, 112 Ga. 817, 38 S. E. 40; *Huff v. State*, 85 Ga. 336, 11 S. E. 619; *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Jackson v. DuBose*, 87 Ga. 761, 13 S. E. 916.

Plaintiff was not required to file an affidavit of forgery in order to attack the deed.

*Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244; *Williams v. Rawlins*, 10 Ga. 491.

The jury may determine from the face of the deed alone that it is a forgery.

*Pridgen v. Green*, 80 Ga. 737, 7 S. E. 97; *Daugharty v. Drawdy*, 134 Ga. 650, 68 S. E. 472.

It was wholly unnecessary to show that Price died in possession of the land.

*Hadley v. Bean*, 53 Ga. 685; *Parker v. Waycross & F. R. Co.* 81 Ga. 387, 8 S. E. 871; *Wilcox v. Moore*, 118 Ga. 351, 45 S. E. 400.

A condition once proved to exist is presumed to continue to exist till the contrary appears.

**Sasser v. Byrd**, 8 Ga. App. 824, 70 S. E. 157; **Anderson v. Blythe**, 54 Ga. 507; **Coleman & B. Co. v. Rice**, 105 Ga. 164, 31 S. E. 424; 1 Greenl. Ev. § 42.

A deed of conveyance is presumed to carry the possession.

**Stall v. Cincinnati**, 16 Ohio St. 169.

The fact that separate suits cannot be maintained for land and for mesne profits in no wise prevents the court from closing one of the issues, and resubmitting the other, according to the court's opinion that one was adjudicated without error, and the other with error.

**Chicago Bldg. & Mfg. Co. v. Butler** 139 Ga. 819, 78 S. E. 244.

**Fish, Ch. J.**, delivered the opinion of the court:

1. The plaintiff in error contends that the court may only grant an entire new trial, either of the cause or of a collateral issue (Code of Practice, § 6079); that the court cannot separate the case into two distinct issues, to be tried separately by the jury, especially in an action of ejectment, with a prayer for recovery of mesne profits, since a separate action cannot be maintained for the recovery of mesne profits. It is therefore insisted that the legal effect of the judgment of the trial court on the motion for new trial is either (1) to grant a new trial of the entire cause, or (2) to deny the motion entirely, on condition that the recovery for mesne profits be written off. The case of **McCarthy v. Lazarus**, 137 Ga. 282, 73 S. E. 493, was an action of ejectment, with a prayer for mesne profits. The trial court directed a verdict in behalf of the plaintiff for the premises in dispute and for mesne profits. The judgment was affirmed "as to the direction of a verdict for the recovery of the premises," but a new trial was ordered "on the sole question as to mesne profits, with direction that the issue as to mesne profits alone be submitted to a jury on another trial." It is true that the power of the supreme court to give direction depends on special statute (Code of Practice, § 6205), but it is also true that "where a judgment appealed from can be segregated, so

that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous." **Chicago Bldg. & Mfg. Co. v. Butler**, 139 Ga. 816(1), 819, 78 S. E. 246.

It is not to be assumed that in an ejectment suit this court would order a new trial "on the sole question as to mesne profits, with direction that the issue as to mesne profits alone be submitted to a jury on another trial," unless it were in the first instance permissible, in a proper case, for the trial court itself to so direct. Where, in an ejectment case, the issue as to title is adjudicated in favor of the plaintiff, and the trial court is of the opinion that the adjudication was without error of law, and is satisfied with the verdict, a new trial may be denied as to the issue of title, and a new trial granted on the issue of mesne profits, if the trial court is of the opinion that errors of law were committed upon the latter issue, or if he disapproves the verdict. **Brooke v. Lowry Nat. Bank**, 141 Ga. 493, 81 S. E. 223(5). The fact that the case is one of ejectment, with a prayer for mesne profits, is immaterial. While § 5576 of the Code of Practice declares: "No plaintiff in ejectment shall have and maintain a separate action in his behalf for the recovery of mesne profits which may have accrued to him from the premises in dispute," it is sufficient to say that in such case the action is not a separate one. In the practical administration of the law, an issue once adjudicated without error may remain closed, where the judgment is divisible, while at the same time the trial court has it within his power to grant a new trial upon a separate, distinct, and independent issue involved in the same case.

Ejectment—  
new trial for  
mesne profits.

2. The plaintiff in the court below desired to put in evidence a certified copy of a deed from J. C. Price to J. N. Price, conveying the lands in controversy. She had duly served



the defendant with a notice to produce the original. During the progress of the trial the plaintiff testified that she did not have the deed in her possession, power, custody, or control, and that she had made diligent search for it and had failed to find it. She then exhibited to the court an affidavit of B. Isler, administrator of the estate of J. N. Price, filed by him in response to a subpoena duces tecum, calling upon him to produce the original of said deed. The administrator in his affidavit averred that he did not have and had never had the original of said deed in his power, custody, or control, and therefore could not produce it. The plaintiff insisted that she be allowed to introduce the certified copy of the deed in question upon the showing made, whereupon the court directed and required the plaintiff's counsel to put the administrator upon the stand, with the statement that the examination would be confined to the question of his ability to produce the original deed. The witness was then examined by the plaintiff's counsel touching his possession of the deed in question, and testified in substance that he did not have the deed and that the same had never been in his possession, power, custody, or control. He was then fully examined by the defendant's counsel upon the same point, and the court ruled that the witness could not be cross-examined by the defendant's counsel upon other and separate and distinct issues in the case. However, the defendant was given the privilege to swear the witness in chief; and the witness was sworn and examined in behalf of the defendant after the plaintiff had closed her case. In the motion for new trial error is assigned on the ruling of the court in refusing to permit the defendant to cross-examine the witness generally upon the merits of the case, and also because the court permitted the examination of the witness on the question of his ability to produce the deed out of the presence of the jury.

The rule in this state is that "when a witness is called and examined, even to only a formal point, by one party, the other party has the right to cross-examine him as to all points." *Aiken v. Cato*, 23 Ga. 154; *News Pub. Co. v. Butler*, 95 Ga. 559, 22 S. E. 282.

The rule undoubtedly applies when the witness is voluntarily called by the party. In that event the court cannot restrict the right of cross-examination to the points upon which the party has examined the witness in chief. If, however, in response to a subpoena duces tecum, the court is not satisfied with the affidavit of the witness, but is yet unwilling to exclude the secondary evidence offered, and directs and requires counsel for the party by whom the witness was subpoenaed to call the witness in person and examine him orally in the presence of the court, we are of the opinion that it is not reversible error to refuse the right of cross-examination to the opposite party generally on the merits of the case. The plaintiff may have preferred to insist upon the introduction of the secondary evidence upon the showing made; and in this case it appears that the plaintiff did insist upon the sufficiency of such showing. It would be manifestly unfair to compel counsel to call a witness, or to compel him to examine a witness called by the direction of the court, upon the sole question of the ability of the witness to produce an original document, with the right to the opposite party to cross-examine the witness on the merits of the case. If error at all, it was certainly not reversible error to permit the witness to be examined, out of the presence of the jury, on the sole question of his ability to produce the deed described in the subpoena duces tecum. See *Code of Practice*, § 5759; *Powell, Actions for Land*, 241, 242, § 198.

3. The vital issue in the case was whether the deed from J. N. Price to J. C. Price was a forgery. The plain-

Witness—  
extent of cross-  
examination—  
formal point.

tiff did not file an affidavit of forgery. She relied entirely upon circumstantial evidence to establish her contention that the deed was a forgery. The court in effect instructed the jury that the plaintiff had the burden of showing, by a preponderance of evidence, that the deed from J. N. Price to J. C. Price was a forgery. The plaintiff in error contends that the court should have charged that the forgery of the deed must be proved beyond a reasonable doubt. The case of *Williams v. Gunnels*, 66 Ga. 521, is cited in support of this contention. It was there said that to support a plea of justification, in a suit for slander on account of words imputing a crime, "the same degree of evidence is required as would be necessary to convict the plaintiff on a criminal prosecution for the offense." But see *Atlanta Journal v. Mayson*, 92 Ga. 640, 44 Am. St. Rep. 104, 18 S. E. 1010, where it was ruled that the question was neither directly made nor decided in *Williams v. Gunnels*, supra.

Evidence—  
forgery—  
burden of proof.

Where, in an ejectment suit, a deed is attacked as a forgery, the burden is upon the party asserting the affirmative of the issue to establish his contention by a preponderance of the testimony. The case falls within the rule announced in § 5730 of the Code of Practice, as follows: "Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction."

4. It is also insisted that the court erred in failing to charge, without request, the rule of circumstantial evidence as applicable to a civil case. We cannot agree with this contention.

New trial—  
refusal to  
charge on  
circumstantial  
evidence.

It is true, as pointed out by counsel for the plaintiff in error, that in a criminal case, where the evidence is entirely circumstantial, it is error for the court to fail to charge the rule applicable to a case of that character, with or with-

out a request to so charge. The rule announced by this court in criminal cases has no application to the issue of forgery in a civil action. As a rule in criminal cases, it must have resulted, in part at least, from the positive requirement of § 1010 of the Penal Code, which is as follows: "To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused."

5. In one ground of the motion for new trial error is assigned upon the following charge of the court to the jury: "Referring again to the question as to whether the deed referred to from J. N. Price to J. C. Price was a forgery, this involves a question of fraud; and I charge you in this connection that fraud may not be presumed, but, being subtle in its nature, slight circumstances may be sufficient to carry conviction of its existence."

It is insisted that this charge was inapplicable to the issues in the case, and misled and confused the jury. In *Smith v. Stone*, 127 Ga. 483, 56 S. E. 640 (3), it is held: "Upon the trial of the issue of forgery, . . . when a registered deed is offered in evidence, nothing is involved except the factum of the deed assailed; and when the uncontradicted evidence shows that the deed was executed, a finding that it was a forgery is unauthorized, notwithstanding there may be evidence tending to show that the grantee had, by his conduct and sayings, estopped himself from asserting title under the deed, as against certain persons."

We agree with counsel for the plaintiff in error that the charge was inapplicable to any issue in the case, but we cannot say that it either misled or confused the jury. The court clearly stated the issues to the jury, and instructed them that the burden was upon the plaintiff to show that the deed from J. N. Price to J. C. Price was in fact a forgery. In immediate connection with the excerpt

to which exception is taken, the court charged as follows: "You would have no right to find for the plaintiff in this case unless you should, by the testimony or the circumstances, determine that the deed in question was never in fact executed by J. N. Price; but you may consider all the circumstances of the case in determining whether the deed was genuine or whether it was a forgery."

In view of the entire charge, considered in the light of the evidence in the record, we do not feel authorized to reverse the case upon this ground. The evidence authorized the jury to find that the plaintiff's intestate died in possession of the land in controversy, that the defendant claimed under the plaintiff's intestate, and that the deed from the plaintiff's intestate to J. C. Price was a forgery. None of the assignments of error upon the rulings of the court in admitting or rejecting evidence, in charging the jury, or in failing to charge, assigned as erroneous in the motion for new

**Evidence—  
sufficiency.**

evidence authorized the jury to find that the

trial, will require a reversal of the case on the main bill of exceptions.

6. The grant of the new trial on the issue of mesne profits, assigned as error in the cross bill of exceptions, is within the rule that

**Appeal—dis-  
turbing grant  
of new trial.**

the first grant of a new trial will not be disturbed, unless the evidence demands the verdict rendered, nor will the court undertake to make any ruling with respect to the reason assigned by the trial judge as the basis of his action, although the new trial be granted upon a special ground of the motion. *Vam Giesen v. Queen Ins. Co.* 182 Ga. 515, 64 S. E. 456, and cases cited; *Ballenger v. Ballenger*, 147 Ga. 351, 94 S. E. 237. It goes without saying that the verdict for \$1,960 for mesne profits was not demanded, under the rule recognized in this state. See *McCarthy v. Lazarus*, 137 Ga. 282, 73 S. E. 498.

Judgment affirmed on both bills of exceptions.

All the Justices concur.

Petition for rehearing denied.

## ANNOTATION.

**Cross-examination of witness called to testify on particular point or under order of court.**

### I. Majority rule:

a. Rule stated, 1116.

b. Application of rule, 1118.

### II. Minority rule, 1125.

#### I. Majority rule.

##### a. Rule stated.

Although there is a decided conflict of opinion, the great weight of authority is to the effect that where a witness is called to testify on a particular point, either by counsel or under order of court, the adverse party is restricted in the cross-examination of the witness to the point on which he testifies, and cannot question him in regard to other issues in the case.

*United States. — Æolian Co. v. Standard Music Roll Co.* (1910) 176 Fed. 811; *Foster v. United States* (1910) 101 C. C. A. 485, 178 Fed. 165;

*Ferry-Hallock Co. v. Orange Hat Box Co.* (1910) 185 Fed. 816, reversed on other grounds in (1912) 115 C. C. A. 103, 195 Fed. 71; *O'Connell v. Pennsylvania Co.* (1902) 55 C. C. A. 483, 118 Fed. 991; *Mine & S. Supply Co. v. Parke & L. Co.* (1901) 47 C. C. A. 34, 107 Fed. 881; *Montgomery v. Ætna L. Ins. Co.* (1899) 38 C. C. A. 557, 97 Fed. 913; *Seymour v. Malcolm McDonald Lumber Co.* (1898) 7 C. C. A. 593, 16 U. S. App. 245, 58 Fed. 957; *Wills v. Russell* (1879) 100 U. S. 621, 25 L. ed. 607; *Philadelphia & T. R. Co. v. Stimpson* (1840) 14 Pet. 448, 10 L. ed. 535.

*Arkansas. — Duke v. Eminent Household, C. W.* (1911) 97 Ark. 290, 133 S. W. 1028.

*California. — Yordi v. Yordi* (1907) 6 Cal. App. 20, 91 Pac. 343.

**Connecticut.**—Goodno v. Hetchkins (1914) 88 Conn. 655, 92 Atl. 419.

**Illinois.**—Fred Miller Brewing Co. v. Jones (1914) 190 Ill. App. 169; Nagle v. Schnadt (1909) 239 Ill. 595, 88 N. E. 178; Sheedy v. Chicago (1906) 221 Ill. 111, 77 N. E. 539; East Dubuque v. Burhyte (1898) 173 Ill. 553, 50 N. E. 1077; Stevens v. Brown (1883) 12 Ill. App. 619; Hurlbut v. Meeker (1882) 104 Ill. 541; Lloyd v. Thompson (1879) 5 Ill. App. 90; Stafford v. Fargo (1864) 85 Ill. 481; Bell v. Prewitt (1872) 62 Ill. 361.

**Indiana.**—Guilfoil Contracting Co. v. Clark (1912) — Ind. App. —, 99 N. E. 777; Indianapolis & M. Rapid Transit Co. v. Walsh (1909) 45 Ind. App. 42, 90 N. E. 138.

**Iowa.**—Wheeler v. Schilder (1918) 183 Iowa, 623, 167 N. W. 534; Re Barrett (1914) 167 Iowa, 218, 149 N. W. 247; Collins v. Wells, F. & Co. Exp. (1908) 140 Iowa, 304, 118 N. W. 401; McCormick Harvesting Mach. Co. v. Jacobsen (1889) 77 Iowa, 582, 42 N. W. 439; Pellersells v. Allen (1881) 56 Iowa, 717, 10 N. W. 261.

**Kansas.**—Pratt v. Brockett (1878) 20 Kan. 201.

**Louisiana.**—Vanzant v. Bodcaw Lumber Co. (1911) 128 La. 923, 55 So. 577.

**Maryland.**—Consolidated Gas, E. L. & P. Co. v. State (1909) 109 Md. 186, 72 Atl. 651.

**Montana.**—Borden v. Lynch (1906) 34 Mont. 503, 87 Pac. 609.

**Nebraska.**—Owens v. Omaha & C. B. Street R. Co. (1916) 97 Neb. 364, 156 N. W. 661; Hurlbut v. Hall (1894) 39 Neb. 889, 58 N. W. 538.

**New Jersey.**—Brown v. Nevins (1913) 84 N. J. L. 215, 86 Atl. 933.

**New York.**—Blumquist v. Snare & T. Co. (1909) 135 App. Div. 709, 119 N. Y. Supp. 728, affirmed in (1911) 200 N. Y. 595, 94 N. E. 1092; Union Bank v. Mott (1863) 39 Barb. 180. Compare Jackson ex dem. Lowell v. Parkhurst (1830) 4 Wend. 369; Varick v. Jackson (1828) 2 Wend. 166, 19 Am. Dec. 571.

**Oregon.**—Benson v. Johnson (1917) 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014.

**Pennsylvania.**—Brown v. Marm-

duke (1915) 248 Pa. 252, 93 Atl. 1021; Lesley v. Ewing (1914) 244 Pa. 480, 90 Atl. 797; Harter v. Whitebread (1909) 38 Pa. Super. Ct. 10; Wolf v. Wolf (1893) 158 Pa. 621, 28 Atl. 164; Re Sheriff's Elections (1862) 1 Brewst. 67; Tiley v. Moyers (1862) 43 Pa. 404, 4 Mer. Min. Rep. 320; Mitchell v. Cooper (1851) 17 Pa. 343; Mitchell v. Welch (1851) 17 Pa. 339, 55 Am. Dec. 557.

**South Dakota.**—Buchanan v. Randall (1906) 21 S. D. 44, 109 N. W. 513; First Nat. Bank v. Smith (1895) 8 S. D. 101, 65 N. W. 439.

**Utah.**—People v. Thiede (1895) 11 Utah, 241, 39 Pac. 837, affirmed in (1895) 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 68.

**Vermont.**—Seeley v. Central Vermont R. Co. (1914) 88 Vt. 178, 92 Atl. 28; Taplin v. Marcy (1908) 81 Vt. 428, 71 Atl. 72; Carpenter v. Willey (1893) 65 Vt. 168, 26 Atl. 438.

**Washington.**—Brace v. Northern P. R. Co. (1911) 63 Wash. 417, 33 L.R.A. (N.S.) 1135, 115 Pac. 341; Richardson v. Spangle (1900) 22 Wash. 14, 60 Pac. 64. But see Patchen v. Parke & L. Machinery Co. (1893) 6 Wash. 406, 33 Pac. 976.

"A party offering a witness stands sponsor for his credibility, and, stated generally, is bound by what he may say both on direct and cross examination. Being so bound, he has a right to call him for a particular purpose, and his adversary has no right to examine him generally, but is confined to the subject testified to by him in chief." *Æolian Co. v. Standard Music Roll Co.* (1910) 176 Fed. 311.

"When a witness is called to prove a single fact, the opposite party, under the guise of a cross-examination, cannot enter into a general examination of the witness, but the cross-examination must be confined to the examination in chief." *Hurlbut v. Meeker* (1882) 104 Ill. 541.

"When a witness is called for the special purpose of proving a signature, he cannot be cross-examined in regard to the case generally." *Vanzant v. Bodcaw Lumber Co.* (1911) 128 La. 923, 55 So. 577.

A party has no right to cross-exam-

ine a witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause. *Philadelphia & T. R. Co. v. Stimpson* (1840) 14 Pet. (U. S.) 448, 10 L. ed. 585.

*b. Application of rule.*

In *Æolian Co. v. Standard Music Roll Co.* (1910) 176 Fed. 811, a witness was called to prove the record of sales made by the complainant of an instrument called the Metrostyle, and a statement of the aggregate of sales tabulated therefrom. It was held that the scope of the cross-examination of the witness should be restricted to the particular subject of his examination in chief.

In *Foster v. United States* (1910) 101 C. C. A. 485, 178 Fed. 165, a prosecution for using the mails in furtherance of a scheme to defraud, an expert accountant was called by the government to testify as to the contents of certain books. On cross-examination, certain questions were put to the witness which were not related to the subject of the direct examination. It was held that the action of the trial court in excluding these questions was not erroneous.

In *Ferry-Hallock Co. v. Orange Hat Box Co.* (1910) 185 Fed. 816, reversed on other grounds in (1912) 115 C. C. A. 103, 195 Fed. 71, a suit for infringement of a patent, a witness was called as an expert for the complainant, and on his examination gave his opinion as to whether the complainant's exhibit embodied the invention referred to in the several claims of the patent in suit. It was held that although he might be fully cross-examined as to his fitness to testify as an expert, the cross-examination otherwise must be restricted to the particular purpose for which he was called.

In *O'Connell v. Pennsylvania Co.* (1902) 55 C. C. A. 488, 118 Fed. 991, an action was brought against the defendant company to recover damages for personal injuries alleged to have been

received by the plaintiff through the negligence of the defendant. The plaintiff's counsel introduced a witness for the sole purpose of identifying the car from which the plaintiff fell. Upon cross-examination the defendant questioned the witness in regard to the condition of the car. In ruling on an assignment of error in the admission of this testimony, Lurton, Ch. J., said: "All this was objected to by the plaintiff in error as not legitimate cross-examination, but evidence in chief. It was, however, admitted, over objection, as proper cross-examination. This statement as to the condition of the step on the car examined by the witness was plainly evidence in chief. The witness should have been recalled if the defendant so desired, and thus made the witness of the defendant as to the condition of the step of the car he had identified by number and name as the car from which plaintiff fell."

In *Mine & S. Supply Co. v. Parke & L. Co.* (1901) 47 C. C. A. 84, 107 Fed. 881, a witness was called to prove that certain letters and statements constituting an account stated were in the handwriting of the defendant, and that the letters and statements offered in evidence were the originals. His examination in chief was confined strictly to these points. On cross-examination the defendant sought to examine the witness generally in reference to the business transactions between the parties. It was held on appeal that this evidence was properly excluded.

In *Montgomery v. Aetna L. Ins. Co.* (1899) 38 C. C. A. 557, 97 Fed. 913, a witness introduced to prove the mere formal parts of the plaintiff's case was cross-examined in respect to the subject-matter of defendant's set-off, touching which he had not been examined in chief. Holding this to be error, it was said: "The right of cross-examination in courts of the United States is limited to facts and circumstances connected with the matter testified to upon the original examination of the witness. If it is desired to examine the witness as to other matters, the proper practice is to call

the witness as the witness of the party desiring to make such proof."

In *Seymour v. Malcolm McDonald Lumber Co.* (1893) 7 C. C. A. 593, 16 U. S. App. 245, 58 Fed. 957, an action was brought against the defendant on an acceptance of a negotiable instrument. On the trial of the case the plaintiff called the defendant, who was examined as a witness merely to the fact that he signed the acceptance, and that certain notes, from the proceeds of which it was payable, were paid to him before suit was commenced. On cross-examination the defendant's counsel sought to elicit from this witness testimony to sustain his defense. It was held that this evidence was properly excluded.

*Wills v. Russell* (1879) 100 U. S. 621, 25 L. ed. 607, was an action brought against a former collector of customs to recover certain duties on importations, paid under protest. One of the plaintiffs was called to testify as to the payment of the duties, and the protest. The court then permitted this witness to be examined as to the contents of the protest, and on other matters entirely foreign to his examination in chief. It was held that the admission of this testimony was error.

In *Duke v. Eminent Household, C. W.* (1911) 97 Ark. 290, 133 S. W. 1023, the plaintiff, as beneficiary in a policy of life insurance issued by the defendant, brought suit to recover the amount of the policy. The defense was interposed that, at the time of the death of the insured, he was not in good standing, having failed to make payment of his dues as required by the contract. The plaintiff contended that the deceased was incapable, because of illness, of directing payment of a premium due March 10. Defendant called as a witness a physician, who testified that he attended the deceased in his last illness, and that his first visit was March 18th. The plaintiff then asked the witness what was the mental and physical condition of the deceased on that day. The court refused to allow the witness to answer. Wood, J., speaking for the supreme court, said: "The question was not responsive to the examination

in chief. If appellant desired to show by Dr. Tapscott that the condition of R. T. Duke was such between the 1st and 10th of March as to render him mentally incapable of directing the payment of premiums, then she should have offered to make the doctor her witness, for that purpose. There was nothing in the question to indicate that the purpose of appellant was to show the mental incapacity of the assured between the 1st and 10th day of March to direct the payment of premiums."

In *Yordi v. Yordi* (1907) 6 Cal. App. 20, 91 Pac. 348, an action for specific conveyance, it was attempted to show that a deed executed by a wife to her husband was procured by undue influence. The notary who prepared the deed was called as a witness and testified simply to the fact that he was hired by the husband to prepare a deed similar to another deed shown him. Cross-examination by the defendants, seeking to bring out the conversation which occurred at the time between the husband and the notary, was held to be improper.

In the case of *Goodno v. Hotchkiss* (1914) 88 Conn. 655, 92 Atl. 419, a witness in a will contest was called merely to identify certain checks and receipts given for payment to herself and her brother of the amounts reserved to them in a mutual agreement. On cross-examination the witness was asked as to the intentions of the parties to the mutual agreement when they signed it. It was held that the action of the trial court in excluding the testimony was correct, since it was not germane to the examination in chief.

In *Fred Miller Brewing Co. v. Jones* (1914) 190 Ill. App. 169, it appeared that a witness's testimony on direct examination was limited solely to identification of signatures on a judgment note. It was held that cross-examination as to the duties of the witness was improper.

In *Nagle v. Schnadt* (1909) 239 Ill. 595, 88 N. E. 178, a claim was filed against an estate, based on a note alleged to have been signed by the deceased, and assigned by the payee

to the plaintiff. The only question involved was the genuineness of the signature. The defendant introduced as a witness the testator's son, who testified that the signature was a forgery. It was held that he could not be cross-examined as to whether he was satisfied with his father's will, and whether he had previously had a dispute with the executor, since these questions were outside the scope of the direct examination, and were not proper to show interest or prejudice.

In *Sheedy v. Chicago* (1906) 221 Ill. 111, 77 N. E. 539, an appeal from a judgment confirming a sewer assessment, a witness was introduced by the defendant who testified solely to the value of plaintiff's property and the amount which the property would be benefited by the improvement. It was held that he could not be asked on cross-examination how much the city would be benefited by the improvement.

In *East Dubuque v. Burhyte* (1898) 173 Ill. 563, 50 N. E. 1077, an action against the defendant city to recover for an injury received, caused by the breaking of a board in a defective sidewalk, the plaintiff introduced a witness who testified solely to the fact that the walk was constructed of inferior material. It was held that the witness could not be cross-examined as to a point entirely outside of this issue.

In *Stevens v. Brown* (1883) 12 Ill. App. 619, an action for rent of certain premises, a defense was set up that the plaintiff erected a certain building on land adjacent to the building occupied by the defendant, and that the excavation made for the foundation of the building caused the wall of the building occupied by defendant to settle, thereby causing the plaster to fall and damage his goods; and that, by the erection of the building, light by which he was accustomed to do photographic printing was cut off. The defendant called a witness and proved by him merely that the lessor erected, or caused to be erected, the building. The plaintiff's counsel thereupon was allowed to cross-examine the witness on various points relating to the mer-

its of the case. On appeal the court said: "The witness in this case, besides being asked some questions as to the execution of the lease, which are immaterial here, was examined in chief merely as to whether the defendant's lessor erected or caused to be erected the buildings of which the defendant complained. His cross-examination should, therefore, have been limited to that one fact. A conversation between the defendant and the lessor's agent, before the erection of one of said buildings, in which the defendant gave his consent to the erection of said building, was an entirely independent matter, and if the plaintiffs wished to examine the witness in relation to such conversation, they should have been compelled to recall him at a subsequent stage of the case, and make him their own witness."

In *Hurlbut v. Meeker* (1882) 104 Ill. 541, an action on a promissory note, a witness was produced simply to prove a handwriting, and the court confined the cross-examination to the examination in chief. It was held that this ruling was correct.

In *Lloyd v. Thompson* (1880) 5 Ill. App. 90, an action was brought for a balance due on an advertising contract. A witness was called to prove the fact that the defendant's card had been published in a newspaper according to agreement. The defendant was permitted to cross-examine the witness in regard to other facts connected with the merits of the case. It was held that this was error.

In *Stafford v. Fargo* (1864) 35 Ill. 481, an action on a promissory note, a witness was called by the defendant and examined solely as to when the note was indorsed by him, whether before or after suit was commenced thereon, and whether it was indorsed by him at the same time when another indorsed it. On cross-examination the witness was asked as to the payment of the note. To the contention that the cross-examination should be restricted to the particular point to which the witness testified, it was said: "It seems to be the well-recognized rule that when a witness is

called by one party, the other has only the right to cross-examine upon the facts to which he testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time, and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise, the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in a cross-examination."

In *Guilfoil Contracting Co. v. Clark* (1912) — Ind. App. —, 99 N. E. 777, an action for wrongful death, a physician was called to testify as to the injuries of the plaintiff's intestate, as disclosed by his examination of her. It was held that he could not be asked on cross-examination as to statements made to him by plaintiff's intestate concerning the accident.

In *Indianapolis & M. Rapid Transit Co. v. Walsh* (1909) 45 Ind. App. 42, 90 N. E. 188, an action was instituted against the defendant company to recover damages for personal injuries alleged to have been received through the negligence of the defendant. The plaintiff introduced a witness, and in her examination in chief elicited from her only the fact that she observed the condition of the plaintiff's skirt immediately after the accident. It was held that as the witness's examination was confined strictly to this point, she could not be asked on cross-examination whether plaintiff then claimed she had been injured in the hip, and that she claimed this injury was due to the fact that she became tangled in her skirts, and fell.

In *Collins v. Wells, F. & Co. Exp.* (1908) 140 Iowa, 304, 118 N. W. 401, action was brought against the defendant to recover damages for injuries sustained by the plaintiff, whose carriage collided with a wagon owned by the defendant and driven by its servant. The plaintiff introduced as a witness the defendant's driver, who

testified only to the fact that the colliding wagon, which he drove, was owned by the defendant. It was held that the defendant's counsel should not have been permitted to cross-examine this witness on the merits of the case.

*Wheeler v. Schilder* (1918) 183 Iowa, 623, 167 N. W. 534, was a suit by a landlord against a tenant for violation of contract provisions in the lease, by which the tenant agreed to keep the land free from noxious weeds and grasses. A witness was called who testified solely as to the reduced value of the land after it became infected with cockleburrs. It was held that the witness could not be cross-examined as to whether the land was infected with cockleburrs.

In *Re Barrett* (1914) 167 Iowa, 218, 149 N. W. 247, a proceeding brought by an administrator for the discovery of assets, a witness who had made the affidavit of decess for the appointment of the administrator was called to testify merely to the fact that she had been unable to find certain drafts after the death of her father. It was held that she could not tell, on cross-examination, what she knew about her father's death.

In *McCormick Harvesting Mach. Co. v. Jacobson* (1889) 77 Iowa, 582, 42 N. W. 499, action was brought against the defendant on a promissory note. A witness for plaintiff, who signed the note as a witness to defendant's signature, was called simply to testify that he saw defendant sign the note. On cross-examination he was asked if he had, on the same day, any other transaction with the defendant. He replied to the question, relating a transaction which had occurred on that day. This evidence was held to have been properly stricken out.

In *Pellersells v. Allen* (1881) 56 Iowa, 717, 10 N. W. 261, an action was brought to recover specific personal property, which had been levied upon and taken into possession by a sheriff by virtue of an execution against the plaintiff, who claimed the property was exempt from execution. A witness was introduced by the plaintiff, who testified simply as to the



value of the property. The defendant sought to prove on cross-examination that the plaintiff never claimed the property was exempt, but had waived the provision of the law in that respect. It was held that the ruling of the trial court in excluding this testimony was correct.

In *Pratt v. Brockett* (1878) 20 Kan. 201, an action was brought on a contract and guaranty, whereby it was agreed that the principal contractor should deliver to the plaintiff certain Texas cattle. The defendant contended that the plaintiff had agreed with the principal for an extension of the time for the delivery of the cattle, thereby releasing the surety from all obligation or liability. The plaintiff was introduced as a witness to testify solely to the fact that the cattle were never delivered, and to fix the value of the cattle. This was all of the evidence introduced in the case. It was held proper to refuse to permit defendant to prove by this witness, on cross-examination, that an agreement for extension of time had been made.

In *Vanzant v. Bodcaw Lumber Co.* (1911) 128 La. 923, 55 So. 577, a witness was introduced to prove the mark of an alleged grantor in a deed. The adverse party thereupon cross-examined the witness in regard to the whole case. The allowance of this cross-examination was held to be error.

In *Consolidated Gas, E. L. & P. Co. v. State* (1909) 109 Md. 186, 72 Atl. 651, an action to recover damages was brought by the state for the use of the widow and child of a deceased whose death was caused by coming in contact with an electric wire. A witness was called by the plaintiff and testified merely that, on hearing someone cry out, he ran to the place of the accident and saw the decedent fall. The defendant then attempted to prove by cross-examination of this witness that he saw that the insulation of the wires had been cut away. It was held that this was not proper cross-examination.

*Borden v. Lynch* (1906) 34 Mont. 503, 87 Pac. 609, was an action for damages for the conversion of certain personal property by the defendant, a

constable. It appeared that the plaintiff held a note which was secured by a chattel mortgage on certain property, this mortgage being duly recorded. The defendant, under a writ of attachment in an action on another claim, seized the property and took it into his possession, neither paying nor tendering the amount of her note. The plaintiff was introduced as a witness, and was asked only as to whether she was the owner of the note and mortgage in question. It was held that she could not be asked on cross-examination for what consideration the note and mortgage had been given.

In *Owens v. Omaha & C. B. Street R. Co.* (1916) 99 Neb. 364, 156 N. W. 661, an action to recover damages for the death of plaintiff's intestate, it appeared that the plaintiff's intestate was struck and killed by the defendant's car, which, it was alleged, was negligently propelled backwards, striking the decedent, who was at the time crossing the street. A witness who was on the car at the time of the accident was introduced and testified merely to the movements of the car. It was held proper to refuse to allow the witness to be cross-examined generally as to the happening of the accident.

In *Hurlbut v. Hall* (1894) 39 Neb. 839, 58 N. W. 538, action was brought against the defendant on a promissory note. The plaintiff called the defendant as a witness, for the sole purpose of proving that the latter signed the note sued on. On cross-examination this witness was asked whether there had been any alteration made in the note since he signed it. Objection was taken to this question and on appeal the court said: "The plaintiff called the defendant to the stand for the single purpose of having him identify his signature to the note; and while the testimony sought to be elicited on cross-examination by the question objected to tended to establish the defendant's plea that the instrument had been materially altered after the execution thereof, the question was not proper to be put to the witness on his cross-examination,

since it did not relate to the facts testified to on his direct examination."

In *Brown v. Nevins* (1913) 84 N. J. L. 215, 86 Atl. 988, an action was brought against the defendant for a breach of warranty of a roof, the plaintiff seeking to recover the outlays necessarily incurred by him in repairing the roof, and the damages sustained by him. Upon trial of the case a witness was introduced who testified merely as to the condition in which he found the roof. The defendant thereupon sought to cross-examine him as to whether he knew the usage in the roofing trade as to slag guaranties. It was held that the cross-examination was properly ruled out.

In *Blumquist v. Snare & T. Co.* (1909) 185 App. Div. 709, 119 N. Y. Supp. 728, affirmed in (1911) 200 N. Y. 595, 94 N. E. 1092, an action to recover for the death of an employee of the defendant, caused by the capsizing, because of alleged unseaworthiness, of a floating pile driver which was chartered by the defendant, a witness was called by the plaintiff solely to prove the hiring of the pile driver. It was held that, as the witness was sworn only to prove this one fact, it was improper for the defendant to cross-examine him as to the seaworthiness of the pile driver.

In *Union Bank v. Mott* (1863) 89 Barb. (N. Y.) 180, an action to recover the amount of alleged overdrafts, a witness was called to produce a written dissolution of partnership. He denied having it and denied its existence, and was then cross-examined as to the facts concerning the dissolution. It was held that it was error to permit this examination.

But in *Varick v. Jackson* (1828) 2 Wend. (N. Y.) 166, 19 Am. Dec. 571, a party directly interested as to the outcome of plaintiff's case was called by the defendant to testify to a particular fact. It was held that he might be examined generally by the plaintiff's counsel.

So, in *Jackson ex dem. Lowell v. Parkhurst* (1830) 4 Wend. (N. Y.) 360, a witness was examined with relation to the loss of a certain deed. It was held that since the witness was

generally sworn, he might be cross-examined generally as to the other points in the case. The court held, however, that it would be otherwise if the loss or destruction of an instrument was sought to be proved by a party to the record, since such a witness is sworn specially, and his cross-examination must be limited to the particular point involved in the direct examination.

In *Benson v. Johnson* (1917) 85 Or. 677, 165 Pac. 1001, the plaintiff, a trustee in bankruptcy, brought an action in replevin to recover possession of certain personal property said to have been owned by the bankrupts prior to plaintiff's election as trustee. The defendant took the stand as a witness and testified only to a sale between himself and the bankrupts. The plaintiff then sought to cross-examine him as to his compliance with the Bulk Sales Law. It was held that this was not a proper subject of cross-examination. The court said: "Having testified only to a sale between himself and Smith, the witness could not be cross-examined as to all the elements going to make up such a transaction. The circumstances of the sale, the payment of consideration, the time when and the place where, might be developed on cross-examination, because these are essential elements of, and necessarily connected with, what the witness asserted was a sale. Whether or not the same was void as to other persons at their election is an entirely different matter and is not a subject of cross-examination."

In *Brown v. Marmaduke* (1915) 248 Pa. 247, 93 Atl. 1021, an action of assumpsit on a note under seal, witnesses were called simply to testify that the maker's signature was genuine. The defendant's counsel offered to show by these witnesses that the note bore evidence of an erasure. This testimony was excluded by the court, and the action of the court in so doing was sustained.

In *Lesley v. Ewing* (1914) 244 Pa. 480, 90 Atl. 797, an action was instituted by the maker of a check against a bank on whom the plaintiff drew the check to the order of a payee whose indorsement on the check had

been forged. The payee was called as a witness for the plaintiff, and was asked the single question whether his indorsement was genuine. The court then permitted the defendant to ask this witness as to other irregularities by the forger, and also as to the forged indorsement of other checks which had passed through the hands of the forger. It was held on appeal that this testimony should have been excluded.

In *Harter v. Whitebread* (1909) 38 Pa. Super. Ct. 10, an action for slander, a witness was called for the sole purpose of contradicting a statement imputed to him by the plaintiff in her testimony. It was held that if the defendant desired to elicit from him his version of the entire conversation with the plaintiff, he should have been called in chief, testimony as to the entire conversation being without the scope of the question the witness was called to answer.

In *Wolf v. Wolf* (1893) 153 Pa. 621, 28 Atl. 164, an action of trespass *quare clausum fregit* for cutting timber, a witness was introduced to testify that he had made a draft of the land described in a certain deed. The adverse party then sought to cross-examine him as to whether the land in controversy was any part of the land described in the draft. The ruling of the trial court in refusing to allow the question was sustained.

In *Re Sheriff's Election* (1862) 1 Brewst. (Pa.) 67, a proceeding was instituted by electors, complaining of the undue election and false return of a candidate to the office of county sheriff. A witness was called simply to prove the hour in which he voted for the candidate. It was held that he could not be cross-examined as to his qualifications to vote.

In *Tiley v. Moyers* (1862) 43 Pa. 404, 4 Mor. Min. Rep. 320, an action to recover for coal, a commissioner was appointed by agreement between the parties, to report the quantity of coal mined by defendant. At the trial the commissioner was called as a witness for the sole purpose of identifying his report. It was held that he

could not be cross-examined as to the basis on which the report was made.

In *Mitchell v. Welch* (1851) 17 Pa. 339, 55 Am. Dec. 557, an action by the indorsee of a bill of exchange against the acceptors, a witness was called by plaintiff to prove simply the fact that he indorsed the bill of exchange. It was held that the trial court did not err in refusing the defendants the liberty of cross-examining the witness as to matters which belonged entirely to a distinctive defense alleged by them in their special plea. See, to the same effect, *Mitchell v. Cooper* (1851) 17 Pa. 343.

In *Buchanan v. Randall* (1906) 21 S. D. 44, 109 N. W. 513, an action was instituted against a broker for conversion of a part of the purchase price paid to him for a piece of land. The question arose as to whether the sale was made to the purchasers by the broker's agent, or whether the broker sold to the agent, who, in turn, sold to the purchasers. One of the purchasers was introduced as a witness simply to testify as to what he paid for the property. On cross-examination the witness was asked if he purchased the property from the defendant. Objection to this question was sustained by the trial court, and this ruling was assigned as error. Haney, J., said: "It was not proper cross-examination, as the witness on his direct examination testified only concerning what he paid for the property."

In *First Nat. Bank v. Smith* (1895) 8 S. D. 101, 65 N. W. 439, an action on a promissory note, a witness was called simply to prove the signatures of the signers and indorsers of the note, no other questions having been propounded to him. It was held that the defendant's counsel was not entitled to cross-examine the witness as to the consideration received for the note.

In *People v. Thiede* (1895) 11 Utah, 241, 39 Pac. 837, affirmed in (1895) 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62, a prosecution for homicide, a witness for the prosecution testified that on the Sunday evening preceding the homicide the deceased

came to her home, weeping. Cross-examination as to whether, on the following evening, defendant and his wife had not appeared friendly toward each other, was held to be improper.

In *Seeley v. Central Vermont R. Co.* (1914) 88 Vt. 178, 92 Atl. 28, an action for damages for personal injuries, a physician was called to testify to an examination which he made of the plaintiff shortly after the accident. The defendant then sought to cross-examine the physician in regard to a conversation which took place at the time of the examination, between the plaintiff and another physician who was present at the examination. It was held that the court properly excluded this question, as it was outside the direct examination.

In *Taplin v. Marcy* (1908) 81 Vt. 428, 71 Atl. 72, an action of assumpsit for logs sold and delivered, the plaintiff introduced in evidence the heading of a page in an account book, expressly limiting the evidence to a showing of the way the account was headed and the manner of making entries. It was held that the cross-examination should be confined to that issue, and questions could not be asked on cross-examination which called for an explanation of the items which appeared under the heading.

In *Carpenter v. Willey* (1893) 65 Vt. 168, 26 Atl. 488, an action for slander, a witness was introduced who testified merely to an attempt which was made by the adverse party to prevent the attendance of a witness. It was held that this witness could not be asked on cross-examination as to the plaintiff's reputation for chastity.

In *Brace v. Northern P. R. Co.* (1911) 63 Wash. 417, 38 L.R.A. (N.S.) 1135, 115 Pac. 841, action was brought against the defendant for breach of contract, the plaintiff seeking to recover profits he would have realized in filling orders for menu card folders. The plaintiff called the defendant's superintendent as a witness, for the sole purpose of having him identify his signature to the order, and asked no further question. On cross-examination, the defendant, over

plaintiff's objection, was permitted to show that a change had been made in the wording of the order. It was held, on appeal, that this was not proper cross-examination.

*Richardson v. Spangle* (1900) 22 Wash. 14, 60 Pac. 64, was an action for malicious prosecution. A justice of the peace was called as a witness by the plaintiff merely to identify certain papers and docket entries in a criminal proceeding instituted in his court. Testimony on cross-examination that the complaining witness therein asked for a writ of replevin, and instituted the criminal complaint on the suggestion of the justice, was held to have been improperly admitted.

But in *Patchen v. Parke & L. Mach. Co.* (1893) 6 Wash. 486, 33 Pac. 976, wherein it appeared that a witness was asked on direct examination only to identify a signature to a receipt, the receipt being offered for the purpose of showing payment in full of the plaintiffs' demand against the defendant, it was held that the trial court properly permitted the plaintiffs to cross-examine the witness as to the money he had received and paid out for and on their account.

## II. *Minority rule.*

In a few jurisdictions it has been held that a witness called for the sole purpose of testifying to a particular or formal point becomes a witness as to all facts in issue, and may be fully cross-examined as to his knowledge of the merits of the entire case.

*Georgia.*—*Ficken v. Atlanta* (1902) 114 Ga. 970, 41 S. E. 58; *News Pub. Co. v. Butler* (1894) 95 Ga. 559, 22 S. E. 282; *Aiken v. Cato* (1857) 23 Ga. 154; *Dawson v. Callaway* (1855) 18 Ga. 573. And see the reported case (*COWART v. STRICKLAND*, ante, 1110).

*Massachusetts.*—*O'Connell v. Dow* (1903) 182 Mass. 541, 66 N. E. 788; *Blackington v. Johnson* (1878) 126 Mass. 21; *Beal v. Nichols* (1854) 2 Gray, 262; *Moody v. Rowell* (1835) 17 Pick. 490, 28 Am. Dec. 817. Compare *Swift v. Union Mut. Marine Ins. Co.* (1877) 122 Mass. 573.

*Michigan.*—*Hemminger v. Western Assur. Co.* (1893) 95 Mich. 355, 54 N. W. 949; *Ireland v. Cincinnati, W.*

& M. R. Co. (1890) 79 Mich. 163, 44 N. W. 426; *People v. Barker* (1886) 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539; *Lichtenberg v. Mair* (1880) 43 Mich. 387, 5 N. W. 455.

Missouri. — *Walter v. Hoeffner* (1892) 51 Mo. App. 46; *Jones v. Roberts* (1889) 37 Mo. App. 163; *State v. Brady* (1885) 87 Mo. 142; *St. Louis & I. M. R. Co. v. Silver* (1874) 56 Mo. 265; *Brown v. Burrus* (1843) 8 Mo. 26; *Page v. Kankey* (1840) 6 Mo. 438. Compare *Posch v. Southern Electric R. Co.* (1898) 76 Mo. App. 601.

England. — *Hawkesworth v. Showler* (1843) 12 Mees. & W. 45, 152 Eng. Reprint, 1105; *Rex v. Brooke* (1819) 2 Starkie, 472, 20 Revised Rep. 723, 11 Eng. Rul. Cas. 166; *Morgan v. Bridges* (1818) 2 Starkie, 314, 1 Barn. & Ald. 647, 106 Eng. Reprint, 238. Compare *Ely v. Stewart* (1740) 2 Atk. 44, 26 Eng. Reprint, 423, Barnard, Ch. 170, 27 Eng. Reprint, 600.

Canada. — *Gilbert v. Campbell* (1870) 13 N. B. 55.

If a witness is examined only on a single point, he may be cross-examined on every other point pertaining to the merits of the case. *Dawson v. Callaway* (1855) 18 Ga. 573.

In *Aiken v. Cato* (1857) 23 Ga. 154, it was held that if a witness is examined even to a formal point only, the other party has a right to cross-examine him as to all points.

In *Ficken v. Atlanta* (1902) 114 Ga. 970, 41 S. E. 58, an action against a city for injury to property, the plaintiff introduced a witness who was present under a subpoena duces tecum, and examined him only in reference to a deed in his possession. The court, over the objection of the plaintiff, then allowed the witness to testify, on cross-examination, as to the merits of the case. On the motion for a new trial this was complained of as error. The court, after citing *Aiken v. Cato* (Ga.) supra, held that there was no merit to this contention, and the witness could testify on cross-examination to the merits of the whole case.

In *News Pub. Co. v. Butler* (1894) 95 Ga. 559, 22 S. E. 282, a witness was sworn by both the plaintiff and the defendant, but neither party called

him until rebuttal, when the plaintiff called him to rebut a certain point in the defendant's testimony, restricting him to that point only. It was held that the defendant might cross-examine the witness on every issue in the case.

In the reported case (*COWART v. STRICKLAND*, ante, 1110) the rule in Georgia is approved, but is held not to apply where a witness is called under order of court to testify to a formal point only, the reason for this exception being that it would be a manifest injustice to a party not wishing to call a witness, to have the witness submitted to a cross-examination on the entire case.

In *O'Connell v. Dow* (1903) 182 Mass. 541, 66 N. E. 788, an appeal from the probate of a will, it appeared that at the hearing before the probate court, a witness who was called to testify as an attesting witness to the will was allowed to be cross-examined on the entire case. To the contention that the ruling of the presiding judge was erroneous, Loring, J., said: "The general rule that a witness in this commonwealth can be cross-examined on the whole case is too well established to require discussion."

In *Blackington v. Johnson* (1878) 126 Mass. 21, the defendant introduced witnesses who testified as to one item in the declaration of set-off; the plaintiff was then allowed to cross-examine the witnesses as to all the items in the set-off. In sustaining the ruling it was said: "The admission of the questions put upon cross-examination was within the discretion of the presiding judge, and not a subject of exception. In the courts of this commonwealth, a witness, called by one party for any purpose, may be cross-examined by the other party upon the whole case."

In *Beal v. Nichols* (1854) 2 Gray (Mass.) 262, a witness was called solely to prove the execution of a written instrument. The court, commenting on the right to cross-examine, said: "It follows that the adverse party has the right to cross-examine the witness upon all matters material

to the issue. Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party who produces a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of a witness, constantly to determine what is or is not new matter upon which the opposite party has the right to put leading questions, leads to confusion and delay in the progress of trials."

In *Moody v. Rowell* (1835) 17 Pick. (Mass.) 490, 28 Am. Dec. 317, a witness who was called for the defendant was examined as to the handwriting of a payee in a promissory note. On his cross-examination the plaintiff examined him as to the handwriting of defendant, and this was objected to by the defendant. It was held that where a witness is called to testify to a particular fact, he is a witness for all purposes, and may be fully cross-examined as to the whole case.

But in *Swift v. Union Mut. Marine Ins. Co.* (1877) 122 Mass. 577, an action on a policy of marine insurance, where the issue was as to whether the vessel insured was lost by a peril insured against or by inherent weakness, the plaintiff called a witness for the sole purpose of proving that the vessel was seaworthy when she left port, and waived the examination when the defendant admitted this fact. It was held that the defendant could not ask the witness, on cross-examination, how old the vessel was.

In *Hemminger v. Western Assur. Co.* (1893) 95 Mich. 355, 54 N. W. 949, it appeared that the plaintiff's assignors agreed to remove wreckage of certain boats which belonged to the defendant from Lake Huron, in consideration for which the defendant was to pay to plaintiff's assignors one half the amount realized from the sale of the wreckage. In a suit on the contract a witness was introduced who testified that he purchased the wreckage. It was held that the defendant's counsel should have been permitted to cross-examine the witness generally.

In *Ireland v. Cincinnati, W. & M.*

*R. Co.* (1890) 79 Mich. 163, 44 N. W. 426, an action against a railroad company for negligently burning plaintiffs' building, a witness was introduced to testify to a single point. Commenting on the right to cross-examine this witness, it was said: "The rule is well established that a witness may be cross-examined upon all points material to the issue, whether the party has called them out upon direct examination or not; and there was no error in permitting the facts to be elicited upon the cross-examination of plaintiffs' witnesses."

In *People v. Barker* (1896) 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539, it was held that if a witness is sworn and gives some evidence, however formal the proof may be, he is to be considered a witness for all purposes, and may be fully cross-examined as to the merits of the entire case.

In *Lichtenberg v. Mair* (1880) 43 Mich. 387, 5 N. W. 455, an action on a negotiable instrument, the payee of the draft in suit testified as to certain conversation had with the drawee in which the latter stated that he had an unsettled account with the maker of the draft. It was held that he could be cross-examined as to the entire conversation.

*Walter v. Hoeffner* (1892) 51 Mo. App. 46, was an action for slander, wherein it appeared that the plaintiff, upon trial of the case, introduced and questioned a witness only as to the matter of reputation. It was held error to refuse to allow the defendant to cross-examine the witness on other points in the case.

In *Jones v. Roberts* (1899) 37 Mo. App. 163, an attesting witness to a will was introduced by the proponents, for the purpose of proving the execution of the will and the sanity of the testatrix. Error was assigned on the ruling of the court in allowing this witness to be cross-examined on the issue of undue influence. In ruling on this question the court of appeals said: "We see no error in this ruling. Under our state practice, which, in this respect, follows the practice of the English courts, in contradistinction to the practice of the Federal courts, a

witness who 'is sworn to give some evidence, however slight and unimportant, may be cross-examined in relation to all matters involved in the case."

*Page v. Kankey* (1840) 6 Mo. 433, was an action in *assumpsit*. At the trial of the case the plaintiff introduced a witness whom he examined as to the signature of certain letters which he wished to read to the jury. The defendant then proposed to cross-examine the witness in relation to other matters involved in the issue, but the court refused to permit the witness to be examined in relation to any point except the signature of the letters. On appeal it was held that this was error; that, however formal the proof may have been, the witness, on taking the stand, became a witness for all purposes connected with the trial of the issue. See, to the same effect, *St. Louis & I. M. R. Co. v. Silver* (1874) 56 Mo. 265.

In *Brown v. Burrus* (1848) 8 Mo. 26, it was held that if a witness is introduced to prove a single isolated fact, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue.

But in *Posch v. Southern Electric R. Co.* (1898) 76 Mo. App. 601, an action for personal injuries received by the plaintiff through the alleged negligence of the defendant, a witness was called who testified simply to the fact that he assisted the plaintiff to his feet after being thrown from the defendant's car. The trial court would not allow this witness to be cross-examined on any other fact in issue. The court held that this ruling was not erroneous.

In *Hawkesworth v. Showler* (1843) 12 Mees. & W. 45, 152 Eng. Reprint, 1105, Lord Abinger, C. B., said: "When once a witness is sworn, he is not sworn to answer particular ques-

tions, but to give evidence on all the matters in dispute between the parties."

In *Rex v. Brooke* (1819) 2 Starkie (Eng.) 472, 20 Revised Rep. 723, 11 Eng. Rul. Cas. 166, the attorney for the defendant, in the course of a prosecution for a misdemeanor, was called as a witness and sworn, and produced a copy of a declaration in an action brought by the defendant against the prosecutor, but he was not asked any questions by the party calling him. The adverse party insisted on his right to cross-examine him as a witness. The court was of opinion that the witness should be cross-examined, and the objection on the part of the attorney calling him was overruled.

In *Morgan v. Bridges* (1818) 2 Starkie, 314, 1 Barn. & Ald. 647, 106 Eng. Reprint, 298, it was held that if a party calls his adversary in the case, although for the purpose of formal proof only, he may be cross-examined as to the whole of the case.

But compare *Ely v. Stewart* (1740) 2 Atk. 44, 26 Eng. Reprint, 423, where the court said: "Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine, as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact."

In *Gilbert v. Campbell* (1870) 13 N. B. 55, the attorney general was examined as a witness by consent, as to whether he had a certain deed in his possession. It was held that the defendant's counsel had a right to cross-examine him upon any fact in the cause, and not merely as to his possession of the deed,—the fact which he was called to prove. W. F. F.

MAUDE LEWIS, Exrx., etc., of John F. Bailey, Deceased, Appt.,  
v.  
OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, Respt.

*New York Court of Appeals — May 28, 1918.*

(224 N. Y. 18, 120 N. E. 56.)

**Insurance — accident — infected wound — voluntary act.**

Death from inflammation of the brain caused by infection due to voluntarily puncturing a pimple on the lip is within a policy insuring against loss resulting from bodily injuries effected solely through accidental means.

[See note on this question beginning on page 1131.]

(Crane, J., dissents.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part XIV., dismissing the complaint in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Harry B. Bradbury for appellant.

Mr. Frederick W. Catlin, with Mr. Robert H. Woody, for respondent:

The policy by its express terms does not insure against loss of life except when such loss results directly, independently, and exclusively of all other causes from bodily injury effected solely through accidental means.

Crandall v. Continental Casualty Co. 179 Ill. App. 330; Penn v. Standard Life & Acci. Ins. Co. 158 N. C. 29, 42 L.R.A.(N.S.) 593, 73 S. E. 99, on rehearing in 160 N. C. 399, 42 L.R.A.(N.S.) 597, 76 S. E. 262; Laessig v. Travelers' Protective Assn. 169 Mo. 272, 69 S. W. 469; Keefer v. Pacific Mut. L. Ins. Co. 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366; Martin v. Manufacturers' Acci. Indemnity Co. 151 N. Y. 94, 45 N. E. 377; Bailey v. Interstate Casualty Co. 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed in 158 N. Y. 723, 53 N. E. 1123.

The spreading of the inflammation beyond the area of the lip appears to have taken place only after the incision made by Dr. Williamson, which was, of course, not an injury effected by accidental means.

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; Bacon v. United States Mut. Acci. Assn. (Stedman v. United

States Mut. Acci. Assn.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; Appel v. Aetna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed in 180 N. Y. 514, 72 N. E. 1139; Niskern v. United Brotherhood, C. J. 93 App. Div. 364, 87 N. Y. Supp. 640; United States Mut. Acci. Assn. v. Barry, 181 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

Infection by a disease-producing germ that comes in contact with the body under such circumstances that it can and does develop a disease does not of itself constitute a bodily injury resulting from accidental means.

Bacon v. United States Mut. Acci. Assn. (Stedman v. United States Mut. Acci. Assn.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399.

Cardozo, J., delivered the opinion of the court:

The plaintiff's testator, John F. Bailey, held a policy of insurance issued by the defendant. It covered "loss or disability resulting directly, independently, and exclusively of all other causes from bodily injuries effected solely through accidental means." The question is whether injuries resulting in death were ef-



fected by accidental means within the meaning of the policy. The trial judge dismissed the complaint. The appellate division, two justices dissenting, affirmed.

On July 6, 1915, the insured had a pimple on his lip. A friend who lunched with him says that it looked like an ordinary pimple at that time. A day or so later it was larger and more inflamed. On July 10th the insured consulted a physician. The physician's testimony is that there was then a punctured wound in the lip, which had inflamed and infected the deep tissues. The lip was opened by the physician, and remedies were applied. They were of no avail. The infection spread through the cheek toward the eye. A week later, July 17th, the insured became paralyzed and blind. He died the next day. His death was due to inflammation of the brain produced by the germ known as the staphylococcus aureus. There is little doubt that the germ came from the infected pimple. If the infection was the result of accident, the defendant is liable.

We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened,

there was an accident. We have held that infection resulting from the use of a hypodermic needle is caused by "accidental means." *Bailey v. Interstate Casualty Co.* 8 App. Div. 127, 40 N. Y. Supp. 513, id., 158 N. Y. 723, 53 N. E. 1123; *Marchi v. Aetna L. Ins. Co.* 140 App. Div. 901, 125 N. Y. Supp. 1130, id., 205 N. Y. 606, 98 N. E. 1108. The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby

became lethal. To the scientist who traces the origin of disease there may seem to be no accident in all this. "Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident." *Halsbury, Ltd. Ch., in Brintons v. Turvey* [1905] A. C. 230, 233, 2 Ann. Cas. 137. But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. *Brintons v. Turvey, supra*; *Ismay v. Williamson* [1908] A. C. 437, 440, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts. *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Lewis v. Iowa State Traveling Men's Asso.* (D. C.) 248 Fed. 602; *Western Commercial Travelers Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; *Brintons v. Turvey and Ismay v. Williamson, supra*; *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, 30 L.R.A. (N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; *Aetna L. Ins. Co. v. Portland Gas & Coke Co.* L.R.A. 1916D, 1027, 144 C. C. A. 12, 229 Fed. 552; *Omberg v. United States Mut. Acci. Asso.* 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; *Hiers v. Hull*, 178 App. Div. 350, 352, 164 N. Y. Supp. 767; *Bailey v. Interstate Casualty Co. supra*.

The defendant argues that the puncture may not have caused the infection. But the plaintiff's experts say that in their opinion the entrance of the germs from the skin into the deeper tissues was the result of trauma. They say that trauma is almost invariably the cause of such infections. We find the signs

of trauma here in the punctured wound which was visible when the physician was first consulted. The insured was an athlete in the prime of life and the fullness of health; the infection was not due, therefore, to lowered powers of resistance. The punctured wound is an adequate cause. The evidence suggests no other; at least, a jury might so find. Here, as elsewhere, the law contents

itself with probabilities, and declines to wait for certainty before drawing its conclusions.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Hiscock, Ch. J., and Cuddeback, Pound, McLaughlin, and Andrews, JJ., concur.

Crane, J., dissents.

## ANNOTATION.

**Insurance: death or injury resulting from insured's voluntary act as caused by accident or accidental means.**

- I. Introductory, 1181.
- II. Losses arising from voluntarily puncturing skin, 1133.
- III. Losses resulting from exertion or exercise, 1136.
- IV. Losses resulting from taking poison, 1141.
- V. Miscellaneous, 1142.

### I. Introductory.

It will be observed that this note deals only with the question whether death or injury resulting from the insured's voluntary act was caused by accident or accidental means, and it does not consider the effect of express provisions; such, for example, as those excluding liability in case of diseased condition, or liability in case of strain, etc.; nor does it go into the construction of the words "external" or "violent," as used in clauses providing for a recovery in case of death or injury resulting from "external, violent, and accidental means."

As to injury received by insured while assaulting another as an accident, see annotation to *Meister v. General Acci. Fire & Life Assur. Corp.* 4 A.L.R. 718.

It is generally held that death or injury does not result from accident or accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, unaccompanied by anything unforeseen, except the death or injury.

**United States.**—*McCarthy v. Travelers' Ins. Co.* (1878) 8 Biss. 363, Fed. Cas. No. 8,682; *Dozier v. Fidelity & C. Co.* (1891) 13 L.R.A. 114, 46 Fed.

446; *Taliaferro v. Travelers' Protective Asso.* (1897) 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; *Western Commercial Travelers' Asso. v. Smith* (1898) 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; *Shanberg v. Fidelity & C. Co.* (1907) 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; *Hastings v. Travelers' Ins. Co.* (1911) 190 Fed. 258; *Preferred Acci. Ins. Co. v. Patterson* (1914) 130 C. C. A. 175, 213 Fed. 595; *Maryland Casualty Co. v. Spitz* (1917) L.R.A.1918C, 1191, 159 C. C. A. 119, 246 Fed. 817.

**California.**—*Rock v. Travelers' Ins. Co.* (1916) 172 Cal. 462, L.R.A.1916E, 1196, 156 Pac. 1029; *Bennetts v. Occidental L. Ins. Co.* (1919) — Cal. App. —, 178 Pac. 964.

**Connecticut.**—*Southard v. Railway Pass. Assur. Co.* (1868) 34 Conn. 574, Fed. Cas. No. 13,182.

**Georgia.**—*Cobb v. Preferred Mut. Acci. Asso.* (1895) 96 Ga. 818; *Fulton v. Metropolitan Casualty Ins. Co.* (1916) 19 Ga. App. 127, 91 S. E. 228.

**Indiana.**—*Schmid v. Indiana Travelers' Acci. Asso.* (1908) 42 Ind. App. 485, 85 N. E. 1032.

**Iowa.**—*Smouse v. Iowa State Traveling Men's Asso.* (1902) 118 Iowa, 436, 92 N. W. 53; *Lehman v. Great Western Acci. Asso.* (1911) 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752.

**Kentucky.**—*Salinger v. Fidelity & C. Co.* (1917) 178 Ky. 369, L.R.A. 1918C, 101, 198 S. W. 1168; *American Acci. Co. v. Carson* (1895) — Ky. —, 30 S. W. 879.

**Massachusetts.**—*Smith v. Travelers'*

Ins. Co. (1914) 219 Mass. 147, L.R.A. 1915B, 872, 106 N. E. 607.

Mississippi.—Fidelity & C. Co. v. Johnson (1894) 72 Miss. 333, 30 L.R.A. 206, 17 So. 2.

New York.—Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) (1890) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Appel v. Aetna L. Ins. Co. (1903) 86 App. Div. 83, 88 N. Y. Supp. 238, affirmed without opinion in (1904) 180 N. Y. 514, 72 N. E. 1139.

Ohio.—New Amsterdam Casualty Co. v. Johnson (1914) 91 Ohio St. 155, L.R.A. 1916B, 1018, 110 N. E. 475.

Oregon.—Kendall v. Travelers' Protective Asso. (1918) 87 Or. 179, 169 Pac. 751.

Tennessee.—Stone v. Fidelity & C. Co. (1915) 133 Tenn. 672, L.R.A. 1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86.

England.—Scarr v. General Acci. Assur. Corp. [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

Scotland.—Clidero v. Scottish Acci. Ins. Co. (1892) 29 Scot. L. R. 303, 19 Sc. Sess. Cas. 4th series, 355.

Where, however, the death or injury is not the natural or probable result of the insured's voluntary act, or something unforeseen occurs in the doing of the act, the death or injury is held to be within the protection of policies insuring against death or injury from accident or accidental means.

United States.—United States Mut. Acci. Asso. v. Barry (1889) 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Nax v. Travelers' Ins. Co. (1904) 130 Fed. 985; Interstate Business Men's Asso. v. Lewis (1919) — C. C. A. —, 257 Fed. 241; Iowa State Traveling Men's Asso. v. Lewis (1919) — C. C. A. —, 257 Fed. 552.

Arkansas.—Standard Life & Acci. Ins. Co. v. Schmaltz (1899) 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49.

District of Columbia.—Patterson v. Ocean Acci. & Guarantee Corp. (1905) 25 App. D. C. 46.

Georgia.—Atlanta Acci. Asso. v. Alexander (1898) 104 Ga. 709, 42

L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616.

Illinois.—Robison v. United States Health & Acci. Ins. Co. (1915) 192 Ill. App. 475.

Iowa.—Lickleider v. Iowa State Traveling Men's Asso. (1918) — Iowa, —, 3 A.L.R. 1295, 166 N. W. 363, 163 N. W. 884.

Kentucky.—General Acci. & Life Assur. Corp. v. Meredith (1910) 141 Ky. 92, 132 S. W. 191.

Maine.—McGlinchey v. Fidelity & C. Co. (1888) 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13.

Mississippi.—Pervanagher v. Union Casualty & Surety Co. (1904) 85 Miss. 31, 37 So. 461.

Missouri.—Summers v. Fidelity Mut. Aid Asso. (1900) 84 Mo. App. 605; Young v. Railway Mail Asso. (1907) 126 Mo. App. 325, 103 S. W. 557.

New Mexico.—Rodey v. Travelers' Ins. Co. (1886) 3 N. M. 543, 9 Pac. 343.

New York.—Bailey v. Interstate Casualty Co. (1896) 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed in (1899) 158 N. Y. 723, 53 N. E. 1123; Lewis v. OCEAN ACCI. & GUARANTEE CORP. (reported herewith) ante, 1129.

Pennsylvania.—Pickett v. Pacific Mut. L. Ins. Co. (1891) 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; Rose v. Commercial Mut. Acci. Co. (1900) 12 Pa. Super. Ct. 394.

Washington.—Horsfall v. Pacific Mut. L. Ins. Co. (1903) 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028.

England.—Martin v. Travellers' Ins. Co. (1859) 1 Fost. & F. 505; Hamlyn v. Crown Acci. Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663.

A distinction is drawn in some cases between "accident" and "accidental means," on the theory that although the result of an intentional act may be an "accident," the act itself, that is the cause, where intended, is not an "accidental means." This distinction was recognized in the following cases, which are subsequently set forth under their appropriate subdivisions:

**United States.**—*McCarthy v. Travelers' Ins. Co.* (1878) 8 Biss. 362, Fed. Cas. No. 3,682; *Shanberg v. Fidelity & C. Co.* (1907) 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; *Hastings v. Travelers' Ins. Co.* (1911) 190 Fed. 258; *Preferred Acci. Ins. Co. v. Patterson* (1914) 130 C. C. A. 175, 218 Fed. 595; *Maryland Casualty Co. v. Spitz* (1917) L.R.A.1918C, 1191, 159 C. C. A. 119, 246 Fed. 817; *Iowa State Traveling Men's Asso. v. Lewis* (1919) — C. C. A. —, 257 Fed. 552.

**California.**—*Rock v. Travelers' Ins. Co.* (1916) 172 Cal. 462, L.R.A.1916E, 1196, 156 Pac. 1029; *Bennetts v. Occidental L. Ins. Co.* (1919) — Cal. App. —, 178 Pac. 964.

**Connecticut.**—*Southard v. Railway Pass. Assur. Co.* (1868) 34 Conn. 574, Fed. Cas. No. 13,182.

**Georgia.**—*Cobb v. Preferred Mut. Acci. Asso.* (1895) 96 Ga. 818, 22 S. E. 976; *Fulton v. Metropolitan Casualty Ins. Co.* (1916) 19 Ga. App. 127, 91 S. E. 228.

**Indiana.**—*Schmid v. Indiana Travelers' Acci. Asso.* (1908) 42 Ind. App. 483, 85 N. E. 1032.

**Iowa.**—*Lehman v. Great Western Acci. Asso.* (1911) 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752; *Feder v. Iowa State Traveling Men's Asso.* (1899) 107 Iowa, 538, 43 L.R.A.(N.S.) 693, 70 Am. St. Rep. 212, 78 N. W. 252.

**Kentucky.**—*Salinger v. Fidelity & C. Co.* (1917) 178 Ky. 369, L.R.A.1918C, 101, 198 S. W. 1163.

**Massachusetts.**—*Smith v. Travelers' Ins. Co.* (1914) 219 Mass. 147, L.R.A. 1915B, 872, 106 N. E. 607.

**New York.**—*Appel v. Aetna L. Ins. Co.* (1903) 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed without opinion in (1904) 180 N. Y. 514, 72 N. E. 1139.

**Oregon.**—*Kendall v. Travelers' Protective Asso.* (1918) 87 Or. 179, 169 Pac. 751.

**Tennessee.**—*Stone v. Fidelity & C. Co.* (1915) 133 Tenn. 672, L.R.A.1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86.

**England.**—*Scarr v. General Acci. Assur. Corp.* [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 123, 21 Times L. R. 173, 1 Ann. Cas. 787.

**Scotland.**—*Clidero v. Scottish Acci. Ins. Co.* (1892) 29 Scot. L. R. 308, 19 Sc. Sess. 4th series, 355.

## *II. Losses arising from voluntarily puncturing skin.*

It will be observed that in the reported case (*LEWIS v. OCEAN ACCL. & GUARANTEE CORP.* ante, 1129) it was decided that death resulting from infection due to the voluntary puncturing of a pimple was within the protection of a policy insuring against loss resulting from bodily injuries effected solely through accidental means.

Two other cases against different insurance companies grew out of the same state of facts and involved the same loss that was involved in the reported case. In *Interstate Business Men's Acci. Asso. v. Lewis* (1919) — C. C. A. —, 257 Fed. 241, the use by the deceased of his infected scarf pin to puncture a pimple, without knowledge that the pin was infected, was held an accidental means causing death within a provision insuring against death resulting directly and without intervening cause from injuries sustained solely by accidental means. The court here said: "Counsel for defendant further contends that, if the deceased selected a scarf pin in ignorance of its infected condition, to use in making a voluntary puncture of the skin, this fact would not make the means of death accidental. To sustain this proposition, a distinction is sought to be drawn between the intentional selection of an instrument in ignorance of some peculiar property which it possessed, and the inadvertent selection of an instrument known to be inappropriate. The last-named situation, it is admitted, might be an accidental means; but in inadvertently selecting an instrument known to be inappropriate there is no intention of selecting that instrument; neither was there, in the case at bar, any intention to select an infected instrument. Such refinement may be indulged in as a matter of intellectual pleasure, but in the practical adjustment of the rights of parties to an insurance contract it ought not to be given much weight. There is no evidence or finding that de-

ceased knew as a fact that the scarf pin was infected, and we are not prepared to decide that the knowledge as to bacterial infection has been so widely diffused that the deceased was bound to know that fact. The stipulation of facts is silent upon the question; but as the trial court found in favor of the plaintiff it must have found that the deceased did not know, nor could he be presumed to know, of the presence of bacteria upon the pin. We are therefore of the opinion that the death of deceased was due to a bodily injury effected by external, violent, and accidental means."

The other case arising from this accident was *Iowa State Traveling Men's Asso. v. Lewis* (1919) — C. C. A. —, 257 Fed. 552, where the court, relying on the conclusion in *Interstate Business Men's Acci. Asso. v. Lewis* (Fed.) *supra*, affirmed the district court's decision in (1918) 248 Fed. 602, that the insured died as a result of bodily injuries due to accidental means. The district court relative to the point under discussion said: "Were the 'means' in this case accidental? That is, 'unforeseen, involuntary, unexpected;' 'happening by chance; unexpectedly taking place; not according to the usual course of things.' If, 'in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means.' *United States Mut. Acci. Asso. v. Barry* (1889) 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755. Judge Sanborn well defines 'accidental means' in *Western Commercial Travelers' Asso. v. Smith* (1898) 40 L.R.A. 653, 29 C. C. A. 223, 85 Fed. 401, 56 U. S. App. 393, as follows: "The significance of this word 'accidental' is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use,—the result which may be reasonably anticipated from their use, and which ought

to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing, under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means.' In this case the facts are agreed upon. John F. Bailey, the insured, was a strong, vigorous man, in excellent health. He discovered a small pimple on the right side of his upper lip. He removed his gold scarf pin from his necktie and intentionally pricked the pimple with said scarf pin. His lip at said place became immediately infected with staphylococci infection from the scarf pin. The infection spread and caused his death in a few days. It is also agreed 'that the scarf pin used by insured in pricking his lip communicated or caused infection by being introduced into the tissues of the lip.' Therefore there can be no dispute in the case that the pin was infected; that it carried the cocci upon it. It is not a case of breaking the skin and having it afterwards infected, but it is specifically agreed 'that the infection was caused by, and came from, the scarf pin.' If it came from the scarf pin, it is ap-

parent that the cocci were on the scarf pin. It cannot be assumed that the deceased knew that the cocci were upon the pin. There is no basis for the assumption that the deceased intentionally infected his lip. He did the act, which, as a matter of common knowledge, thousands do every year,—he used a pin which he had at hand to open a pimple. I suppose it would be safe to say, as a matter of common knowledge, that not once in a thousand times does such use of a pin, even when no effort to sterilize is made, result in infection. If the injury resulted from the pin alone, and there was no proof that the pin was infected, the accidental result would not be covered by this policy; but the deceased clearly used something which he did not intend to use. He used not only the pin, but he used an infected pin,—a poisoned pin. This infection was such that it could not, in the nature of things, be discovered by him without perhaps a microscopic investigation. To my mind the means were clearly accidental. A man who eats infected food, without knowledge of its infection, is doing something he did not intend to do. The eating of the food is voluntary, but the eating of the poison is not. The housewife goes to the flour bin, kneads her bread, bakes it, and serves it. Those who eat it die. It is found that the bin contains not only flour, but arsenic. The unfortunates voluntarily eat the bread, composed of flour and arsenic. The 'means,' causing death, are accidental. I see no distinction in principle between the case at bar and the numerous cases illustrated by ptomaine poisoning, and other cases of unintentional infection."

In *Bailey v. Interstate Casualty Co.* (1896) 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed in (1899) 158 N. Y. 723, 53 N. E. 1123, it was held a question for the jury whether the insured's injuries were sustained through accidental means within a provision of an accident policy, there being evidence that the plaintiff, a physician, while on his way home in a road cart, to relieve exhaustion, injected morphia with a hypodermic needle, and that

while he was so doing the horse started, and the needle might have gone deeper than was intended, and that the poisoning which followed was not due to the morphia injected but to the puncture by the needle or infection on the needle or skin. The court said: "The defendant says it was not an accident, because the plaintiff voluntarily inserted the needle. According to Webster an accident is an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore, not expected. In *United States Mut. Acci. Asso. v. Barry* (1889) 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, the insured voluntarily jumped from a platform 4 or 5 feet high to the ground, and it was alleged that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. The court, at page 121, says: 'It must be presumed, not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping from the time deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected;" that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means, but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means.' Within the rule laid down in the *Barry Case*, the jury might have found in

this case that the injury resulted through accidental means." The Barry Case, above referred to, is set out in the subdivision following this.

In *Townsend v. Commercial Travelers' Mut. Acci. Asso.* (1919) 188 App. Div. 370, 177 N. Y. Supp. 68, however, a policy insuring against death from accidental means was held not to cover the insured's death, where it appeared that, being unable to sleep, he obtained a hypodermic needle which had been furnished by a doctor some years before to treat the insured's wife for cancer; that his daughter at his direction inserted the needle into his arm, resulting in blood poisoning, from which he died. The court stated that it would be an abuse of the word "accidental" to hold that it contemplated an act deliberately done by the insured, or at his direction, constituting a crime; that there was nothing accidental about the insured's having the needle in his possession in violation of statute, nor in the use which he directed to be made of it, and that the fact that he did not contemplate the result reached did not alter the character of the act; that the needle was unlawfully in his possession, was unlawfully used, and that there were no more of the elements of an accident in the transaction than in any crime. It does not appear from the opinion in this case whether or not the policy contained a provision commonly found in accident policies excluding liability for death or injury in consequence of violation of law. Apart from such a provision, it is not entirely clear how the fact that the insured was violating the law at the time he received the injury resulting in his death could affect the question whether his injury or death resulted from accidental means.

It has been held that death was not effected through accidental means within a provision of an accident policy where the insured died from erysipelas caused by germs which entered after the breaking of the scab on a boil by scratching it with unclean hands to allay itching. *Maryland Casualty Co. v. Spitz* (1917) L.R.A. 1918C, 1191, 159 C. C. A. 119, 246 Fed.

817. The court said: "The verdict has established, and we therefore assume the further fact to be, that the germs of erysipelas entered the wound after the scab had been rubbed or scratched off, and that the disease then introduced was the immediate cause of death; so that the only question now is whether the means that opened the way for the germs to enter, namely, the rubbing or scratching of the boil, was an accidental means. The court submitted this question to the jury, asking them to find whether the injury was inflicted accidentally, and in this submission we think there was error. As we read the testimony, nothing appears to show that the injury was inflicted by accidental means. The deceased rubbed or scratched his neck in the ordinary way; there is no evidence that he was disturbed or interfered with during the operation, and an ordinary and not unusual result followed; that is, he broke the scab. His hands were not clean, but he knew that fact and must be held to the risk of such harm as might follow therefrom. In a word, he seems to have done just what he intended to do, namely, rub or scratch his neck to relieve the itching, and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected. We think the defendant was entitled to binding instructions."

And in *Kendall v. Travelers' Protective Asso.* (1918) 87 Or. 179, 169 Pac. 751, it was held that the injury did not result from accidental means, if it was impossible for a barber, requested by the insured to remove an ingrowing hair, to perform the operation without making some incision of the skin, and on that account the barber intentionally and with the implied consent of the insured made a cut which afterward became infected and resulted in blood poisoning.

### *III. Losses resulting from exertion or exercises.*

In many of the cases involving losses resulting from exertion or exercise the distinction mentioned in the introductory, between an accident and an accidental means, has been recog-

nized, and a recovery on account of death or injury resulting from the insured's voluntary act has been denied on the theory that it is not enough that the death or injury be unusual and unexpected, but that the cause must also be unexpected and unusual.

**United States.**—*McCarthy v. Travelers' Ins. Co.* (1878) 8 Biss. 362, Fed. Cas. No. 8,682; *Hastings v. Travelers' Ins. Co.* (1911) 190 Fed. 258.

**California.**—*Rock v. Travelers' Ins. Co.* (1916) 172 Cal. 462, L.R.A.1916E, 1197, 156 Pac. 1029; *Bennetts v. Occidental L. Ins. Co.* (1919) — Cal. App. —, 178 Pac. 964.

**Connecticut.**—*Southard v. Railway Pass. Assur. Co.* (1868) 34 Conn. 574, Fed. Cas. No. 13,182.

**Georgia.**—*Cobb v. Preferred Mut. Acci. Asso.* (1895) 96 Ga. 818, 22 S. E. 976; *Fulton v. Metropolitan Casualty Ins. Co.* (1916) 19 Ga. App. 127, 91 S. E. 228.

**Indiana.**—*Schmid v. Indiana Travelers' Acci. Asso.* (1908) 42 Ind. App. 483, 85 N. E. 1032.

**Iowa.**—*Feder v. Iowa State Traveling Men's Asso.* (1899) 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Lehman v. Great Western Acci. Asso.* (1911) 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752.

**Kentucky.**—*Salinger v. Fidelity & C. Co.* (1917) 178 Ky. 369, L.R.A.1918C, 101, 198 S. W. 1163.

**New York.**—*Appel v. Aetna L. Ins. Co.* (1903) 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed without opinion in 180 N. Y. 514, 72 N. E. 1139.

**Tennessee.**—*Stone v. Fidelity & C. Co.* (1916) 133 Tenn. 672, L.R.A.1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86.

**England.**—*Scarr v. General Acci. Assur. Corp.* [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

**Scotland.**—*Clidero v. Scottish Acci. Ins. Co.* (1892) 29 Scot. L. R. 303, 19 Sc. Sess. Cas. 4th series, 355.

In *Rock v. Travelers' Ins. Co.* (1916) 172 Cal. 462, L.R.A.1916E, 1197, 156 Pac. 1029, it was held that death from a dilatation of the heart, due to a voluntary attempt to carry a casket con-

taining a corpse down a stairway, was not a death from "accidental means" within the meaning of an accident policy where nothing unusual or unexpected, such as slipping, occurred in the course of carrying the casket. The court said: "The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which are the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death. Policies like the one before us have been before the courts in many cases, and the great weight of authority, we think, sustains the view which we have just expressed. Thus, in *Clidero v. Scottish Acci. Ins. Co.* (Scot.) supra, Lord Adam said: 'The question, in the sense of this policy, is not whether death was the result of accident in the sense that it was a death which was not foreseen or anticipated. That is not the question. The question is, in the words of this policy, whether the means by which the injury was caused were accidental means. The death being accidental in the sense in which I have mentioned, and the means which led to the death as accidental, are, to my mind, two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental.'"

The decision in *Rock v. Travelers' Ins. Co.* (Cal.) supra, was followed in *Bennetts v. Occidental L. Ins. Co.* (Cal.) supra, where it was held that no recovery could be had under a policy insuring against injuries effected through accidental means; it merely appearing that the insured was taken ill shortly after he had assisted an-



other in pulling a pipe out of a sump hole, and there being nothing to show that the insured slipped, or that anything unforeseen occurred in lifting the pipe.

And it has been held that death from heart paralysis caused by exertions in a rarefied atmosphere in ascending a long flight of steps and carrying his baggage in going from the station to his hotel was not a death from accidental means, as it was the direct result of an intentional act. *Schmid v. Indiana Travelers' Acci. Asso.* (1908) 42 Ind. App. 483, 85 N. E. 1032.

So death from dilation of the heart occasioned by the insured's act in placing his hands on the arms of a chair and raising and lowering himself has been held not to have been caused by accidental means. *Hastings v. Travelers' Ins. Co.* (1911) 190 Fed. 258.

And in *Cobb v. Preferred Mut. Acci. Asso.* (1895) 96 Ga. 818, where the insured while in a feeble condition alighted from a train and was injured in some way while carrying his baggage, weighing between 60 and 80 pounds, a distance of 50 yards, and as a result lost the sight of an eye, it was held that the injury was not effected by accidental means.

The decision in the Cobb Case was followed in *Fulton v. Metropolitan Casualty Ins. Co.* (1916) 19 Ga. App. 127, 91 S. E. 228, where the policy insured against injury sustained through accidental means, and the evidence merely tended to show an injury by straining in pulling and pushing a boat from dry land to the water, the court holding that under the facts a nonsuit was properly granted.

And appendicitis due to the irregular working of the muscles of the sides because of strain in bowling has been held not to be within the protection of a policy providing for indemnity for loss of time resulting from disability due to accidental means. *Lehman v. Great Western Acci. Asso.* (1911) 155 Iowa, 737, 43 L.R.A. (N.S.) 562, 133 N. W. 752.

And a rupture of the appendix caused by the friction of the muscles

in riding a bicycle has been held not produced by accidental means. *Appel v. Aetna L. Ins. Co.* (1903) 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed without opinion in (1904) 180 N. Y. 514, 72 N. E. 1139.

And where one in getting out of bed and stooping over to put on his stockings displaced an intestine and died as a result, the injury was held not to have been caused by accidental means. *Clidero v. Scottish Acci. Ins. Co.* (1892) 29 Scot. L. R. 303, 19 Sc. Sess. Cas. 4th series, 355.

And in *Scarr v. General Acci. Assur. Corp.* [1905] 1 K. B. (Eng.) 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787, death resulting from violent physical exertion, which was intended, was held not to have been caused by accidental means.

And it has been held that loss of sight because of a blood clot, due to a sudden intentional movement of the hand to reach a desired object when in a weakened condition, and under high blood pressure, is not within a policy insuring against injury through accidental means. *Stone v. Fidelity & C. Co.* (1916) 133 Tenn. 672, L.R.A. 1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86.

And a like conclusion was reached in *Salinger v. Fidelity & C. Co.* (1917) 178 Ky. 369, L.R.A. 1918C, 101, 198 S. W. 1163, where there was a loss of the sight of an eye because of the lodgment in an artery of an embolus, due to a bodily condition, while insured was under strain in lifting.

And death caused by the rupture of an artery when the insured reached to close a window shutter has been held not a death "from accidental cause," since, except for the rupture, nothing unforeseen occurred. *Feder v. Iowa State Traveling Men's Asso.* (1899) 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252.

And in *McCarthy v. Travelers' Ins. Co.* (1878) 8 Biss. 362, Fed. Cas. No. 3,682, it was held that death from rupture of a blood vessel while exercising with Indian clubs did not result from accidental means if the insured voluntarily used the clubs in the

ordinary way without the intervention of any unusual circumstances, but that if any unforeseen or involuntary movement of the body occurred, which, in connection with the use of the clubs, brought about the injury, or if any unforeseen or unexpected circumstance interfered with the usual course of the exercises, by which there was produced an involuntary strain or wrench which occasioned the injury, the means would be accidental.

And it has been held that a rupture of the heart, which was in a state of degeneration, by carrying a door, or filling the lungs with air in taking a long breath, was not within a policy insuring against injuries sustained through accidental means. *Shanberg v. Fidelity & C. Co.* (1907) 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1.

And death did not result from accidental means where the insured, while performing an operation on an animal on his farm, ran up a small hillside to a fire, heated an iron, and ran back again without stumbling or falling and immediately sustained a stroke of apoplexy because of a diseased condition. *Travelers' Ins. Co. v. Selden* (1897) 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285.

And where the insured, after going through a train standing at a station, jumped from the train and walked briskly for some distance, and the same day a partial rupture was discovered, it was held that the injury was not one effected through violent and accidental means. *Southard v. Railway Pass. Assur. Co.* (1868) 34 Conn. 574, Fed. Cas. No. 13,182.

In *Preferred Acci. Ins. Co. v. Patterson* (1914) 130 C. C. A. 175, 213 Fed. 595, it was recognized that there could be no recovery under a policy insuring against injuries sustained by accidental means in case the insured sustained an injury from the ordinary strain in cranking his automobile, as the strain would be regarded as a result of what he intended to do. In that case, however, there was evidence that the insured slipped and fell while attempting to crank the machine, and a

judgment for the plaintiff was affirmed.

In *Smouse v. Iowa State Traveling Men's Asso.* (1902) 118 Iowa, 486, 92 N. W. 58, where one, just recovering from pneumonia, was suddenly aroused from sleep, arose in a confused condition of mind, and hurriedly attempted to remove his nightgown over his head, and while his arms were raised they became entangled in the garment, and putting forth a violent exertion in an endeavor to extricate himself he ruptured a blood vessel and died therefrom, it was held that the exertions were voluntary, and that his death could not be regarded as resulting from an accidental cause.

In *Niskern v. United Brotherhood*, C. J. 93 App. Div. 364, 87 N. Y. Supp. 640, the rupture of a blood vessel by lifting a heavy weight in pursuing his business was held not accidental where the insured was suffering from a disease of the arteries.

There is, however, some conflict among the cases, and in some, upon facts similar to those involved in some of the preceding cases, a different conclusion has been reached.

Thus, a policy insuring against the effect of bodily injuries caused solely by accidental means has been held to cover death resulting from a rupture of the heart where it appeared that the insured was a healthy man, never sick, and accustomed to easily lift from 100 to 250 pounds, and that the rupture resulted from his picking up one end of an iron bar weighing 350 to 400 pounds. *Horsfall v. Pacific Mut. L. Ins. Co.* (1903) 32 Wash. 132, 68 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1023.

And the court in *Rose v. Commercial Mut. Acci. Co.* (1900) 12 Pa. Super. Ct. 394, was of the opinion that the insured's injury resulted from accidental means, where in the course of his employment he raised a heavy weight, and thereafter felt oppressed, and stopped work, and the next day, while helping move a heavy stone with a pick, collapsed and subsequently suffered hemorrhages. The policy involved in this case, however, excepted liability for injuries occasioned by

lifting or overexertion and a nonsuit was held to have been properly entered.

And in *Summers v. Fidelity Mut. Aid Asso.* (1900) 84 Mo. App. 605, death was held to be due to an accident produced by accidental means where it appeared that the insured, an employee in a railway shop, while engaged in attempting to lift a heavy truck, suddenly said that he was hurt, and was taken home, and found to have a hernia, from which he died shortly after.

And in *Atlanta Acci. Asso. v. Alexander* (1898) 104 Ga. 709, 42 L.R.A. 188, 80 S. E. 939, 4 Am. Neg. Rep. 616, where there was evidence that the insured, a healthy man, accustomed in his occupation as blacksmith to use a heavy sledge, while striking a slanting blow with the hammer, felt a severe pain in his abdomen, which resulted in a rupture and death, it was held that the jury were warranted in finding that death resulted from accidental means.

And the question whether the insured's injury was caused by accidental means was held for the jury in *Young v. Railway Mail Asso.* (1907) 126 Mo. App. 325, 108 S. W. 557, where it appeared that he was a railway mail clerk, and that while lifting a heavy mail sack he ruptured a blood vessel on his lung, and so strained and injured himself as to cause several hemorrhages, and there was evidence that such a rupture was not a natural or probable effect of lifting a mail sack.

And in *Pervanger v. Union Casualty & Surety Co.* (1904) 85 Miss. 31, 37 So. 461, where a declaration alleged that the insured's death was caused from bodily injuries to his lungs or stomach, or some part thereof, or some part of his body adjacent thereto and connected therewith, or the rupture of some blood vessel caused by being strained in lifting or handling some heavy machinery or substance, it was held that a cause of action was stated upon a policy insuring against injuries sustained through accidental means.

And in *Standard Life & Acci. Ins.*

*Co. v. Schmaltz* (1899) 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, it was held that the jury might have found that the insured's death resulted from accidental means, where there was evidence that he was a mechanic and that while engaged in his work he caught a cylinder head which was about to fall and suffered a rupture of a blood vessel which caused his death.

And the insured's injury has been held to have resulted from accidental means where he stooped forward to pick up a marble as it rolled from him, separated his knees, and leaned forward, and made a grab at the marble, in doing which he wrenched and injured his knee. *Hamlyn v. Crown Acci. Ins. Co.* [1893] 1 Q. B. (Eng.) 750, 62 L. J. Q. B. N. S. 409, 57 J. P. 663, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531.

In *United States Mut. Acci. Asso. v. Barry* (1889) 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, affirming a judgment, where death was due to an injury to the duodenum following a jump from a platform a few feet high, the charge which the court approved made the right of the jury to find "accidental means" dependent not upon the mere fact of an injury to the duodenum by the jar, but upon the occurrence of something unexpected or unforeseen, e. g., an "unforeseen or involuntary movement, turn, or strain of the body which brought about the alleged injury." And the jury were expressly instructed that if the insured "jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means." As the defendant's request for a special verdict was denied, it is of course impossible to determine whether the jury in return-

ing a general verdict for the plaintiff did in fact find the facts or conditions which the charge hypothesized as essential to a verdict for plaintiff.

And death has been held to have resulted through accidental means where the insured, whose attention was fixed on a train, failed to notice when he had reached the end of the pavement, and, in stepping off of it, and down about 8 inches, received a jolt which caused intussusception and death. *General Acci. & Life Assur. Corp. v. Meredith* (1910) 141 Ky. 92, 132 S. W. 191.

In *McGlinchey v. Fidelity & C. Co.* (1888) 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13, death was held to have been caused by injuries effected by accidental means where it appeared that the insured was driving a carriage containing himself and his small boys, when the horse became frightened and ran away and nearly collided with other vehicles, but was brought under control without upsetting the carriage or throwing anyone out, and immediately after he gained control of his horse he was taken sick and died within an hour.

And death resulting from a strain of the heart has been held the result of accidental means, where it appeared that, with some exertion of strength, the insured was attempting to remove an automobile tire when it suddenly came off and caused him to fall backward, and suffer injuries from which he died. *Lickleider v. Iowa State Traveling Men's Asso.* (1918) — Iowa, —, 3 A.L.R. 1295, 166 N. W. 363, 168 N. W. 884.

In *Robison v. United States Health & Acci. Ins. Co.* (1915) 192 Ill. App. 475, an injury from lifting a stove, which was claimed to have caused heart trouble, subsequently resulting in death, was held an accidental injury.

And a sprain of the back caused by heavy lifting in the course of business has been held within the protection of a policy providing against injury arising from accident if occasioned by any external or material cause. *Martin v. Travellers' Ins. Co.* (1859) 1 Fost. & F. (Eng.) 505.

And a strain by an osteopath in the ordinary course of treating a patient has been held an accident within a policy insuring against "accidental bodily injuries." *Patterson v. Ocean Acci. & Guarantee Corp.* (1905) 25 App. D. C. 46.

#### *IV. Losses resulting from taking poison.*

It is generally held that death or injury results from accidental means where it is caused by taking poison by mistake, or by taking an overdose by mistake. *Healey v. Mutual Acci. Asso.* (1890) 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; *Mutual Acci. Asso. v. Tuggle* (1890) 39 Ill. App. 509, reversed on other ground in (1891) 138 Ill. 423, 28 N. E. 1066; *Travelers Ins. Co. v. Dunlap* (1896) 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, affirmed in (1895) 59 Ill. App. 515; *Metropolitan Acci. Asso. v. Froiland* (1896) 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766; *Riley v. Interstate Business Men's Acci. Asso.* (1915) — Iowa, —, 152 N. W. 617; *Carnes v. Iowa State Traveling Men's Asso.* (1898) 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Dezell v. Fidelity & C. Co.* (1903) 176 Mo. 253, 75 S. W. 1102.

And in *Pollock v. United States Mut. Acci. Asso.* (1883) 102 Pa. 230, 48 Am. Rep. 204, and *Kennedy v. Aetna L. Ins. Co.* (1903) 31 Tex. Civ. App. 509, 72 S. W. 602, it was apparently assumed that death resulting from taking poison by mistake was accidental. The decisions in these cases, however, relate to certain exceptions contained in the policies.

It has been held that death by ptomaine poisoning due to eating tainted food through mistake is within the terms of a policy insuring against death by accident. *Johnson v. Fidelity & C. Co.* (1915) 184 Mich. 406, L.R.A. 1916A, 475, 151 N. W. 593.

And death from ptomaine poisoning contained in mushrooms supposed to be edible, and eaten by the insured without negligence, has been held within a policy insuring against death by accidental means not resulting from or contributed to, directly or indirectly, wholly or partially by disease. *United States Casualty Co. v. Griffin*

(1916) 186 Ind. 126, L.R.A.1917F, 481, 114 N. E. 88.

And death resulting from an overdose of morphine taken unintentionally is accidental. *Pixley v. Illinois Commercial Men's Asso.* (1915) 195 Ill. App. 133.

And death has been held to have resulted from accidental means where a physician mistook poison for water. *Hill v. Hartford Acci. Ins. Co.* (1880) 22 Hun (N. Y.) 187.

In *Grosvenor v. Fidelity & C. Co.* (1918) 102 Neb. 629, 168 N. W. 596, where the policy insured against death by accidental means, and the insured died from drinking carbolic acid, it was held that although death was due to the insured's voluntary act in drinking the acid a recovery might nevertheless be had, the court holding that any event which takes place without the expectation of the person acted upon is accidental, even though the accident would not have happened but for a voluntary act on the part of the person receiving it.

#### *V. Miscellaneous.*

It has been held that death from meningitis was not caused by accidental means where the disease resulted from a violent snuffing of a nasal douche, which caused infection to pass to the brain, it appearing that the snuffing was no harder than the insured intended. *Smith v. Travelers' Ins. Co.* (1914) 219 Mass. 147, L.R.A. 1915B, 872, 106 N. E. 607.

And it has been held that where one holding a policy indemnifying him against bodily injuries which, independently of all other causes, are effected solely and exclusively by accidental means, suffers an injury due to the dilation of the heart, following the voluntary taking of a cold water bath, it was not the result of an accident, where there was no evidence that anything occurred which the insured had not anticipated except the dilation. *New Amsterdam Casualty Co. v. Johnson* (1914) 91 Ohio St. 155, L.R.A.1916B, 1018, 110 N. E. 475.

In *Rody v. Travelers' Ins. Co.* (1886) 3 N. M. 543, 9 Pac. 843, it was held that a rupture of the ear caused by diving from a plank into 6 or 7 feet of water

while bathing justified a recovery on a policy insuring against injuries resulting from accidental means.

And death from asphyxia, occasioned by deadly gas in a shallow well, into which the insured had voluntarily descended to fix a pump, has been held to have been caused by accidental means. *Pickett v. Pacific Mut. L. Ins. Co.* (1891) 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871.

And death from blood poisoning resulting from a cut made by the insured while trimming a corn has been held accidental within the meaning of an accident policy. *Nax v. Travelers' Ins. Co.* (1904) 130 Fed. 985.

In *Rowden v. Travelers Protective Asso.* (1916) 201 Ill. App. 295, where the insured was pulling on the limb of a tree to remove it when the limb broke and he fell backwards and suffered a hernia, resulting in his death, it was contended that under a policy which insured against death through accidental means it was not sufficient that death was an accidental result of an external cause, but that the cause thereof must have been accidental; that the insured did exactly what he intended to do and that nothing was accidental except the result. The court in denying the contention said: "In 4 Cooley's Briefs on Ins. 3156, it is said: 'An effect which does not ordinarily follow and cannot reasonably be anticipated from the use of such means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means.' . . . This is the rule if the assured is within the terms of the contract, even though he be negligent, if he be not guilty of misconduct or fraud. While the insured desired to remove the limb of the tree, it is not pretended that there was any intention on his part of falling and injuring himself. The fall and the injury were clearly accidental."

In *Rowe v. United Commercial Travelers* (1919) — Iowa, —, 4 A.L.R. 1235, 172 N. W. 454, where the insured while driving an automobile at a rapid speed was killed, the court held that it was not the law, as stated in a requested

instruction, that "if an injury or death is the result of a man's intentional act it is not an accident," stating that the fact that an intentional act, not per se dangerous, and not intended or expected to be attended with injurious results to the actor, may by some un-

foreseen, unexpected, or unusual contingency become the accidental means of injury to the actor, is too clearly demonstrated by common observation, common experience, and innumerable precedents to justify argument.

J. T. W.

ELSIE E. WADE, Respt.,  
v.  
WALTER E. WADE, Appt.

*Oregon Supreme Court — June 24, 1919.*

(— Or. —, 176 Pac. 192.)

**Writ — amendment of summons nunc pro tunc.**

1. The court may allow an amendment nunc pro tunc of the return of mailing summons and complaint to defendant so as to show the true date of mailing.

[See note on this question beginning on page 1148.]

**Courts — power — vacation of void judgment.**

2. The superior courts in Oregon have power to vacate void judgments at any time.

**Judgment — setting aside after term.**

3. The lapse of several terms of court after the rendition of a judgment does not prevent the court from setting it aside because the order directing the mailing of the published summons and complaint to the last-known address of the defendant was not complied with.

[See 15 R. C. L. 692, 700 et seq.]

**Writ — service — return — effect.**

4. The service of summons, not the return of service, gives the court jurisdiction to proceed with an action.

[See 21 R. C. L. 1315.]

**— notice of motion — motion to amend return.**

5. Notice to the opposite party is not necessary to authorize the amendment of a return of service of process so as to make it speak the truth.

[See 21 R. C. L. 1329.]

**Judgment — expiration of term — power to vacate valid order.**

6. A court cannot after expiration of the term set aside an order permitting an amendment of return of summons and vacate the decree founded upon the summons.

[See 21 R. C. L. 1330.]

**Appeal — right — order vacating judgment.**

7. An order setting aside an amendment of return of summons in a divorce proceeding and vacating the decree of divorce is appealable.

[See 2 R. C. L. 44.]

**APPEAL** by defendant from an order of the Circuit Court for Multnomah County (Kavanaugh, J.) vacating a default decree and an amendment of affidavit of mailing, in a suit for a divorce. *Reversed.*

On Motion to Dismiss.

Statement by McBride, Ch. J.:

This is a motion to dismiss an appeal and is based upon the following facts: On September 30, 1915, plaintiff filed in the circuit court for Multnomah county a complaint for

divorce, and on the 24th day of November, upon an affidavit duly setting forth all the necessary jurisdictional facts, obtained an order authorizing service of publication of summons upon the defendant and directing that a copy of the complaint and published summons

be forthwith deposited in the post-office at Portland, Oregon, directed to defendant at his last-known post-office address, the same being Boise, Idaho, which summons together with a copy of the complaint was duly mailed on November 29, 1915, but by inadvertence the affidavit of mailing was made to read "December 30" instead of November 29th. The summons was duly published as provided in the order, the day for answer being fixed for January 10, 1916. On June 23, 1917, the plaintiff obtained a default decree against defendant. On April 4, 1918, plaintiff, having discovered the mistake in the affidavit showing the mailing of the summons to defendant, asked leave to correct the affidavit nunc pro tunc in accordance with the facts, which motion was allowed, and the correction made by permitting the affidavit to be entered and filed as of June 15, 1917. On May 20, 1918, plaintiff applied for and obtained an order of the court vacating and setting aside the decree of divorce rendered on June 23, 1915, on the ground that it was void and of no effect, and setting aside the order allowing the amendment to the proof of mailing, and directing that an alias summons issue, as provided by law. From this order defendant appeals.

Plaintiff moves to dismiss the appeal, specifying four reasons for dismissal, as follows:

"First. That the order appealed from is not an appealable order, in that the order made by his Honor J. P. Kavanaugh on May 20, 1918, was an order to vacate a void decree.

"Second. For the reason that the order appealed from is not a decree within the purview of § 548, L. O. L., and by reason thereof is not appealable.

"Third. That the order vacating the void decree was not a final order, in that it permitted the filing of an amended complaint and directed alias summons to issue.

"Fourth. That, until after service was made on appellant under the

alias summons provided in said order appealed from, defendant and appellant was in default and not entitled to an appeal from the orders or decrees of the court."

Messrs. Cochran & Eberhard, for appellant:

The court has a right to correct, modify, or vacate its judgments and decrees only in the term during which the judgment or decree was entered, and at the close of such term all final proceedings had therein become conclusive and the court loses jurisdiction of them.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Anderson v. Anderson, 89 Or. 654, 175 Pac. 287; William Deering & Co. v. Creighton, 26 Or. 556, 38 Pac. 710.

The only exception to this rule is in case the judgment, order, or decree made by the court is void, when the court has power at all times, whether at the same term or not, to vacate them.

Huffman v. Huffman, 47 Or. 610, 114 Am. St. Rep. 943, 86 Pac. 593; Multnomah County v. Portland Cracker Co. 49 Or. 345, 90 Pac. 155; Ladd v. Mason, 10 Or. 303.

By leave of court first had and obtained, an affidavit of mailing in the proof of service by publication may be amended so as to correct defects in the same manner and to the same extent as sheriff's returns on personal service.

Knapp v. Wallace, 50 Or. 348, 126 Am. St. Rep. 742, 92 Pac. 1054; Ranch v. Werley, 162 Fed. 509; Hass v. Sedlack, 9 Or. 462; Weaver v. Southern Oregon Co. 30 Or. 348, 48 Pac. 171; Hackett v. Lathrop, 36 Kan. 661, 14 Pac. 220; People v. Wrin, 143 Cal. 11, 76 Pac. 646; Herman v. Santee, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509; Freeman, Judgm. 4th ed. § 89-b; Crook v. Crook, 19 Ariz. 448, 170 Pac. 280; 32 Cyc. 540, note 75; 21 R. C. L. 1331, notes 8-10; Palmer-Haworth Logging Co. v. Henderson, 90 Or. 192, 174 Pac. 631; Boehmer v. Silvestone, — Or. —, 174 Pac. 1176; Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552; Spaulding & Co. v. Chapin, — Cal. App. —, 174 Pac. 334; Rickards v. Ladd, 6 Sawy. 40, Fed. Cas. No. 11,804.

When judgment is not void on its face, the court has no power to set it aside, but resort should be had to an action, and all parties interested

should be notified and have an opportunity to be heard.

People ex rel. Schwartz v. Temple, 103 Cal. 453, 37 Pac. 414, 416; Zumbusch v. Superior Ct. 21 Cal. App. 76, 130 Pac. 1070.

An order for the publication of summons followed by the publication of summons for a legal length of time cannot be attacked and is sufficient.

32 Cyc. 483, note 73; 21 R. C. L. 1287, note 9; Blight v. Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

An order vacating a default judgment is ordinarily not appealable.

Bowan v. Holman, 48 Or. 351, 86 Pac. 792; Taylor v. Taylor, 61 Or. 257, 121 Pac. 431, 964; Hall v. McCan, 62 Or. 556, 126 Pac. 5.

The exception to this rule is when the order vacating the default judgment was made when the court had no jurisdiction, or is void; then it is appealable.

William Deering & Co. v. Creighton, 26 Or. 556, 38 Pac. 710; Trullenger v. Todd, 5 Or. 37; Hoover v. Hoover, 39 Or. 456, 65 Pac. 796; Hume v. Bowie, 148 U. S. 248, 37 L. ed. 439, 13 Sup. Ct. Rep. 582.

Mr. G. Evert Baker for respondent.

McBride, Ch. J., delivered the opinion of the court (November 26, 1918):

The situation disclosed by the record is somewhat out of the usual order, in that the respondent seeks to show and must show that the decree rendered in her favor on June 23, and the order of the court made May 20, 1917, were absolutely void, in order to sustain this motion.

Superior courts possess the undoubted authority to vacate void judgments at any time. Jones v. Jones, 59 Or. 308, 313, 117 Pac. 414; William Deering & Co. v. Creighton, 26 Or. 556, 38 Pac. 710. The decree entered on June 23, 1917, was, upon the face of the record, invalid and void because the record as it then stood did not show a compliance with the order directing a copy of the summons and complaint to be forthwith mailed to the

defendant at his last-known place of residence, and unless the amendment to the return gave it validity it was still ineffectual for any purpose, and the court had the authority to set it aside, notwithstanding the fact that several terms had elapsed since its rendition. We are of the opinion the court had authority to allow the amendment to the return, and that upon the making of the order the decree became valid ab initio between the parties and all others having actual or constructive notice of the litigation. The general rule is thus stated by Mr. Freeman: "A very important part of the judgment roll is that containing evidence of the service of process, or the taking of such other steps as are necessary to give the court jurisdiction over the person of the defendant; and it may happen that this part has been omitted from the roll, or has never been filed in court at all, or, as filed and incorporated in the roll, is defective, and not sufficient to sustain the jurisdiction of the court, when attacked on appeal, or by motion to set it aside, or even when assailed in a collateral action or proceeding. Then the question arises whether the omission may be supplied, or the error corrected; and, if so, by what means. As a general rule, an officer who has made a return of process will be permitted to amend such return at any time. If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule pre-

Judgment—  
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Writ—  
amendment of  
summons  
nunc pro tunc.

Courts—power—  
vacation of void  
judgment.



vails. Thus if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment as if filed before its entry." 1 Freeman, Judgm. 4th ed. § 89b; *Hefflin v. McMinn*, 2 Stew. (Ala.) 492, 20 Am. Dec. 58; *Kirkwood v. Reedy*, 10 Kan. 453; *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232, 19 Am. St. Rep. 898, 9 S. E. 1003; *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887.

The reason why such an amendment relates back to the original service and validates the decree already rendered is that it is not the return, but the fact of actual service, that gives the court jurisdiction; the return being merely the evidence by which the court is informed that service has been made upon the defendant. 21 R. C. L. p. 1331, § 79, and cases there cited. While some courts hold that an amendment of process after judgment can only be made upon notice, we think the better reason and authority at least justify the contrary view. *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Kahn v. Mercantile Town Mut. Ins. Co.* 228 Mo. 585, 137 Am. St. Rep. 665, 128 S. W. 995.

Mr. Freeman, in his work on *Executions* (3d ed. p. 358), criticizes the practice of the courts in allowing ex parte amendment of process, but concedes that such amendments are not void. This question was thoroughly considered in *Rickards v. Ladd*, 6 Sawy. 40, Fed. Cas. No. 11,804, a case arising in this state in the United States district court. The circumstances were not substantially different from the case at bar, and the opinion bears the mark of painstaking examination of the authorities, as do all the opinions rendered by

Judge Deady. In discussing the question of the right of defendant to notice of the motion to amend, he says:

"And, first, this is not a jurisdictional matter. The jurisdiction of the court depends upon the service of the process. The proof of the fact, the return, is made by the officer making the service in obedience to the command of the writ, under such regulations as the law may prescribe. The court cannot say what return shall be made, but, when made, it becomes a part of the record of the court. The defendant is not a party to the proceeding, and it is made without his consent or notice to him.

"If afterwards it is discovered that a mistake has been made in the matter, the return, being now a record of the court, can only be amended by leave of the court. But still the court does not make the amendment. The authority to amend the return, as in the case of making it, is primarily in the officer, and not in the court; but, after making the return, the authority of the officer becomes qualified, so that it cannot be exercised without the consent of the court. Strictly speaking, then, the proceeding is one between the officer and the court. It is ex parte in its very nature, and no one has an absolute right to notice of it. In contemplation of law, the amended return is made under the same sanction and responsibility as the mistaken one. In effect, it becomes the return in the case, and cannot be questioned collaterally by the parties to the action or those claiming under them as privies."

The case last referred to presented features which might suggest a more rigid rule against upholding the validity of an amendment than the case at bar. In that case the amendment was procured by the plaintiff, and it was the defendant who called it in question. Here the plaintiff, pursuing a course that she then believed was in her own interest, asked and received permission

—service—  
return—effect.

—notice of  
motion—motion  
to amend  
return.

to amend the return and thereafter applied to the court to set aside the order which she had so obtained. As between her and her husband the amendment was perfectly valid. As to other parties we are not called upon to express an opinion further than to say that any party dealing with the property involved in the divorce suit, and with that staring him in the face, would not appear to be in a very good position to plead that he was an innocent purchaser in good faith and without notice. It being settled that the amendment was valid, it requires no discussion to determine that the court had no

Judgment—  
expiration of  
term—power to  
vacate valid  
order.

power to vacate the decree in favor of plaintiff or to set aside the order permitting the amended proof of service after the expiration of the term at which such order was made. *William Deering & Co. v. Creighton*, *supra*.

The order appealed from is clearly appealable. It affected a substantial right and changed the status of the defendant from that of a single man to that of a married man. His case had been tried and passed to a final decree, and he was not required to go through the useless ceremony of retrying it upon an amended complaint, the filing of which the court had no jurisdiction to authorize, before he could appeal.

The other questions raised are merely variations of these already considered and need not be separately discussed.

The motion to dismiss is overruled.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down February 25, 1919 (— Or. —, 178 Pac. 799):

In a petition for rehearing re-

spondent calls attention to several defects in the proceeding to obtain service of summons by publication, in addition to those particularly pointed out in the brief heretofore presented, and insists that these defects rendered the original proceedings wholly void. The objections are serious and go to the vital merits of the appeal, and should not be decided without full oral argument.

We, therefore, adhere to our original decision, and deny the motion to dismiss, with permission to renew at the hearing, where all the questions raised can be more fully discussed.

On the Merits (— Or. —, 182 Pac. 136).

#### *Per Curiam:*

The material facts in this case are sufficiently stated in *Wade v. Wade*, — Or. —, 176 Pac. 192, which involved the determination of a motion to dismiss, which motion went practically to the whole merits of this appeal.

After that decision, learned counsel for the plaintiff suggested, upon petition for rehearing, that there were other defects in the original proceedings, which were so serious as to render the order permitting the amendment of proof of service absolutely void. Whereupon we granted permission to respondent to renew the motion to dismiss, upon the final hearing, — Or. —, 178 Pac. 799.

Since that hearing, we have carefully re-examined the record and are satisfied the circuit court had jurisdiction to permit the amendment *nunc pro tunc* of the original proof of service, and that the original decree of divorce rendered on June 23, 1917, was a valid decree. This being the case, the court was without power to vacate said decree on May 20, 1918. The order of May 20, 1918, is therefore reversed.

## ANNOTATION.

**Power to amend nunc pro tunc return of service of summons in divorce suit.**

In divorce actions the usual doctrine is followed that the court has power to amend nunc pro tunc the return of service of summons. *Crook v. Crook* (1918) 19 Ariz. 448, 170 Pac. 280; *Re Newman* (1888) 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Hawes v. Hawes* (1864) 33 Ill. 286; *Fowler v. Cooper* (1900) 81 Minn. 19, 83 N. W. 464; *WADE v. WADE* (reported herewith) ante, 1143; *Zahorka v. Geith* (1906) 129 Wis. 498, 109 N. W. 552.

In *Crook v. Crook* (Ariz.) supra, it was held that the trial court should have granted the right after judgment in divorce to amend the affidavit of constructive service of summons nunc pro tunc as of the date of the judgment, where date of the mailing was by clerical error wrongly stated. But the judgment was vacated on other grounds.

Where the court on September 6, 1890, at the close of the hearing in a divorce action, where there had been an order for service by publication, declared that "judgment is ordered for plaintiff and against defendant," and fourteen years later there was filed an affidavit of the mailing, shortly after the bringing of the divorce action, of a copy of the summons and complaint to the defendant, it was held that the court was justified in 1904 in ordering judgment nunc pro tunc as of September 6, 1890, and that such judgment was binding as effectual in dissolving the marriage as of September 6, 1890, and that the marriage of the wife to a third person between the two dates mentioned was a valid marriage. *Zahorka v. Geith* (1906) 129 Wis. 498, 109 N. W. 552, supra.

Where judgment of divorce was signed by the judge on the 19th of October, 1885, was filed with the clerk on the 22d of the same month, and was entered on the 5th of January, 1887, the judgment recited the default of the defendant in the action, and that he had been duly served with summons by publication. On the said

5th of January, 1887, an amended proof of publication of summons and of the mailing of the summons and complaint was filed nunc pro tunc as of the 19th of October, 1885, and an order was made in said action on said 5th of January, 1887, allowing the filing of the amended proofs of publication and deposit, and ordering the entry of judgment in said action nunc pro tunc as of the 19th of October, 1885. The court said: "The recital in the judgment that the defendant was duly served with process is consistent with the proof of service. It is the fact of service which gives the court jurisdiction, not the proof of service, and the court had authority to receive the amended affidavits of service after judgment and before the roll was made up." *Re Newman* (1888) 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887, supra.

The defendant in divorce, having been defaulted, sued out a writ of error, assigning among other errors that the return of the summons did not show that it was served after its issue as it did show that it was served before its issue. Subsequently to the filing of the record in the appellate court the trial court permitted the sheriff to amend his return by showing that the date of service of the summons was after its issue, and the amendment was brought to the appellate court by supplemental record, and the decree was affirmed. *Hawes v. Hawes* (1864) 33 Ill. 286, supra.

In an action to annul a marriage on the ground that the defendant had obtained a decree of divorce from a prior husband which was not legal, it appeared that the affidavit or service of the summons and complaint in the divorce action was wholly insufficient, as it stated that the papers were left with another person than the defendant, but it also appeared that six years after the entry of judgment in the divorce action the court permitted the filing of an affidavit of the person with whom the papers had

been left for the defendant, showing that he had delivered the summons and complaint to the defendant on the day on which the papers were left with him, and it also appeared that the court had permitted the filing of an affidavit by the defendant in the divorce action showing the receipt of the papers, etc. It was held that the action of the court in permitting the filing of the new affidavits was proper. The court said: "We are of the opinion that the statute allowing amendments of legal proceedings is broad enough in terms to authorize the court, upon proper cause shown, to supply an omission of actual facts in the proof of service of the summons and complaint to be added to the judgment roll. Such view is not only within the letter, but the spirit, of the statute. . . . It follows that the judgment upon the service as established was a perfect bar to this action at the time this suit was commenced. We think there is no reason to doubt that the court can supply that omission, under the amendment statute referred to, *nunc pro tunc*." *Fowler v. Cooper* (1900) 81 Minn. 19, 83 N. W. 464, *supra*.

The propriety of allowing the amendment of return of the service by notice and copy of the petition out

of the state in a divorce case was recognized in *Trevino v. Trevino* (1881) 54 Tex. 261, where the amendment seems to have been before judgment; but the case was reversed on other grounds.

It may be noted that in *Eyster v. Eyster* (1853) 14 Ill. 369, on a writ of error by the defendant in divorce, the court said: "It appeared from the sheriff's return that the summons was served by reading. The parties stipulated that affidavits might be presented to show the real manner of service; and if it should appear that the sheriff could amend his return, so as to show that service was made by the delivery of a copy of the process, the return should be considered as amended accordingly. The sheriff swears positively that he delivered a copy of the summons to the party, and expressed his willingness so to amend the return. This clearly shows that he would so amend the return on leave; and regarding the amendment as made, as we are bound to do by the terms of the stipulation, there is no error in the record."

For effect of defects or informalities as to appearance or return day in summons or notice of commencement of action, see the annotation to *Flanery v. Kusha*, 6 A.L.R. 838. B. B. B.

## ARIZONA EASTERN RAILROAD COMPANY, Appt.,

v.

J. A. MATTHEWS.

*Arizona Supreme Court — April 16, 1919.*

(— Ariz. —, 180 Pac. 159.)

### Workmen's compensation — operation of railroad — who engaged in.

1. Persons engaged in the operation of a railroad within the meaning of the Employers' Liability Act are those who have an actual physical connection with the handling, organizing, loading, unloading, and movement of trains and cars, extending sometimes to section men.

[See note on this question beginning on page 1160.]

— who entitled to take benefit of.

2. One whose employment does not bring him within the operation of the Employers' Liability Act cannot elect to recover under that act for injuries received in the employment.

— billing clerk — mechanical or manual labor.

3. A billing clerk in a local freight office of a railroad company is not engaged in manual or mechanical labor within the meaning of the Employers' Liability Act.

**Definition — mechanical labor.**

4. Mechanical labor is labor performed by a mechanic or one who practises any mechanical art, one skilled or employed in shaping or uniting materials into any kind of structure, machine, or other object, requiring the use of tools or other objects.

**Workmen's compensation — manual labor — clerical work.**

5. The term "manual labor," as used in the Employers' Liability Act, does not include clerical work in a railroad office.

**Statute — interpretation — meaning of words.**

6. Words used in a statute must be taken in their common and ordinary sense, unless from the context it is evident that other meaning was intended.

[See 25 R. C. L. 988.]

**Workmen's compensation — condition of hazardous employment.**

7. Before an employee can recover for injuries under an act passed under constitutional requirement of a law to make the employer liable for injuries due to accident, "due to a condition or conditions of such hazardous employment," the injury must have occurred while the employee was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation.

**— condition of employment — injury in returning from lunch.**

8. Injury to a billing clerk in a railroad freight office, by falling into an unguarded hole in a platform when returning from a restaurant where he had gone for lunch, is not due to a condition or conditions of his employment within the meaning of that

**provision in the Employers' Liability Act.**

[See 18 R. C. L. 847.]

**— hazard peculiar to employment.**

9. Liability to injury by falling into a hole in a platform which is along the route usually taken by persons having business in a railroad freight office, and by employees in going to and from their work, is not a risk or hazard peculiar to the work of a billing clerk employed in the office so as entitle him to compensation under the Employers' Liability Act.

[See 18 R. C. L. 848.]

**— constitutional or statutory provision.**

10. The right of an employee to compensation depends upon the statute, and not upon the Constitution, where the Constitution directs the legislature to enact a law providing for such compensation.

**Statute — construction — deleted section.**

11. A section of a statute cannot be deleted by the courts if it is possible to construe the statute so as to harmonize such section with others.

[See 25 R. C. L. 1006.]

**— lack of comprehensiveness — effect.**

12. A statute attempting to put into force a direction of the Constitution cannot be declared invalid because it is not as comprehensive as the Constitution intended.

**Evidence — physician — witness at former trial.**

13. That one called his physician as a witness at a former trial of the case does not prevent his objecting to his testimony at a second trial, under a statute making the physician competent only where the patient himself testified to the facts communicated by him to the physician.

**APPEAL** by defendant from a judgment of the Superior Court for Maricopa County (Stanford, J.) in favor of plaintiff, and from an order overruling a motion for new trial, in an action brought under the Employers' Liability Act to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

**Mr. G. P. Bullard**, for appellant:

Plaintiff is not such an employee as is designated in or entitled to the benefits of the state Employers' Liability Act.

**Behringer v. Inspiration Consol. Copper Co.** 17 Ariz. 234, 149 Pac. 1065;

**Deyo v. Arizona Grading & Constr. Co.** 18 Ariz. 149, L.R.A.1916E, 1257, 157 Pac. 371.

Plaintiff was not injured while exposed to the peculiar hazards of operating a railway.

**Jemming v. Great Northern R. Co.**

(— *Ariz.* —, 180 *Pac.* 159.)

96 Minn. 802, 1 L.R.A. (N.S.) 696, 104 N. W. 1079; *Manning v. Burlington, C. R. & N. R. Co.* 64 Iowa, 240, 20 N. W. 169; *Malone v. Burlington, C. R. & N. R. Co.* 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; *Potter v. Chicago, R. I. & P. R. Co.* 46 Iowa, 399; *Ailes v. Illinois C. R. Co.* 135 Iowa, 154, 112 N. W. 226; *Stroble v. Chicago, M. & St. P. R. Co.* 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 63; *Luce v. Chicago, St. P. M. & O. R. Co.* 67 Iowa, 75, 24 N. W. 600; *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 96, 78 N. W. 800, 6 Am. Neg. Rep. 60; *Hathaway v. Illinois C. R. Co.* 92 Iowa, 337, 60 N. W. 651; *Matson v. Chicago, R. I. & P. R. Co.* 68 Iowa, 22, 25 N. W. 911; *Depuy v. Chicago, R. I. & P. R. Co.* 110 Mo. App. 110, 84 S. W. 103; *Smith v. Burlington, C. R. & N. R. Co.* 59 Iowa, 73, 12 N. W. 763; *Williams v. Chicago, R. I. & P. R. Co.* 106 Mo. App. 61, 79 S. W. 1167; *Mitchell v. Wabash R. Co.* 97 Mo. App. 411, 76 S. W. 647; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; *Brown v. Richmond Light & R. Co.* 173 App. Div. 432, 159 N. Y. Supp. 1047; *Cahill v. Illinois C. R. Co.* 143 Iowa, 241, 28 L.R.A. (N.S.) 1121, 125 N. W. 331.

The cause of the injury must be hazard to which the employee is peculiarly exposed because of his employment, and one not common to the general public.

*Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; *Mann v. Glastonbury Knitting Co.* 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368; *Brown v. Decatur*, 188 Ill. App. 147; *Sanderson's Case*, 224 Mass. 558, 113 N. E. 355; *Harboe's Case*, 223 Mass. 139, L.R.A.1916D, 933, 111 N. E. 709; *McNicol's Case*, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 218; *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A. 1916A, 310, 150 N. W. 325; *De Voe v. New York State R. Co.* 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256; *Heitz v. Ruppert*, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665; *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192.

Plaintiff, having waived his privi-

lege by himself calling and examining his physician on the first trial, cannot assert the privilege when the same witness is produced by defendant on the second trial of the same cause.

*Bryant v. Modern Woodmen*, 86 Neb. 372, 27 L.R.A. (N.S.) 326, 125 N. W. 621, 21 Ann. Cas. 365; *Elliott v. Kansas City*, 198 Mo. 593, 6 L.R.A. (N.S.) 1082, 96 S. W. 1023, 8 Ann. Cas. 653; *Pittsburgh, C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969; *People v. Bloom*, 193 N. Y. 1, 18 L.R.A. (N.S.) 898, 127 Am. St. Rep. 931, 85 N. E. 824, 15 Ann. Cas. 932; *Armstrong v. Topeka R. Co.* 93 Kan. 493, 144 Pac. 847; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. ed. 415, L.R.A.1915C, 834, 35 Sup. Ct. Rep. 210.

Mr. A. S. Hawkins, for appellee:

The Constitution and statutes extend protection to any employee engaged in railroad transportation, who suffers an injury caused by an accident due to a condition in such occupation, and said act is not limited to those engaged only in manual or mechanical labor.

*Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465; *Behringer v. Inspiration Consol. Copper Co.* 17 Ariz. 232, 149 Pac. 1065; *Deyo v. Arizona Grading & Constr. Co.* 18 Ariz. 149, L.R.A.1916E, 1257, 157 Pac. 371; 26 Cyc 1370 (1); *Mabry v. North Carolina R. Co.* 139 N. C. 388, 52 S. E. 124; *Sigman v. Southern R. Co.* 135 N. C. 181, 47 S. E. 420; *Mott v. Southern R. Co.* 131 N. C. 234, 42 S. E. 601; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 161; *Williams v. Iowa C. R. Co.* 121 Iowa, 270, 96 N. W. 774; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; *Eames v. Home Ins. Co.* 94 U. S. 628, 24 L. ed. 300; *Texas & P. R. Co. v. Webb*, 31 Tex. Civ. App. 498, 72 S. W. 1044; *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 54 L.R.A. 789, 60 N. E. 943; *Cannon v. Chicago, M. & St. P. R. Co.* 101 Iowa, 613, 70 N. W. 755, 2 Am. Neg. Rep. 131.

The evidence of Doctors Palmer and Brockway was properly excluded.

*Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *Burgess v. Sims Drug Co.* 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307, 10 Am. Neg. Rep. 42; *Kelley*

v. Andrews, 102 Iowa, 119, 71 N. W. 251; Briesenmeister v. Supreme Lodge, K. P. 81 Mich. 525, 45 N. W. 977; McConnell v. Osage, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550; Indianapolis & M. Rapid Transit Co. v. Hall, 165 Ind. 557, 76 N. E. 242; Maryland Casualty Co. v. Maloney, 119 Ark. 434, L.R.A.1916A, 519, 178 S. W. 387; McAllister v. St. Paul City R. Co. 105 Minn. 1, 116 N. W. 917; Hilary v. Minneapolis Street R. Co. 104 Minn. 432, 116 N. W. 983; Cohodes v. Menominee & M. Light & Traction Co. 149 Wis. 308, 135 N. W. 879; Green v. Nebagmain, 113 Wis. 508, 89 N. W. 520; Noelle v. Hoquiam Lumber & Shingle Co. 47 Wash. 519, 92 Pac. 372; May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 Ann. Cas. 605; 7 Enc. Ev. 89; Jones v. Andrews, 72 Tex. 5, 9 S. W. 170; Sutton v. State, 16 Tex. App. 490; Smart v. Kansas City, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 Ann. Cas. 932; Davis v. Supreme Lodge, K. H. 165 N. Y. 159, 58 N. E. 891; Elliott v. Kansas City, 198 Mo. 593, 6 L.R.A.(N.S.) 1082, 96 S. W. 1023, 8 Ann. Cas. 653.

Plaintiff did not waive his rights by his own testimony at this trial or at the preceding one. He did not testify about any communications to said physicians.

Noelle v. Hoquiam Lumber & Shingle Co. 47 Wash. 519, 92 Pac. 372; Warsaw v. Fisher, 24 Ind. App. 46, 56 N. E. 42; McConnell v. Osage, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550; Butler v. Manhattan R. Co. 30 Abb. N. C. 78, 28 N. Y. Supp. 163; Dunkle v. McAllister, 70 App. Div. 278, 74 N. Y. Supp. 902; May v. Northern P. R. Co. 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 Ann. Cas. 605; Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Jones v. Brooklyn, B. & W. E. R. Co. 21 N. Y. S. R. 169, 3 N. Y. Supp. 253, affirmed in 121 N. Y. 683, 24 N. E. 1098; Indianapolis & M. Rapid Transit Co. v. Hall, 165 Ind. 557, 76 N. E. 242; Fox v. Union Turnp. Co. 59 App. Div. 363, 69 N. Y. Supp. 551; Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 59 L. ed. 415, L.R.A.1915C, 834, 35 Sup. Ct. Rep. 210.

Plaintiff was protected while going to lunch and returning therefrom.

Whiting-Mead Commercial Co. v. Industrial Acci. Commission, 178 Cal. 505, 5 A.L.R. 1518, 173 Pac. 1105; Gra-

ber v. Duluth S. S. & A. R. Co. 159 Wis. 414, 150 N. W. 490; Sundine's Case, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; Peter Schoenhofen Brewing Co. v. Giffey, 162 Iowa, 204, 143 N. W. 1017; Beale v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153.

Ross, J., delivered the opinion of the court:

Appellee sued the appellant railroad company for damages for personal injury. Omitting formal parts, the complaint is as follows:

"III. That on or about April 5, 1916, defendant was, by its servants and employees, engaged in installing platform scales on a platform of defendant's freight depot, located in the city of Phoenix, Arizona; that the work was not finished on that day, but by night of said day the work had progressed to such an extent that about 8 square feet of said flooring of said depot platform had been removed, and that said platform floor was about 5 feet from the ground, and when said flooring had been removed a pit was formed about 8 feet wide, 8 feet long, and 5 feet deep.

"IV. Plaintiff says that defendant left said pit thus formed as above stated, during the night of April 5, 1916, unlighted, uncovered, unfenced, and otherwise unprotected at a place, vicinity, and time where and when its employees, and particularly this plaintiff, were required by defendant to work in and about said premises, and that the night of April 5, 1916, was quite dark.

"V. That on the night of April 5, 1916, plaintiff was, in the course of his employment, compelled to work all night for defendant at defendant's freight depot aforesaid, at manual labor as bill clerk, and that while so engaged at such manual labor between 4 and 5 o'clock A. M.

of April 6th . . . he became so fatigued and hungry that it was necessary for him to have something to eat, and some coffee, . . . and, in order to secure the same, he went to a near-by restaurant, and then and there procured such refreshment, and immediately started to return to such manual labor as such bill clerk for defendant, along the route usually traveled by plaintiff and others having business in and about defendant's freight depot, and that while so returning to his said work, and while at all times exercising due care and acting without negligence on his part, plaintiff stepped in said pit so left by defendant without any warning light or any kind of protection therefrom, and fell to the bottom of said pit, a distance of about 5 feet, . . . and was injured," etc.

Appellant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action; also, on the ground that the Employers' Liability Law (Civ. Code 1913, §§ 3098-3179) is unconstitutional in that it violates the 14th Amendment to the Federal Constitution. It answered by general denial, pleaded contributory negligence and assumed risk, and also raised the question of the constitutionality of the Liability Law.

At the close of the appellee's case in chief, the appellant moved the court to require him to elect whether he would ask a recovery under the Employers' Liability Act, or under the common law. Whereupon, appellee announced (without any ruling of the court) his election to recover under the Employers' Act. Appellant then made the following motion: "We desire to make a formal motion to instruct for the defendant upon the ground that the state Employers' Liability Act applies to those engaged in the operation of a railroad, to those engaged in manual and mechanical labor, and that the uncontradicted evidence in this case shows that on the night in question, upon which it is claimed that plaintiff was injured, he was

not engaged in any mechanical or manual labor, and was not engaged to any extent in the operation of a railroad."

The motion being denied, appellant introduced its evidence, and, the case being submitted to the jury, it returned a verdict in favor of appellee for the sum of \$3,000. The appeal is prosecuted from the order overruling motion for a new trial and from the judgment. The assignments of error are numerous—twenty-eight in number—but it will not be necessary, from the view we take of the matter, to pass upon all of them.

The first assignment is based upon the ruling of the court in denying the motion for an instructed verdict. The evidence at the time of making the motion, and at the close of the entire case, was in confirmation of the allegations of the complaint that appellee was a bill clerk in the employ of appellant at its freight depot in the city of Phoenix. The appellee describes the nature and character of his work as follows:

"On or about April 5, 1916, I was employed as bill clerk for the Arizona Eastern Railroad Company, working at the local freight office situated between First avenue and Center street. My work was in the office, which is located in the west end of the building. My duties were billing freight, writing up the transfer book, making up tonnage reports, balancing the cashbooks, making an abstract, loading and unloading live stock, and sprinkling down hogs during warm weather. . . .

"We sometimes had loading and inspection of live stock at the freight-house platform, but the bulk of it was at the union stockyards, located about thirteen blocks west of the freight office, and in the yards of the Arizona Eastern, twelve blocks east of the freight office.

"I have been required to go out and inspect stock after it was loaded. I have used this platform at night in loading live stock, and in loading automobiles and all kinds of freight. . . . I never loaded any stock my-



self, but I had to make a live-stock report and an inspection of them. They were loaded by the shipper from this platform.

"I don't do manual labor. I don't do manual labor at all when I was working for the Arizona Eastern. I was doing clerical work.

"It was my duty to go out and check in the loading of the stock.

"Between the time I went to work at half past 5 on the evening of the 5th and the time when I was injured on the morning of the 6th, my duties were the regular duties of the office, billing and writing transfers and making abstracts, and that is all I now recall that I did between the hour I went to work and the hour I was injured. I was not handling any stock that night. The duties I refer to were clerical that night."

Keeping this evidence in mind, as also the allegations of the complaint as to the character of the work appellee was engaged in, we now turn to the Employers' Liability Act to see if he generally, or at the time of his injury, was embraced within its terms, so as to entitle him to maintain an action thereunder for damages or compensation. If the cause

Workmen's  
compensation—  
who entitled to  
take benefit of.

of action set out in his complaint and the evidence on the trial do not bring the appellee within the terms of the Employers' Liability Act, he ought not to be permitted to recover upon his election.

The constitutional mandate contained in § 7, art. 18, is that the legislature enact a law to make the employer liable for injuries to employees in hazardous occupations when the accident causing the injury is due to a condition or conditions of such hazardous occupation, and is not caused by the negligence of the employee; said law so to be enacted to apply to "all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry." Chapter 6, title 14, being §§ 3153 to 3162, inclusive, Civil Code of 1913, is the legislative effort to

comply with the mandate of the Constitution. Hereafter we will refer to it as the "Liability Act."

This Liability Act has declared and determined in § 3156 certain occupations in the named industries to be hazardous, and § 3155 extends the benefits of the act only to those employees engaged in manual and mechanical labor.

Among other things, it is contended by appellant that appellee was not (1) employed in an occupation declared and determined to be hazardous, nor (2) engaged in manual or mechanical labor. As to the first point made, if appellee is to receive the benefits of the act, his occupation must be one of those enumerated in subdivision 1 of § 3156, which reads as follows: "(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated."

The arguments of both sides are directed to the 1st division of the subsection, it being the contention of appellant that appellee was not engaged in an occupation in "the operation of a railroad." Whereas appellee contends that a bill clerk's occupation is essential to the proper operation of a railroad, and is within the occupations declared to be hazardous in the operation of appellant's railroad. We will not go into this question further than to say that, as we understand the law, those persons engaged in "the operation of a railroad" are persons who have an actual physical connection with the handling, organizing, loading, unloading, and movement of trains, locomotives, engines, motors, and cars, extending sometimes to section men. *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W.

1079; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208; 26 Cyc. 1370. It includes those whose occupations subject them to hazards and dangers incident to and inherent in the physical part of the operation of the railroad, and not those who perform services essential to the railroad business, but not in its actual operation.

It may be that appellee's occupation falls within those named in subsection 1 as "including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated." If the freight depot and platform, in which was the opening that appellee fell into, was a plant "by which the railway business" of appellant was in part operated, and the appellee was not without the line of his duty when using the platform as a way of returning to his work, we submit, without so deciding, that his occupation might be one of those intended to be declared and determined as hazardous by the statute. As this question was not presented to us in brief or argument, and as its decision is not necessary, as we view the case, we only suggest it, for if it be granted that he was in the use

—billing clerk—  
mechanical or  
manual labor.

of a plant of appellant at the time of his injury, and that

his occupation was hazardous, still he was not engaged in manual or mechanical labor.

Aside from the context, it is easy to determine that appellee, in the occupation of "billing freight, writing up the transfer book, making up tonnage reports, balancing the cashbooks, making an abstract, . . . " was not engaged in mechanical labor. The definition of "mechanical," as given by Webster, is: "(1) Of or pertaining to, or concerned with manual labor; engaged in manual labor; of the artisan class. (2) Of, pertaining to, or concerned with machinery or mechan-

ism; made or performed by machinery or with tools."

"Mechanical labor" is labor performed by a mechanic or "one who practises any me-

Definition—  
mechanical  
labor.

chanical art; one skilled or employed in shaping or uniting materials, as wood materials, etc., into any kind of structure, machine, or other object requiring the use of tools or other objects, an artisan." Webster.

Taken in connection with the context, we think "mechanical labor" is such skilled labor as is necessarily employed by employers in making and repairing tools and instruments used in the operation of the business. It is manual labor, but of the skilled kind.

While the words "manual labor" might be construed to mean clerical work, we do not think any such meaning attaches to them as they are used in the context.

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manual labor—  
clerical work.

In the first place, the hazardous occupations in mining, smelting, manufacturing, railroading, and other industries named as hazardous, exclude the idea of the office man's occupation. They are those occupations engaged: (1) In the operation of railroads, in the construction, use, and repair of machinery, etc., by which the business of railroading is carried on; (2) the use of gunpowder, etc.; (3) erection and demolition of buildings, etc.; (4) the operation of elevators, etc.; (5) work on ladders, etc.; (6) work in connection with electricity; (7) work on telegraph and telephone lines; (8) work in or about quarries, open pits, open cuts, mines, reduction works, and smelters; (9) tunnel work; and (10) work in mills, etc., operated by steam, electricity, or other mechanical power. ¶ 3156.

Labor in any of the named occupations must mean actual physical contact with the dangerous instruments and means used in carrying on the business. One of the canons of interpretation of words used in a statute is that they must be taken in

their common and ordinary sense, unless, from the context, it is evident some other meaning was intended. When we speak of a person doing manual labor, the mind is instantly directed to some kind of toil in which the physical predominates over the mental. The words would never call to mind the office man engaged in keeping books, or making out bills or statements, or operating a typewriter. Even if appellee did occasionally, as an incident in his occupation as bill clerk, do manual labor in the loading and unloading of live stock and freight, it is enough to say he was not injured by any accident while so engaged. At the time of his injury, his sole occupation was that of a bill clerk. So we conclude appellee was not, at the time of the accident in which he was injured, engaged in manual or mechanical labor, and therefore is not entitled to the benefits of the Employers' Liability Act.

The meaning of the phrase, "caused by any accident due to a condition or conditions of such occupation," appearing first in the Constitution (§ 7, art. 18), and next in the Liability Act (§ 3154), as descriptive of the kind of accident intended to give rise to a right of action to an injured employee, has not as yet been construed by the court. The expression is original in our Constitution and laws. We have not been able to find it in any of the compensation or liability laws, or in any decision of a court, or in any textbook, and it, therefore, necessarily follows that it has not been defined or applied. It is evident that the accident must arise out of and also be inherent in the occupation itself; the condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employee therein are outside of the purview of the Constitution and likewise of the Liability Law. The

legislature, in § 3155, has defined the kind of accident intended by it to be covered by the Employers' Liability Act in the following language: "By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

It will be noted that stress in this definition is placed upon "the means used and provided for doing the work in said occupation." In fact, the dangerous "nature and condition" of the occupation is not alone because of the work, but because of the lethal character of the means employed to do the work required of the employee. The nature and conditions of the occupation, and the means used and provided to do the work therein, are so dangerous, and the risks therefrom are so inherent, as that accident therefrom is "unavoidable by the workman therein." It would seem that, before an employee may recover for injury under this act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation.

Workmen's compensation—condition of hazardous employment.

Our statute (§ 3158) requires something more than that the "accident arise out of and in the course of the employment," an expression common to most of the liability and compensation laws, our statute being: "When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment."

These added words to the common expression must mean something.

The words, "arising out of," have been construed to refer to the origin or cause of the injury, and the words, "in the course of," to refer to the time, place, and circumstances under which it occurred. Workmen's Compensation Acts, p. 72, Corpus Juris. Superadded to these under our Liability Act is the requirement that the injury must have occurred in the "work," "labor, service, and employment," and be "due to a condition or conditions of such occupation." The act of appellee in going away from his work for refreshments was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence he was not rendering work, service, or labor for appellant, and therefore

—condition of  
employment—  
injury in  
returning from  
lunch.

the injury he sustained while on such errand was not due to a condition or conditions of his occupation. Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work itself, and, because of said hazard, "unavoidable" on the part of the employee. *Calumet & A. Min. Co. v. Chambers*, 20 Ariz. —, 176 Pac. 839.

The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employees of appellant were exposed, as much as those engaged in the service of appellant. Appellee shows by his complaint, and by the testimony of himself and others, that the scale pit into which he

—hazard  
peculiar to  
employment.

fell was "along the route usually traveled by himself and others having business in and about defendant's freight depot." This being so, it was not a risk or hazard peculiar to his work, but one "common to the neighborhood." *McNicol's Case*, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522.

If it be concluded that appellee re-

ceived his injury in the course of his employment, and that it arose out of the employment, that is not enough to bring him within the statute, unless at the time of the injury he was engaged in one of the hazardous occupations named by the statute, the rule being, as laid down by the courts of New York, where the occupation, as here, must be hazardous, that "where . . . the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so employed when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute." *Gleisner v. Gross*, 170 App. Div. 41, 155 N. Y. Supp. 946, 949; *De Voe v. New York State R. Co.* 169 App. Div. 472, 155 N. Y. Supp. 12.

Appellee contends we ought to ignore ¶ 3155 as though it were not written in our laws, and especially would he have us ignore the provision therein that limits the benefits of the act to employees doing manual and mechanical labor; for, he says, the constitutional direction to the legislature was to enact a law granting the right of action to every employee, without restriction, other than that his occupation be hazardous and in one of the industries mentioned. Without so deciding, we may suggest that the Constitution itself, in spirit and by implication, if not in terms, by providing that the benefits shall be made to extend only to those employees engaged in hazardous occupations in the businesses or industries mentioned, placed the limitation contained in the law and of which complaint is made. For is it not a fact that the hazardous occupations in the indus-

tries of mining, smelting, manufacturing, and railroad transportation are all of the kind requiring manual or mechanical labor? But, aside from this suggestion, it is the statute law, and not the Constitution, that gives the right of action. Section 7, art. 18, of the Constitution,

~~—constitutional  
or statutory  
provision.~~

is not self-executing, and the principle therein contained can be appropriated and applied only in so far as the legislature provides for it. *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183; 12 C. J. 730, 739, 741.

The deletion of § 3155, or any part thereof, as appellee asks, would be to disregard one of the cardinal

~~Statute—  
construction—  
deleted section.~~

rules of construction stated by Judge Cooley, as follows: "That effect is to be given, if possible, to the whole instrument and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." Cooley, *Const. Lim.* 5th ed. p. 70.

But it is said by appellee that this court, in *Deyo v. Arizona Grading & Constr. Co.* 18 Ariz. 149, L.R.A. 1916E, 1257, 157 Pac. 371, decided that the legislature, in limiting the benefits of the Employers' Liability Act to employees doing manual and mechanical labor, acted without power. What we said in that regard was not necessary to a decision of the case, and shows upon its face that it was not intended as a statement of the law. It was submitted more as a query. We said: "Whether the legislature exceeded its authority and power in restricting the beneficiaries of the law to those engaged in manual and mechanical labor only, we do not deem it necessary to determine under the facts of this case. That question was not presented in argument by counsel; but it appears to be within the rea-

son of the rule laid down by this court in *Behringer v. Inspiration Consol. Copper Co.* 17 Ariz. 232, 149 Pac. 1065, in which we held that the legislature did not possess the power to enlarge the mandate of the Constitution as to the Workmen's Compulsory Compensation Law."

Anything said in that regard in the *Deyo* Case was tentative, and, upon reflection we conclude, unsupported by reason. If we had said, instead of what we did say, that it was the duty of the legislature to observe the mandate of the Constitution and make its legislation conform thereto, our statement would have been more in place and more correct in principle. While the legislature may not extend the constitutional provision so as to include subjects not within its purview, or that conflict with it (*Behringer v. Inspiration Consol. Copper Co.* supra), it is well settled that the lawmaking body may or may not, as it chooses, pass laws putting into effect a constitutional provision, and if, in its efforts to give effect to a constitutional provision, the statute is not broad and comprehensive enough to cover all subjects that it might, we know of ~~—lack of com-  
no reason why it  
—effect.~~ should not be valid

as far as it goes. So it is that, if other employees than those doing manual and mechanical labor might, under the Constitution, be granted the benefits of the act, it is the duty of the legislature to so provide, and, until it does so, the beneficiaries are limited to those mentioned in the statute.

Inasmuch as the judgment will have to be reversed, and the case remanded to the trial court, there is a question involving the introduction of evidence that we feel should be settled at this time. Appellant offered as witnesses two physicians who rendered professional services to appellee, and wanted to prove by them what they discovered or learned of his condition, insisting that appellee had raised the ban of secrecy because in a previous trial

he had examined one of the witnesses in regard to the same subject-matter, and had permitted the other to testify without objection. This offered testimony, upon objection that it was confidential, was rejected. This ruling is assigned as error. Our statute (Civ. Code, subd. 6, § 1677), in regard to the privileged character of information contained in his professional capacity by a physician or surgeon, from or of his patient, is peculiar, and, for that reason, the decisions of courts under statutes whose language is not the same, but widely different, would not greatly aid us in a construction of ours.

In *Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. ed. 415, L.R.A.1915C, 834, 35 Sup. Ct. Rep. 210, it is said:

"The express object [of subdivision 6, *supra*] is to exclude the physician's testimony, at the patient's option, respecting knowledge gained at the bedside, in view of the very delicate and confidential nature of the relation between the parties."

And "it contemplates that the patient may testify with reference to what was communicated by him to the physician, and in that event only it permits the physician to testify without the patient's consent."

It is further said: "The act gives him [patient] the option of excluding the physician's evidence entirely by himself refraining from testifying voluntarily as to that respecting which, alone, their knowledge is equal, namely, what the patient told the physician with reference to the ailment."

If the record shows that appellee, in the former trial or in the present one, testified voluntarily as to what he "told the physician with reference to his ailment," it has not been pointed out to us. It seems, under the statute and the construction given it in the *Clark Case*, the patient can object to the physician testifying as to what he may have learned in his professional capacity, unless the patient has himself "testified to the communications he

made to the physician." It not appearing that appellee testified to any communication made by him to the physicians, he did not waive his right to object to their testifying at the second trial, even though they did at some previous trial testify as to knowledge obtained by personal examination.

Evidence—  
physician—  
witness at  
former trial.

In *Dahlquist v. Denver & R. G. R. Co.* — *Utah*, —, 174 *Pac.* 833, reading at page 845, the supreme court of Utah, speaking of the *Clark Case*, said: "Just how the appellant in that case, under the plain words of the statute and the testimony of the plaintiff, could assume that the plaintiff, who had not testified to any communication made to his physician, had waived his privilege, is beyond our comprehension. The statute mentions one instance in which the patient's consent may be implied, namely, where he voluntarily testifies with reference to communications to his physician. By construction all others are excluded. *Expressio unius est exclusio alterius*."

Even if we questioned the correctness of the construction placed upon our statute, we would be inclined to defer our judgment to that of the highest Federal court, for the sake of uniformity in the administration of the law in this state.

"We think the sounder view is that the mere fact that testimony has been given at a former trial does not necessarily constitute a waiver which is irrevocable at a subsequent trial of the cause. In this view of the matter, we are influenced not only by what seems to us to be the better reason, but by the well-considered opinions of other courts. *Briesenmeister v. Supreme Lodge*, K. P. 81 *Mich.* 525, 45 *N. W.* 977; *Burgess v. Sims Drug Co.* 114 *Iowa*, 275, 54 *L.R.A.* 364, 89 *Am. St. Rep.* 359, 86 *N. W.* 307, 10 *Am. Neg. Rep.* 42.

"In the *Iowa case* cited above, Mr. Justice McClain, speaking for the court, said: 'As to the testimony at

the former trial, it seems to us that the waiver resulting therefrom should be confined to the trial in which the waiver is made. Our statute relates to the giving of testimony, not to the publication in general of the privileged matter, and it seems to us clear that any waiver resulting from the giving or introduction of testimony on a trial should be limited to that trial.

"In the same case, the court, in declining to follow the New York cases, said: 'We do not agree to the reasoning in that case, which would seem to lead to the result that, if the privileged communication is in any way made public by the patient, the privilege is waived for all time; whereas, we understand it to be well settled that a communication to a third person by the patient or client will not be a waiver of the right to insist on the privilege when it is sought to have the disclosure made by the way of testimony in open court.'" *Maryland Casualty Co. v. Maloney*, 119 Ark. 434, L.R.A. 1916A, 519, 178 S. W. 389.

The instructions given to the jury are the ordinary instructions given in personal-injury cases arising under the common law,—as to negligence, contributory negligence, assumed risk, and safe place to work,—and we would feel constrained to affirm the judgment but for the fact that, commingled with those instructions, are others submitting the issues under the Employers' Liability Act. These last instructions, under the pleadings and the evidence, should not have been given.

There are other assignments of error; but, as they do not go to the merits of the case and are not likely to occur upon another trial, we will not notice them.

The judgment is reversed, and case remanded, with directions that further proceedings be had in accordance herewith.

*Cunningham, Ch. J., and Baker, J., concur.*

Petition for rehearing denied, May 31, 1919.

### ANNOTATION.

#### **Workmen's compensation: employees within provision applicable to the "operation of railroads."**

It will be observed that in the reported case (*ARIZONA EASTERN R. CO. v. MATTHEWS*, ante, 1149) it was held that a billing clerk was not engaged in an occupation in "the operation of a railroad" within the meaning of the Arizona Employers' Liability Act, the court stating that those persons engaged in "the operation of a railroad" are those having an actual physical connection with the handling, organizing, loading, unloading, and movements of trains, locomotives, and cars.

The test of the employee's right to the protection of the act there considered is the employee's occupation, or actual work, and not the employer's business. This is also true of the New York Workmen's Compensation Act, under which the only other cases disclosed, involving the question here considered, arose.

In *Brown v. Richmond Light & R. Co.* (1916) 173 App. Div. 492, 159 N. Y. Supp. 1047, a process server and claim adjuster employed by a railway company, who was injured by a passenger stepping on his foot while he was riding on one of his employer's cars, returning from serving process, was held not engaged in the operation of a railway within the meaning of the New York Workmen's Compensation Act, providing for compensation for injuries sustained by employees while engaged in certain hazardous occupations, including "the operation, including construction and repair, of railways operated by steam, electric, or other motive power." The court said: "The decedent was not in any manner employed upon, about, or in connection with the tracks or cars of the railroad, and had nothing to do at, about, or in

connection with the electric light and power lines, dynamos, or appliances of the company. His employment was in the claim department of the company, which had nothing to do with the cars, the tracks, or the electric lines or appliances. His duties, and the hazards attending them, were in all respects the ordinary duties of an investigator, a process server, or claim adjuster, found in many of the large law offices. The fact that the decedent was employed by this corporation, rather than a corporation carrying on any other extensive business employing a like service, does not make his work more hazardous. The fact that he was riding upon the car of the defendant, rather than upon the car of another company, did not add to the hazards of the employment. In performing his duties it was necessary for him at times to go from one place to another. In doing so he might walk, or ride upon a bicycle, a public bus, the car of another company, an automobile, or other vehicle. At the time he was injured he was riding upon the car of his employer. If he had been riding upon the car of another company, or in a bus, and had received a similar injury, it would be a very strict rule which would hold that he was not within the law, but would have been if he had been riding upon defendant's car. In a sense the uptown ticket agent of a railroad company, at an office a mile or so from the railroad track, whose only duty is to sell tickets over the counter, is engaged in operating a railroad, for the sale of tickets is a necessary incident to carrying passengers; but if such an employee fell while passing from one room to another in his office, it could not fairly be said that his injury arose out of the hazardous business of operating a railroad. He was not engaged in that work or occupation, but was a mere clerk, selling tickets at a distance from the railroad, and having no physical connection with the railroad or its operation. If the decedent was operating a railroad, it is difficult to see why the stenographer in the office of the law department was not also operating a railroad. The statute is intended to protect em-

ployees engaged in hazardous works and occupations, and has defined the employments which the legislature deems hazardous. To be within the legislative intent, the work or occupation must subject the employee to the hazards contemplated by this law. The decedent was riding upon the car, not as an employee in the performance of a duty relating to the car, its operation, or its passengers, but was a passenger for his own personal convenience. He was subject to the same hazards as any other passenger in the car, and the hazard came, not because he was operating a railroad, but because he was riding in a car, and the hazards, so far as the accident is concerned, were no greater upon the car than they would have been upon a bus, or at any public place where people assemble. He was not necessary to or an incident to the operation of the car, and had no duty upon the car. The conductor, the engineer, the trainmen, possibly the stenographer, librarian, and barber employed by a company upon a limited car, may be considered as engaged in its operation, as, according to the rules of the company, their presence and the performance of their respective duties are necessary for the operation of the car. But the decedent had no such relation to this car, and was not in any way connected with its operation. The mere fact that an employee is in the service of a railroad company does not bring him within the act; he must be engaged in the hazardous work, or in some way be subject to the hazards arising from the nature of the work."

And it has been held that an employee was not engaged in "the operation . . . of railroads" within the New York statute defining hazardous employments, where a motorman, who had finished his day's work, signed his name to the register denoting this fact, and was run down by an automobile while he was going to have his watch tested, and was on the public highway. *De Voe v. New York State R. Co.* (1915) 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed (1916) 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256. J. T. W.



JOHN M. DANZER, Resp't.,

v.

A. J. MOERSCHEL, Appt.

*Missouri Supreme Court (Division No. 1)—July 9, 1919..*

(— Mo. —, 214 S. W. 849.)

**Vendor and purchaser — requirement of abstract showing good title — what satisfies.**

1. A contract for purchase of real estate requiring an abstract showing good title is not complied with unless the title is shown to be good of record, and is not satisfied by an attempt to prove adverse title by means of affidavits.

[See note on this question beginning on page 1166.]

— marketable title — what is.

2. Title by adverse possession, if adequately proved, is marketable within a contract for sale of real estate.

[See 25 R. C. L. 276.]

**Specific performance — compliance with contract.**

3. If a contract for purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor.

**Vendor and purchaser — contract — time to examine abstract.**

4. An agreement to furnish abstract showing good title to real estate ordinarily implies that time is to be allowed for examination.

— waiver of condition as to abstract.

5. Waiver of a provision in a contract to purchase real estate, requiring abstracts showing good title, and acceptance of deed tendered, are not shown by the fact that the deed was placed in the possession of the purchaser's attorney pending examination of the abstract and the purchaser's agent placed in charge of the property.

— notification of defects — sufficiency.

6. Simple notification that the abstract does not show good title is sufficient without pointing out the defects in case of a requirement of abstracts showing good title in a contract to sell real estate.

**APPEAL** by defendant from a judgment of the Circuit Court for Gasconade County (Breuer, J.) in favor of plaintiff in an action brought to enforce specific performance of a contract of sale. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Calfee & Westhues and Robert Walker, for appellant:

If defendant had accepted the warranty deed signed by plaintiff and had entered into possession of the property, such acts would not constitute any waiver by defendant of his objections to plaintiff's title and abstract of title, and defendant would not, by such acts, waive his right to insist that plaintiff comply with his contract by furnishing an abstract showing good title.

39 Cyc. 1524; Lillienthal v. Bierkamp, 183 Iowa, 42, 110 N. W. 152; Read v. Loftus, 82 Kan. 485, 31 L.R.A. (N.S.) 457, 108 Pac. 850; Cross v. Buskirk-Rutledge Lumber Co. 139 Tenn. 79, 201 S. W. 141, Ann. Cas. 1918D, 983.

In order to constitute a waiver there must be a knowledge of the true situation.

Advance Thresher Co. v. Pierce, 74 Mo. App. 676; Mohney v. Reed, 40 Mo. App. 99; Minor v. Edwards, 12 Mo. 137, 49 Am. Dec. 121.

Plaintiff cannot recover on the averments in his reply on an alleged waiver or estoppel, which constitute a departure and which are inconsistent with the allegations of his petition.

Moss v. Fitch, 212 Mo. 484, 126 Am. St. Rep. 568, 111 S. W. 475; Hill v. Rich Hill Coal Min. Co. 119 Mo. 9, 24 S. W. 223; Mohney v. Reed, 40 Mo. App. 99.

Under the facts in this case time was of the essence of the contract.

36 Cyc. 710; Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460.

Plaintiff's failure and refusal to furnish an abstract showing good title, at the time agreed upon, was a breach of the contract, and entitled defendant to rescind the contract.

39 Cyc. 1404; Lanyon v. Chesney, 186 Mo. 540, 85 S. W. 568; Harvey v. Morris, 63 Mo. 475; Austin v. Shipman, 160 Mo. App. 206, 141 S. W. 425.

The right of plaintiff to enforce specific performance and receive the purchase money is dependent upon the performance by him of the requirements of the contract on his part.

Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460; Lanyon v. Chesney, 186 Mo. 540, 85 S. W. 568; Pom. Spec. Perf. of Contr. 2d ed. p. 63, § 44; Barthel v. Engle, 261 Mo. 307, 168 S. W. 1154.

The mere fact that the title is, fairly and reasonably considered, a doubtful one, prevents the court from forcing its acceptance by an unwilling vendee. The vendee should not be compelled to accept a title which will expose him to litigation, or to bona fide adverse claims of third persons.

Pom. Spec. Perf. of Contr. 2d ed. pp. 63, 284, §§ 44, 203; 36 Cyc. 632.

A contract requiring the vendor to furnish an abstract showing a good title refers to the record title which might be epitomized on the abstract, and the purchaser will not be required to accept the title when there is a defect in the record title as shown by the abstract, which can be cured only by proving adverse possession, limitations, or estoppel, or by otherwise resorting to parol evidence.

39 Cyc. 1518, 1519; St. Clair v. Hellweg, 173 Mo. App. 660, 159 S. W. 17; Austin v. Shipman, 160 Mo. App. 206, 141 S. W. 425; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Thompson v. Dickerson, 68 Mo. App. 535.

Land acquired by a railroad company for right of way, depot, and station grounds, etc., is an appropriation of the land to a public use, and hence under the statute a citizen cannot acquire title to such land by adverse possession.

Hannibal & St. J. R. Co. v. Totman, 149 Mo. 657, 51 S. W. 412; St. Joseph, St. L. & S. F. R. Co. v. Smith, 170 Mo. 327, 70 S. W. 700; Kansas City & N. Connecting R. Co. v. Baker, 183 Mo. 312, 82 S. W. 85.

Messrs. August Meyer, H. A. Krog, and Jesse H. Schaper, for respondent:

Under the defense set up in the an-

swer pleading affirmatively the breach of contract by plaintiff, the reply of plaintiff pleading the waiver thereof by defendant was justified, and the same was not a departure.

Ottumwa Bridge Co. v. Corrigan, 251 Mo. 692, 158 S. W. 39; Estel v. St. Louis & S. E. R. Co. 56 Mo. 282; Fowlds v. Evans, 52 Minn. 551, 54 N. W. 743; Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315; Ehrlich v. Aetna L. Ins. Co. 103 Mo. 240, 15 S. W. 530; Pierce City Water Co. v. Pierce City, 61 Mo. App. 471; Coombs Commission Co. v. Block, 130 Mo. 668, 32 S. W. 1189; Bliss, Code Pl. 2d ed. ¶ 396; New v. Wambach, 42 Ind. 456; Philibert v. Burch, 4 Mo. App. 470.

Defendant was not justified in refusing to perform the contract in suit.

Ranck v. Wickwire, 255 Mo. 42, 164 S. W. 460; Scannell v. American Soda Fountain Co. 161 Mo. 606, 61 S. W. 889; Greffet v. Willman, 114 Mo. 106, 21 S. W. 459; Birge v. Bock, 44 Mo. App. 69; Long v. Lackawanna Coal & I. Co. 233 Mo. 713, 136 S. W. 673; Acord v. Beaty, 244 Mo. 126, 41 L.R.A. (N.S.) 400, 148 S. W. 901; Mastin v. Grimes, 88 Mo. 478; Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070; Rozier v. Graham, 146 Mo. 352, 48 S. W. 470; Carter v. Foster, 145 Mo. 383, 47 S. W. 6; Ellis v. Harrison, 104 Mo. 279, 16 S. W. 198.

The construction so placed upon the contract by the parties themselves by words and conduct is the proper guide and of more importance than an abstract meaning that a court may attach to it by reason of its mere phraseology.

Smith v. Crane, 169 Mo. App. 707, 154 S. W. 857; Patterson v. Camden, 25 Mo. 13; St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 131 Mo. 291, 31 S. W. 908; Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co. 210 Mo. 715, 109 S. W. 47; Tetley v. McElmurry, 201 Mo. 382, 100 S. W. 37; St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121.

It was the duty of defendant upon receipt of the abstract from plaintiff to have it examined, and if there were any defects existing to point them out to plaintiff and give him an opportunity to correct such defects.

Ranck v. Wickwire, 255 Mo. 59, 164 S. W. 460; Bachman v. H. R. Ennis Real Estate & Invest. Co. 199 Mo. App. 674, 204 S. W. 1115; Birge v. Bock, 44 Mo. App. 69; Gerhart v. Peck, 42 Mo. App. 652; St. Clair v. Hellweg, 173

Mo. App. 667, 159 S. W. 17; 22 Am. & Eng. Enc. Law, 960; McWhorter v. McMahan, 10 Paige, 386; 26 Am. & Eng. Enc. Law, 2d ed. 112; Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966; Scannell v. American Soda Fountain Co. 161 Mo. 622, 61 S. W. 889.

Blair, P. J., delivered the opinion of the court:

This is an appeal from a judgment of the Gasconade circuit court enforcing specific performance of a contract for the purchase by appellant of certain realty in Hermann, Missouri, together with some "fixtures and personal property appertaining thereto." The property constitutes a brewery and ice plant. The contract, as a condition of the sale, required respondent to deliver to appellant "a warranty deed and an abstract showing good title" to the property involved. Appellant contends respondent did not comply, and therefore cannot recover. Respondent insists (1) he complied with the contract; and (2) appellant waived failure to comply, if failure there was.

I. The record shows, and respondent's brief concedes, that respondent's record title to a material and very substantial part of the property is bad. It may be granted that, in a suit for the specific performance of a contract for a marketable title, a title by adverse possession, if adequately proved, is sufficient to justify a judgment for the vendor. Scannell v. American Soda Fountain Co. 161 Mo. loc. cit. 618, 619, 61 S. W. 889. If one contracts merely for a marketable title, he cannot insist

Vendor and purchaser—marketable title—what is.

Specific performance—compliance with contract.

upon the delivery of something else. It is quite as true that, if the contract calls for something more or other than a "marketable" title, the courts cannot substitute a different contract therefor. Page v. Greeley, 75 Ill. loc. cit. 405, 406. The great weight of authority supports the rule that an abstract is an epitome of the record evidence of title; that a contract call-

ing "for an abstract showing good title" calls for record evidence; that nothing less will "satisfy the condition no matter what the vendor's real title might be;" that "it is not sufficient that the title is good in fact,—that is, capable of being made good by the production of affidavits or other oral testimony; it must be good of record;"

Vendor and purchaser—requirement of abstract showing good title—what satisfies.

that in such case title by adverse possession will not suffice. Thompson v. Dickerson, 68 Mo. App. loc. cit. 540 et seq.; Bruce v. Wolfe, 102 Mo. App. loc. cit. 389, 76 S. W. 723; Ives v. Kimlin, 140 Mo. App. loc. cit. 301, 124 S. W. 23; St. Clair v. Hellweg, 178 Mo. App. loc. cit. 666, 159 S. W. 17; Austin v. Shipman, 160 Mo. App. loc. cit. 215, 216, 141 S. W. 425; Howe v. Coates, 97 Minn. loc. cit. 396; 4 L.R.A. (N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397; Eagan v. Hook, 134 Iowa, loc. cit. 386, 105 N. W. 155, 111 N. W. 981; Martin v. Roberts, 127 Iowa, loc. cit. 220, 102 N. W. 1126; Hutchinson v. Coonley, 209 Ill. loc. cit. 442, 443, 70 N. E. 686; Buswell v. O. W. Kerr Co. 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837; Noyes v. Johnson, 139 Mass. loc. cit. 439, 31 N. E. 767; Zunker v. Kuehn, 113 Wis. loc. cit. 421, 88 N. W. 605; Parker v. Porter, 11 Ill. App. 602; Coonrod v. Studebaker, 53 Wash. 35, 101 Pac. 489; Lessenich v. Sellers, 119 Iowa, loc. cit. 319, 93 N. W. 348; Bryan v. Straus Bros. & Co. 157 Mich. 49, 121 N. W. 301; Horn v. Butler, 39 Minn. loc. cit. 516, 517, 40 N. W. 833; Bear v. Fletcher, 252 Ill. loc. cit. 214, 96 N. E. 997; Grow v. Taylor, 23 N. D. 469, 137 N. W. 451; Kane v. Rippey, 24 Or. 338, 33 Pac. 936; Lillienthal v. Bierkamp, 133 Iowa, loc. cit. 45, 46, 110 N. W. 152; Loring v. Oxford, 18 Tex. Civ. App. loc. cit. 416, 417, 45 S. W. 395; Beeler v. Sims, 93 Kan. loc. cit. 219 et seq., 144 Pac. 237; Constantine v. East, 8 Ind. App. loc. cit. 296, 35 N. E. 844; Wright v. Glass, — Tex. Civ. App. —, 174 S. W. 717; Maupin, Marketable Title, §§ 6, 288, pp. 23, 689, 690; Thomp-

(— Mo. —, 214 S. W. 849.)

son, Title to Real Prop. § 7, pp. 8, 9. We think the rule is sound. It follows that the title attempted to be shown by affidavits of possession was not in compliance with the contract. This view eliminates the question whether the affidavits offered constituted proof sufficient properly to show title by adverse possession.

II. Respondent urges that appellant waived the defects in the record title shown by the abstract. The question whether waiver was pleaded is presented, but we shall discuss the question on the evidence. The parties and their counsel met at Hermann on November 3d and agreed upon the terms of sale. Respondent and his wife executed a deed to appellant, and respondent signed a bill of sale for the personalty. A written contract (above referred to) was drawn and signed. It was very brief, but set out the price to be paid, the character of the deed to be executed, and that an abstract showing good title should be furnished appellant. The payment of the purchase price was conditioned upon respondent's furnishing an abstract showing good title. The strong preponderance of the evidence shows that on November 3, 1915, when the papers were drawn, the parties contemplated placing the deed and bill of sale in escrow at the Hermann Savings Bank, but that these instruments were not completed until after banking hours. The abstract, deed, and bill of sale were then turned over to appellant's attorney, who, with his client, was about to return to his home in another city. Before leaving, one Runte, who had associated or contemplated associating himself with appellant, was put in charge of the plant. The business was conducted during the ensuing week in the name of respondent, but under the supervision, if not the management, of Runte. Orders were taken and bills paid as before. These bills were paid out of receipts from the business. A small repair was made on the boiler. No notification was given the authorities of any change in ownership, though

some preparation was made by respondent to do so. The parties decided to meet November 10, 1915, for the purpose of closing. Soon after November 3d, appellant's attorney notified respondent's attorney that the abstract did not show good title, and on November 10th notified respondent personally of the same fact. Further effort to complete the abstract was made. The agreement to furnish an abstract showing good title of itself ordinarily implies that time is to be allowed for its examination. No claim was made on November 3, 1915, that the purchase money was due on that day. Neither respondent nor his attorney, upon receipt of notice of the insufficiency of the abstract, contended the sale was closed, or that the fact that appellant's attorney took the deed with him on November 3d was a waiver of any part of the contract. Nor was it suggested on November 10, 1915, that possession of the deed or Runte's position in the plant constituted acceptance of title as it stood. Further effort to comply with the contract requirement concerning the abstract was the response to the notification of the defects in the title. It had been agreed on November 3d that the necessary stamps should be procured and affixed to the deed when the parties returned at a later date to close the contract. The petition itself alleges a refusal to accept the deed and bill of sale, and respondent testified flatly that it was agreed on November 3d that appellant's attorney should take the abstract to his home, "and later come back, and if it proved satisfactory to finish up the deal."

In view of all this it must be held that there was no acceptance by appellant of the deed as a conveyance. —waiver of condition as to abstract. Poplin v. Brown, 200 Mo. App. 255, 205 S. W. 411. Neither party so understood it, and respondent's testimony, corroborated by every fact proved, and his pleading, shows that the deed was not de-

livered or accepted in the sense that it was to convey title. Appellant himself did not have the deed in person and never agreed to its acceptance. Respondent never claimed a delivery (on November 3d) until he filed his reply in May, 1916. His petition expressly denies any acceptance by appellant. Possession, unexplained, would be a strong circumstance in respondent's favor. It is not, of itself, conclusive. In view of the evidence set out above, and of respondent's testimony in particular, it is clear that Runte's management of the plant from November 3d to November 10th was not an assertion of ownership, but was, as the direct evidence on the point also shows, taken subject to the final completion of the sale, for the purpose of familiarizing himself with the plant as quickly as possible, so that contemplated improvements and repairs might promptly be made when the sale was closed. There is no waiver and no estoppel.

III. It is suggested that appellant failed to point out the defects in the title.

(1) There is authority for the rule that under a contract like that in this case a simple notification of defects—sufficiency. abstract does not show good title is sufficient.

(2) The record shows conclusively that appellant's attorney notified respondent's attorney in writing of the particular defects and that he orally notified respondent in person thereof.

(3) The evidence shows that respondent's answer to the notification to him was that the Hermann Savings Bank, which had a deed of trust on the property, "was good enough for it." The point must be ruled against respondent.

The judgment is reversed.

Bond and Graves, JJ., concur.

Petition for rehearing denied October 10, 1919.

## ANNOTATION.

### Right of vendee to record title where vendor to covenants to furnish abstract showing title.

I. General rule—abstract a condition precedent to liability of the vendee, 1166.

II. Necessity that abstract show record title:

a. In general, 1167.

III. Right to supplement abstract by extrinsic matter:

a. In general, 1170.

b. Explanatory affidavits:

1. In general, 1171.

III. b—continued.

2. Heirship, 1172.

3. Identity, 1173.

4. In relation to limitations or adverse possession, 1174.

5. Marriage, 1174.

c. Recitals in deeds, 1174.

d. Letters, 1175.

e. Proof of title by adverse possession, 1175.

I. General rule—abstract a condition precedent to liability of the vendee.

Covenants and contracts for the sale of land by which the vendor agrees to furnish an abstract showing title in him to the land to which the contract relates are very generally construed to require an abstract showing title of the character contracted for as a condition precedent to the liability of the vendee to perform, unless the furnishing of such abstract is waived by the latter.

United States.—Day v. Mountin (1905) 70 C. C. A. 190, 137 Fed. 756; Alpha Portland Cement Co. v. Slirk (1915) 142 C. C. A. 424, 227 Fed. 966.

Alabama.—McDennis v. Finch (1916) 197 Ala. 76, 72 So. 352.

Illinois.—Page v. Greeley (1874) 75 Ill. 400; Koch v. Streuter (1908) 232 Ill. 594, 83 N. E. 1072; Bear v. Fletcher (1911) 252 Ill. 206, 96 N. E. 997; Geithman v. Eichler (1914) 265 Ill. 579, 107 N. E. 180; Williams v. Daly (1889) 33 Ill. App. 454; Bragg v. Chil-

cote (1912) 176 Ill. App. 371; Husak v. Maywald (1914) 185 Ill. App. 479.

Indiana. — Constantine v. East (1893) 8 Ind. App. 291, 35 N. E. 844.

Iowa.—Lessenich v. Sellers (1903) 119 Iowa, 314, 93 N. W. 348; Martin v. Roberts (1905) 127 Iowa, 218, 102 N. W. 1126; Spooner v. Cross (1905) 127 Iowa, 259, 102 N. E. 1118; Brown v. Widen (1905) — Iowa, —, 103 N. W. 158; Fagan v. Hook (1905) 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Consolidated Coal Co. v. Findley (1905) 128 Iowa, 696, 105 N. W. 206; Lillienthal v. Bierkamp (1907) 133 Iowa, 42, 110 N. W. 152; Eller v. Newell (1913) 159 Iowa, 711, 141 N. W. 52.

Kansas. — Linscott v. Moseman (1911) 84 Kan. 541, 114 Pac. 1088; Beeler v. Sims (1914) 91 Kan. 757, 139 Pac. 371, affirmed on rehearing in (1914) 93 Kan. 213, 144 Pac. 237.

Michigan.—Bryan v. Straus Bros. (1909) 157 Mich. 49, 121 N. W. 301; Frazer v. Hovey (1917) 195 Mich. 160, 161 N. W. 887; Lake Erie Land Co. v. Chilinski (1917) 197 Mich. 214, 163 N. W. 929.

Minnesota.—Howe v. Coates (1906) 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397.

Missouri. — Redmond v. Adams (1901) 165 Mo. 60, 65 S. W. 300; DANZER v. MOERSCHEL (reported herewith) ante, 1162; Thompson v. Dickerson (1897) 68 Mo. App. 535; Bruce v. Wolfe (1903) 102 Mo. App. 384, 76 S. W. 723; Carrabine v. Cox (1909) 136 Mo. App. 370, 117 S. W. 616; Drury v. Mickleberry (1910) 144 Mo. App. 212, 129 S. W. 237; St. Clair v. Hellweg (1913) 173 Mo. App. 660, 159 S. W. 17; Ranck v. Wickwire (1914) 255 Mo. 42, 164 S. W. 460.

Nebraska.—Raddatz v. Christner (1919) — Neb. —, 173 N. W. 677.

New York.—Hennig v. Smith (1915) 151 N. Y. Supp. 444.

North Dakota.—Kennedy v. Dennstadt (1915) 31 N. D. 422, 154 N. W. 271.

Ohio.—Crigler v. Blair (1889) 4 Ohio C. C. 324.

Oregon.—Kane v. Rippey (1893) 24 Or. 338, 33 Pac. 936; McCarty v. Helbling (1914) 73 Or. 356, 144 Pac. 499;

Annand v. Austin (1917) 86 Or. 403, 167 Pac. 1017, 168 Pac. 725.

Texas.—Hamburger v. Thomas (1910) 103 Tex. 280, 126 S. W. 561; Loring v. Oxford (1898) 18 Tex. Civ. App. 415, 45 S. W. 395; Greenville Nat. Bank v. Partain (1899) — Tex. Civ. App. —, 52 S. W. 648; Davis v. Fant (1906) — Tex. Civ. App. —, 98 S. W. 190; Moore v. Price (1907) 46 Tex. Civ. App. 304, 103 S. W. 234; McLaughlin v. Brown (1910) — Tex. Civ. App. —, 126 S. W. 292; Nicholson v. Lieber (1913) — Tex. Civ. App. —, 153 S. W. 641; McLane v. Petty (1913) — Tex. Civ. App. —, 159 S. W. 891; Sparkman v. Davenport (1913) — Tex. Civ. App. —, 160 S. W. 410; Wright v. Bott (1914) — Tex. Civ. App. —, 163 S. W. 360; Matheson v. C-B Livestock Co. (1915) — Tex. Civ. App. —, 176 S. W. 734; Adkins v. Gillespie (1916) — Tex. Civ. App. —, 189 S. W. 275; Slade v. Crum (1917) — Tex. Civ. App. —, 193 S. W. 723; Alling v. Vander Stucken (1917) — Tex. Civ. App. —, 194 S. W. 443; Moser v. Tucker (1917) — Tex. Civ. App. —, 195 S. W. 259; Giles v. Union Land Co. (1917) — Tex. Civ. App. —, 196 S. W. 312.

Washington.—Coonrod v. Studebaker (1909) 53 Wash. 32, 101 Pac. 439; Crosby v. Wynkoop (1910) 56 Wash. 475, 106 Pac. 175; Mauk v. Lee (1911) 66 Wash. 184, 119 Pac. 185.

## II. *Necessity that abstract show record title.*

### a. *In general.*

Although, as is subsequently shown, the abstract may be explained, aided, or supplemented in certain respects, so as to show that the record is in truth in the vendor, the general rule is that a contract to furnish an abstract showing title to the land imposes the duty upon the vendor to furnish an abstract showing title of the character covenanted for; and it is very generally held that to comply with this requirement the vendor must exhibit an abstract which on its face or by reference to public records shows that he has record title to the land. A title resting in whole or in part upon parol proof is not sufficient if the purchaser is entitled to a title

of record, such title being of a higher character and more desirable than one depending upon extrinsic circumstances to be established by parol evidence.

**Federal.**—Day v. Mountin (1905) 70 C. C. A. 190, 137 Fed. 756; Alpha Portland Cement Co. v. Slirk (1915) 142 C. C. A. 424, 227 Fed. 966.

**Alabama.**—McDennis v. Finch (1916) 197 Ala. 76, 72 So. 352.

**California.**—Smith v. Taylor (1890) 82 Cal. 533, 23 Pac. 217.

**Illinois.**—Page v. Greeley (1874) 75 Ill. 400; Koch v. Streuter (1908) 232 Ill. 594, 83 N. E. 1072; Bear v. Fletcher (1911) 252 Ill. 206, 96 N. E. 997; Geithman v. Eichler (1914) 265 Ill. 579, 107 N. E. 180; Bragg v. Chilcote (1912) 176 Ill. App. 371.

**Indiana.**—Constantine v. East (1893) 8 Ind. App. 291, 35 N. E. 844.

**Iowa.**—Lessenich v. Sellers (1903) 119 Iowa, 314, 93 N. W. 348; Fagan v. Hook (1905) 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981.

**Kansas.**—Linscott v. Moseman (1911) 84 Kan. 541, 114 Pac. 1088; Beeler v. Sims (1914) 91 Kan. 757, 139 Pac. 371, affirmed on rehearing in (1914) 93 Kan. 213, 144 Pac. 237.

**Michigan.**—Bryan v. Straus Bros. (1907) 157 Mich. 49, 121 N. W. 301; Ogooshevitz v. Arnold (1917) 197 Mich. 203, 163 N. W. 633, 165 N. W. 633; Lake Erie Land Co. v. Chilinski (1917) 197 Mich. 214, 163 N. W. 929.

**Minnesota.**—Howe v. Coates (1906) 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397; Buswell v. O. W. Kerr Co. (1910) 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837.

**Missouri.**—Redman v. Adams (1901) 165 Mo. 60, 65 S. W. 300; DANZER v. MOERSCHEL (reported herewith) ante, 1162; Thompson v. Dickerson (1897) 68 Mo. App. 535; Bruce v. Wolfe (1903) 102 Mo. App. 384, 76 S. W. 723; Austin v. Shipman (1911) 160 Mo. App. 206, 141 S. W. 425; St. Clair v. Hellweg (1913) 173 Mo. App. 660, 159 S. W. 17.

**Nebraska.**—Raddatz v. Christner (1919) — Neb. —, 173 N. W. 677.

**New York.**—Hennig v. Smith (1915) 151 N. Y. Supp. 444.

**Oregon.**—Kane v. Rippey (1893) 24 Or. 338, 33 Pac. 936; McCarty v. Helbling (1914) 73 Or. 356, 144 Pac. 499; Annand v. Austin (1917) 86 Or. 403, 167 Pac. 1017, 168 Pac. 725.

**Texas.**—Bowles v. Umberson (1907) — Tex. Civ. App. —, 101 S. W. 842; Nicholson v. Lieber (1913) — Tex. Civ. App. —, 153 S. W. 641; McLane v. Petty (1913) — Tex. Civ. App. —, 159 S. W. 891; Sparkman v. Davenport (1913) — Tex. Civ. App. —, 160 S. W. 410; Wright v. Glass (1915) — Tex. Civ. App. —, 174 S. W. 717; Adkins v. Gillespie (1916) — Tex. Civ. App. —, 189 S. W. 275; Slade v. Crum (1917) — Tex. Civ. App. —, 193 S. W. 723; Alling v. Vander Stucken (1917) — Tex. Civ. App. —, 194 S. W. 443; Moser v. Tucker (1917) — Tex. Civ. App. —, 195 S. W. 259.

**Washington.**—Coonrod v. Studebaker (1909) 53 Wash. 32, 101 Pac. 489; Crosby v. Wynkoop (1910) 56 Wash. 475, 106 Pac. 175; Mauk v. Lee (1911) 66 Wash. 184, 119 Pac. 185.

The abstract should show that the vendor owned and was able to convey the kind of title he had agreed to convey. Geithman v. Eichler (1914) 265 Ill. 579, 107 N. E. 180.

Under a contract to submit an abstract showing a perfect title, it is not enough that the title was in fact perfect, but it must appear to be such on the records of the county epitomized in the abstract. Lessenich v. Sellers (1903) 119 Iowa, 314, 93 N. W. 348.

The object of an abstract is to enable the vendee to pass on the validity of the title, and to enable him to do so it should contain everything material concerning its sources and condition. Fagan v. Hook (1905) 134 Iowa, 381, 105 N. W. 155, modified in other respects on rehearing in (1907) 134 Iowa, 390, 111 N. W. 981.

When the vendor contracts to furnish an abstract of title the agreement indicates that the vendee is to have a marketable title, and that such title is to be shown by the abstract. McCarty v. Helbling (1914) 73 Or. 356, 144 Pac. 499, *supra*. An agreement to give a good and sufficient warranty deed and abstract contem-

plates that the abstract shall present a merchantable title which is clear as shown by the record, and does not require litigation to complete. *Raddatz v. Christner* (1919) — Neb. —, 178 N. W. 677. A contract to furnish an abstract showing a perfectly clear title is not complied with unless the abstract itself proves a title of this character. *Slade v. Crum* (1917) — Tex. Civ. App. —, 193 S. W. 723, supra.

In *Smith v. Taylor* (1890) 82 Cal. 583, 23 Pac. 217, an agreement to refund a deposit upon the purchase price if the abstract which the vendor agreed to furnish did not show a good title was held to require title of record, and hence the vendee was not bound to make any investigation outside of the abstract.

In *Annand v. Austin* (1917) 86 Or. 403, 167 Pac. 1017, 168 Pac. 725, the contract provided for the payment of a certain portion of the purchase price "when the title was found to be marketable by an abstract of title." It appeared that the title of the vendor according to the abstract furnished depended upon public records and evidence other than that disclosed by the abstract. Under these circumstances the abstract was held not sufficient. The court said that the question is not whether the title of vendor was actually marketable as disclosed by public records and by evidence other than that disclosed by the abstract. Compare with *Welch v. Dutton* (Ill.) infra, III. d.

In *Buswell v. O. W. Kirk Co.* (1910) 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837, it was held that a contract by the vendor to furnish an abstract of title, although expressed in meager terms, nevertheless contemplated that within a reasonable time after the execution of the contract and the making of the first payment by a note, the vendor was to furnish an abstract of title which upon its face should show that he possessed a good title of record to the land purchased. The court said there was nothing to suggest that the vendee was to acquire information as to the state of the title by any other means than the abstract.

In *Coonrad v. Studebaker* (1909) 7 A.L.R.—74.

53 Wash. 32, 101 Pac. 489, supra, an agreement to furnish an abstract showing a good and sufficient title was held to contemplate a record title. The court said that it is established beyond the necessity of citing authority that under a contract like this the vendee is entitled to a marketable title. He cannot be put to the trouble of hunting up testimony outside of the record or of ascertaining whether or not there are any minor heirs, but he has a right to a clear title as shown by the record.

In *Austin v. Shipman* (1911) 160 Mo. App. 206, 141 S. W. 425, the vendor contracted to convey to the vendee in fee simple, clear of all encumbrances whatever, by good and sufficient warranty deed and abstract of title. The court said that this contract evidently meant that the grantor will assure a fee-simple title—"a title clear of all encumbrances (excepting, of course, the deed of trust, which the grantee was to assume), and, having first furnished an abstract showing such a title, convey by a good and sufficient warranty deed. He could not convey by an abstract of title; nor could he assure a fee-simple title, clear of all encumbrances, by a good and sufficient warranty deed. Therefore, in order to give any meaning whatever to the words, 'and abstract of title,' it must be held that the intention was to assure a clear title by an abstract of the record transfers."

In *Bowles v. Umberson* (1907) — Tex. Civ. App. —, 101 S. W. 842, the contention was made by the vendor that he performed his agreement to furnish a complete abstract of title to the land by furnishing one which showed all the records disclosed of the title to the land, though it failed to show a perfect title. In denying this contention, the court said: "If this contention can be sustained, it would follow that it was not essential to the sale that the title to the land, upon examination of the abstract, should be found good; and, therefore, it was unnecessary for the plaintiffs to aver that the abstract of title furnished should show a good title in plaintiffs to the land. There must have been



some purpose in requiring the plaintiffs to furnish the defendant 'a complete abstract of title to the said land.' We need not grope in the dark to discover it; for it is obvious from the very nature of the contract, as well as from the face of the written agreement, it was to enable the defendant to ascertain from an examination of it whether plaintiffs' title to the premises was good. 'Title' simply means 'ownership.' One who claims ownership in land and agrees to furnish another, contemplates buying from him, a complete abstract of title to it, does so for the purpose of showing thereby that he is the owner, and can confer, by sale, title or ownership in him who desires to buy. The very fact that the one who desires to sell agrees to furnish the one who wants to purchase an abstract of title indicates that the title under which he claims is of such character that a complete abstract can be made of it, and that it is not such that must appear outside of such records and instruments as abstracts of title are made from. Such, for instance, as title by limitation, of which there can be no record or paper. The contract itself stipulates that 'the parties of the first part agree to furnish a complete abstract of title . . . in ample time for the party of the second part to have same examined within thirty days from the date hereof, and if said title is found to be good then they agree,' etc. The obvious meaning of the agreement is that the title must be 'found good' before either of the parties is required to go a step farther in the transaction, or either can acquire any rights, or incur any liability under the agreement. By or through what means is the title to be 'found good?' Clearly, by means of the 'abstract of title to be furnished in ample time for the party of the second part to have the same examined within thirty days from the date of the agreement.'"

In *Attebery v. Blair* (1910) 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475, it is said: "A purchaser may, of course, contract for a patent title or a perfect paper title, and may refuse to accept any other, but all the facts

upon which title depends are not of record, and are not shown by abstracts, and one who gets a perfect paper title may, after all, acquire no real or beneficial title. In this case Blair was not bound to accept a title resting merely upon adverse possession under the Statute of Limitations, but the essence of the contracts was that he should have conveyances giving him a good title, free and clear from encumbrances, and that such a title should be shown by the abstracts. It was not implied that the abstracts should show matters not of record or all the facts and circumstances connected with the conveyances which might affect the title, such as possession, who were the legal heirs of a deceased owner where administration was not had within the jurisdiction, and matters of that kind. An abstract of title is, in a legal sense, a summary or epitome of the facts relied on as evidence of title, and it must contain a note of all conveyances, transfers, or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair the title."

### *III. Right to supplement abstract by extrinsic matter.*

#### *a. In general.*

There is a distinction between actual and apparent breaks in the record chain of title in so far as concerns the question under consideration as to the right of the vendee to a record title where the vendor contracts to furnish an abstract showing his title. In this regard it may be said that the authorities are in substantial accord in holding that where there is an actual break in the chain of title, and to show title in himself the vendor must resort to evidence of extrinsic matters, he cannot in this way supplement the abstract and require the vendee to accept the title, even though, as a matter of fact, he establishes title to the land. Where, however, the break in the chain of title is apparent only, while the cases are not agreed in the matter, there is good authority for the statement that the abstract may be supplemented by explanatory affi-

davits or other instruments in writing or reference to public records (other than the ordinary real property records) which show that, as a matter of fact, the vendor has a record title to the property. That is to say, extrinsic instruments may be resorted to where the purpose is merely to show that in truth the title, as disclosed by the abstract, represents a complete and continuous chain of conveyances from the original owner to the vendor, and the instruments are not for the purpose of importing into the record a new title or instrument of conveyance.

**Illinois.**—*Welch v. Dutton* (1875) 79 Ill. 465; *Clark v. Jackson* (1906) 222 Ill. 13, 78 N. E. 6; *Attebery v. Blair* (1910) 244 Ill. 369, 185 Am. St. Rep. 342, 91 N. E. 475; *Eberhardt v. Miller* (1897) 71 Ill. App. 215.

**Iowa.**—*Prichard v. Mulhall* (1908) 140 Iowa, 1, 118 N. W. 43.

**Kansas.**—*Van Gundy v. Shewey* (1913) 90 Kan. 253, 47 L.R.A.(N.S.) 645, 143 Pac. 720.

**Missouri.**—*Austin v. Shipman* (1911) 160 Mo. App. 206, 141 S. W. 425.

**Oregon.**—*Jaeger v. Harr* (1912) 62 Or. 16, 123 Pac. 61, 901.

**Texas.**—*Hollifield v. Landrum* (1908) 31 Tex. Civ. App. 187, 71 S. W. 979; *Sparkman v. Davenport* (1913) — Tex. Civ. App. —, 160 S. W. 410.

**Washington.**—*Crosby v. Wynkoop* (1910) 56 Wash. 475, 106 Pac. 175.

But in *Moser v. Tucker* (1917) — Tex. Civ. App. —, 195 S. W. 259, *supra*, it is held that where the vendee had stipulated that the abstract shall show a marketable title, the covenant will be construed to mean a good record title, and not such a title as may be shown to be good by oral proof or affidavits and other writings not subject to registration.

And in *Howe v. Coates* (1906) 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397, *supra*, the rule is stated that under a contract to furnish an abstract showing a marketable title, the vendee is not required to resort to evidence dehors the record. It is not sufficient that the title is good in fact, that is capable of being made good by produc-

tion of affidavits or other oral testimony, but it must be good of record.

#### *b. Explanatory affidavits.*

##### *1. In general.*

Affidavits of credible persons having personal knowledge of the facts may be resorted to to supplement abstracts, in order to explain apparent breaks or defects in the record chain of title by showing that, as a matter of fact, the record presents continuous transfers from the different title owners down to the present vendor. The affidavits, however, must disclose sufficient facts to show that the record title is in fact complete.

In this regard it is to be remembered that affidavits presented with an abstract are *ex parte* statements, and the affiants are not subjected to cross-examination, hence the statements contained in the affidavit should leave nothing to conjecture. *Clark v. Jackson* (1906) 222 Ill. 13, 78 N. E. 6.

In *Clark v. Jackson* (Ill.) *supra*, it is pointed out that where it is sought to cure an apparent break in a chain of title by affidavit showing that subsequent grantors were the sole heirs at law of the record holder of the title, such affidavits should not be based upon a conclusion of the affiants, but they should contain statements of the facts as to the family history of the deceased with reference to the heirship, and state in this regard whether or not the deceased was survived by children, and, if so, whether or not such children are still surviving, and if they have deceased, it should appear who their heirs are.

In *Linscott v. Moseman* (1911) 84 Kan. 541, 114 Pac. 1088, *supra*, the abstract showed an oil or gas lease upon the land the vendor had contracted to convey. This defect in the title was held not cured by an affidavit attached to the abstract reciting that the lease was void for noncompliance with its terms in that no work had been done under it, the affidavit failing to identify the affiant or to show his place of residence or that he would be available as a witness to the facts to which the affidavit related.

## 2. Heirship.

An apparent break in the record chain of title is caused by the death of the record owner of the land, and a subsequent conveyance thereof by his heirs. This apparent defect, by the weight of authority, may be cured by affidavits sufficiently identifying the heirs, and showing their right to convey the premises free and clear of any liability for the debts of the ancestor. (As to the sufficiency of the affidavit see *supra*, a, 1.)

**Illinois.**—*Attebery v. Blair* (1910) 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475; *Clark v. Jackson* (1906) 222 Ill. 13, 78 N. E. 6.

**Iowa.**—*Prichard v. Mulhall* (1908) 140 Iowa, 1, 118 N. W. 43.

**Kansas.**—*Van Gundy v. Shewey* (1913) 90 Kan. 253, 47 L.R.A. (N.S.) 45, 143 Pac. 720.

**Missouri.**—*Austin v. Shipman* (1911) 160 Mo. App. 206, 141 S. W. 425.

**Oregon.**—*Jaeger v. Harr* (1912) 62 Or. 16, 123 Pac. 61, 901.

**Washington.**—*Crosby v. Wynkoop* (1910) 56 Wash. 475, 106 Pac. 175. (As to the right to show heirship by a recital in the instrument of conveyance, see *infra*, III. b.)

In *Attebery v. Blair* (Ill.) *supra*, objections were made to the abstract that it did not show the issuance of patents, although showing purchase of the land from the government; nor did it show that certain deeds in the chain of title were under the seals of the grantors or seals of the officers taking the acknowledgments; that it did not appear whether or not certain grantors and mortgagors were married or single, and it was not shown of record who were the heirs of deceased owners. These defects or irregularities were held to be cured by affidavits attached to the abstract. The court said that "affidavits are as satisfactory evidence of such facts as a statement by the grantor himself in the instrument or the certificate of the officer taking the acknowledgment, which is nothing more than the statement of a matter which the officer is not required or authorized to certify to so as to make his certificate evidence

of the fact. Either the certificate or the affidavit is accepted in real estate transactions as evidence of the fact."

In *Prichard v. Mulhall* (Iowa) *supra*, a contract to furnish an abstract showing a good and perfect title in the vendor was held to have been complied with although a break in the chain of title was shown by the abstract, the abstract being supplemented by affidavits in this regard showing that certain grantors in the deed in the chain of title were the sole heirs at law of the preceding record holder of the title. The affidavits also showed the payment of the debts of the deceased. The court said that the affidavit showing the payment and discharge of all the debts, especially in view of the fact that four years had elapsed after the death of the intestate, and the further fact that the vendee made no objection to the abstract after its correction and return after objections had been made thereto, was a sufficient answer to the statement that the abstract did not show title.

In *Van Gundy v. Shewey* (Kan.) *supra*, it appeared that a deed in the chain of title was executed by the reputed heirs of a deceased owner of the land. It was held that the abstract might be supplemented by attaching to it affidavits of creditable persons having knowledge of the facts and showing that the deceased owner died intestate, that all claims against his estate had been satisfied, and that the grantors were his sole heirs and, all of them had capacity to convey.

In *Austin v. Shipman* (Mo.) *supra*, it appeared that there was an apparent break in the chain of title and this the vendor undertook to cure by an affidavit attached to the abstract showing that this apparent break was due to the death of the owner of the land and the conveyance thereof by his heirs. It did not, however, appear that there had been any administration of the decedent's estate or the payment of his debts, and upon this ground the abstract was held defective, since if the decedent was indebted at the time of his death and these debts had not been paid, they remained upon his estate.

Upon this point, in *Jaeger v. Harr* (Or.) *supra*, the court said: "In addition to what may be acquired from the public records, further information may also be necessary and should be furnished by the vendor from other sources than the public records. In cases of descent, where there has been no administration or probate record, additional information of heirship or descent may be supplied by affidavits or other means. Also in regard to marriages, of which no record is ordinarily kept, 'yet, even where such registers are kept, the information they furnish must often be supplemented by evidence aliunde, in order to show identity of person. This evidence usually takes the form of an affidavit, reciting the facts. Such affidavits being only *ex parte* statements, and because, not being made under the sanction of a court, or in any legal proceeding, are not strictly evidence for any purpose, yet, being usually all that can be adduced, they are resorted to by counsel under a choice of difficulties, and have been, as it were, by common consent of the profession, adopted as competent proof in the examination of titles and the testimony taken as corroborative evidence of general reputation, etc. Again, such affidavits, though inadmissible under the rules of evidence, are valuable for the reason that they show that living persons can at the time establish the facts thereto recited.'"

In *Crosby v. Wynkoop* (Wash.) *supra*, a contract to convey a good title, as shown by an abstract, was held not complied with where it appeared that in the chain of title, as shown by the abstract, there was a conveyance by persons claiming to be the heirs of one of the grantors, and there was no evidence to show that such persons were the heirs except an *ex parte* affidavit filed for record in the office of the county auditor.

In *Campbell v. Harsh* (1912) 31 Okla. 436, 122 Pac. 127, however, it is held that neither recitals in deeds of conveyance nor affidavits showing that subsequent grantors in a chain of title are the sole heirs at law of the record title holder are sufficient to

cure a defect in a record title as shown by the abstract, where, by the terms of the contract, the vendor agreed to exhibit an abstract showing a perfect title in him. The broad view is taken in this case that apparent breaks in the chain of title cannot be cured by recitals in deeds in the chain of title or by affidavits attached to the abstract.

### 3. Identity.

Where there is a question as to the identity of a grantor in one instrument in the chain of title with that of a grantee in a preceding instrument, due to a misspelling of the Christian name or to the use of the full surname in one instrument and only the initials in the other, and the like, such identification may be made by affidavit of some credible person having knowledge of the facts.

*Illinois*.—*Attebery v. Blair* (1910) 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475; *Geithman v. Eichler* (1914) 265 Ill. 579, 107 N. E. 180.

*Oregon*.—*Jaeger v. Harr* (1912) 62 Or. 16, 123 Pac. 61, 901.

*Texas*.—*Hollifield v. Landrum* (1903) 31 Tex. Civ. App. 187, 71 S. W. 979; *Sparkman v. Davenport* (1918) — Tex. Civ. App. —, 160 S. W. 410. (As to the right to identify grantor with grantee in preceding instrument in the chain of title, see *infra*, III. b.)

In *Attebery v. Blair* (Ill.) *supra*, it is pointed out that where the initials of a party are given, the identity may be shown by other evidence and by the fact that no adverse claim was ever set up to the property. In this case the name of the grantee was spelled Felker, when his name, in fact, was Felkel, and it was shown by affidavit that the name was so spelled through error; that no person by the name of Felker ever had or claimed any interest in the land.

In *Hollifield v. Landrum* (Tex.) *supra*, it appeared that the contract merely provided that if the title to the property was good and possession was not taken within a certain time after the delivery of the abstract, the vendee should forfeit the deposit money paid. This contract was held to require an abstract showing record title,

and it was held that this abstract might be supplemented by an affidavit showing that an apparent break in the title was due to the fact that the grantee in one deed in the chain of title and the executing grantor in the next deed in the chain of title were one and the same person, although, in executing the deed as grantor, he did not use the same name as that used in the deed conveying title to him.

In *Geithman v. Eichler* (Ill.) *supra*, it appeared that the abstract showed a conveyance of the land to one Noah C. Anderson. The next conveyance was by Noah C. Amiston as grantor. It was conceded that the abstract might have been supplemented by evidence of facts and circumstances explanatory of the record, showing that the insertion in the deed of the name "Anderson" was a mistake and that the conveyance was actually to Amiston. The court said that in such case the requirement of the covenant to convey a marketable title to be shown by an abstract would have been complied with; but in the absence of any such parol evidence, the abstract was held to be insufficient.

**4. In relation to limitations or adverse possession.**

(As to adverse possession generally, see *infra*, III. e.)

In *Eberhardt v. Miller* (1897) 71 Ill. App. 215, it was held that an abstract was sufficient in connection with affidavits making it appear that possession of the vendor was under a tax title and there were no persons interested in the title to the land who were under disability through infancy or coverture or any other cause, and that prescriptive title in the vendor by possession for twenty years matured within a short time after the vendee had purchased the land, and that the vendor also claimed title by reason of possession under his tax deeds and the payment of taxes for more than seven years, at the time he entered into the agreement to convey. The court said: "Very few titles are perfect in and of the record. Where there is a change of ownership by operation of law consequent upon the death of the owner intestate, it is necessary to

prove by parol upon whom the title is cast, and where title is based in whole or in part upon the operation of the Statutes of Limitation, parol proof is necessary with reference to possession and the like. We suppose it is the usual practice in making abstracts of title to manifest such facts by the affidavits of persons cognizant thereof, and while such affidavits are not legal proof of the matters therein set forth, they are usually accepted as sufficient for the purpose." See *infra*, III. e.

However, in *Adkins v. Gillespie* (Tex.) *infra*, III. e, it is held that under a contract to furnish an abstract showing a marketable title, the showing of title by limitations based upon an *ex parte* affidavit attached to the abstract is wholly insufficient. The court said that the mere *ex parte* affidavit of the party as to limitations forming part of the abstract of the title, even when placed of record, is purely hearsay, and not admissible in evidence, and hence not record evidence of title. See *infra*.

**5. Marriage.**

In *Singer v. Guy Invest. Co.* (1910) 60 Wash. 674, 111 Pac. 886, it appeared that there was a defect in the abstract of title in that it did not show whether a certain grantor in an instrument in the chain of title was married or single when she acquired the property. This defect was held to be cured by an affidavit by this grantor to the effect that she was a widow at the time she acquired title to the property. The court said that such an affidavit was certainly as binding as a mere recital in a deed. And see to the same effect *Jaeger v. Harr* (Or.) *supra*, III. b, 3.

**c. Recitals in deeds.**

In *Sparkman v. Davenport* (1913) — Tex. Civ. App. —, 160 S. W. 410, *supra*, one of the conveyances in the chain of title was by the executor and the widow and persons claiming to be the devisees under the will of the record owner of the title. It was held that in absence of any showing by affidavit that the grantors in the deed were the only parties entitled to the land under the devise, the mere decla-

ration in the deed that the grantors were the only parties who by the will of the record owner had any title or interest in the land was not sufficient.

In *Peckham v. Stewart* (1893) 97 Cal. 147, 31 Pac. 928, a contract entitled the vendee to a perfect title of record. Such title was held not possessed by the vendor where, in the chain of title, there was a conveyance to a person by the name of K. F. Redmond and a subsequent conveyance in the name of K. F. Redman, although the instrument of conveyance contained a recital that the grantor derived title to the land under the name of K. F. Redmond, which name was erroneously written, but that the grantor was the identical person to whom such conveyance was in fact made.

Where the abstract shows a mortgage foreclosure under a power of sale contained in the mortgage, it is not sufficient if the foreclosure deed recites that the mortgage contained such a power of sale. *Bryan v. Straus Bros.* (1909) 157 Mich. 49, 121 N. W. 301.

In *Campbell v. Harsh* (1912) 31 Okla. 436, 122 Pac. 127, it is held that neither recitals in deeds nor affidavits are sufficient to cure a gap in the chain of title due to the death of the record owner and the subsequent conveyance of the land by his heirs.

However, in *Singer v. Guy Invest. Co.* (1910) 60 Wash. 674, 111 Pac. 886, *supra*, in holding an affidavit sufficient as to whether or not a certain grantor in an instrument in the chain of title was married or single when she acquired the title, the court remarked that such an affidavit was certainly as binding as a mere recital in a deed.

#### *d. Letters.*

In *Welch v. Dutton* (1875) 79 Ill. 465, a contract to furnish an abstract, with a provision that if the abstract showed a good title, the vendee was to pay a certain sum of money, was held not to require an abstract on its face showing a good title, where the abstract was supplemented by letters from the state auditor's office containing statements as to the records in that

office which, together with the abstract, evidenced a good title in the vendor. But see upon the point of extrinsic records *Annand v. Austin* (Or.) *supra*, II. 1.

#### *e. Proof of title by adverse possession.*

(As to the right to complete a record title by affidavits showing title by limitations or adverse possession see *supra*, b, 4.)

Where the vendor covenants to furnish an abstract showing his title to the land, it is not enough that as a matter of fact he has a good title to the land, but he must exhibit an abstract showing such title; in other words, a title of record is required. This is to be shown by the abstract, hence it is very generally held that since the title by adverse possession is not a title of record and is necessarily dependent upon evidence of facts extrinsic to the abstract, a title of this character does not comply with the contract.

*United States.* — *Day v. Mountin* (1905) 70 C. C. A. 190, 137 Fed. 756.

*Alabama.* — *McDennis v. Finch* (1916) 197 Ala. 76, 72 So. 352.

*Arkansas.* — *Mays v. Blair* (1915) 120 Ark. 69, 179 S. W. 331; *Shelton v. Ratterree* (1915) 121 Ark. 482, 181 S. W. 288.

*California.* — *Benson v. Shotwell* (1890) 87 Cal. 49, 25 Pac. 249; *McCroskey v. Ladd* (1891) 3 Cal. Unrep. 423, 28 Pac. 216, affirmed in (1892) 96 Cal. 455, 31 Pac. 558; *Gwin v. Calegaris* (1903) 139 Cal. 384, 73 Pac. 851.

*Illinois.* — *Page v. Greeley* (1874) 75 Ill. 400; *Bear v. Fletcher* (1911) 252 Ill. 206, 96 N. E. 997. Compare with *Eberhardt v. Miller*, *supra*, III. a.

*Indiana.* — *Constantine v. East* (1893) 8 Ind. App. 291, 35 N. E. 844.

*Iowa.* — *Fagan v. Hook* (1905) 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981.

*Kansas.* — *Beeler v. Sims* (1914) 91 Kan. 757, 139 Pac. 371, affirmed on rehearing in (1914) 93 Kan. 213, 144 Pac. 237.

*Massachusetts.* — *Noyes v. Johnson* (1885) 139 Mass. 436, 31 N. E. 767.

*Michigan.* — *Ogooshevitz v. Arnold* (1914) 197 Mich. 203, 163 N. W. 946,

165 N. W. 633; *Lake Erie Land Co. v. Chiliniski* (1917) 197 Mich. 214, 163 N. W. 929.

**Missouri.**—*Redman v. Adams* (1901) 165 Mo. 60, 65 S. W. 300; *DANZER v. MOERSCHER* (reported herewith) ante, 1162; *Thompson v. Dickerson* (1897) 68 Mo. App. 535; *Bruce v. Wolfe* (1903) 102 Mo. App. 384, 76 S. W. 723; *St. Clair v. Hellweg* (1913) 173 Mo. App. 660, 159 S. W. 17.

**New York.**—*Hennig v. Smith* (1915) 151 N. Y. Supp. 444.

**Texas.**—*Bowles v. Unberson* (1907) — Tex. Civ. App. —, 101 S. W. 842; *McLaughlin v. Brown* (1910) — Tex. Civ. App. —, 126 S. W. 292; *Nicholson v. Lieber* (1913) — Tex. Civ. App. —, 153 S. W. 641; *McLane v. Petty* (1913) — Tex. Civ. App. —, 159 S. W. 891; *Wright v. Glass* (1915) — Tex. Civ. App. —, 174 S. W. 717; *Adkins v. Gillespie* (1916) — Tex. Civ. App. —, 189 S. W. 275; *Alling v. Vander Stucken* (1917) — Tex. Civ. App. —, 194 S. W. 443.

**Washington.** — *Watson v. Boyle* (1909) 55 Wash. 141, 104 Pac. 147.

It has been held that a break in the chain of title cannot be cured by adverse possession where the contract is to convey the land by warranty deed with abstract showing good title. The court said that "the title may be good; but one to whom an abstract showing good title has been promised as a condition precedent is not bound to accept any evidence thereof except that contained in the abstract. The vendee in such a case is not required to accept or rely on parol evidence of title, or information dehors the records, or the word of the vendor. That the title was not only to be good, but that the abstract was to so exhibit it, was a valuable consideration in entering into the agreement; for everyone recognizes the superior salability of land with good paper title." *Fagan v. Hook* (Iowa) *supra*.

In *McLane v. Petty* (1913) — Tex. Civ. App. —, 159 S. W. 891, the court said that an agreement to furnish an abstract showing a good title was not complied with where the abstract indicated that the title to a portion of the land depended upon a limitation

statute, since the contract required a good record title.

In *Ogooshevitz v. Arnold* (1917) 197 Mich. 203, 163 N. W. 946, modified on rehearing in (1917) 197 Mich. 212, 165 N. W. 633, it was held that an agreement to furnish an abstract showing a clear title was not complied with by giving evidence of a clear title by prescription, such title not being established of record and resting upon parol testimony. The court said that "a clear title, as matter of record and as shown by abstract, is one thing; while a clear title by prescription, made good by the Statute of Limitations, and presumptions which may arise from undisputed possession, and shown by parol testimony, is another thing. They are by no means synonymous terms. We know, as matter of common knowledge, that, in buying and selling real estate, abstracts are usually desired by the purchaser, in order that they may be submitted to those skilled in the law for an opinion as to their validity. A clear title, as matter of record, is much more desirable, much more valuable, much more salable, than one depending for validity upon the testimony and memory of witnesses. A clear title, shown to be such by an abstract, and resting on the record, was one of the valuable considerations of this contract. It was what the parties contracted for, and the obligation to furnish it was not discharged by furnishing any other title."

In *Wright v. Glass* (1915) — Tex. Civ. App. —, 174 S. W. 717, it appeared that the contract was for an abstract of title to be sent to a designated person for examination. The contract was held to require an abstract showing a record title. The court said that "contracting, as the parties did, for an abstract of the title to the land, and that it should be sent to an attorney of the purchaser for examination, comprehends the purpose of the parties that the abstract exhibited should be subject to reasonable examination and approval by the purchaser. A provision that the abstract should be first sent to an attorney 'for examination' would be meaningless un-

less construed as words intended to be appropriate to a condition that if after reasonable examination by the attorney the abstract exhibited failed to show a good title in the vendor, the purchaser was not then bound to consummate the purchase and should not forfeit his earnest money. There would be no necessity for an 'abstract to the land' unless it was for the purpose of exhibiting a record title. As ordinarily used and understood 'an abstract' is simply a compilation in abridged form of the record of the title. In this meaning of the term, as commonly understood, such construction of the contract should be adopted as would require an abstract showing a good record title. Anything less than this would not satisfy the term and carry out the implied intention of the parties. The terms used by the parties exclude, it is thought, any expectation on the part of the purchaser that there would be offered to him a title by limitation, depending, as it does, upon facts outside of and independent of the records. In the absence of adjudication in some way, a title by limitation is not settled."

In *Stevenson v. Polk* (1887) 71 Iowa, 278, 32 N. W. 840, it appeared that the vendor had agreed to furnish an abstract, but he did not trace his title back to the government by introducing in evidence deeds from the grantors. He simply showed the conveyance of the real estate to him, and that he had been in open, notorious, and undisturbed possession of the premises for more than ten years. This was held sufficient evidence of title. The court said: "The intestate agreed that he would furnish an 'abstract.' This we understand to mean that he would furnish an abstract of the records in the recorder's office, and of all the records showing title in himself. The object of this abstract was to enable the defendants to determine as to the sufficiency of the title, and facilitate their examination of the records. The abstract furnished showed to whom the land was conveyed by the government, and by and to whom it was afterwards conveyed. Such abstract was examined

by the defendants or their attorneys, and certain objections made thereto. Certain defects were pointed out. It is not pleaded as a defense that the intestate did not have a title to any specific part of the land, but that such title was defective only. We therefore think the plaintiffs were not required to trace their title back to the government, by the introduction of deeds or other evidences of title. The title of the intestate was shown and exhibited by the abstract, and the defendants were required either to accept or reject it within a reasonable time. They were in no respect bound by it. But it amounted to an exhibition of title on the part of the intestate, and should have the same effect as if he had placed in the hands of the defendants all patents and deeds showing such a title as the defendants were entitled to under contract, which undoubtedly was a fee-simple title which would vest in them absolute ownership of the real estate free of encumbrances."

In *Page v. Greeley* (1874) 75 Ill. 400, supra, it is held that a title by adverse possession does not meet the requirements of a covenant to exhibit and convey a good title of record, since such title is based upon extrinsic facts in parol. The court said that where a purchaser has contracted for a good title of record, and, upon a bill filed by the vendor, it appeared that the latter had not such title as he covenanted to convey, for the court to permit the vendor to establish a title dependent upon adverse possession under a statute of limitations, and compel the vendee to take that as a substitute for what was contracted for, is, in effect, for the court to make a new contract for the parties, and then execute it. In the very nature of things, a good title of record in real estate must be more reliable, and consequently more valuable and desirable, than one dependent upon a variety of extrinsic circumstances to be established by parol evidence.

In *McDennis v. Finch* (1916) 197 Ala. 76, 72 So. 352, supra, the agreement was to furnish an abstract of title to be approved by the attorneys



for the vendee. Title by adverse possession was held not sufficient, especially where the character and continuity of the possession involved matters of such uncertainty as could only be removed by judicial proceedings.

In *Nicholson v. Lieber* (1918) — Tex. Civ. App. —, 153 S. W. 641, an agreement by the vendor to furnish an abstract of title brought down to date was held to require an abstract showing the record title, and was not complied with by an abstract which was incomplete without the aid of evidence establishing title by adverse possession.

In *Hennig v. Smith* (1915) 151 N. Y. Supp. 444, it appeared that the vendor contracted to furnish the vendee an abstract showing a good and marketable title. This contract was held to require a title which would appear to be marketable by the abstract, and not by way of adverse possession.

In *Bruce v. Wolfe* (1903) 102 Mo. App. 384, 76 S. W. 723, supra, an agreement to give a clear abstract of title showing title fully vested in the vendor was held not complied with by an abstract showing that an early deed in the chain of title misdescribed the land, and this defect is not cured by evidence showing such occupation of the land as would vest title in the vendor under the Statute of Limitations.

In *Thompson v. Dickerson* (1897) 68 Mo. App. 535, supra, a break in the chain of title was held not susceptible of being cured by proof of adverse possession, where the contract was to furnish an abstract showing a fee-simple title.

In *Lake Erie Land Co. v. Chiliniski* (1917) 197 Mich. 214, 163 N. W. 929, supra, it is held that where a contract for the sale of real estate provides for the delivery by the vendor of an abstract showing merchantable title, if the abstract does not on its face show a merchantable title and it requires parol proof to establish the fact that the title is merchantable, the contract is not complied with, hence, title by adverse possession is not sufficient.

In *Bear v. Fletcher* (1911) 252 Ill.

206, 96 N. E. 997, supra, the rule is stated that where the language of the contract requires the vendor to furnish the vendee with a perfect record title and an abstract showing the same, the purchaser will not be required to accept a title dependent upon adverse possession.

In *Attebery v. Blair* (1910) 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475, the rule is stated that where a purchaser has contracted for a good title of record, a court of equity will not compel him to take a title depending upon adverse possession under a statute of limitations.

In *Kane v. Rippey* (1893) 24 Or. 333, 33 Pac. 936, it is held that a good record title is required under a contract to furnish an abstract of title showing a good clear title free from defects. The court said that it may be true that the title, tested by the original record and conveyances and other facts not upon the face of the abstract, is good and free from defects. It may be true that the curative acts will obviate the objection suggested, and that the Statute of Limitations would bar the uncanceled encumbrance, but these are matters which may involve litigation or judicial inquiry to determine the validity of title. The title as disclosed by the abstract is not the good title the defendants agreed to convey.

In the reported case (*DANZER v. MOERSCHER*, ante, 1162) it is held that a title by adverse possession will not comply with a contract by the vendor to deliver to the vendee a warranty deed and an abstract showing good title, and it is pointed out that the great weight of authority supports the rule that an abstract is an epitome of the record evidence of title, and where the vendor contracts to furnish an abstract showing good title, nothing less will satisfy the condition for a record title, no matter what the vendor's real title may be.

In this connection attention is called to *Jamison v. Van Auken* (1919) — Mo. —, 210 S. W. 404, decided by the same court a few months prior to the decision in the *DANZER CASE*. The opinion is by Woodson, J., and is con-

curred in by Graves, J. In this case the vendor contracted to furnish an abstract showing good merchantable title. As to the effect of this contract, Woodson, J.,—while conceding that where the terms of the contract show that it was the intention of the parties that the vendor should furnish an abstract of title and show a perfect title in him to the real estate by the records, and the vendee was to purchase the land only upon such showing made by the abstract, he would be under no legal obligation to accept a title, though good and merchantable, if not shown by the abstract—declares that while such a contract might be drawn and executed, and if so drawn the courts would enforce it, points out, however, that when the subject and purpose of an abstract are considered “we seriously doubt that such a contract was ever intentionally drawn and executed. What we mean is that the purpose of an abstract of the record of the title to a piece of real estate is not simply to show that the paper title is perfect as it appears of record, but it is also to show in addition thereto that the vendor has the actual title thereto, the latter is of paramount importance while the former is duly incidental thereto, pointing out the evidences of the real title.” The title of the vendor involved in this case was sustained on two grounds, one that a title by adverse possession sufficiently complied with the contract and the other on the ground that the vendee, having gone into possession of the land and still retaining possession, he could not refuse to pay the purchase price. Upon this latter ground, Blair, P. J., and Bond, J., concur in the result, i. e., the specific performance of the contract in behalf of the vendor.

It would seem, however, that there may be circumstances disclosed by the abstract so clearly showing title by limitations or adverse possession, as to make the record title sufficient. (In this connection see *supra*, b, 4, as to the right by means of affidavits attached to the abstract to show title by limitations or adverse possession.)

In *Heller v. Cohen* (1897) 154 N. Y.

299, 48 N. E. 527, it was apparently assumed that the vendee was entitled to a record title, and upon this assumption it was held that title by adverse possession was not sufficient, at least where, to sustain the vendor's title, the vendee would be required to resort to parol evidence, and the validity of the title might depend upon an issue of fact as to which some dispute might arise.

In *Alling v. Vander Stucken* (1917) — Tex. Civ. App. —, 194 S. W. 443, the vendor contracted to furnish a complete abstract showing marketable title. It was held that unless the abstract exhibited showed facts upon which to base a title by limitations, such title cannot be relied upon as a compliance with the contract.

In *St. Clair v. Hellweg* (1918) 173 Mo. App. 660, 159 S. W. 17, it is held that where a contract calls for an abstract showing a good title, title by adverse possession is thereby eliminated, since title by adverse possession is not ordinarily evidenced by an abstract.

In *Redman v. Adams* (1901) 165 Mo. 60, 65 S. W. 300, the contract was to furnish an abstract showing title to be free and clear of all encumbrances, and showing title sufficiently good and satisfactory to vendee. The abstract tendered failed to show a record title in the vendor, and the latter depended upon the Statute of Limitations, based upon possession of the land, to establish his title. This was held not sufficient, at least without attempting to show the termination of outstanding rights of others by evidence that they were and are *sui juris*, and not under any disability.

In *Beeler v. Sims* (1914) 91 Kan. 757, 139 Pac. 371, *supra*, the court remarked that if the abstract showed title from the record alone, it would be sufficient, or if it showed title from the record aided by adverse possession, it might be sufficient. On rehearing of the case, however, in (1914) 93 Kan. 213, 144 Pac. 237, it is said that a contract to furnish an abstract showing a marketable title is not complied with by exhibiting one that purports to show by affidavit only that

the fee title which appears by the abstract to be outstanding has been divested by limitation or adverse possession.

In *Forsyth v. Leslie* (1902) 74 App. Div. 517, 77 N. Y. Supp. 826, defects in the record abstract growing out of undischarged mortgages were held not to affect the marketable title of the land where these mortgages had reached maturity from seventy-five to eighty years prior to the time in question. On the same ground, the lapse of over eighty years was held to have cured and defect arising from the fact that the heirs of a record owner of the property had conveyed title to the land, a search in this connection being supplemented by an affidavit, the contents of which, however, were not disclosed in the opinion.

In *Parr v. Lovegrove* (1857) 4 Drew. 176, 62 Eng. Reprint, 68, the court

said that "the first inquiry, whether a good title can be made, means, not only that the vendor shows on his abstract such documents and facts that if the documents are produced and the facts proved, he has a good title, but that the vendor has shown that he can produce the documents and prove the facts." Another branch of the inquiry is, When is a good title first shown in the abstract? And if, on the face of the abstract, "the vendor has shown, say a sixty years' title, and if, for the purpose of supporting that title, it is necessary to show that such a person died intestate or any other fact—if the facts are alleged with sufficient specification on the abstract then that abstract shows a good title, although the proof of the matters shown may be the subject of ulterior investigation." A. G. S.

## BETHLEHEM SHIPBUILDING CORPORATION, Limited,

v.

## INDUSTRIAL ACCIDENT COMMISSION of the State of California et al.

*California Supreme Court (In Banc)—November 3, 1919.*

(— Cal. —, 185 Pac. 179.)

### Workmen's compensation — transfer of germs — chain of causation.

1. That germs from an infected wound on the foot reached the face of the injured person by external means rather than through the system does not break the chain of causation between the original injury and death resulting from the facial infection, and prevent an award of compensation under the Workmen's Compensation Act.

[See note on this question beginning on page 1186.]

### — source of infection — evidence.

2. The Industrial Accident Commission may award compensation for the death of an employee due to infection of his face after a foot injured in the course of his employment had become infected, on the testimony of medical witnesses that the foot was the most probable source of infection of the face.

### — determination of question of fact — proximate cause.

3. Whether or not infection of the face from a wound of the foot re-

ceived in the course of one's employment is the proximate result of the wound so as to require compensation under the Workmen's Compensation Act is a question of fact for the Industrial Accident Commission to determine.

### — negligence in attempting home treatment.

4. A workman with an injured foot is not, as matter of law, so negligent as to prevent an award of compensation under the Workmen's Compensation Act.

tion Act in attempting to treat the foot at home with witch-hazel and iodine, after it had been dressed at the

hospital and he had been told to report again at the hospital, if the injury did not seem serious.

(Shaw, J., dissents.)

**PETITION** for a writ of certiorari to review an order of the Industrial Accident Commission awarding compensation to claimants in a proceeding under the Workmen's Compensation Act to recover compensation for the death of their decedent alleged to have been caused by an injury received in the course of his employment with petitioner. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Wilson & Wilson for petitioner.

Messrs. A. E. Graupner, Maurice T. Dooling, Jr., and F. A. Devlin, for respondents:

The Commission was justified in finding that the facial infection was caused by the transfer of infective material from the infected toe.

Walker v. Industrial Acci. Commission, 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954; Crosaro v. Industrial Acci. Commission, — Cal. App. —, 177 Pac. 489; John A. Roebling's Sons Co. v. Industrial Acci. Commission, 36 Cal. App. 10, 171 Pac. 987; Santa v. Industrial Acci. Commission, 175 Cal. 235, 165 Pac. 689; Shell Co. v. Industrial Acci. Commission, 36 Cal. App. 463, 172 Pac. 611; Lewis v. London, 58 Sol. Jo. 686, 7 B. W. C. C. 577; Fleet v. Johnson, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60; Blaess v. Dolph, 195 Mich. 137, 161 N. W. 885.

The death was proximately caused by the original injury.

Head Drilling Co. v. Industrial Acci. Commission, 177 Cal. 194, 170 Pac. 157, 16 N. C. C. A. 550; Shell Co. v. Industrial Acci. Commission, 36 Cal. App. 463, 172 Pac. 611; Dunham v. Clare [1902] 2 K. B. 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645; Hodgson v. Robins [1914] W. N. 47, 7 B. W. C. C. 232; Burns's Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635; Newcomb v. Albertson, 85 N. J. L. 435, 89 Atl. 928; Bailey v. Industrial Commission, 286 Ill. 623, 122 N. E. 107; G. H. Hammond Co. v. Industrial Commission, 288 Ill. 262, 123 N. E. 384; Reiss v. Northway Motor & Mfg. Co. 201 Mich. 90, 166 N. W. 840; State ex rel. Adriatic Min. Co. v. District Ct. 137 Minn. 435, L.R.A.1917F, 1094, 163 N. W. 755; Cline v. Studebaker Corp. 189 Mich. 514, L.R.A.1916C,

1139, 155 N. W. 519; Canadian P. R. Co. v. Flore, Rap. Jud. Quebec 24 B. R. 55, 24 D. L. R. 710; Shirt v. Calico Printers' Asso. [1909] 2 K. B. 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 480, 2 B. W. C. C. 342; Mutter v. Thomson, 50 Scot. L. R. 447, 6 B. W. C. C. 424; Lewis v. London, 58 Sol. Jo. 686, 7 B. W. C. C. 577; Hoseth v. Preston Mill Co. 49 Wash. 682, 96 Pac. 423; Postal Teleg.-Cable Co. v. Hulsey, 132 Ala. 444, 31 So. 527; Smith v. Northern P. R. Co. 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 947; Hyvonen v. Hector Iron Co. 103 Minn. 331, 132 Am. St. Rep. 332, 115 N. W. 167; Wieting v. Millston, 77 Wis. 523, 46 N. W. 879; Conner v. Nevada, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Batton v. Public Service Corp. 75 N. J. L. 857, 8 L.R.A. (N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 164; Rossier v. Metropolitan Street R. Co. 125 Mo. App. 159, 101 S. W. 1111; Texas & P. R. Co. v. Mosley, — Tex. Civ. App. —, 124 S. W. 485; Salladay v. Dodgeville, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696; Sauter v. New York C. & H. R. Co. 66 N. Y. 50, 23 Am. Rep. 18, 5 Am. Neg. Cas. 208; Rettig v. Fifth Ave. Transp. Co. 6 Misc. 328, 26 N. Y. Supp. 896; Jones v. Watney, C. R. & Co. 28 Times L. R. 399; Saunders v. London & N. W. R. Co. 2 L. T. N. S. 153; Whiting-Mead Commercial Co. v. Industrial Acci. Commission, 178 Cal. 505, 5 A.L.R. 1518, 178 Pac. 1105.

Lennon, J., delivered the opinion of the court:

Certiorari directed to the Industrial Accident Commission. The return of the respondent Commission reveals the following facts:

The proceeding was instituted by an application for benefits under

the Workmen's Compensation Act (Stat. 1917, p. 831), presented by the guardian ad litem and trustee of the incompetent wife and minor child of John Caffrey, deceased, whose death was alleged to have been caused by an injury received in the course of his employment and arising out of the employment. It appears that on Friday, July 26, 1918, Caffrey sustained a contused wound on the great toe of his right foot while engaged in the service of the petitioner. He continued at his work on Saturday, and also on the following Monday. On Monday he had the toe dressed by Dr. Marvin at the emergency hospital of the Union Iron Works. On Tuesday, July 30th, the foot was so painful that after starting to work he returned home and undertook to treat the toe himself. He first complained of a swelling of the face on August 1st. On the following day, the symptoms of the face becoming alarming, Caffrey was removed to a hospital, where it was discovered that there was a streptococcic infection of the injured toe. The skin surrounding the toe was in an erysipelatos condition and there was a development of erysipelas on the face. The facial infection resulted in septicemia, from which Caffrey died on August 8, 1918.

The Commission found that the germs which caused the facial infection were carried from the toe to the face by external means, and that Caffrey's death was proximately caused by the original injury. It is contended on behalf of petitioner that these findings are not justified by the evidence.

The medical testimony upon which the Commission based its finding that the germs which caused the facial infection were carried from the toe to the face by external means was, in effect, that such a method of transfer was exceedingly common, the transmission of the germs being very readily accomplished, that there was no reason to suppose that the infection had come from another source than the toe,

and that, while it was within the realm of possibility for the infection to have come from another source, such hypothesis was so very much the least probable that it seemed useless to theorize as to such possibility in the face of facts indicating that the germs "certainly must have been carried" from the foot.

It is contended on behalf of petitioner that this evidence shows that the opinion of the experts that the infection of the face was due to germs carried from the toe was pure "guesswork." The testimony shows, however, that the experts were not indulging in mere conjecture or speculation. They were giving what, on the facts before them, and in the light of medical science, appeared to be the most probable explanation of the event. The theory that germs were carried from the toe to the face was "guesswork" only in the sense that there was no direct evidence of the source of the facial infection. In the view of the experts, other admittedly possible causes were so far excluded by the conditions which were shown as to make the one which they advanced by far the more probable one. As stated in *Santa v. Industrial Acci. Commission*, 175 Cal. 235, 165 Pac. 689: "This was a sufficient basis for the action of the Commission. Absolute proof or mathematical demonstration is not required. Code Civ. Proc. § 1826. The Commission is the final judge of the facts, and its findings cannot be overturned where they have the support of evidence upon which a reasonable man could come to the conclusion which was reached."

Petitioner, however, insists that, even if it be assumed that the facial infection was caused by germs carried from the toe by external means, the chain of causation was so broken that the original injury of the toe could not reasonably be said to have been the proximate cause of Caffrey's death. The rule of law

Workmen's  
compensation—  
source of infection—evidence.

which must guide us in the determination of the question thus presented is stated in *Head Drilling Co. v. Industrial Acci. Commission*, 177 Cal. 194, 170 Pac. 157, 16 N. C. C. A. 550. In that case it appeared that a workman sustained a fracture of the leg in the course of his employment. Three days after his discharge from the hospital, he sustained a second injury, causing a displacement of the bones by reason of accidentally striking the heel of the foot of the injured limb against a piece of furniture. The chief justice said: "We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature, and occur under such circumstances, as to make such aggravation the proximate and natural result of the original injury. Whether the subse-

—determination  
of question of  
fact—proximate  
cause.

quent incident or  
accident is such, or  
should be regarded  
as an independent,

intervening cause, is a question of fact for the Commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. . . . Our conclusion is not at all opposed, in our opinion, to what is said in *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24. The question there was whether the Commission is authorized by the act to award compensation to the employee 'for an additional injury sustained by him afterward, not in the course of his employment, by an accident or act which aggravates the first injury and prolongs the disability.' The answer was that it had no such authority if the subsequent injury 'is neither the natural nor the proximate result of the injury received in the course of the employment.' It was fully recognized in that case, we think, that the subsequent injury may be the proximate result of the injury received in the course of the employment,

and compensable under the act, and the finding to that effect in this matter has sufficient support in the evidence."

In a concurring opinion in that case, Mr. Justice Shaw added that "the award for the further disability here under review can be sustained only upon the ground that the subsequent accident and resulting displacement of the fractured bone was not the result of a lack of ordinary care on the part of the injured employee. An injury so occurring subsequently may be regarded as a part of the proximate consequences of the original accident. The finding of the Commission is in effect a finding that at the time of the second accident Scott was not guilty of a lack of the ordinary care which reasonably prudent persons in his condition exercise for their own safety from injury. I think it cannot be said, as matter of law, that such finding is without any evidence to support it."

The rule announced in *Head Drilling Co. v. Industrial Acci. Commission*, *supra*, is well established in all cases where it becomes necessary to determine whether or not there is evidence to justify a finding that a subsequent injury or disease is part of the proximate consequences of an injury for which the defendant is responsible. In *Dickson v. Hollister*, 123 Pa. 421, 10 Am. St. Rep. 533, 16 Atl. 484, erysipelas followed a flesh wound received in the course of a fall occasioned by the defendant's negligence. At the time of the decision, the causes of erysipelas were not understood, but the mere fact that it frequently developed from personal injuries was held to warrant an instruction that the disease might be regarded by the jury as part of the injury itself. To the same effect is *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83, 85, 6 Am. Neg. Cas. 492. The reluctance of the courts to determine the question of proximate cause as a matter of law in cases similar to the instant case is illustrated by *Baltimore City Pass. R. Co. v. Kemp*, 61

Md. 619, 48 Am. Rep. 134, 3 Am. Neg. Cas. 667, wherein it was held that it was properly left to the jury to determine whether or not a supervening cancerous growth was caused by injuries sustained by plaintiff as a result of defendant's negligence. The evidence in this behalf was to the effect that the personal injury might have superinduced and contributed to the production and development of the cancer. The court quoted with approval from *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65, wherein it was held that it was for the jury to determine whether or not a blow on the head was a proximate cause of death from pneumonia, the evidence being to the effect that the personal injury had so reduced the vitality of the deceased as to render him more susceptible to disease and less able to resist it. See also *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168, 3 Am. Neg. Cas. 148; *Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co.* 68 App. Div. 441, 73 N. Y. Supp. 842, id., 174 N. Y. 519, 66 N. E. 1107; *Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902, 9 Am. Neg. Cas. 5.

It only remains to apply the above reasoning to the facts of the instant case. In the light of medical knowledge properly presented to the Commission that such a transfer of a streptococcic infection from a discharging wound as that found to have taken place in Caffrey's case is not only possible, but highly probable, we are of the opinion that the fact that the germs reached the face by external means, and not through the system, cannot,

—transfer of germs—chain of causation.

be said in itself to have broken the chain of causation. But petitioner contends that Caffrey's conduct was such as to require a finding of negligence on his part. Caffrey was, of course, under a duty to use reasonable care to restore himself to health. But if he con-

ducted himself as would a reasonably prudent person in his situation and circumstances, and innocently enhanced the original injury, it was within the province of the Commission to find that the original cause continued to the end and accomplished the final result, and was therefore the proximate cause. *Dunham v. Clare* [1902] 2 K. B. 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645; *Hodgson v. Robins*, [1914] W. N. 47, 7 B. W. C. C. 232, 233; *Bailey v. Industrial Commission*, 286 Ill. 623, 122 N. E. 107; *Hope v. Troy & L. R. Co.* 40 Hun, 438, 440, 5 Am. Neg. Cas. 430; *Batton v. Public Service Corp.* 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 164. Under all of the circumstances, we are not prepared to say that the Commission was not justified in the instant case in finding that his original injury was the proximate cause of Caffrey's death.

It appears that when the toe first troubled him Caffrey had it dressed by Dr. Marvin at the emergency hospital at the shipbuilding plant. When called as a witness, the doctor did not recollect the case, but the hospital record, as explained by him, indicated that the toe was not in a very serious condition, that Caffrey was given no special warning, and that he was told to go to another hospital in a day or two when the dressing needed to be changed. The next day he started to work, but, on account of the pain in the foot, he returned home. He might have had free treatment at the hospital maintained by petitioner for its employees, but he chose instead to remain at home and treat the foot himself with witch-hazel and iodine. In the light of subsequent events, this was an unfortunate decision. We are, however, unable to say as a matter of law that the Commission was bound to find that, under all the circumstances appearing at the time, it was a decision so unreasonable and imprudent as to amount to a breach

of his duty to use due care to restore himself to health. There is no further fact in the case upon which negligence can be predicated. It is not suggested that Caffrey failed to use due care in his own treatment of the foot. It was not until the third day of his absence from work that he first noted a swelling of the face, which he at that time attributed to a cold in the head. The toe, however, was improving, and he wrote to his foreman on that day that he was a little better, and that he would try to return to work as soon as possible. Serious symptoms first developed on the face on the following day and without further delay he was removed to a hospital for treatment.

The facts of the case are not such as to warrant the conclusion that the Commission was bound to find that the transfer of the germs from Caffrey's toe to his face was due to his own negligence. It follows that we cannot disturb the finding that his death was the natural consequence of the original injury.

The award is affirmed.

We concur: Angellotti, Ch. J.; Wilbur, J.; Melvin, J.; Lawlor, J.; Olney, J.

Shaw, J., dissenting:

I dissent. Caffrey, while at work for his employer, had an accident which abraded the skin of his toe. From that abrasion natural causes which he could not control brought on an infection in the toe. The infection and consequent diseased condition of the toe were the proximate results of the abrasion and of the accident. But the infection did not reach his face by the operation of natural causes. The Commission so found. It reached the face by being subsequently carried there, either from some other source, or by some agency entirely disconnected with the infected condition of the toe, or by his own act in carelessly or accidentally touching his face with something which had been in con-

tact with the infection in the toe. Any one of these causes would be an independent intervening cause, and not a cause arising proximately from the injury.

It makes no difference, with respect to this question, whether the act of Caffrey which carried the infection to his face, if it was so carried, was negligent or merely accidental; in either event it was a cause independent of the original injury and intervening it and the deposit of the infection on the face. The opinion of the majority appears to assume that an act of the injured person cannot be an independent, intervening cause unless it is a negligent act. This, of course, cannot be correct. The question whether or not it is negligent has no place in an inquiry whether or not it is an independent, intervening cause.

The decision and the reasons therefor stated in Head Drilling Co. v. Industrial Acci. Commission, 177 Cal. 194, 170 Pac. 157, 16 N. C. C. A. 550, are not applicable to the present case. The facts were materially different. There the injured person, Scott, had a fracture of the leg. He was put in the care of a physician engaged by the insurance carrier of the employer. He had been discharged from the hospital, but was still acting under the supervision of the physician, and had been directed by him to begin to use the fractured leg. It was while he was obeying these instructions and in his usual habits of going about in his home, as the directions contemplated he should do, that his foot slipped on a rug. The leg, owing to the injury, was not yet capable of free motion. This caused an involuntary outward motion of that foot, which struck a table or chair near by, and brought about the additional injury for which the second award was made. There was therefore an unbroken chain of causation from the original injury to the second injury. The original injury was one of the di-



rect causes of the second injury. Scott was following the advice of the physician to accelerate recovery, and because of his doing so he received the second injury. In such cases it is always conceded that the second injury is not produced by an independent, intervening cause. It may be an intervening cause, but is not an independent cause. In the case at bar the original injury had

no connection whatever, natural or artificial, with the transmission of the infection from the toe to the face. It was not directly or indirectly the result of treatment or advice of the physicians in charge of the case, nor the necessary or natural result of the infection in the toe. For these reasons I am of the opinion that the employer was not liable for the additional award.

### ANNOTATION.

**Workmen's compensation: compensation as affected by external infection from, or subsequent incident of, original injury.**

This note does not include the question of the effect on the right to compensation of a workman's refusal to submit to an operation for medical treatment.

It is held that a subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury, but that, on the other hand, the facts and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence.

**California.**—*Pacific Coast. Casualty Co. v. Pillsbury* (1915) 171 Cal. 319, 153 Pac. 24; *Head Drilling Co. v. Industrial Acci. Commission* (1918) 177 Cal. 194, 170 Pac. 157, 16 N. C. C. A. 550; *Shell Co. v. Industrial Acci. Commission* (1918) 36 Cal. App. 463, 172 Pac. 611; *BETHLEHEM SHIPBUILDING CORP. v. INDUSTRIAL ACCI. COMMISSION* (reported herewith) ante, 1180.

**Connecticut.**—*Blackall v. Winchester Repeating Arms Co.* (1915) 1 Conn. Comp. Dec. 183.

**Illinois.**—*G. H. Hammond Co. v. Industrial Commission* (1919) 288 Ill. 262, 123 N. E. 384; *Bailey v. Industrial Commission* (1919) 286 Ill. 623, 122 N. E. 107.

**Michigan.**—*Reiss v. Northway*

*Motor & Mfg. Co.* (1917) 201 Mich. 90, 166 N. W. 841; *Cook v. Hoerts* (1917) 198 Mich. 129, 164 N. W. 464.

**Wisconsin.**—*Kill v. Industrial Commission*, 160 Wis. 549, L.R.A.1916A, 14, 152 N. W. 148.

**England.**—*Martin v. Barnett* (1910) 3 B. W. C. C. 146; *Noden v. Galloways* [1912] 1 K. B. 46 [1911] W. N. 192, 81 L. J. K. B. N. S. 28, 105 L. T. N. S. 567, 28 Times L. R. 5, 55 Sol. Jo. 838, 5 B. W. C. C. 7; *Hodgson v. Robins* [1914] W. N. 47, 7 B. W. C. C. 232.

**Scotland.**—*Borland v. Watson, G. & Co.* (1911) 49 Scot. L. R. 10, 5 B. W. C. C. 514.

It will be observed that in the reported case (*BETHLEHEM SHIPBUILDING CORP. v. INDUSTRIAL ACCI. COMMISSION*, ante, 1180) where there was evidence that the workman sustained an injury to his toe while engaged in his work, which resulted in infection in the toe and was transferred to his face, resulting in septicemia and death, although there was no direct evidence of the source of the facial infection, the Commission's finding that the germs which caused the facial infection were carried from his toe to his face by external means was sustained, there being medical testimony that such a method of transfer was exceedingly common; and it was held that the fact that the germs reached the face by external means, and not through the system, could not, as a matter of law, be said to have broken the chain of causation, and that the Commission was not bound to find that the trans-

fer of the germs was due to the workman's negligence, notwithstanding testimony that, although he might have had free treatment at the hospital, he chose to treat the toe at home.

In *Great Western Power Co. v. Pillsbury* (1915) 171 Cal. 69, L.R.A.1916A, 281, 151 Pac. 1136, 11 N. C. C. A. 493, blood poisoning from an abrasion of the skin received by an employee in the course of his employment was held the proximate result of the injury within the California Workmen's Compensation Act.

And in *Dunham v. Clare* [1902] 2 K. B. (Eng.) 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645, it was held that "death resulted from the injury" within the Workmen's Compensation Act where a workman while engaged in his employment accidentally suffered a wound on his toe and died from erysipelas, which set in some days after the injury, although in the interval he walked to and from the hospital and although there was medical evidence that erysipelas was a very unusual consequence of such a wound. The court here held that even if the erysipelas was not the probable consequence of the injury a recovery was allowable if death resulted from the injury.

And in *Head Drilling Co. v. Industrial Acci. Commission* (1918) 177 Cal. 194, 170 Pac. 157, 16 N. C. C. A. 550, which is quoted in the *BETH-LEHEM CASE*, where a workman sustained a fracture of the leg in the course of his employment, and a few days after his discharge from the hospital, while getting up from the table, sustained an injury which caused a displacement of the bones of the fractured leg, the latter injury was held the proximate result of the original injury, and compensation was held allowable as a part of that injury for the extended disability.

And in *Shell Co. v. Industrial Acci. Commission* (1918) 86 Cal. App. 488, 172 Pac. 611, the workman's second injury was held to have arisen from a condition produced by the original injury, so that compensation was allowable therefor as a part of it, where

it appeared that he broke his femur while engaged in his work, and that some time after, while walking with a crutch in his yard at the direction of the surgeon, he slipped and refractured the bone.

And in *Bailey v. Industrial Commission* (1919) 286 Ill. 623, 122 N. E. 107, the finding of the Industrial Commission that the second injury was not an independent, intervening occurrence and the allowance of compensation therefor as a part of the first, was sustained, there being evidence that while engaged in his work the workman fell and fractured his leg; that when he had partially recovered, owing to his condition he fell again and broke the leg in the same place.

And in *Cook v. Hoerts* (1917) 198 Mich. 129, 164 N. W. 464, where an employee was injured so that he was obliged to go on crutches and fell a second time, injuring himself and prolonging his incapacity, it was held that the board was justified in continuing compensation, there being nothing wilful or intentional, or even negligent, in his action and conduct when he sustained the second injury.

And in *Hodgson v. Robins* [1914] W. N. (Eng.) 47, 7 B. W. C. C. 232, where there was evidence that a charwoman, while coming downstairs in the offices in which she worked, slipped on the stairs and twisted her leg, and that she did some further work at the office and the following day slipped on her own kitchen stairs and sustained an injury, it was held that the evidence supported a finding that the injury at home was the result of the accident at the office, and that allowance for the extended disability was proper.

And in *Reiss v. Northway Motor & Mfg. Co.* (1917) 201 Mich. 90, 166 N. W. 841, where a workman broke his leg, and, upon the advice of a physician, returned to work before it was entirely healed, and broke it a second time, it was held that it might be found that the second injury was the direct effect of the original injury.

And in *G. H. Hammond Co. v. Industrial Commission* (1919) 288 Ill. 262, 123 N. E. 384, death was held to

have resulted from the original injury, where there was evidence that the workman was knocked down and his leg injured while at his work; that an abscess developed which attacked the bone and necessitated cutting away part of it; that this weakened the bone so that while the injured person was getting out of bed it broke, and he fell, and that he was subsequently operated on and died from the shock.

But in *Pacific Coast Casualty Co. v. Pillsbury* (1915) 171 Cal. 319, 153 Pac. 24, where a workman broke his arm while engaged in his employment, and subsequently, after it had been set, the bone slipped, or was shifted in such a manner as to necessitate re-setting, and the only evidence as to the cause of the slipping was that of two doctors, one of whom testified that it might have been caused by the use of the arm too soon, and the other that it slipped from something other than natural causes,—the evidence was held insufficient to support a finding by the Commission that the second disability was the proximate result of the original accident, and the Commission was held not authorized to award compensation for the prolongation of the disability by the second injury.

And in *Blackall v. Winchester Repeating Arms Co.* (1915) 1 Conn. Comp. Dec. 183, where an employee suffering from an incurable disease fell while engaged in her employment and received an injury which would ordinarily have been trivial, and before she was able she left her bed and fell again on account of weakness, and sustained injuries which hastened her death by aggravating the disease, it was held that death was not due to the original injury and had no causal connection with it, but that compensation should be allowed only for the period of incapacity which would ordinarily result from the original injury.

And in *Noden v. Galloways* [1912] 1 K. B. (Eng.) 46, [1911] W. N. 192, 81 L. J. K. B. N. S. 28, 105 L. T. N. S. 567, 28 Times L. R. 5, 55 Sol. Jo. 838, 5 B. W. C. C. 7, where a riveter received an injury to a finger on his

right hand and had the finger amputated, and it healed perfectly and he worked for seven years, although at lighter work, at the end of which time he started using a pneumatic hammer as a result of which his right hand was inflamed so that he was obliged to stop work, and it appeared that a piece of diseased bone was the cause of the trouble, it was held that he was not entitled to compensation for this incapacity on the theory that it was due to his first injury.

And the aggravation by a boxing match of a wound, received in the course of employment, which had practically healed and would have caused no further trouble had it been given a little more rest, so that blood poisoning and permanent injury to a hand resulted, is the proximate cause of such injury, and no recovery can be had under the Workmen's Compensation Act providing for compensation for injuries received in the course of employment. *Kill v. Industrial Commission* (1915) 160 Wis. 549, L.R.A. 1916A, 14, 152 N. W. 148.

In *Borland v. Watson, G. & Co.* (1911) 49 Scot. L. R. 10, 5 B. W. C. C. 514, where a workman wrenched his knee while engaged in his work and received compensation for some weeks and worked without difficulty for three years, when in arising from a kneeling position in his work for another employer he felt pain, and the cartilage of his knee was found to be ruptured, and it was not clear from the evidence that the cartilage had been ruptured by the first injury, it was held that he had suffered an injury by the second accident and was entitled to compensation therefor.

And in *Martin v. Barnett* (1910) 3 B. W. C. C. (Eng.) 146, compensation was allowed for the second injury, and it was held that a cartman's incapacity was due to that injury, where he was struck by his horse's tail which resulted in inflammation and loss of his eye, although it appeared that ten years before he had received a blow in the temple which had rendered one of his eyes useless for many purposes.

J. T. W.

THOMAS W. LAW  
v.  
BRYANT ASPHALT PAVING COMPANY, Appt.

*Iowa Supreme Court—April 10, 1916.*

(175 Iowa, 747, 157 N. W. 175.)

**Highway — obstruction by contractor — liability.**

1. One contracting to make a street improvement has a right to occupy the street with the machinery necessary for the work, and is not liable for inconvenience because of the obstruction to persons wishing to make use of the street.

[See note on this question beginning on page 1203.]

**— negligence in failing to maintain barrier.**

2. A contractor for street improvements who obstructs the path taken by the public along the street on which he is at work may be found to be negligent in failing to erect a suitable barrier to call the attention of travelers to the danger and divert them therefrom, or to maintain a watchman to prevent their injury.

[See 13 R. C. L. 386, 438, 440.]

**Trial — jury — obstruction of highway — failure to maintain barrier.**

3. Whether or not one contracting to make street improvements is negligent in failing to maintain barriers or watchmen to warn the public when he obstructs the traveled way is a question for the jury.

[See 13 R. C. L. 517.]

**— use of dangerous way — negligence.**

4. The court cannot say, as matter of law, that a pedestrian is negligent

in attempting to pass along a traveled path past a machine engaged in making street improvements, in a snow-storm, where the machine had stood idle for several days, and he and others had passed along the adjacent walk without danger, and when the machine was put in operation just prior to his injury no barrier was erected or warning given that the machine was in operation so that the passageway was dangerous.

[See 13 R. C. L. 475; 20 R. C. L. 110, 119.]

**Appeal — instruction — stating issue — error.**

5. It is not reversible error for the court, in its instruction to the jury, to state the issues as set out in the complaint on the theory that the jury is thereby instructed that defendant's duty is measured by such contentions, if the proper rule of duty and liability is subsequently given.

[See 14 R. C. L. 782, 793.]

APPEAL by defendant from a judgment of the District Court for Webster County (Wright, J.) in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kenyon, Kelleher, & O'Connor, for appellant:

Plaintiff failed to show freedom from contributory negligence.

Dreier v. McDermott, 157 Iowa, 726, 50 L.R.A.(N.S.) 566, 141 N. W. 315; Gray v. Chicago, R. I. & P. R. Co. 160 Iowa, 1, 139 N. W. 934; Williams v. Chicago, M. & St. P. R. Co. 139 Iowa, 552, 117 N. W. 956; Landis v. Inter-Urban R. Co. 166 Iowa, 20, 147 N. W.

318; Wilson v. Illinois C. R. Co. 150 Iowa, 33, 34 L.R.A.(N.S.) 687, 129 N. W. 340.

As negligence is always predicated upon a failure to discharge a duty, the definition of the duty attempted to be violated upon which negligence is predicated is important.

Wolfe v. Chicago G. W. R. Co. 166 Iowa, 506; 147 N. W. 901.

The measure of the obligation of

either the contractor or a city is to give reasonable notice or warning by a sign or barrier that the way is not open to travel.

*Jones v. Collins*, 177 Mass. 444, 59 N. E. 64.

No such extraordinary duty should have been imposed or submitted as that of maintaining a barrier to "amply" prevent persons from approaching a dangerous place.

*Lineburg v. St. Paul*, 71 Minn. 245, 73 N. W. 723, 4 Am. Neg. Rep. 64; *Hamilton v. Detroit*, 105 Mich. 514, 68 N. W. 511; *Jones v. Collins*, *supra*.

There is no duty to keep one on guard there to see that the barriers are not removed, or to prevent persons from going into a place of danger.

*Garnetz v. Carroll*, 186 Iowa, 569, 114 N. W. 57; *Jones v. Collins*, *supra*; *Chicago v. McKenna*, 114 Ill. App. 270; *Stainback v. Meridian*, 79 Miss. 447, 28 So. 947, 30 So. 607.

Messrs. Price & Joyce for appellee.

Weaver, J., delivered the opinion of the court:

The defendant, as contractor, was engaged in laying a pavement on one of the streets of Fort Dodge. As a part of its equipment in the performance of the work, it made use of a machine or device known as a concrete mixer, which was operated by steam power. The machine was provided with a boom, or lifting beam, on the outer end of which was fitted a hopper or "skip." When lowered to the ground, the skip was filled with materials for the mixture, then lifted to a position from which the contents were discharged into the mixing drum. The engineer operating the machine stood in a position where he could see the operation of the lift. The outfit was mounted on a truck, by which it was moved from place to place, as might be needed in the prosecution of the work. The paving had been in the course of construction for a considerable period before the accident herein-after mentioned, but the mixing machine had recently been moved from another location and placed at the intersection of Second avenue North, and Seventh street. It was so placed that the lifting beam ex-

tended over and across the path or walk ordinarily used by pedestrians. When the lift was raised, the path, unless otherwise obstructed, was clear; when lowered, it was an obstruction to travel; and when in operation, was a source of danger to anyone passing under it. The street was a main thoroughfare leading into the business section of the city, and many pedestrians made use of it. The plaintiff, who was employed in a grocery in the business section of the city, used the street in question in passing between his home and place of employment, and had seen the mixing machine at other locations, but claims not to have been familiar with its method of operation. There is some conflict in the evidence as to how long the machine had been in this particular location before the accident, but the jury could properly have found that it had stood there some three or four days, but had not been in operation until the day when plaintiff was hurt. The jury could also have found that, while the machine was thus standing idle, no barricade was provided to divert the travel of pedestrians from the usual path at this point, and that in fact many people continued to pass back and forth, without any apparent effort by defendant to interfere with such passage until after the accident. The plaintiff, going to his work in the morning and returning to his home at noon of that day, used the path by the machine and saw no indication of its operation. During his noon hour, and before his return to work, it appears that the machine was set in motion. As he approached the place, a severe snow-storm had set in. He saw several men gathered in that vicinity, who did not appear to him to be engaged in work, and he drew the inference that work had been suspended on account of the storm. He saw nothing and heard nothing which suggested to him that the machine was in operation; there was no barrier on or across the

walk; and he had no warning of any kind that the passage was dangerous, and proceeding, as he and others had done before, he was struck by the descending skip and severely injured. This statement is, of course, in many respects denied by the defendant and its witnesses; but there is evidence upon which, as we have already said, the jury could find it substantially true.

The charge of negligence made against the defendant is, in effect, that it failed to exercise due care to erect a barrier to turn pedestrians from the path of danger, or to give warning of such danger, or to discover the plaintiff's danger in time to prevent his injury by the falling skip.

I. The question first in order is whether there is any evidence for the jury upon the charge of negligence made against the defendant. Upon this, there is little room for argument. The defendant undoubtedly had the right, and the jury

Highway—  
obstruction by  
contractor—  
liability.

were so informed,  
to occupy the  
streets with its machine, and the mere

fact that it thereby obstructed the travel did not render the defendant a wrongdoer or make it liable in damages for the inconvenience thereby occasioned to the public or to individuals. It was bound, however, to exercise that right with reasonable care to avoid injury to persons attempting to make such use of the street as was practicable; and, if the machine was so located as to make passage along the walk

—negligence  
in failing to  
maintain  
barrier.

unsafe, it was open  
to the jury to find  
that reasonable care  
required the erection

of suitable barriers to call the attention of travelers to the danger and divert them therefrom, or, in the absence of barriers, to keep a watchman on guard to turn people away while the machine was in operation. From what we have already said of the facts of which there was evi-

dence, it is very clear that the question of defendant's negligence was not one upon which the court was authorized to pass as a matter of law, and there was no error in submitting it to the jury.

Trial—jury—  
obstruction of  
highway—  
failure to maintain barrier.

II. Was the plaintiff chargeable with contributory negligence as a matter of law? The affirmative of this question is vigorously argued for the defendant. Some of the proved or admitted facts have a legitimate tendency to sustain the conclusion that plaintiff did not manifest reasonable care for his own safety; but, on the other hand, the record is not without a showing of facts from which his exercise of reasonable care may be inferred. The machine had stood at this location idle for several days, and its presence during that time created no danger to persons using the path. The path had been left open and unobstructed, an invitation to its continued use. Plaintiff and others frequently passed that way without being advised or warned by the defendant of any danger. He had in fact used the path without objection or warning but an hour before his injury. When he came back, the machine had been in operation less than half an hour; he was facing a severe storm; and, his progress being uninterrupted by any barrier or warning, the court can hardly assume to say, as a matter of law, that the average man of ordinary intelligence and prudence would have done otherwise than he did under the circumstances.

—use of dangerous way—  
negligence.

The case is not comparable, we think, with the railway cases cited by the appellant. It is only where there is no room for fair and reasonable minds to differ upon the conclusion to be reached that the court may direct a verdict, and the case before us is not of that conclusive character.

III. Error is assigned upon the instructions given the jury as follows. The court, in summarizing

the issues, said to the jury: "The acts which the plaintiff says constitute the negligence on which he claims and upon which he predicates his right to recovery are that (1) The defendant was negligent in that it failed to erect an ample and sufficient barrier at said place in order that pedestrians might be turned from the path usually trod by them; (2) the defendant was negligent in that it failed by any device or method to warn the public generally and this plaintiff in particular of the danger incident to the operation of the said machine at said place; (3) the defendant was negligent in that it failed to erect and maintain a guard around the said place where the said machine was being operated sufficient to prevent the public in general or this plaintiff in particular from going into a place where he would be injured by the operation of the said machine; (4) the defendant was negligent in failing to warn the plaintiff of its purpose to lower the said lift or elevator as the plaintiff was passing in close proximity thereto."

This is said by counsel for appellant to be equivalent to instructing the jury that defendant was bound to put up a barrier which was impassable. It is further objected that the statements in the second, third, and fourth subdivisions of the paragraph are capable of being understood by the jury as charging the defendant with the duty not only to erect a suitable barrier, but also to warn the public generally and the plaintiff in particular of the danger there existing, as well as to give him notice when the elevator was to be lowered, and that such duties were incumbent upon defendant even though plaintiff knew, or as a reasonable man ought to have known, of the danger to be encountered in using the path.

Appeal—  
instruction—  
stating issue—  
error.

These criticisms, we think, are not justified. The statement of the acts and omissions which plaintiff charges as

negligence are quoted literally by the court from the plaintiff's petition. In so doing, we think that the court rightfully allowed the plaintiff to state in his own language the very grounds upon which he seeks to recover. The fact that, with the linguistic exuberance of the profession, counsel for plaintiff state and restate their alleged cause of action in varied forms, cannot serve to prejudice the defense where the court clearly states the pertinent rules of law and directs the attention of the jury to the essential issues, in which respect the defendant here has no just ground of complaint. The jury was told that defendant was rightfully in the street, that it was bound to no more than ordinary care in the conduct of its work therein. An "ample and sufficient barrier" could not mean more to any ordinarily intelligent juror than a barrier reasonably sufficient to indicate to the mind of the traveler passing that way that the path was closed to public use. Nor is there anything in the other specifications of negligence or in the instructions with reference thereto to suggest to the jury that, if defendant had performed its full duty with reference to a barrier, it could still be held negligent in not giving, in addition thereto, a public or an individual warning of the danger. It is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer, in the seclusion and quiet of his office, with a dictionary at his elbow, cannot extract therefrom some legal heresy of more or less startling character. The real test of the meaning and effect of an instruction for the purpose of review by an appellate court ought to be, and we think is, the idea which the language objected to is fairly calculated to convey to the minds of jurors drawn from the ordinary walks of life; and the fact that, upon a minute, technical, or hypercritical analysis, some other interpretation can be placed thereon,

may be disregarded. The charge in this case, taken as a whole, recognizes the right of the defendant, as well as of the plaintiff, in the street; the duty of each to use reasonable care to avoid injury to or interference with the other; the burden upon plaintiff to establish his allegation of negligence by defendant; and his own freedom from contributory negligence. All these matters bearing upon the relative rights and duties of the parties were treated with reasonable fullness.

The record impresses us with the thought that the case was fairly

tried, and that there is no substantial reason for interfering with the result below. The judgment appealed from is therefore affirmed.

Evans, Ch. J., Deemer and Preston, JJ., concur.

#### NOTE.

The right and duty of a highway contractor as to barricading or obstructing the street, considered in the reported case (LAW v. BRYANT ASPHALT PAVING CO. ante, 1189), is the subject of an annotation beginning at page 1203, post.

JOHN B. DAVIS, Respt.,

v.

J. W. MELLEN, Impleaded, etc., Appt.

Utah Supreme Court — July 11, 1919.

(— Utah, —, 182 Pac. 920.)

#### Highway — right to obstruct — contractor for improvement.

1. One contracting to improve a public street has the right to obstruct public travel over the section of the street upon which he is at work.

[See note on this question beginning on page 1203.]

#### — lights on barricade.

2. One contracting for the improvement of a public street must place lights at night upon the barriers placed to obstruct public travel over the section of the street upon which he is at work.

[See 13 R. C. L. 336, 438, 440.]

#### — absence of watchman — right to complain.

3. Travelers upon a public highway cannot complain of a breach by a contractor for its improvement, of his contract with the road commissioners to maintain a watchman to protect the work from injury by the traveling public.

[See 13 R. C. L. 440.]

#### — contract as to barricade — construction.

4. A provision in a contract for street improvements that all work shall be done in sections consisting of the space between the property line and the center of the street, so that the street shall at no time be entirely closed to traffic, does not forbid the

extending of the barricade beyond the center line of the street.

#### Proximate cause — street improvement — injury in bypath.

5. The negligence of one leaving an obstruction in a bypath around a street improvement so that vehicles traveling in opposite directions cannot pass each other, combined with the negligence of the driver of an automobile in propelling it into the bypath at a reckless speed so that a traveler from the opposite direction is compelled to turn into the barricade to avoid a collision, and not the negligence of the street contractor in failing to light and guard the improvement, is the proximate cause of injury to the latter.

[See 13 R. C. L. 446.]

#### Highway — contractor for improvements — liability for injuries in bypaths.

6. A contractor for street improvements who fails to maintain proper lights on the barricade protecting his work, and also a watchman to protect the work, is not liable for injury to



the driver of an automobile who is injured in attempting to pass around the barricade, by the act of a stranger in leaving an obstruction in the by-path so that vehicles traveling in opposite directions cannot pass each other, combined with the negligence of one who drives an automobile from the opposite direction at a reckless speed into the passageway.

— duty to anticipate obstruction.

7. A contractor for street improvements who leaves a passageway around his work sufficient for vehicles traveling in opposite directions to pass each other is not bound to anticipate that a stranger will leave an obstruction in the passageway in the night which will prevent such passing and cause injury.

**APPEAL** by defendant Mellen from a judgment of the District Court for Salt Lake County (Porter, J.) in favor of plaintiff in an action brought to recover damages for personal injuries and injury to his automobile, alleged to have been caused by the negligence of defendants. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Stewart, Stewart, & Alexander, for appellant:

Where a contract is made by a public corporation for the construction of a public work, and incidentally contains stipulations intended for the safety of the public, an individual who sustains personal injuries by reason of the nonperformance of such stipulation does not bear such a relation to the contractor as will support an action of tort against the latter, based upon the mere violation of the contractual duty.

Styles v. F. R. Long Co. 67 N. J. L. 413, 51 Atl. 710; Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 810, 13 Am. Neg. Rep. 363; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91; Ockerman v. Woodward, 165 Ky. 752, L.R.A. 1916A, 1005, 178 S. W. 1100; Schneider v. Cahill, — Ky. —, 27 L.R.A. (N.S.) 1009, 127 S. W. 143; Larned v. Holt & Jeffery, 74 Wash. 274, 46 L.R.A. (N.S.) 635, 133 Pac. 460; Davis v. Clinton Waterworks Co. 54 Iowa, 59, 87 Am. Rep. 185, 6 N. W. 126; Nickerson v. Bridgeport Hydraulic Co. 46 Conn. 24, 33 Am. Rep. 1.

If evidence of other accidents is admissible, the conditions must be shown to have been similar to those in question before any evidence of prior accidents can be received, and evidence of accidents subsequent to the injury is not admissible and it is error to receive evidence of such accidents.

Brady v. Manhattan R. Co. 127 N. Y. 46, 27 N. E. 368, 5 Am. Neg. Cas. 346; Abbotts, Proof of Fact, 3d ed. p. 311;

Chamberlayne, Ev. § 1012; Jones, Ev. 2d ed. § 163; Dillingham v. Whitaker, — Tex. Civ. App. —, 25 S. W. 723; Matthews v. Missouri P. R. Co. 142 Mo. 645, 44 S. W. 802, 3 Am. Neg. Rep. 699; Hunt v. Dubuque, 96 Iowa, 314, 65 N. W. 319; Schmidt v. Coney Island & B. R. Co. 26 App. Div. 391, 49 N. Y. Supp. 777; Menominee River Sash & Door Co. v. Milwaukee & N. R. Co. 91 Wis. 447, 65 N. W. 176; Louisville & N. R. Co. v. Malone, 109 Ala. 509, 20 So. 33; Sullivan v. Salt Lake City, 13 Utah, 125, 44 Pac. 1039; Snowden v. Pleasant Valley Coal Co. 16 Utah, 369, 52 Pac. 599; People v. Rodawald, 177 N. Y. 408, 70 N. E. 1; Hill v. American Surety Co. 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

Messrs. Dey, Hoppaugh, & Fabian, for respondent:

Mellen having failed to give the warnings required by his contract with the state, and having failed to keep one side of the street open for travel, plaintiff is entitled to recover for the breach of the obligation Mellen assumed in entering into that contract.

Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; 36 Cyc. 881; Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363; Lyme Regis v. Henley, 3 Barn. & Ad. 77, 110 Eng. Reprint, 29, 5 Bing. 91, 130 Eng. Reprint, 995; Jenfree v. Metropolitan Street R. Co. 86 Kan. 479, 39 L.R.A. (N.S.) 1112, 121 Pac. 510, Ann. Cas. 1918C, 214; Montgomery Street R. Co. v. Smith, 146 Ala. 316, 39 So. 757.

**Defendant was liable for negligence, irrespective of contract.**

13 R. C. L. 317; *Lyme Regis v. Henley*, 3 Barn. & Ad. 77, 110 Eng. Reprint, 29, 5 Bing. 91, 130 Eng. Reprint, 995; *Wade v. Gray*, 104 Miss. 151, 43 L.R.A. (N.S.) 1046, 61 So. 168; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91; *Nye v. Dibley*, 88 Minn. 465, 93 N. W. 524; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Little v. Banks*, 85 N. Y. 258; *Young v. Waters-Pierce Oil Co.* 185 Mo. 634, 84 S. W. 929; *Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 Am. St. Rep. 268, 32 N. E. 324; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Sanitary Dist. v. Ray*, 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Wegmann v. Jefferson*, 61 Mo. 55; *McGregor v. Boyle*, 34 Iowa, 268; *Shaw v. Crocker*, 42 Cal. 435; *Kimball v. Bath*, 38 Me. 219, 61 Am. Dec. 243; *Bailey v. Osborn*, 80 N. J. L. 333, 78 Atl. 9, Ann. Cas. 1912A, 454.

**It is not necessary that Mellen's negligence should have been the sole cause of the injury. If it were a proximate cause, then he is liable, although the negligent act of another was a concurring cause.**

29 Cyc. 496.

**It was not error to permit witnesses to testify as to other accidents that had occurred during the time appellant was making street improvements.**

*Gale v. Shillock*, 4 Dak. 182, 29 N. W. 661; *Benecke v. Welch*, 168 Mo. 267, 67 S. W. 604; *State v. Eifert*, 102 Iowa, 188, 38 L.R.A. 485, 63 Am. St. Rep. 433, 65 N. W. 309, 71 N. W. 248; *Lloyd v. Simons*, 90 Minn. 237, 95 N. W. 903; *Ward v. Abbott*, 14 Me. 275; *Tatom v. White*, 95 N. C. 453; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; *Chesapeake, & O. R. Co. v. Barger*, 112 Va. 688, 72 S. E. 963.

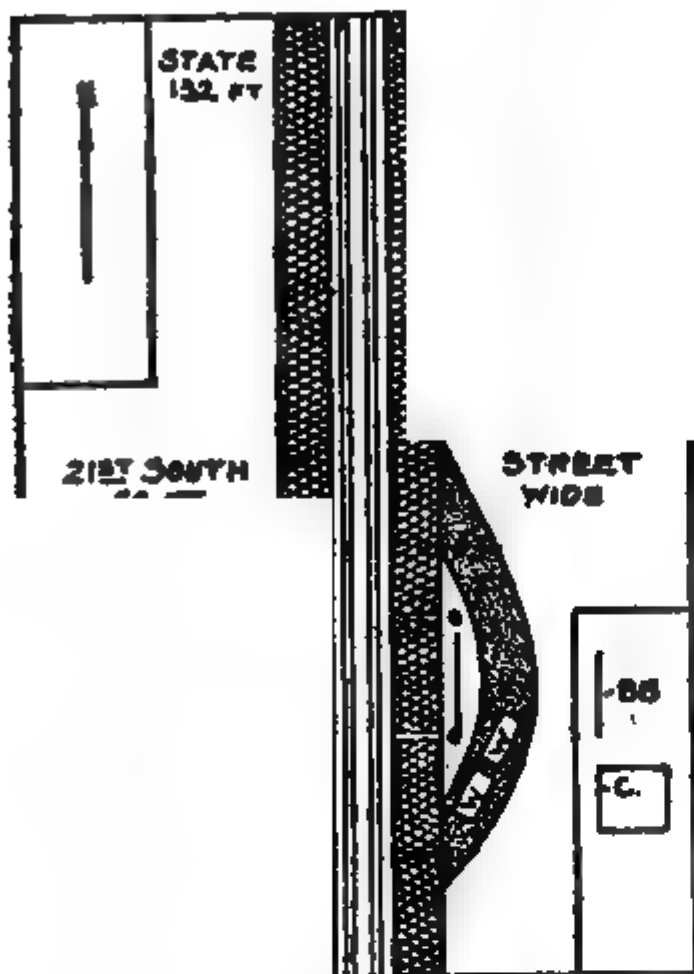
**Corfman, Ch. J., delivered the opinion of the court:**

Plaintiff brought this action in the district court of Salt Lake county to recover damages alleged to have been sustained by him

through the negligence of the defendants while he was driving his automobile on State street, a public highway leading from the south into Salt Lake City. At the trial plaintiff dismissed his action as to the defendants constituting the partnership Salt Lake Transfer Company, and then proceeded against Mellen alone, whom we shall hereinafter refer to as defendant.

Mellen was a contractor engaged by the State Road Commission, hereinafter referred to as the Commission, to lay cement pavement for the surfacing of certain portions of State street between Salt Lake City and Murray. He was required, under his contract with the Commission, to do the paving in sections. He had finished the pavement at or near the intersection of Twenty-first South street with State street, when it was found that a water pipe or conduit crossing State street at that point was of insufficient size, and that it would be necessary to take it up and replace it with a larger one in order to carry the water. He was requested by the Commission to make the change after the completion of the pavement, as before stated, and was engaged in so doing when the accident occurred of which plaintiff complains. While proceeding to the work of taking up the pipe and replacing it, certain barricades were placed by Mellen across State street, to warn the public of the excavations made in the street, and to prevent vehicle travel over the green cement used in repairing the pavement where the pipe was being replaced. Twenty-first South street is 66 feet wide. State street is 132 feet in width, and is traversed through or near the center by a double-track street railway line. The pavement had been laid on both sides of the street railway lines. To better illustrate the condition on State street at the time and at the place of the accident, we

have drawn the accompanying sketch or plat.



The plat is not drawn to scale, nor is it intended to do more than represent the conditions in a general way.

The two sets of parallel lines represent the street car tracks near the center of State street. The space between tracks is 6 feet, 8½ inches wide. The heavily shaded spaces indicate paved portion of street, 16 feet in width on either side within 2 feet of street car line. The lines extending at right angles with the paved portions of the street represent wooden barriers approximately 8½ feet in height, entirely closing State street to the west of car tracks, and partially to the east, for a distance north and south between barriers. The two small circles represent telephone poles. Attached to the ends of the wooden barricades, and passing around and nailed to the poles, as indicated by irregular line, was a wire mesh 42 inches high, containing 12 longitudinal wires with numerous cross wires. The light dotted space indicates the passageway or detour around the barricaded section of the

street taken by vehicles leaving and returning to the pavement, covering a distance of about 80 feet. The two parallelograms marked "W" indicate two wagons attached together and heavily loaded with flat steel, standing within the traveled detour. Both were platform wagons. The north wagon had an elevated seat. The effect of the barricades was to direct all travel from the west side to the east side of the street, and to pass vehicles over and through the open passageway or detour, about 81 feet in width. The heavy line marked "BB," to the east of property line, represents a billboard, while parallelogram "C" represents a cottage. There were telephone poles along the east side of State street not shown on the plat.

In preparing the foregoing plat we were unfortunately deprived of the benefit of the exhibits used at the trial of the case, which should have accompanied, but are missing from the files and record on appeal. It is not claimed to be a detailed representation of all the conditions surrounding the accident, and it may not be in all respects accurate. However, we think it fairly illustrates the conditions and reflects the testimony of witnesses who saw them at or about the date of the accident.

It is alleged in the complaint in substance:

That the work was being done by the defendant J. W. Mellen under the authority, direction, and supervision of the State Road Commission of the State of Utah; that reasonable care and prudence were required of the defendant J. W. Mellen in doing said work, and the said Commission exacted from him in the performance thereof that he should erect good and sufficient guards, barricades, and signals and so perform the work as not to close the entire road, but should provide an open unobstructed passageway sufficient to accommodate and provide for the traffic and travel thereon in both directions, all of which the defendant Mellen failed to do;

that the only means provided by the defendant J. W. Mellen, or otherwise, for the passage of vehicles traveling in both directions where the said state road was closed and barricaded as aforesaid, was a passageway from said Twenty-first South street, extending south a distance of about 100 feet in length, where it re-entered said state road; the said passageway was over premises immediately adjoining and adjacent to said state road on the east, and immediately east of the line of telephone poles aforesaid; that said passageway so provided was rough and uneven, and only of sufficient width for two vehicles to meet and pass thereon by the exercise of great care and caution; that to the east of said passageway, extending in close proximity to Twenty-first South street, there was a long and high billboard which prevented persons traveling north on state road, prior to and when entering into said passageway, from seeing vehicles traveling west on Twenty-first South street, intending to turn south on said state road, until such vehicles turned into and had entered upon said passageway, and likewise prevented persons traveling west on Twenty-first South street, intending to turn and go south on said state road, from seeing approaching vehicles traveling north on State street until said passageway was entered; that during the evening of the 12th of June, 1917, and about the hour of 9 o'clock, as plaintiff is informed and believes, the defendant Salt Lake Transfer Company wrongfully and negligently left two large transfer wagons attached together, and loaded with steel and machinery, stand in and occupy, unattended, unguarded, and unlighted, a portion of the east side of said passageway for a distance of about 50 feet in length; that said wagons so situated left the width of the remaining part of said passageway, which was between said wagons and said line of telephone poles, a distance of less than 11 feet in width, totally insufficient for vehicles to meet and pass;

the said passageway of approximately 11 feet in width was the only passageway for vehicles in both directions; that said defendants and each of them wrongfully and unlawfully permitted said wagons to obstruct said passageway for at least twelve hours, as plaintiff is informed and believes, notwithstanding the heavy and congested traffic over and upon said state road; that about 3 o'clock in the morning of June 13, 1917, and while the plaintiff was returning home from Ophir, Utah, and driving his automobile north on the said state road, with due care and caution, when he approached said portion of said state road, barricaded as aforesaid, he turned into said passageway so provided as aforesaid, leading to Twenty-first South street; that at the time there was no approaching vehicle of any kind in sight; that while passing along the west side of said wagons, standing as aforesaid, an automobile traveling west on Twenty-first South street, which had been obstructed from plaintiff's view by said billboards and wagons, suddenly turned into said passageway from the north; that a head-on collision was imminent, and to prevent such collision and its consequences, plaintiff instantly accelerated the speed of his machine, and turned quickly into said state road, thereby avoiding a collision with said approaching automobile in said obstructed passageway; that in so doing plaintiff's automobile encountered and ran into a wire fence forming part of the barricade upon the state road, which said fence the plaintiff was unable to see or discover, owing to the absence of any light or other signal upon the same; that thereupon plaintiff's automobile was upturned, and the plaintiff and Mr. Kahn, who was traveling with him, were violently thrown and caught under said upturned automobile; that at the time of said accident said wagons had been wrongfully and negligently, by the said defendants, and each of them, permitted

to stand, remain, and obstruct the said passageway and view for about six hours, as plaintiff is informed and believes, without any watchman or signal or warning or any other precaution whatsoever being taken to guard or protect travelers or traffic along said passageway; that said accident occurred without any fault on the part of the plaintiff or said Kahn; that it was caused wholly and solely by reason of the carelessness and negligence of the said defendants and each of them in permitting said wagons to obstruct and blockade said passageway, and remain for an unreasonable time; also in not providing a watchman or watchmen to warn approaching travelers from both directions of the conditions and danger aforesaid; and in failing to have danger lights and other signals to warn approaching travelers that said road was barricaded, and that said passageway was obstructed, and of the unusual and extraordinary conditions and dangers aforesaid, which the said defendants and each of them knew, or by the exercise of reasonable care and prudence ought to have known, in time to have averted and prevented said accident; also in failing to provide and maintain a safe detour or passageway for vehicles around the place where state road was barricaded; also by reason of the negligent, careless, and wrongful conduct of the said defendant J. W. Mellen in entirely closing said street to traffic."

The answer of the defendant J. W. Mellen admits the doing of the work under contract and by the direction of the State Road Commission, but denies that the work was being done in a negligent manner, or that he failed to maintain suitable barricades, notices, and warnings on the portion of the street being repaired, or that he left an unsafe passageway for travel; and affirmatively alleges that the accident to plaintiff was caused by his own negligence in fast driving, failure to observe the crossway, the

lights, signs, and warnings placed there by defendant, failure to take heed of the approaching automobile, and negligence, without his knowledge, of the transfer company in leaving its wagons standing in and obstructing the passageway afforded for public travel.

Upon trial of the issues the jury found a verdict in plaintiff's favor, and a judgment was entered against the defendant.

On appeal the defendant assigns many errors, so many that it is impractical to set them all forth and discuss them here in detail. Summarizing, the defendant complains of the rulings of the trial court in denying defendant's motion for a nonsuit at the conclusion of plaintiff's testimony, the refusal to instruct and direct a verdict in favor of defendant, permitting plaintiff's counsel in addressing the jury to argue immaterial and incompetent testimony over defendant's objection, and that the verdict and judgment are not sustained by the evidence and are contrary to law.

There is not a great deal of conflict in the testimony. The physical conditions at and near the place of the accident, as testified to by the witnesses, were in a general way the same as alleged in the complaint and as admitted by the answer. Plaintiff introduced testimony to show that there were no lights on the barricades. Defendant's witnesses testified that lights were placed on the barricades to warn travelers at night, and that lanterns were seen there the morning following the accident, one of them still burning. There was also some conflict in the testimony as to how extended a view could be had of Twenty-first South street, and also of State street, while approaching the barricaded section from the south.

Robert B. Mark, a witness for the plaintiff, who had viewed the scene of the accident the same morning, made the following observations concerning road conditions: "June 13, 1917, I made an examination at about 9:15 A. M. concerning physi-

cal conditions near the intersection of Twenty-first South and State street. State street on the south side of its intersection with Twenty-first South street, was partly barricaded with barricades about 3½ feet high. The barricade on the east side of the street extended to the first telegraph pole. There was another telegraph pole in the street on the east of the southeast telegraph pole. Between the two poles was 31 feet. . . . At a point 80 feet south of the intersection of Twelfth (Twenty-first) South and State, traffic had been diverted in a northwesterly direction. In this space, through which traffic was being directed, there had been left two vans of the Salt Lake Transfer Company. The van farther south was loaded with flat steel. The steel extended beyond the bed of the wagon to the south probably 5 or 6 feet. The wagon, or pole of that wagon, was extended underneath the wagon ahead of it, and the wagon ahead of it was loaded partly with flat steel and partly with some pieces of machinery. . . . Extending on northerly from the north wagon were two poles to accommodate a three-horse team. The length over all, from the north point of the north wagon—that is, the wagon bed—to the south point of the projecting load of the second wagon was 40 feet 8 inches. Each wagon was approximately 6 feet across. The available traveling space between these wagons and the barricade was 9 feet 10 inches. . . . A wire mesh ran between the north telegraph pole and the south telegraph pole, and thence near the east side of the railroad track, marking the boundary lines of the barricade on the east side of State street. The distance from the north telegraph pole to the south telegraph pole is 38 feet 4 inches. The distance from the south telegraph pole to the south edge of the load on the south wagon of the Transfer Company is 41 feet. The distance from the southeast pole to the barricade to the property line on the east is

about 35 feet, so that there was left 35 feet of the street east of the barricade. . . . I noticed that the street had been traveled by wagons east of where the Salt Lake Transfer wagons were located, the width of another team or another wagon, which showed that the passageway extended east 8 or 10 feet, and that this had been used as a part of the passageway. I am speaking of the south wagon. The south wagon was 19 feet 11 inches east from the east rail. The south end of the south wagon bed was about 2 feet 5 inches east of the east line of the pavement. The steel projected about 5 feet over the hind end of the south wagon and about a foot and a half or 2 feet over onto the pavement. . . . I found that the wire barricade running from the south pole to the railroad track was not intact. All the wires were broken into from the machine coming in contact with and pulling the wire. . . . The wires on the east side of the barricade running between the two telephone poles were still intact."

The plaintiff testified concerning the accident:

The accident occurred about 2:30 A. M., June 13, 1917, while I was driving my car north on State street. Mr. Kahn, another traveling salesman, was with me. We were coming from Grantsville, Tooele county. I was traveling about 20 miles an hour when I was going around the end of the wagon, the large truck standing on the east side of State street. When I got around the end of the wagon and within a short distance from the telegraph pole another machine drove in from Twenty-first South street. I saw I was going to have a head-on collision, and I turned my car quickly, and used my accelerator, and gave her more gas, and turned back into State street, and I thought it was about the only course I could take at the time to save me having a head-on collision. As I made my turn I got in contact with the wire. I was watching the road as I came up

State street. I observed Twenty-first South street at the point that it could be observed; that would be back and east of the billboards there. That is the only place that I could observe Twenty-first South street with these wagons there where they were. The lights on the car coming towards me were dim. They had their dimmers on. I was about 4 feet in the cut-off or passageway from the south pole when I observed this car approaching. . . . There were no lanterns or other lights on the wire or wagons. I did not see or hear a watchman. The next thing I heard was the lights break, the glass in my lap, and I knew I was up against a wire fence. I saw the fence at the time. I went down over that little embankment south of the pole, and the car jarred and swerved. I do not remember very much more until I found myself under the car. . . . I was perfectly familiar with Twenty-first South at the time of the accident, and knew the billboards were in that locality. Every man that rides up and down State street and looks to the right or to the left of him with a view of seeing whether anyone is coming down at that intersection northeasterly sees those signboards. In approaching a street light at Twenty-first South, in order for a man to have any degree of security or safety, it is necessary for him to look both to the right and to the left of him and in front of him to see who is approaching from that point. That is true. Twenty-first South is a very much used street, and that intersection with State is a very busy intersection. I knew that this night. I knew there was an obstruction there Monday morning, and I thought there was an obstruction there the night of the accident. I presumed there was, and I was watching for it until I saw those wagons, then I made my turn. . . .

Q. Now you state here in your complaint that the reason why there wasn't enough room through that passageway for two vehicles to pass,

or two machines to pass, was because of the two wagons that were left there by the Salt Lake Transfer Company. Is that true?

A. Yes, sir.

Q. Was there ample room for two vehicles to pass each other there if these two wagons had been out of the way?

A. Yes, sir.

Q. If these two wagons hadn't been there when you saw this machine coming, if you did see one coming, you would have had ample room to have turned to the right, and the automobile coming towards you would have had ample room to have passed you. That is true, isn't it?

A. Yes, sir.

The contract between the State Road Commission and the defendant for the improvement of State street, among other things, provided: "All the work shall be done in sections consisting of the space between the property line and the center of the street, so that the street at no time shall be entirely closed to traffic. No deviation from this rule will be allowed, except upon written permission from the engineer. . . . The contractor shall erect and maintain good and sufficient guards, barricades, and signals at all unsafe places at or near the work, and shall in all cases maintain a safe passageway at all road crossings, crosswalks, and street intersections, and shall do all other things necessary to prevent accident or loss of any kind. The contractor shall provide necessary lights, barricades, fences, etc., and a competent watchman at all times, to protect the work from traffic or damages of any nature until traffic is admitted."

The testimony shows beyond any dispute that while the improvement was being made by defendant under direction and supervision of the State Road Commission the defendant had no authority to direct or control the traffic of the street, except incidentally to the work of making the improvement, by barricading the section where the work

was being performed by him under the contract. The undisputed testimony also is that the defendant had no knowledge of the act of the Salt Lake Transfer Company leaving its wagons standing in the passageway (which wagons were placed there in the nighttime and in defendant's absence) left open by the defendant in the street for public travel around the closed and barricaded section.

In the presentation of the case to this court counsel have devoted in their briefs, needlessly we think, much space in citing cases, and in the discussion of the rights and liabilities of the defendant under his contract with the State Road Commission. As we view the case, and more especially in the light of the decisions of this court in *Callahan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863, and *Dayton v. Free*, 46 Utah, 277, 148 Pac. 408, and the authorities there cited, the defendant was an independent contractor, and the only questions to be determined here are, Was the defendant negligent? and, if so, Was his negligence the proximate cause of the injury of which the plaintiff complains? Having these questions in mind, we have quoted more extensively from both the pleadings and testimony than we otherwise would, in order that the assignments of error may be considered as a whole and as bearing on this one important matter for our determination. The contract between the State Road Commission and the defendant, in so far as the issues between the plaintiff and the defendant are involved, is of but little consequence, except for the purpose of showing that the defendant rightfully entered upon the highway for the purpose of improving the street. The right to obstruct—contractor for improvement.

Highway—right to obstruct—contractor for improvement.

obstruct the public travel over the section of the street being improved, upon principle and authority, was a paramount right. *Phelan v. Granite Bituminous Paving Co.* 227 Mo. 666, 137 Am. St. Rep. 603, 127 S. W.

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318; 13 R. C. L. title "Highway," § 188. We find nothing in the record tending to show that the closed section of State street was not properly barricaded. That it was the duty of the defendant to place suitable lights in the nighttime on the barricades to warn the public of its presence, and that the portion of the street closed and barricaded was not open to travel, must be conceded, regardless of his contract with the State Road Commission that he must do so. The contract further provided that the defendant should provide "a competent watchman at all times to protect the work from traffic or damages of any nature until traffic is admitted." (Italics ours.) The testimony is in conflict as to whether or not lights were on the barricade on the night of the accident in question. That there was no watchman present is an admitted fact. We find no testimony in the record tending to show that it was necessary, usual, or customary to have a watchman there for safeguarding the public, or for any purpose other than "to protect the work," as is provided in the contract. His failure to do that was a matter, as we view —absence of watchman—right to complain.

—lights on barricade.

it, wholly between himself and his employer, the State Road Commission, and not one of which the plaintiff in this action may complain.

Again, referring to the contract, some contention is made by respondent that under the contract defendant was not authorized to barricade the street to the extent it was closed to public travel. In other words, that after barricading the west side the entire east side should have been left open for travel.

—contract as to barricade—construction.

We do not so construe the contract. It simply provides: "The street at no time shall be entirely closed to traffic." That a portion of the street was left open for travel by the passageway, over which hundreds of automobiles and other vehicles were daily passing, the



testimony shows to be an absolute certainty.

But conceding that the defendant was negligent in all the particulars complained of, the question still remains, Was the defendant's negligence the proximate cause of the injuries? We think not. The plaintiff's own testimony conclusively establishes that immediately before the accident, when he was in the passageway, he appreciated and knew of the closed section of the street. He had driven his automobile over State street but a day or two before, and had passed through the passageway. He remembered it, and, as he was approaching the closed or barricaded section, he followed the traveled track of vehicles, fully conscious of the fact that he was entering it. Unobstructed, there was ample room for his automobile to pass in safety any approaching vehicle from the north or opposite direction. Left standing unattended in the passageway, without lights or other signals of warning upon them, were the two wagons of the Salt Lake Transfer Company, closing it so that vehicles moving in opposite directions could not pass. As plaintiff entered the passageway where the wagons stood, he saw an automobile with an unknown driver dashing through the passageway at a speed of not less than 30 miles an hour. Plaintiff was driving 20 miles an hour. A head-on collision was imminent, to avoid which he quickly turned his machine into the wire of the barricade, and was injured. Had the wagons not been left standing in the passageway plaintiff would have passed through in perfect safety. Had the approaching driver not been driving his machine at so reckless a speed no danger would have confronted plaintiff, and he would have had time to pass without accident. The plaintiff so testified.

The closing of the passageway by the wagons so that two vehicles could not pass, and leaving them there without signals and unattended through the night, and the reckless speed with which the automobile was driven through it by the unknown driver, were the two contributing and the proximate causes of the plaintiff's injuries, of neither of which did the defendant have any knowledge, nor was he, under the circumstances, in duty bound to anticipate.

Admitting that the barricades were insufficient about the closed section of the street, that they were left without lights

or proper signals of warning, yet the fact remains beyond any dispute,

Proximate cause—street improvement—injury in bypath.

had it not been for the wrongful acts of others in leaving the wagons standing in the detour or passageway, and the reckless manner in

which the automobile driven from the north approached the plaintiff, which, as we have pointed

Highway—contractor for improvements—liability for injuries in bypaths.

out, were the sole proximate causes of the accident, the plaintiff would have passed by the closed section of the street without harm, regardless of any act of omission or commission charged against the defendant.

We think the trial court erred in not granting the defendant a nonsuit, in refusing to

direct a verdict in defendant's favor,

—duty to anticipate obstruction.

and in denying him a new trial. The findings of the jury in plaintiff's favor were not supported by the evidence, and therefore the judgment entered against the defendant was contrary to law and should be reversed. It is so ordered. Defendant to recover costs.

Frick, Weber, Gideon, and Thurman, JJ., concur.

## ANNOTATION.

### Right and duty of highway contractor as to barricading or obstructing street.

#### I. Liability as for negligence:

##### a. General rule, 1203.

##### b. Application of rule:

1. Contractor held negligent, 1203.

2. Contractor held not negligent, 1208.

3. Effect of acceptance of street by municipality, 1211.

#### II. Liability as for nuisance, 1212.

#### I. Liability as for negligence.

##### a. General rule.

A contractor engaged in constructing or improving a street in pursuance of a contract with the proper municipal authorities has a right to barricade the street and reasonably to obstruct the public travel over the section of the street being improved, but it must be exercised with due regard to the subservient right of the public to use the street. And, as a corollary to the duty to maintain barriers around portions of the street under improvement, it is the duty of the contractor to maintain lights in the nighttime on the barricades to warn the public of the dangerous condition of the street. A breach of the duty to erect barriers, or to place lights, or reasonably and carefully to maintain obstructions to public travel constitutes actionable negligence, for which the contractor is liable when it is the proximate cause of any injury to one lawfully using the street.

**United States.**—Charles A. Cowen & Co. v. Price (1913) 121 C. C. A. 618, 203 Fed. 473.

**California.**—Barton v. McDonald (1889) 81 Cal. 265, 22 Pac. 855; Stockton Automobile Co. v. Confer (1908) 154 Cal. 402, 97 Pac. 881; Martin v. Shea (1920) — Cal. —, 187 Pac. 23.

**Iowa.**—LAW v. BRYANT ASPHALT PAVING CO. (reported herewith) ante, 1189.

**Louisiana.**—Weber v. Union Development & Constr. Co. (1907) 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012.

**Massachusetts.**—Jones v. Collins (1901) 177 Mass. 444, 59 N. E. 64;

Stewart v. Hugh Naun Contracting Co. (1916) 223 Mass. 525, 112 N. E. 218.

**Michigan.**—Williams v. Sager (1911) 165 Mich. 635, 131 N. W. 103.

**Missouri.**—Phelan v. Granite Bituminous Paving Co. (1910) 227 Mo. 666, 137 Am. St. Rep. 603, 127 S. W. 318; Hunt v. St. Louis (1919) — Mo. —, 211 S. W. 673.

**New York.**—Johnson v. Friel (1872) 50 N. Y. 679; McMahon v. Second Ave. R. Co. (1878) 75 N. Y. 231; Steivermann v. White (1882) 16 Jones & S. 523; Charlock v. Freel (1891) 125 N. Y. 357, 26 N. E. 262; Reilly v. Sicilian Asphalt Paving Co. (1896) 16 Misc. 65, 87 N. Y. Supp. 638; Tompert v. Hastings Pav. Co. (1898) 35 App. Div. 578, 55 N. Y. Supp. 177; Steinbrenner v. M. W. Forney Co. (1910) 143 App. Div. 73, 127 N. Y. Supp. 620; Reilly v. Barber Asphalt Paving Co. (1913) 155 App. Div. 108, 140 N. Y. Supp. 16; Reck v. Uvalde Asphalt Co. (1913) 159 App. Div. 736, 144 N. Y. Supp. 917; Ya Deau v. Gasparrini (1918) 170 N. Y. Supp. 1011; Karlson v. Rapid Transit Subway Constr. Co. (1918) 170 N. Y. Supp. 949.

**Oklahoma.**—Cleveland Trinidad Paving Co. v. Mitchell (1914) 42 Okla. 49, 140 Pac. 416.

**Pennsylvania.**—Zehnder v. Miller (1868) 6 Phila. 556; Nicholas v. Keeling (1902) 21 Pa. Super. Ct. 181; Keeley v. Shanley (1891) 140 Pa. 213, 21 Atl. 805, 806; Klingensmith v. Keeling (1902) 21 Pa. Super. Ct. 188.

**Utah.**—See DAVIS v. MELLE (reported herewith) ante, 1193.

**Washington.**—Hoyt v. Independent Asphalt Paving Co. (1909) 52 Wash. 672, 101 Pac. 367.

##### b. Application of rule.

##### 1. Contractor held negligent.

In Barton v. McDonald (1889) 81 Cal. 265, 22 Pac. 855, it appeared that the defendant was a contractor to repair and replank a certain street. He left a hole in the street without any guard or other protection around it,

and the plaintiff fell into it without any fault on his part. The court held the defendant liable for the plaintiff's injury, resulting from the fall.

In *Stockton Automobile Co. v. Confer* (1908) 154 Cal. 402, 97 Pac. 881, it appeared that a contractor, who had been employed by the board of public works to build crosswalks of bitumen at the intersection of two of its streets, had placed, in the performance of this work, a pile of bitumen upon the highway, and had failed to erect a suitable or sufficient light or warning about the obstruction. While being driven on the highway at night, an automobile struck the pile and was damaged. The contractor and the superintendent of streets, who had notice of the obstruction and lack of lights, were held liable.

In *Martin v. Shea* (1920) — Cal. —, 187 Pac. 23, a sewer contractor under contract with a city was held to have been negligent, and liable to an automobile passenger in leaving unguarded by lights or barriers a shaft or hole about 5 feet long, more than 3 feet wide, and 9 feet deep between street railway tracks.

In *Weber v. Union Development & Constr. Co.* (1907) 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012, it appeared that a contractor, in repaving a street, placed on the crossing a barrier so weather stained as to be inconspicuous at night, and failed to provide a red lantern as required by a city ordinance. This barrier, either from its rickety condition or from being run against by passers-by, was frequently upset and lying flat on the pavement. It was in this position when the plaintiff, in running at night to take a car, was tripped by it and suffered serious injuries. The court held that the right of the contractor to place obstructions on the public street was negligently exercised, rendering him responsible to the plaintiff for injuries resulting therefrom.

So, where a suit was brought against the city for damages resulting to a citizen who was injured by falling over an obstruction left unguarded by a paving contractor, the court held the city liable, and said by way of dictum

that perhaps the contractor was also liable. *McCormack v. Robin* (1910) 126 La. 594, 139 Am. St. Rep. 549, 52 So. 779.

In *LAW v. BRYANT ASPHALT PAVING Co.* (reported herewith) ante, 1189, it appeared that a paving contractor engaged in laying a pavement made use of a machine known as a concrete mixer. This machine was so placed that the lifting beam extended over and across the path or walk ordinarily used by pedestrians. When the lift was raised, the path was clear; when lowered, it was an obstruction to travel; and when in operation was a source of danger to anyone passing under it. No sufficient barrier was erected to indicate that the path was closed to public use; nor was there any warning of any kind that the passage was dangerous. The plaintiff in using the path was struck by the descending lift and severely injured. The defendant was held liable for damages for the personal injury to the plaintiff.

In *Stewart v. Hugh Nawn Contracting Co.* (1916) 223 Mass. 525, 112 N. E. 218, it appeared that an independent contractor, in pursuance of a contract with the proper municipal authorities, was engaged in the construction of a subway under a street, and in the course of its work had removed the surface paving and had replaced it with a plank-covered structure. One of the planks of the structure was in a defective condition, so that when the plaintiff stepped upon it it gave way, causing her to fall and sustain injuries. The court held the contractor liable.

In *Williams v. Sager* (1911) 165 Mich. 635, 181 N. W. 103, it appeared that a paving contractor, engaged in repaving a street, made an excavation at a street crossing and failed to light or protect the intersection, or in any way to warn pedestrians of the dangerous condition of the intersection. The plaintiff, in walking along the street on a dark night, and having no knowledge or warning of the excavation, stepped down at the intersection and was injured. The paving con-

tractor was held liable for the injuries thus sustained by the plaintiff.

In *Phelan v. Granite Bituminous Paving Co.* (1910) 227 Mo. 666, 187 Am. St. Rep. 582, 127 S. W. 818, it appeared that an independent contractor was engaged in improving a street under a contract with the city. In pursuance of the work the contractor was using a steam roller on a portion of the street that was barricaded to the public. The plaintiff, a driver of a laundry wagon, entered upon the portion of the street thus barricaded in pursuance of his ordinary business. The horse took fright at the negligent operation of the steam roller and ran away with the plaintiff, causing the latter to suffer severe injuries. The court held that, while the contractor had a right to obstruct the street with the roller in so far as was necessary in the performance of his work, he was liable for injuries resulting from the negligent operation of the machine.

In *Hunt v. St. Louis* (1911) — Mo. —, 211 S. W. 673, it appeared that a paving contractor engaged in repairing a street placed large piles of rock and sand therein, obstructing and narrowing the passageway. Plaintiff, while driving along the street ran against the pile of rock, overturning his wagon, and as a result was severely injured. The evidence tended to show that at the time of the casualty there was no light of any kind on the pile of rock, nor any other sign serving as a warning to travelers. The paving contractor was held liable.

In *Johnson v. Friel* (1872) 60 N. Y. 679, it appeared that the defendant, in pursuance of a contract with a city, had constructed a sewer, filled in and repaved the trench, and restored the surface of the street. During a rainfall, the water washed out a hole where the earth had been thus replaced, about 2 feet deep and some 6 or 7 feet long. The plaintiff's horse and carriage, in attempting to cross the street at this point, fell into the hole and were injured. There were no lights or guards about the place. The defendant had a watchman, but the evidence tended to show that at the time of the accident he was in a house

two blocks off. The court, in holding the defendant liable, said: "It was not enough that defendant left the work in a proper and safe condition for the time, but it was his duty to anticipate and provide for the natural effect of rains upon earth excavated and replaced, to see that during and after the rain it was in proper and safe condition, or that safeguards were placed about it, or watchmen kept near it, or such measure of prudent forethought adopted to prevent damage to the traveling public."

In *McMahon v. Second Ave. R. Co.* (1878) 75 N. Y. 231, it appeared that defendant contracted with the city of New York to pave the streets wherein its tracks were laid; in and about the rails, and keep the same in repair. It appeared further that one Riss, under a permit from the city authorities, made an excavation under the defendant's tracks for the purpose of connecting his house with the sewer. The defendant took up the street pavement for 6 or 7 feet on each side of the trench from the space between its tracks, and laid down planks to bridge the excavation. The plaintiff was driving a truck along the street and across the bridge when the left-hand wheels of the truck broke through the bridge, which was concealed at the time by a covering of snow, and the plaintiff was thrown from the truck to the ground, sustaining injuries. There were no barriers around the excavation nor other sign of warning to the public. The defendant was held liable for the injuries resulting to the plaintiff through the negligence of the former in repairing the street.

In *Steivermann v. White* (1882) 16 Jones & S. (N. Y.) 523, it appeared that the defendants, as contractors with an elevated railroad company and with authority from the city, were engaged in digging pits and holes in the street for the columns required for the support of the road then about to be erected. They had dug two holes and the earth taken from them was thrown toward the westerly side of the street, rendering that side of the street impassable, so that the traffic was forced to the side of the street

where the holes were dug. There was no railing or barrier of any kind about the holes. The plaintiff, while driving carefully along this street, and through no negligence on his part, collided with another wagon and was thrown into one of the holes and sustained severe injuries. In an action for damages, the defendants were held liable. The court said: "Inasmuch as the defendants failed to comply with a city ordinance requiring them to erect safeguards about holes of the character of those proved in this case, their failure to do so was alone sufficient evidence of their negligence, to demand the submission of this case to the jury, so far as that matter is concerned. But without the ordinance, the fact that they left such holes without barriers, in a crowded thoroughfare in constant use, under the circumstances proved in this case, was at least evidence to submit to the jury to say whether or not the defendants were negligent. That they were authorized to dig the holes by the charter of the elevated road, and by a permit from the city authorities, does not affect this question."

In *Charlock v. Freel* (1891) 125 N. Y. 360, 26 N. E. 262, it appeared that the defendant had a contract with the city which called for the construction of a sewer in certain streets. After the sewer was put in, but before the street had been repaved, the contractor was directed to raise the grade of the street at its intersection with another street. He undertook to do this, and, after raising the curbstones, left the adjoining portion of the sidewalk flagging disarranged and lower than the grade of the street. A storm occurred and water collected in the spot left open by the removal of the flagstones. The workmen dug away the earth, so as to admit the water through the curb into the sewer basin. This caused a hole, into which, being left unguarded, the plaintiff fell at night, a day or two afterwards. The court, in holding defendant liable for the injury sustained by plaintiff, laid down the controlling principles as follows: "The principle of liability for such an occurrence as we have in

this case is that the defendant, and not the city, was the master of the workmen. He had the control of the execution of the work which he had been directed to perform. A duty rested upon him, therefore, to use such precautions in doing the work as to make it reasonably safe against the possibility of accidents to the traveling public. For the consequences of a neglect such as was testified to here he became responsible. Upon the evidence, we must accept the verdict as conclusively establishing the negligence of the defendant's workmen and the plaintiff's own freedom from fault, and as, for the reasons we have mentioned, the defendant was not devastated of liability for the carelessness of his men, the judgments below were right and should be affirmed, with costs."

In *Reilly v. Sicilian Asphalt Paving Co.* (1896) 16 Misc. 65, 87 N. Y. Supp. 638, it appeared that the defendant company, which was engaged in repairing sidewalks, left a pile of sand and gravel in the highway during darkness, without any signal of warning. The plaintiff, without any negligence on his part, drove against this pile of sand and gravel, and his carriage was thereby injured. In an action by plaintiff to recover damages, the court held defendant liable for the negligent manner of maintaining the locality, rendered dangerous by the work in progress.

In *Tompert v. Hastings Pav. Co.* (1898) 35 App. Div. 578, 55 N. Y. Supp. 177, it appeared that a paving company was engaged in repairing a portion of a street, and had removed the paving stones from the street at its intersection with an avenue. A wooden structure was stretched across the westerly curb, but a space was left to the east for the passage of vehicles. The plaintiff's intestate, who was driving a truck down the avenue, turned to the east of the wooden structure and drove across the street. When the wheels of the truck struck the ridge on the south side of the street, caused by the removal of the paving stones, the jar threw him from the truck, and he was killed as a result

of the injuries sustained. It was proved by a preponderance of the evidence that the neighborhood of the accident was dark, and that it was difficult to make out surrounding objects. The court held that the paving company had failed to exercise reasonable care toward citizens using the streets, and was, therefore, liable for the death of the plaintiff's intestate. The court said: "It is urged that the appellant had the right to tear up the street, and thus make it more dangerous than it ordinarily was; and that the sole duty resting upon it was to notify passers-by of the changed condition, in order that they might take care to avoid injury. But the appellant, in the exercise of this right, was still bound to keep the place reasonably safe, regard being had to the nature of the work. *Nolan v. King* (1884) 97 N. Y. 565, 49 Am. Rep. 561. The right to make a place more unsafe than it is normally does not authorize the contractor to make it as hazardous as he may choose. The additional danger must be such as the nature of the repairs renders reasonably necessary."

Where it appeared that a railroad company engaged in fixing its tracks, due to the streets having been disturbed by reason of a sewer tunnel being built in the street, negligently left a large timber lying in the gutter alongside of the curb and extending above the sidewalk, it was held liable to plaintiff, who in crossing the street at that point stumbled over the timber and sustained injuries. The supreme court reversed a judgment for the plaintiff on other grounds, without denying the company's liability. *Harrington v. New York R. Co.* (1918) 170 N. Y. Supp. 32.

In *Ya Deau v. Casparrini* (1918) 170 N. Y. Supp. 1011, it appeared that a paving company under a contract with the city for the repaving of a street removed the paving blocks therefrom. When work on the street was suspended by order of the city, the blocks were replaced except at one point, where a depression resulted. This depression was left without any guards around it or other warn-

ing of the dangerous condition of the street, as was required by law and the contract with the city. The plaintiff's driver, through no fault of his own, drove his wagon into the depression, resulting in damage to the wagon and contents. The court held the paving company liable.

In an Indiana case it appeared that an independent contractor, under a contract with the city for the improvement of a public street and the sidewalks thereof, made a deep excavation extending across the sidewalk. There were no guards, lights, signals, or other warnings of danger to the public about or near said excavation. A person walking along the street at night, and without knowledge of the excavation, fell into same and sustained injuries. The injured party brought an action against the city for damages. The court quoted with approval from *Dillon on Municipal Corporations*, as follows: "Accordingly, the later and better-considered cases in this country, respecting streets, have firmly, and in our judgment reasonably, established the doctrine that, where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable." *Anderson v. Fleming* (1902) 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 448.

In *Zehnder v. Miller* (1868) 6 Phila. (Pa.) 556, it appeared that the plaintiff was injured by the fall of a horse into an excavation made by the defendant, as contractor with the city. The accident occurred on a moonless night, and there was no light near

the hole. It further appeared that when the employees of the defendant left off work for the day they left the hole unguarded except by placing a pole across the street by which plaintiff approached it, at an elevation of 2 or 3 feet at a distance of 20 to 30 feet from the excavation. The evidence adduced by the defendant was not sufficient to charge plaintiff with contributory negligence, though it was shown that he had stopped at several saloons and had drunk some other liquid than water at each, and was unusually heedless of warning intended to prevent his falling into the excavation. The court, in holding defendant liable for plaintiff's injuries, stated his duty in the premises as follows: "While, on the other hand, we think it is the plain duty,—and, as we suppose, has been the general practice, in work of a similar kind to that which was in course of execution by the defendant,—to bar up the entrance of the street in which the excavation is, at its intersection with the nearest rectangular street, or to place a light so as to discover the excavation to anyone near it. Neither of these precautions had been resorted to by the defendant."

In a case arising in Oklahoma, it appeared that a paving company, engaged in certain street improvements under contract with the city, made an excavation in the street, leaving a step-off in the sidewalk at a point almost perpendicular with the level of the ground, to a depth of about 4 feet, and in an attempt to make the street passable the paving company had thrown in loose dirt against the step-off. The plaintiff, in passing along said street, stepped on this loose dirt, which crumbled away and caused her to fall, receiving injuries. The court, in holding the paving company liable for plaintiff's injuries, stated the paving company's duty to the public as follows: "It was the duty of the company as contractor, agent, servant, or employee of the city, to construct the approach in accordance with the plan or method prescribed by the city, if any was prescribed, or, if no method or plan was prescribed by the city,

but the company was required by the city to maintain temporary crossings of streets undergoing improvement, or acted upon its own initiative to then guard against the danger incident to said excavation, it was the duty of the company to so construct the approach as that it should be reasonably safe for public travel, and thereafter, before completion of the improvement of the street at such crossing, to exercise due care that the approach remain reasonably safe for public travel. The city and company owed these respective duties to the plaintiff; no more, no less." *Cleveland Trinidad Paving Co. v. Mitchell* (1914) 42 Okla. 49, 140 Pac. 416.

In *Charles A. Cowen & Co. v. Price* (1918) 121 C. C. A. 618, 208 Fed. 478, it appeared that a general contractor employed a subcontractor to build a temporary bridge over an excavation in a crowded thoroughfare, for use by the public. After the work was completed it was accepted by the general contractor. The plaintiff was using this bridge when a step gave way with her, causing her to fall and sustain injuries. In an action for damages the general contractor was held liable for the plaintiff's injuries.

So a contractor, engaged in paving a street under a contract with the city, is responsible for negligence in putting down a plank, rendering the street unsafe to one alighting from a street car at a regular stopping place, on what she was warranted in supposing to be a platform for passengers to alight on. *Hoyt v. Independent Asphalt Paving Co.* (1909) 52 Wash. 672, 101 Pac. 367.

*2. Contractor held not negligent.*

In *Jones v. Collins* (1901) 177 Mass. 444, 59 N. E. 64, it appeared that a contractor, engaged in constructing a new street over an existing narrower street, gave reasonable notice to the public that the street was in progress of construction, and not open to use, by the placing of barriers and appropriate signs across each end of the new street and across the ends of each street leading into it. The obstructions did not extend across the whole of the space at the ends of the new

street, nor across the whole width of the side streets. There was sufficient space at the sides so that persons on foot could get into the space included within the lines of the new street, without removing or climbing over any obstructions. The plaintiff, who did not know the street was in process of construction and closed for travel, made her way through one of these open spaces, and, in that part of the new street which was to be its sidewalk, ran into a shut-off pipe, which projected some inches above the surface and was not marked by a light, and sustained injuries. In an action by the plaintiff for damages, the court held that the giving of reasonable notice by the defendant to the public, by signs and barriers, that the street was closed for travel, suspended liability for injury resulting to one using the street, saying: "When, as in the present case, the order for laying out and construction includes what has been an existing way, the whole surface of which, as well as that of the other land included in the laying out, is to be torn up and wrought anew, if reasonable notice is given to the public by signs and barriers that there is no passing and that the way is not open to travel, this suspends the . . . liability. It also is sufficient to free the town or city and its contractor from all obligation to keep the way safe for the use of travelers until it has been completed in accordance with the order, or opened for use. In the meantime it is not negligence for the municipality or its agents to leave in the surface of the street such projections as that over which the plaintiff fell, and it is not an invitation to use the street, to leave at the entrances to it openings through which travelers can pass, if at the same time there are exposed to view such signs and barriers as are fitted to convey to the public notice that the street is, for the time being, closed for travel. It is not essential that such notice shall be brought to the actual knowledge of all persons; and it is immaterial to the duty of the defendants to the plaintiff in the present case, whether she had actual

knowledge that the street had been closed for travel."

In *Steinbrenner v. M. W. Forney Co.* (1910) 143 App. Div. 73, 127 N. Y. Supp. 620, it appeared that a general contractor, engaged in widening a street, left an open manhole without a barricade around it or any signal of warning to the public. The street, however, was barricaded, and this, together with the presence of material and the implements of street construction, indicated that the street was under repair and not open to the public. There was light enough to disclose to everyone that the way was not open and was obstructed by the barriers and materials, and therefore dangerous for traveling on foot, when plaintiff, disregarding the barriers, made her way at night with great difficulty over this street until she fell into the open and unguarded manhole. In an action for damages for injuries thus sustained, the court held that the contractor was not negligent under the circumstances, in leaving the unguarded manhole, and that plaintiff was herself guilty of contributory negligence in using the highway when she was acquainted with its condition.

In *Reilly v. Barber Asphalt Paving Co.* (1913) 155 App. Div. 108, 140 N. Y. Supp. 16, it appeared that defendant, under a contract with the city, was engaged in repairing the streets by putting down asphalt over spots or small places where it had been worn out. When the asphalt was put down, it was heated to a high temperature, then allowed to cool, and a roller of heavy weight run over it. At the time in question, the plaintiff, between two and three years of age, in the custody of his sister, about nine years of age, was on the sidewalk immediately adjoining the spot in the road that was being repaired, when he suddenly broke away from her and went to the edge of the sidewalk, and fell into the asphalt, sustaining burns about the hands and face. The evidence showed that this spot was not near a crosswalk, but in a part of the roadway where pedestrians did not ordinarily go, and that there was a barrier at each crosswalk to prevent people walk-



ing or driving on that portion of the street. In an action for damages by plaintiff, alleging negligence on the part of the defendant in not having a guard on the sidewalk to warn the plaintiff, or some barrier around the spot to prevent his falling into it, the court said that it would be unreasonable to hold defendant negligent in not anticipating that an accident of this kind was possible.

In *Reck v. Uvalde Asphalt Co.* (1913) 159 App. Div. 736, 144 N. Y. Supp. 917, it appeared that the defendant company was engaged in repairing the asphalt pavement of a street in the city of New York, cutting out holes in the pavement and filling them with fresh asphalt. To insure a good union between the new asphalt and the old pavement, the edge of the cut was washed with asphaltic cement, which must be used very hot. This cement was kept in a pail about the size of an ordinary water pail, which was moved from place to place as required. There was some dispute as to whether the street was barricaded, but it was clearly shown that there were a number of men at work on the job, and the usual machines and apparatus used in asphalt paving, so that everyone using the street had ample notice that repair work was going on. The plaintiff had been playing ball on the sidewalk with another boy. In running backwards with his hands aloft in an effort to catch a ball, he stepped off the sidewalk onto the roadway, and then into the pail of hot cement. The plaintiff brought an action for damages against defendant, charging negligence in leaving the pail of hot cement on the roadway and unguarded, at the time it was not actually in use in cementing the cuts in the asphalt. The court held that the charge of negligence on this ground was wholly unreasonable, and the defendant, therefore, not liable for damages to the plaintiff.

In another case in the same jurisdiction, it appeared that a contractor engaged in the construction of a railroad, a work of public necessity, under contract with the city, placed an obstruction on a sidewalk, but left a

reasonably free passageway 8 feet wide between the obstruction and the coping at the house line, for the use of pedestrians, and maintained it with reasonable care. It appeared that there was an arc light at the corner of the street, lighting up the street at the point where the obstruction was maintained. The passageway was not dangerous except for the stone coping, which was neither erected nor maintained by the contractor. The coping did not extend into the 3-foot space, and pedestrians were not compelled to pass over the coping in using the passageway. The plaintiff in using the street stumbled over the coping at the point where the obstruction was maintained by the contractor, and sustained injuries. In an action for damages against the contractor, alleging negligence in obstructing the street, the court held the contractor not liable. *Karlson v. Rapid Transit Subway Constr. Co.* (1918) 170 N. Y. Supp. 949.

The right of the public to the use of the highway is subordinate to the right of the public authorities to make reasonable repairs for the public benefit. Hence in a case where it appeared that a steam roller, lawfully in use in the construction of a macadamized roadway of the width of 18 feet, in the middle of a highway 66 feet wide, was left standing over Sunday on the edge of the already macadamized part of the road, leaving a clear space of about 30 feet, the steam roller being covered with canvas tied at the sides or corners, it was held as matter of law that the defendants, the contractors, were not liable for an accident occurring in the daytime, through the fright of a horse at the sight of the machine. *Keeley v. Shanley* (1891) 140 Pa. 213, 21 Atl. 305, 306.

In *Nicholas v. Keeling* (1902) 21 Pa. Super. Ct. 181, it appeared that a contractor was engaged in the performance of work under a contract to macadamize and otherwise improve a certain highway. Among his employees was one M. R., whose duty it was to go along the road and remove slips, and cart the dirt over to the other side of the road. He was hired

for no definite time. The relation of master and servant ended with the day's work. So far as his duty to his employers was concerned, he was then at liberty to go where he pleased. At the close of the day in question he started for the place where he usually kept his horses and cart, but after going about a mile, one of the horses becoming lame, he backed the cart behind a slip and left it, exposed in such a way as to scare almost any horse. There was no guard, barrier, or signal of any kind to warn the public of the presence of the obstruction. The plaintiff was driving along the road when his horse suddenly took fright and plunged over an embankment, resulting in injuries to the plaintiff. In an action for damages the court held the contractor not liable for negligence of the employee, at a time when he had no control over his actions.

See to the same effect, *Klingensmith v. Keeling* (1902) 21 Pa. Super. Ct. 188.

See also *DAVIS v. MELLEN* (reported herewith) ante, 1193.

*B. Effect of acceptance of street by municipality.*

The general rule is that, after the contractor has turned the work over and it has been accepted by the municipality, the contractor incurs no further liability to third persons by reason of the condition of the work, but the responsibility, if any, for maintaining or using it in a defective condition, is shifted to the municipality. *Memphis Asphalt & Paving Co. v. Fleming* (1910) 96 Ark. 442, 182 S. W. 222, Ann. Cas. 1912B, 709; *Handy v. Barber Asphalt Co.* (1906) 117 La. 637, 42 So. 193; *Kulwicki v. Munro* (1893) 95 Mich. 28, 54 N. W. 703.

In *Memphis Asphalt & Paving Co. v. Fleming* (Ark.) supra, it appeared that appellee was injured by falling off the edge of a sidewalk which had been constructed by the appellant. There was no guard rail or barrier erected along the edge of the sidewalk, nor was any provided for in, or required by, the contract for the protection of persons using the walk;

neither was there any light placed thereon to warn persons of the danger at the time of the injury. The proof showed that the street had been paved and the sidewalk constructed in accordance with the contract, and that it had been in fact and formally accepted by the engineer in charge of the district, and thrown open to the use of the public three days before the injury to the appellee occurred. The court held that after the work was completed and accepted by the municipality, the contractor incurred no further liability by reason of the condition of the work.

In *Handy v. Barber Asphalt Co.* (1906) 117 La. 637, 42 So. 193, it appeared that the defendant, under a contract with a city calling for different kinds of work in a public street, made excavations in the sidewalk and covered them with movable lids. After this work was completed, in performing the work of paving the street, the defendant's employees displaced one of the lids, and concealed the displacement with sand. Plaintiff trod on the lid thus displaced, which tilted with her, so that she fell through the opening, and was thereby seriously injured. The court held the defendant liable for the plaintiff's injury, but expressly declared that the liability did not rest on him because of any duty on his part to keep the lids on the excavations, which he had completed according to contract, but because of the negligence of his employees in displacing the lid so as to make it unsafe to walk on, and covering it over with sand so as to conceal the danger.

In *Kulwicki v. Munro* (1893) 95 Mich. 28, 54 N. W. 703, it appeared that a paving contractor, engaged in repairing a street, made an excavation at a crossing and erected a barrier around it in such a manner as to prevent accidents. It appeared further that a member of the board of public works, acting as inspector of the work under statutory authority, caused the excavation to be filled in with sand by the contractor's employees, and directed that the barrier be removed. While plaintiff was driv-

ing over the crossing at the point where the excavation was made, the wheels of his carriage sank into the sand, and, coming in contact with the street railway track, the carriage was damaged. In an action against the contractor it was held that he was relieved from liability by the action of the member of the board of public works.

In *Shalata v. Rodgers* (1919) 189 App. Div. 228, 178 N. Y. Supp. 494, where a child wandered upon the concrete extension of a sewer from the foot of the street into the river and thence upon a cofferdam from which he fell into the river and was drowned, it appearing that the work upon the sewer extension at that point had been completed except that the cofferdam had not been removed, the court, in repudiating the contention that the sewer contractor was negligent in failing to erect a fence or guard at the foot of the street to prevent children going upon the concrete work, observed: "As well might one who was employed to construct a wharf or dock at the foot of any street of the city be called upon to fence off the dock after his work was completed."

But where a contractor, engaged in constructing streets for a city, negligently left an unexploded blast beneath the surface of the street, he was held to be liable to one who, in lawful pursuit of his own business, was injured by a subsequent explosion of the blast, even though the city had accepted the street as a compliance with the contract. The court said: "The appellants, Forster & Hindle, make the contention that the evidence is insufficient to justify the verdict against them. They argue that when they completed the contract and turned the street over to the city, and the city accepted the work as a compliance with the contract, their liability to third persons for the negligent performance of the work ceased, and from henceforth the city alone was responsible for any such negligent performance. This argument is perhaps sound in so far as it relates to defects in the street arising from a mere negligent performance of the

work, but we think it has no application to an act of the nature here charged against the contractors. The leaving of the unexploded charge of dynamite in the rock beneath the surface of the street was not a matter connected with the contract work. It was a matter wholly collateral thereto, and was, as we have said, of itself a negligent and wrongful act, rendering the persons wrongfully leaving it there liable to anyone who, in the lawful pursuit of his own business, should be injured thereby." *Wilton v. Spokane* (1913) 73 Wash. 619, L.R.A. 1917D, 234, 182 Pac. 404.

#### *II. Liability as for nuisance.*

A temporary obstruction of a street or highway by the contractor, when it appears that the act was done with the consent of the proper public authorities and in the course of the construction or improvement of the street or highway, is not a nuisance. *Murphy v. Hugh Nawn Contracting Co.* (1916) 223 Mass. 404, 111 N. E. 890; *Malkan v. Carlin* (1905) 93 N. Y. Supp. 378; *Cunningham v. Wright* (1882) 28 Hun (N. Y.) 178.

In *Cunningham v. Wright* (N. Y.) supra, it appeared that the defendant, in pursuance of a contract made with the city for the repaving and regrading of a street, removed a number of large stones from the street and piled them in a side street. The plaintiff, while playing on the pile of stones, was injured by the falling upon her of a large stone which had been negligently placed on end. The plaintiff brought suit for damages, alleging injuries resulting from illegal and unlawful acts of defendant in removing the stones from the street under repair, and placing them in the side street. The defendant offered to show that he acted under authority from the city, but the lower court refused to allow him to prove that fact as incompetent evidence, and gave judgment for the plaintiff. The supreme court held that the defendant should have been allowed to prove that he was acting under the authority of the city, and that he was not, therefore, liable for maintaining a nuisance, but that his liability to the plaintiff, if any,

should be tested by the rules applicable to cases of the negligent performance of a lawful act.

In a Massachusetts case, it appeared that a contractor, engaged in constructing a tunnel under contract with the proper municipal authorities, negligently placed a plank on a street and left it there, without taking proper precautions by barriers, or signs, or other adequate means, to warn the public of its presence. The plaintiff fell over this plank and was injured. The court held that the contractor had a right to use the street in performance of necessary public work, and was, therefore, not liable for maintaining a nuisance, but was liable for negligence in thus obstructing the street without providing adequate warning to the public. *Murphy v. Hugh Nawn Contracting Co.* (1916) 223 Mass. 404, 111 N. E. 890.

In *Malkan v. Carlin* (1905) 93 N. Y. Supp. 378, it appeared that defendants, having obtained a contract from a city for laying a sidewalk around a building then in course of construction, during the progress of the work, piled a number of flagstones near the curb, leaving considerable space between the pile and the building or house line. The plaintiff stumbled over the pile of stones and sustained injuries. In an action by plaintiff to recover damages "for personal injuries resulting from a nuisance established or maintained by defendants," the court held that the temporary obstruction of the highway, when the act was done with the consent of the proper authorities and in the course of construction of a sidewalk, was not a nuisance, and that the defendants, therefore, were not liable.

B. R.

PAULINE BRUNSWICK, Appt.,

V.

STANDARD ACCIDENT INSURANCE COMPANY, Resp't.

*Missouri Supreme Court (In Banc)—May 18, 1919.*

(— Mo. —, 213 S. W. 45.)

**Evidence — presumption against suicide — death from poison.**

1. In an action upon an accident insurance policy where the death results from taking poison and the evidence is circumstantial, the presumption is against suicide if the known facts are consistent with the theory of accidental death.

[See note on this question beginning on page 1226.]

**Appeal — theory of case — reversal.**

2. One cannot secure a reversal of a judgment for defendant in an action to recover on an insurance policy for accidental death because recovery was not permitted under a clause providing for recovery in case of suicide where suicide was not brought to the attention of the trial court as a ground of recovery.

[See 2 R. C. L. 183.]

**Evidence — presumption of sanity.**

3. The sanity of one dying as a result of taking poison must be presumed in the absence of evidence that he was non compos mentis.

[See 10 R. C. L. 879; 14 R. C. L. 628.]

**Insurance — accident — death by poison.**

4. Death from the effects of a poison intentionally swallowed is not due to accident within the meaning of an accident insurance policy.

[See 14 R. C. L. 1251.]

**— statutory provision — death by accident.**

5. A statutory provision making void an exception of suicide in an insurance policy does not prevent the person from contracting for liability only in case of death by accident.

**— accident — suicide while insane.**

6. Death by suicide while insane is an accident within the meaning of an accident insurance policy.

[See 14 R. C. L. 1264.]

**Evidence — burden of proof — death by accident.**

7. One seeking recovery on an accident insurance policy for death has the burden of showing that the death resulted from accident.

[See 14 R. C. L. 1437.]

**Judgment — in other jurisdictions — binding effect.**

8. A decision of the Supreme Court of the United States upon a question of insurance law is not binding on a state court.

[See 7 R. C. L. 1013.]

**Evidence — when presumption obtains.**

9. If, in an action on an accident insurance policy, there is evidence both for and against suicide, which is not evenly balanced, the presumption against suicide is not to be considered, but the question must be resolved upon the evidence.

[See 14 R. C. L. 1236.]

**— presumption as.**

10. The presumption against suicide is not evidence, but a mere term to designate the burden upon the side against which the presumption operates, of producing evidence to rebut the finality of the legal conclusion which might be drawn from it.

**Appeal — erroneous instruction — right result — effect.**

11. If the court should have sustained a demurrer to the evidence and

the verdict attains the same result as the court would thereby have done, an erroneous instruction is not reversible error.

**Evidence — to overcome presumption against suicide.**

12. The fact that one in good health who dies from taking poison was seen a few minutes before his death to fold a handkerchief which contained poison similar to that which killed him, and which he knew to be poison, is not sufficient to exclude every reasonable hypothesis favoring accidental death, and the case is therefore, because of the presumption against suicide, to be left to the determination of the jury.

[See 14 R. C. L. 1237.]

**Trial — necessity of proper instructions.**

13. A case which should go to the jury must go under proper instructions.

[See 14 R. C. L. 726.]

**Appeal — erroneous instruction — reversible error.**

14. An instruction in an action on an accident insurance policy, where insured died from taking poison, that there is no presumption that the taking of the poison was accidental and that the burden is upon plaintiff to show that death resulted from accident, is reversible error where the evidence does not establish suicide.

[See 14 R. C. L. 1235.]

(Woodson, J., dissents.)

**CERTIFICATION** by the St. Louis Court of Appeals for the determination by the Supreme Court of questions arising upon appeal by plaintiff from a judgment of the Circuit Court of the City of St. Louis (Withrow, J.) in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Emerson E. Schnepf, Otto F. Karbe, and Taylor & Mayer, for appellant:

Defendant was Hable under the policy for the death of plaintiff's husband from the effect of taking a deadly poison.

*Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 200, 47 L. ed. 189, 143, 23 Sup. Ct. Rep. 108; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 80 L. ed. 740, 7 Sup. Ct. Rep. 685; *Keller v. Travelers' Ins. Co.* 58 Mo. App. 557; *Whitfield v. Aetna L. Ins. Co.* 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578.

The court abused its discretion in failing to grant plaintiff a new trial.

*Newland v. Modern Woodmen*, 168 Mo. App. 319, 153 S. W. 1097; *Wear v. Lee*, 26 Mo. App. 107; *Fitzjohn v. St. Louis Transit Co.* 183 Mo. 79, 81 S. W. 907; *State ex rel. Iba v. Ellison*, 256 Mo. 661, 165 S. W. 369; *Knisely v. Leathe*, — Mo. —, 178 S. W. 461.

The evidence showed conclusively that Brunswick died from taking cyanide of potassium. Under the statute this constituted an accident within the meaning of the policy.

*Applegate v. Travelers Ins. Co.* 153 Mo. App. 90, 132 S. W. 2; *Harms v.*

Fidelity & C. Co. 172 Mo. App. 250, 157 S. W. 1046; Whitfield v. *Ætna L. Ins. Co.* supra; Logan v. Fidelity & C. Co. 146 Mo. 114, 47 S. W. 948.

The presumption of law is against suicide, hence, that being the presumption, in the absence of evidence to the contrary, the question of suicide being excluded, there is but one alternative left and that is that the taking of poison was accidental.

Richy v. Woodmen of the World, 163 Mo. App. 247, 146 S. W. 461; Newland v. Modern Woodmen, 168 Mo. App. 819, 153 S. W. 1097; Norman v. Order of United Commercial Travelers, 163 Mo. App. 175, 145 S. W. 853; Voelker v. Hill-O'Meara Constr. Co. 153 Mo. App. 1, 131 S. W. 907.

Even if it could be said that there was some evidence tending to show that Brunswick died because he intentionally took cyanide of potassium (suicide) yet, under the law, such intentional taking constituted an accident.

Applegate v. Travelers Ins. Co.; Harms v. Fidelity & C. Co.; Whitfield v. *Ætna L. Ins. Co.* and Logan v. Fidelity & C. Co. — supra; Knights Templars & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108.

Messrs. Anderson, Gilbert, & Hayden and M. U. Hayden, for respondent:

If the record discloses that the evidence offered by plaintiff wholly failed to establish that she is entitled to recover or entitled to have her case submitted to the jury at all, then, the verdict of the jury having been in favor of defendant, there can be no error in any instructions given at the instance of the respondent which can be held to be reversible error.

Wagner v. Edison Electric Illuminating Co. 177 Mo. 60, 75 S. W. 966; Bradley v. James H. Forbes Tea & Coffee Co. 213 Mo. 320, 111 S. W. 919; Trainer v. Sphalerite Min. Co. 243 Mo. 371, 148 S. W. 70; Shinn v. United R. Co. 248 Mo. 181, 154 S. W. 103; Hurck v. Missouri P. R. Co. 252 Mo. 51, 153 S. W. 581; Shelton v. Kirksville Light, Power & Ice Co. 258 Mo. 541, 167 S. W. 544; Boesel v. Wells, F. & Co. 260 Mo. 479, 169 S. W. 110; Moore v. Lindell R. Co. 176 Mo. 545, 75 S. W. 672; Mockowik v. Kansas City, St. J. & C. B. R. Co. 196 Mo. 568, 94 S. W. 256; Schuepbach v. Lacleda Gaslight Co. 232 Mo. 611, 135 S. W. 29.

A judgment will not be reversed where the right result was reached, though the record may show that the proceedings were irregular, or perhaps erroneous.

Mockowik v. Kansas City, St. J. & C. B. R. Co. 196 Mo. 568, 94 S. W. 256; Petersen v. St. Louis Transit Co. 199 Mo. 344, 97 S. W. 860.

The burden is upon the plaintiff, in any lawsuit, to prove the allegations of his petition, and if he fails to prove those allegations, or if he prove another and different theory than that pleaded, he is not entitled to recover.

Reed v. Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; Schneider v. Patton, 175 Mo. 723, 75 S. W. 155; Roden v. Helm, 192 Mo. 94, 90 S. W. 798; Milliken v. Thyson Commission Co. 202 Mo. 654, 100 S. W. 604; Burk v. Pence, 206 Mo. 833, 104 S. W. 23; Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; Lampport v. *Ætna L. Ins. Co.* — Mo. —, 199 S. W. 1020.

The burden was, therefore, imposed upon plaintiff to prove three facts: that Brunswick did, in fact, take cyanide of potassium; that he took it accidentally; and that it caused his death.

Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; Lampport v. *Ætna L. Ins. Co.* supra; Norman v. Order of United Commercial Travelers, 163 Mo. App. 184, 145 S. W. 853; Bathe v. Metropolitan L. Ins. Co. 152 Mo. App. 94, 132 S. W. 743; Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175; Ranney v. Lewis, 182 Mo. App. 64, 167 S. W. 601; Berger v. St. Louis Storage & Commission Co. 186 Mo. App. 42, 116 S. W. 444; O'Shea v. Lehr, 182 Mo. App. 693, 165 S. W. 837; Wright v. Order of United Commercial Travelers, 188 Mo. App. 463, 174 S. W. 883; *Ætna L. Ins. Co.* v. Vandecar, 80 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 282; Taylor v. Pacific Mut. L. Ins. Co. 110 Iowa, 621, 82 N. W. 326; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Goodes v. Order of United Commercial Travelers, 174 Mo. App. 330, 156 S. W. 995; Vernon v. Iowa State Traveling Men's Asso. 158 Iowa, 602, 138 N. W. 696; Travellers Ins. Co. v. McConkey, 127 U. S. 666, 32 L. ed. 810, 8 Sup. Ct. Rep. 1360; Whitlatch v. Fidelity & C. Co. 149 N. Y. 45, 43 N. E. 405.

If a plaintiff plead one theory of lia-

bility, and, on the trial, prove another and different theory, there can be no recovery.

*Madden v. Missouri P. R. Co.* 167 Mo. App. 150, 151 S. W. 489; *Ham v. St. Louis & S. F. R. Co.* 149 Mo. App. 206, 130 S. W. 407; *Reed v. Bott*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; *Schneider v. Patton*, 175 Mo. 723, 75 S. W. 155; *Roden v. Helm*, 192 Mo. 94, 90 S. W. 798; *Milliken v. Thyson Commission Co.* 202 Mo. 654, 100 S. W. 604; *Burk v. Pence*, 206 Mo. 333, 104 S. W. 23; *Farmers Bank v. Manchester Assur. Co.* 106 Mo. App. 125, 80 S. W. 299; *State Bank v. American Hardwood Lumber Co.* 121 Mo. App. 333, 98 S. W. 786.

There must be substantial evidence either establishing or tending to establish a fact necessary to a recovery.

*Dutcher v. Wabash R. Co.* 241 Mo. 137, 145 S. W. 63; *State ex rel. Savings Trust Co. v. Hallen*, 165 Mo. App. 422, 146 S. W. 1171.

Opinion evidence when based on mere conjecture or supposition is not sufficient to prove a material fact.

*Sexton v. Metropolitan Street R. Co.* 245 Mo. 254, 149 S. W. 21; *Stafford v. Adams*, 113 Mo. App. 717, 33 S. W. 1130; *Pickens v. Metropolitan Street R. Co.* 125 Mo. App. 669, 103 S. W. 124; *Bowlin v. Union P. R. Co.* 125 Mo. App. 419, 102 S. W. 631; *Cartlich v. Metropolitan Street R. Co.* 129 Mo. App. 721, 108 S. W. 584; *Majors v. Parkhurst*, 124 Mo. App. 107, 100 S. W. 1100; *David v. Clarksville Cider Co.* 186 Mo. App. 17, 171 S. W. 594.

Failure of plaintiff to call Dr. John Grant, who was the first physician to reach the deceased after his death, raises a strong presumption that the doctor's testimony would have been damaging to her case.

*Kame v. St. Louis & S. F. R. Co.* 254 Mo. 194, 162 S. W. 240; *Booher v. Trainer*, 172 Mo. App. 379, 157 S. W. 848; *Vannest v. Missouri, K. & T. R. Co.* 181 Mo. App. 379, 163 S. W. 782.

Where a case is tried upon the theory that the insured committed suicide, and where evidence is offered by the plaintiff tending to prove that he committed suicide, there can be no application of the presumption that the insured did not commit suicide.

*Laessig v. Travelers' Protective Asso.* 169 Mo. 272, 69 S. W. 469; *Sowers v. St. Louis & S. F. R. Co.* 127 Mo. App. 124, 104 S. W. 1122; *Caldwell v. Iowa State Traveling Men's Asso.*

156 Iowa, 327, 136 N. W. 678; *Supreme Tent, K. M. W. v. King*, 73 C. C. A. 668, 142 Fed. 678.

The insured who commits suicide is presumed to be sane, and the burden of proving the contrary rests upon the plaintiff.

*Scales v. National Life & Acci. Ins. Co.* — Mo. App. —, 186 S. W. 948.

Opinions of experts are advisory only and are not binding upon either courts or juries. The cause of death is a fact for the jury.

*Hoyberg v. Henske*, 153 Mo. 63, 55 S. W. 33; *Shipman v. National Live Stock Ins. Co.* 187 Mo. App. 406, 173 S. W. 735; *MacDonald v. Metropolitan Street R. Co.* 219 Mo. 481, 118 S. W. 78, 16 Ann. Cas. 810; *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; *Beile v. Travelers' Protective Asso.* 155 Mo. App. 644, 135 S. W. 497.

*Faris, J.*, delivered the opinion of the court:

This is an action by plaintiff as beneficiary on a policy of insurance issued by defendant, insuring one William Brunswick, the husband of plaintiff, against death by accident. Upon a trial by a jury, the verdict was for the defendant. From the resulting judgment plaintiff appealed to the St. Louis court of appeals, wherein, upon a hearing, the case was reversed for error and ordered remanded for a new trial. See *Brunswick v. Standard Acci. Ins. Co.* 195 Mo. App. 651, 187 S. W. 802. The court of appeals, however, being of the opinion that the views announced by them in this case were in conflict with the opinion of the Springfield court of appeals in the case of *Scales v. National Life & Acci. Ins. Co.* — Mo. App. —, 186 S. W. 948, made an order transferring the case to this court, pursuant to the mandate of the Constitution. Hence our jurisdiction.

The petition seems to be conventional. After averring formally the issuance of the policy, the petition sets out substantially the conditions of the policy under which the liability of defendant for accidental death of the assured shall accrue. These conditions, as the petition and the policy recite them, are that lia-

bility accrues in the event of the death of assured "resulting directly, exclusively, and independently of all other causes from accidental bodily injuries." The policy contains, following the above-quoted conditions as to the cause of death, an exception; to wit, "Except when self-inflicted while insane," which is not set out, or in any wise referred to, in the petition. Continuing, the petition avers that assured died on the 22d day of April, 1913, and that his death resulted "directly, exclusively, and independently of all other causes from accidental bodily injuries from and caused by the said William Brunswick taking on said day poison known as cyanide of potassium." Other allegations are made as to additional increments to the principal sum of \$2,500, arising, it is averred, from annual renewals of the policy, and as to damages and attorneys' fees accruing from an alleged vexatious refusal to pay. But these have no pertinence to the points vexing us upon this appeal.

The answer of defendant, so far also as it is pertinent to the questions mooted here, was an admission of the issuance of the policy and of the several annual renewals thereof as pleaded, and a general denial of each and every allegation (sic) contained in the petition.

The facts immediately surrounding the death of assured are meager, but so far as these facts are shown, and so far as they are pertinent to elucidate the questions mooted on this appeal, run substantially thus: Assured on the morning of his death seemed to be in the best of health. He ate his breakfast just before 8 o'clock in the morning, and apparently was preparing to go to his work. After breakfast he went into the bedroom of plaintiff, who seems to have been ill, and the latter tied his necktie for him. He then went into a bedroom adjoining that of plaintiff. Some five minutes afterward, hearing an unusual noise from this room, plaintiff entered it and found assured lying on the bed

in a dying condition. His necktie and collar had been removed. There were burns on his mouth and cheek and hand, the latter seemingly from having wiped his mouth with his hand. A glass and spoon were found on the floor near the bed on which assured was lying. While in this bedroom, and a few minutes before he was found dying, he was seen folding a handkerchief. In a handkerchief which was found in his pocket after his death were found some 2 or 3 ounces of cyanide of potassium. A can containing some  $\frac{3}{4}$  of a pound of cyanide of potassium was found in the bathroom.

The coroner, who was a physician, examined the body of assured some two hours after his death, and from the symptoms and the history of the case testified that assured came to his death from cyanide of potassium poisoning. The finding of the coroner's inquest that assured came to his death by suicide, caused by swallowing cyanide of potassium, was offered by plaintiff, but excluded by the trial court on defendant's objection.

It will be necessary to state other and omitted facts in the course of the discussion of the points made by plaintiff. These will be set out in connection with the point to which they are apposite.

I. Plaintiff insists that the verdict is against the evidence. This contention is bottomed on the fact that the contract of insurance contained a provision substantially to the effect that if assured came to his death by suicide, while either sane or insane, the company would pay the beneficiary one tenth of the principal sum; that is to say, \$250. So, it is urged, since the death of the assured was unquestionably due either to accident or suicide, the verdict ought, in any event, to have been for at least the sum of \$250.

It is enough to say upon this contention that the case was not tried below upon any such theory. Neither the pleadings upon either side, nor the instruction, nor the evi-



dence, except the policy, contain the word "suicide," and the policy has it only in the clause whereon the alleged right is bottomed

**Appeal—theory of case—reversal.**

to recover the lesser sum above mentioned. Even in these days when the leaven of reform is working in all the law, and the strife is toward a legal millenium, whereat every man shall be his own lawyer, one may not yet sue and cause the jury to be instructed upon one cause of action, and then, when cast, urge error, for that he was not permitted to recover upon a wholly different theory, and upon a wholly different cause of action, which he did not see fit even to mention till he came up to the appellate court. The rule which forbids this practice is that which requires the appellant to try his case in the appellate forum on the same theory upon which he tried it below. *Paramore v. Campbell*, 245 Mo. 287, 149 S. W. 6; *Linn County Bank v. Clifton*, 268 Mo. 200, 172 S. W. 388.

II. Complaint is made by plaintiff of the following instruction given for the defendant; to wit, "You are instructed that, even though you may find from the evidence that William Brunswick took cyanide of potassium on the day of his death, and even though you may further find that his death was caused thereby, there is still no presumption in law that his act in taking said poison, if you find that he did take it, was accidental, or that his death resulted from accidental bodily injuries. On the contrary, the burden is upon plaintiff to prove that the death of said William Brunswick resulted, independently of all other causes, from accidental bodily injuries; and unless she has proved such fact she cannot recover, and your verdict must be for the defendant."

In condemnation of the above instruction plaintiff urges (a) that it substantially tells the jury that death by suicide is not an accident; (b) that the burden was upon plaintiff to prove that the death of

assured was caused by an accident; and (c) that, if the jury should find that assured's death was caused by poison, no presumption exists that such poison was taken accidentally. Taking the converse of each of the above propositions, plaintiff strenuously urges that the above instruction was erroneous as to all of them.

In resolving these contentions it is necessary to re-examine the facts, cursorily at least. By these facts we think the cause of assured's death is fairly well settled; for, while the evidence is upon some vexing points utterly lacking, we are yet convinced that enough is shown to justify a finding by the triers of fact that assured came to his death from taking poison, whether accidentally or intentionally swallowed is another question and one presently reserved. For in addition to his sudden death and the burns upon his mouth, face, and hand, which some of the witnesses say are characteristic effects of cyanide of potassium, crystals of this drug were found in a handkerchief in his pocket, and a can containing a large quantity thereof was found upon the premises. A few minutes before the death of assured he was seen to fold up a handkerchief, and, as stated, in a handkerchief after his death some 2 or 3 ounces of cyanide of potassium were found. A glass and spoon were found upon the floor near his body, which lay upon the bed, but whether containing evidences of recent use does not appear. The coroner, who is a physician, saw and examined the body of assured some two hours after his death, and as a result of that examination and the history of the case swore unequivocally that death was caused by cyanide of potassium poisoning. So, we think the postulate of fact in the instruction was fully warranted by the evidence in the case, which clearly tended to prove that the death of deceased was caused by his swallowing cyanide of potassium.

The obvious inference arises, and in fact the testimony shows, that

assured was fully cognizant of the deadly nature of cyanide of potassium; for the testimony is that only a few days before his death he had taken from his pocket crystals of some drug, and in exhibiting these crystals to his partner in business had stated in substance that it was cyanide of potassium and a deadly poison. No reason whatever for suicide is disclosed by the record; neither, on the other hand, are there any facts in evidence making for the theory of accidental taking of this poison. The assured is not shown to have been ill, or to have been intending to take medicine, or even to have been in the habit of taking medicine. There is, as forecast above, no hint in the record, in either pleadings or proof, that assured was insane, or non compos, to any degree. Therefore his sanity must be presumed.

Upon these meager facts how stands the case upon the question of the correctness of the above instruction, and incidentally upon the right of plaintiff to recover at all on a contract of insurance against death "resulting directly, exclusively, and independently of all other causes from accidental bodily injuries, except when self-inflicted while insane?"

In the light of the presumption in favor of sanity, and the utter lack of any proof of insanity in the record, we go afield, in preserving the thread of our argument, to say that if assured took cyanide of potassium while insane his death was caused by an accident within the purview of the policy herein. *Accident Ins. Co. v. Crandal*, 120 U. S. loc. cit. 531, 30 L. ed. 742, 7 Sup. Ct. Rep. 685; *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, 652, 7 L.R.A. (N.S.) 223, 104 N. W. 1131; *Grand Lodge, I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Blackstone v. Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156; *Berger v. Pacific Mut. L. Ins. Co. (C. C.)* 88 Fed. 241. And the above-quoted

clause of that policy, which excepts liability for death self-inflicted while insane, is rendered void by the express provisions of § 6945, Rev. Stat. 1909, and ceteris paribus recovery could be had by the beneficiary. *Logan v. Fidelity & C. Co.* 146 Mo. 114, 47 S. W. 948; *Whitfield v. Aetna L. Ins. Co.* 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578.

If, on the other hand, assured *intentionally swallowed* cyanide of potassium—that is, if he committed suicide while sane—his death was not due to accident, and his beneficiary cannot recover under this policy, which bottoms the right to recover only for a death resulting from *accidental injuries*. *Williams v. United States Mut. Acci. Asso.* 138 N. Y. 866, 31 N. E. 222; *Aetna L. Ins. Co. v. Vandecar*, 30 C. O. A. 48, 57 U. S. App. 446, 86 Fed. 282; *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, loc. cit. 654, 7 L.R.A. (N.S.) 223, 104 N. W. 1131; *Laessig v. Travelers' Protective Asso.* 169 N. loc. cit. 280, 69 S. W. 469; *Lamport v. Aetna L. Ins. Co. — Mo. —*, 199 S. W. 1024.

For in such case neither sound sense nor logic will permit us to hold that an act intentionally done by a sane man is an accident. Such a view would stultify common sense. Neither does § 6945, supra, upon which plaintiff so confidently relies, aid at all or apply to the situation. The above section has nothing to do with the manner or cause of death. It leaves the parties perfectly free to contract in an accident policy touching the cause of death.

If they see fit to contract that there shall be no liability except for a death resulting from an accidental injury, then the proof must show such a cause of death, before any recovery can be had on the contract. In other words, if the proof, even where aided in a proper case by the presumption against suicide, yet

Insurance—  
accident—  
death by poison.

Evidence—  
presumption  
of sanity.

—statutory  
provision—  
death by  
accident.

shows suicide by assured while sane, the plaintiff has simply failed to meet the burden expressly assumed in the insurance contract of proving the death of assured by accident.

In case of insurance effected upon life by the usual life insurance policy, the fact of death, since such fact is the sole condition precedent to recovery, is alone pertinent, and § 6945, *supra*, applies automatically to all cases of death by suicide, regardless of whether the assured was sane or insane at the time he killed himself, barring, of course, the exception noted in the statute itself. But where the assured solemnly contracts in an accident policy that liability for his death accrues only when the cause of death shall be an accidental injury, nothing seems clearer than that § 6945, *supra*, has no application, unless, as already stated, assured shall commit suicide while insane. In the latter event the death, being unintentional, is held to be accidental, and, though suicide is expressly excepted by the policy, recovery can be had because of the saving provisions of said § 6945.

Upon this phase, therefore, we conclude that the burden was upon plaintiff to prove that the death of assured resulted from accidental injuries; that is, that it was due to an accident. That such burden may sometimes be aided by a presumption against suicide (which presumption we discuss below) does not, in our view, affect this phase of the situation. This is so for the reason, if for no other, so clearly set forth in the case of *Laessig v. Travelers Protective Assn.* *supra*, at page 280 of 169 Mo. where it was said: "In other words, the contract of accident insurance primarily casts the burden upon the plaintiff to show that the death was accidental. It must be so pleaded and proved. If the defendant wants to avoid liability for an accidental

death, it must prove that the death was due to a cause excepted from the operation of the policy; that is, that it was a suicide. In such cases there is no presumption of law that because the death was not due to suicide it was accidental. For it might not be due either to suicide or accident. It might be natural. In such case the defendant would fail in its contention that it was suicide, and plaintiff would fail in his case because the death was not due to accident, and the contract only insured against accidental death. In fact, if there was no plea of suicide, the plaintiff would have to prove accidental death. There would be no presumption of accidental death. The jury must determine the facts as to what caused the death. There need not necessarily be direct proof or evidence of the cause. The cause may be found by the jury from facts and circumstances. But the cause of death is a fact for the jury. There is no presumption of law in such cases, further than the presumption against suicide; but even this presumption does not carry with it, in accident insurance cases, the further presumption that the death was accidental."

When examined in the light of the facts and the points mooted and respectively held in judgment therein, neither the case of *Logan v. Fidelity & C. Co.* *supra*, nor the case of *Whitfield v. Aetna L. Ins. Co.*, *supra*, militates conclusively against this view. This is so because in the *Logan Case* the defense was "that the death of said assured was caused while either sane or insane, in either of which events defendant was not liable." The precise concrete question up for judgment under this defense, as that point was stated by the court in the *Logan Case*, was: "Is suicide in this state a valid defense to an action upon a policy of insurance issued by an accident insurance company, containing provisions such as the one in controversy, where it is not shown that the insured contemplated suicide at the time he made his

Evidence—  
burden of proof  
—death by  
accident.

application for the policy (and it being admitted that the assured afterwards came to his death from external, violent, and accidental means)?"

Under these defenses and the above admission it was competent for this court to find and conclude that assured was insane when he committed suicide. If he was insane his death, as we have already seen, was accidental, and the right to recover unquestionable. In fact, the above admission concedes that his death was caused by accidental means; so, if he died by suicide, such suicide, in order to be in harmony with this solemn admission, must have occurred while assured was insane. Therefore the Logan Case is in no respect out of harmony with our views herein.

In the Whitfield Case the question whether the death was accidental, and whether the burden of proving the cause of death to have been on this phase within the terms of the policy, was not discussed. The defendant in the Whitfield Case specifically pleaded suicide as a defense. The Supreme Court of the United States held that there could no longer be such a defense made, because forbidden by § 6945 of the Missouri Statutes. The burden resting upon the plaintiff to prove a cause of death falling within the contract of insurance, i. e., an accidental death, was not adverted to by the court. It seems to have been tacitly assumed by the court that the death was accidental, although the reply of plaintiff in effect admitted that the assured therein was sane when he killed himself. It is regrettable that it was not pointed out wherein the language of said § 6945 had the effect to create by its terms a cause of action, when none theretofore existed under the policy and upon the conceded facts. This section is short and fairly simple, and reads thus: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that

the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Rev. Stat. 1909, § 6945.

While the above section makes absolutely void all stipulations exempting liability on account of suicide and all defenses bottomed on the fact of suicide, yet it nowhere relieves the plaintiff, in an action upon a policy of accident insurance, from making proof that the death of the assured was caused by an accident. In short, as forecast above, the section does not write into an accident policy a cause of action where none existed upon the facts. Granting, for the sake of argument, that the section (the applicability of which to accident policies, though now fairly well settled, has been strenuously and ably combated and denied) could have gone further, and provided that "suicide by a sane person shall be deemed to be an accident," it is enough to say that it does not so provide. If the legislature desired to create a cause of action upon a policy of accident insurance where none existed within the obvious meaning of the plain language of such contracts, it would have been easy to say so. Therefore, unless the courts are able to say that a death by suicide of a sane person is a death by accident, further legislation would seem to be called for. There are no cases up to the present time so holding. Both the reason of the thing and the cases are the other way. *Williams v. United States Mut. Acci. Asso.* 133 N. Y. 306, 31 N. E. 222; *Aetna L. Ins. Co. v. Vandecar*, 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 282; *Tuttle v. Iowa State Traveling Men's Asso.* 132 Iowa, loc. cit. 654, 7 L.R.A. (N.S.) 223, 104 N. W. 1131; *Laessig v. Travelers Protective Asso.* 169 Mo. loc. cit. 280, 69 S. W. 469; *Lam-*

port v. *Ætna L. Ins. Co.* — Mo. —, 199 S. W. 1024.

Neither does the view we here announce conflict with the rule in *Fetter v. Fidelity & C. Co.* 174 Mo. loc. cit. 269, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592. The latter case at most merely deals with the burden of adducing evidence. When the plaintiff has shown that assured died from cyanide of potassium poisoning, self-administered, then the inevitable inference arose that death was caused by either accident or suicide, and plaintiff could not recover if the evidence (aided by the presumption against suicide) yet showed suicide, till there was further evidence adduced showing that such suicide was committed while assured was insane. We have here referred to, but left out of discussion or consideration, the effect and nature of the presumption against suicide, elsewhere fully discussed in the expression of our views. And so we conclude that under the rule defining and delimiting *stare decisis*, as that rule is announced in the case of *State ex rel. Bixby v. St. Louis*, 241 Mo. 231, 145 S. W. 801, the instant case may be, to the extent stated, distinguished from the *Whitfield*, *Logan*, and *Fetter* Cases, *supra*. If under this rule it be impossible to distinguish the *Whitfield* Case (there are no difficulties as to the others), then we may content ourselves with saying that it is not binding on us in any respect, but, at most, only persuasive as the utterance of a great court, unfamiliar, however, with many of the intricacies of our local statutes and rulings thereon.

But having shown that assured came to his death from swallowing cyanide of potassium, the inference, naught else appearing, that the act of swallowing this poison was either accidental or intentional, i. e., suicidal, inevitably arose. In such case, and after such a showing, was it proper to instruct the jury that

"there is still no presumption in law that his [assured's] act in taking said poison was accidental?" It was clearly improper as an abstract proposition. Whether it was reversible error here, upon the concrete case made, depends upon whether there is upon the facts any room for the presumption; i. e., whether suicide was not so conclusively shown as to eliminate any presumption.

Discussing this presumption and its effect, a majority of this court in the late case of *Reynolds v. Maryland Casualty Co.* 274 Mo. loc. cit. 96, 201 S. W. 1131, said:

"No legal proposition is more firmly established than that where the act which caused the death may be either accidental or suicidal, the burden is upon the insurer to establish the fact of suicide by a preponderance of the evidence; for the presumption arising from the love of life, which is created for its preservation, is, like every natural law, always within the contemplation of the courts. It follows, as is stated by Mr. Bacon in his work on *Life and Accident Insurance*, 4th ed. § 488, that 'when circumstantial evidence only is relied on, the defense fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.' *Boynton v. Equitable Life Assur. Soc.* 105 La. 202, 52 L.R.A. 687, 29 So. 490; *Shotliff v. Modern Woodmen*, 100 Mo. App. 138, 73 S. W. 326; *Norman v. Order of United Commercial Travelers*, 163 Mo. App. 175, 145 S. W. 853; *Almond v. Modern Woodmen*, 133 Mo. App. 382, 113 S. W. 695; *Claver v. Woodmen of the World*, 152 Mo. App. 155, 138 S. W. 158; *Hunt v. Ancient Order of Pyramids*, 105 Mo. App. 41, 78 S. W. 649; *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 382; *South Atlantic L. Ins. Co. v. Hurt*, 115 Va. 398, 79 S. E. 401; *Cosmopolitan L. Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166; *Pagel v. United States Casualty Co.* 158 Wis. 278, 148 N. W. 878;

Judgment—  
in other  
jurisdictions—  
binding effect.

Huestis v. Aetna L. Ins. Co. 131 Minn. 461, 155 N. W. 643; Kornig v. Western L. Indemnity Co. 102 Minn. 31, 112 N. W. 1039; Jenkin v. Pacific Mut. L. Ins. Co. 131 Cal. 121, 68 Pac. 180; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Aetna L. Ins. Co. v. Milward, 118 Ky. 716, 68 L.R.A. 285, 82 S. W. 364, 4 Ann. Cas. 1092.

"These cases, and many others to which our attention has been directed, amply sustain the doctrine stated in the proposition we have quoted from Mr. Bacon's excellent book. In the Kornig Case, 102 Minn. 31, 112 N. W. 1039, the court states it more fully as follows: 'Where the defense of suicide is asserted against an action by a beneficiary on an insurance policy. (a) the burden of proving that the deceased committed suicide is upon the defendant; (b) the presumption is against suicide; (c) if the known facts are

Evidence—  
presumption  
against suicide—  
death from  
poison.

consistent with the  
theory of natural or  
accidental death,  
the presumption  
which the law

raises from the ordinary motives and principles of human conduct requires a finding against suicide; (d) when circumstantial evidence is relied on, the defendant must establish facts which exclude any reasonable hypothesis of natural or accidental death.'

"It is a doctrine that appeals to every just and reasonable mind. It does not relieve the plaintiff from the burden of proving accidental death by a preponderance of evidence as a condition of recovery, but requires that when he has put in evidence circumstances which prove that the death was either accidental or suicidal, the unreasonableness of the theory of suicide must receive due consideration in weighing it against the more reasonable and natural theory of accident."

While the writer sharply disagreed with the judgment and with much that was said in the Reynolds Case, yet, since a majority of this

court in banc ruled contrary to his views, he is constrained by the view which he entertains of his duty under the Constitution to adopt as the law and follow the opinion of the majority.

The presumption against suicide is a rule of law deduced from convenience and necessity; it is based on the well-nigh universal human characteristic of love of life and fear of death, and it arises in a case whenever the cause of death is in issue and the evidence discloses a state of facts consistent with either accident or suicide. While the doctrine is a veritable presumption of law, it is sometimes and in some of the cases loosely spoken of as a presumption or inference of fact, and is put in the category of evidence. While a few authorities assert the converse, by far the better view is that it is not evidentiary in character; yet when invoked in the trial of a case, in a way as a constituent of evidence, it undoubtedly accomplishes a function of evidence pro hac vice. It is to be invoked, or automatically rises, to be exact, when there is no convincing evidence for or against suicide, and in such case, perforce this presumption alone, a finding in favor of accidental death will be upheld. *Fitzgerald v. Barker*, 85 Mo. loc. cit. 22. The evidence for or against the fact may be either direct or circumstantial. If the evidence in favor of suicide is wholly circumstantial, then it ought to be such and of such weight as to negative every reasonable inference of death by accident. *Prudential Ins. Co. v. Dolan*, 46 Ind. App. 40, 91 N. E. 970; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 218, 76 Am. St. Rep. 905, 80 N. W. 1020; *Ritchey v. Woodmen of the World*, 163 Mo. App. 235, 146 S. W. 461. In the case of *Agen v. Metropolitan L. Ins. Co.* supra, at page 218, in a syllabus by the writer of the opinion, the supreme court of Wisconsin sets out the converse of the rule we announce, and negatively indorses the correctness

of that rule thus: "Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law."

If there is evidence both for and against suicide, the presumption (unless, as some of the cases hold,

—when  
presumption  
obtains.

and the reason of the thing makes plausible, the evidence be equally balanced) has no place in the reasoning, as its very nature indicates. If, therefore, invoked, or present, it vanishes, and the question is to be thereupon resolved upon the evidence. 9 Enc. Ev. 885, and cases cited. Obviously, the presumption against suicide cannot continue to exist in the face of evidence showing suicide, for such a view would be utterly subversive of the well-settled doctrine, figuratively but strikingly announced by Lamm, J., substantially, to wit, that presumptions are the bats of the law, which the light of evidence frightens and causes to fly away. *Mockowik v. Kansas City, St. J. & C. B. R. Co.* 196 Mo. loc. cit. 571, 94 S. W. 256. Not only do the cases and the textbooks sustain this view (*Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188; *State v. Swearengin*, 269 Mo. 186, 190 S. W. 268; *Mockowik v. Kansas City, St. J. & C. B. R. Co.* supra; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Diefenthaler v. Hall*, 96 Ill. App. 639; *Largen v. State*, 76 Tex. 323, 13 S. W. 161; *Conway v. Supreme Council C. K. A.* 137 Cal. 384, 70 Pac. 223; *Jones v. Bond (C. C.)* 40 Fed. 281; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Keller v. Over*, 136 Pa. 1, 20 Atl. 25; *Adams v. State*, 87 Ind. 573; *Myers v. Kansas City*, 108 Mo.

480, 18 S. W. 914; 2 *Chamberlayne, Ev.* 1085; *Lawson, Presumptive Ev.* 242; 9 Enc. Ev. 885; *Bates v. Prickett*, 5 Ind. 22, 61 Am. Dec. 73; 4 *Wigmore, Ev.* 2495-2511; *Winter v. Supreme Lodge, K. P.* 96 Mo. App. 1, 69 S. W. 662), but the very legal nature of the rule of law which we call a presumption demonstrates it. For in the very last analysis this rule of law which we call a presumption operates when it arises in the case, as the result of evidence adduced, only in two ways: (a) It either forecloses the question unless and until further evidence is offered by the other side; or (b) it shifts the burden of the evidence to the adverse side; that is all it does in the case. *Banbury Peerage Case*, 1 Sim. & Stu. 153, 57 Eng. Reprint, 62; *Pickup v. Thames Marine Ins. Co. L. R.* 3 Q. B. Div. 594, 47 L. J. Q. B. N. S. 749, 39 L. T. N. S. 341, 26 Week. Rep. 689, 4 Asp. Mar. L. Cas. 43; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *Dacey v. People*, 116 Ill. 555, 6 N. E. 165, 6 Am. Crim. Rep. 461; *Jones v. Granite State F. Ins. Co.* 90 Me. 40, 37 Atl. 326; *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *J. D. Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240; *Blodgett v. Cummings*, 60 N. H. 115; *Brotherton v. People*, 75 N. Y. 159, 3 Am. Crim. Rep. 218; *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Thayer, Ev.* 386. Should this burden not be met, and should no other and countervailing evidence be adduced, the presumption will have the effect to conclude the question in favor of the side upon which the presumption operates. *State v. Jones*, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *Lisbon v. Lyman*, 49 N. H. 563; *Tilghman's Succession*, 7 Rob. (La.) 387; *Kidder v. Stevens*, 60 Cal. 414; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Fitzgerald v. Barker*, 85 Mo. 13; 2 *Chamberlayne, Ev.* 1085.

Therefore it obviously follows that such a presumption is not evidence, but that it is a mere term in legal nomenclature, employed to designate the imperative duty or burden, upon the side against which the presumption operates, of producing evidence to rebut the finality of the legal conclusion which arises, in the course of a trial of a case, from the proof of other facts therein. 9 Enc. Ev. 385; 4 Wigmore, Ev. 2490-2511; Allen v. United States, 164 U. S. loc. cit. 500, 41 L. ed. 530, 17 Sup. Ct. Rep. 154; 2 Chamberlayne, Ev. 1175a; Thayer, Ev. 314-339; Lisbon v. Lyman, 49 N. H. 558; State v. Jones, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; Wooten v. State, 24 Fla. 335, 1 L.R.A. 819, 5 So. 39; State v. Hudspeth, 159 Mo. 178, 60 S. W. 136; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Moore v. Renick, 95 Mo. App. 202, 68 S. W. 936; Rousseau v. Brotherhood of American Yeomen, 186 Mich. loc. cit. 105, 152 N. W. 939; Lincoln v. French, 105 U. S. 614, 26 L. ed. 1189; 1 Elliott, Ev. 94; Prudential Ins. Co. v. Dolan, 46 Ind. App. 40, 91 N. E. 970; Water Comrs. v. Robbins, 82 Conn. 623, 74 Atl. 938; Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Jenkins v. St. Paul City R. Co. 105 Minn. 504, 20 L.R.A. (N.S.) 401, 117 N. W. 928; Peters v. Lohr, 24 S. D. 605, 124 N. W. 853; First Nat. Bank v. Adams, 82 Neb. 801, 118 N. W. 1055; Atehison, T. & S. F. R. Co. v. State, 23 Okla. 210, 21 L.R.A. (N.S.) 908, 100 Pac. 11; Ryan v. Union P. R. Co. 46 Utah, 530, 151 Pac. 71; Purdy v. State, 86 Neb. 638, 126 N. W. 90; Savage v. Rhode Island Co. 28 R. I. 391, 67 Atl. 633; Agnew v. United States, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; State v. Kennedy, 154 Mo. 268, 55 S. W. 293; McDuffee v. State, 55 Fla. 125, 46 So. 721.

As stated above, if there is among the facts in evidence in this case any room or place for the pre-

sumption, the instruction above set out was on this phase erroneous. That is to say, if it cannot be said by us as a court that, as a matter of law, the facts and circumstances proved show suicide and exclude any reasonable hypothesis of accident (Prudential Ins. Co. v. Dolan, 46 Ind. App. 40, 91 N. E. 970; Agen v. Metropolitan L. Ins. Co. 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; Ritchey v. Woodmen of the World, 163 Mo. App. 235, 146 S. W. 461), then the instruction, which was, as we have already demonstrated, abstractly bad, was here also concretely bad. Defendant put in no evidence whatever. Save and except the proved facts that a few minutes before assured was found in a dying condition due to his taking cyanide of potassium he was seen to fold up a handkerchief; that after his death a large quantity of this poison was found in a handkerchief in his pocket; that he had had this poison in his pocket for several days, and knew what it was, and likewise knew its deadly nature, —there are no affirmative facts in the record to show suicide. Was this evidence sufficient to overcome, as a matter of law, the presumption against suicide, and enable the court to say as a matter of law that suicide, and not accident, was the cause of assured's death? If it was sufficient to overcome this presumption, then the court below ought to have sustained the defendant's demurrer to the evidence, and the bad instruction in such case would, of course, cut no figure, since in such event the only possible result, under the law and the evidence, was reached by the jury.

Appeal—  
erroneous  
instruction—  
right result—  
effect.

While the point is close and difficult, we are yet constrained to say, perforce the ruling in the Reynolds Case, 274 Mo. 96, 201 S. W. 1131, that the facts proven, and which



tend to show suicide, are not sufficient to exclude every reasonable hypothesis favoring accident, and there is left, on account of the presumption against suicide, an inference of accident sufficient to take the case to the jury. If it ought, as a matter of law, to have gone to the jury at all, then it is elementary that it ought to have gone to the jury under proper instructions. It results that the

**Evidence—  
to overcome  
presumption  
against suicide.**

**Trial—necessity  
of proper  
instructions.**

giving of instruction 2 constituted reversible error. Let the case be reversed and remanded for a retrial not inconsistent with what we have herein ruled.

**Appeal—  
erroneous  
instruction—  
reversible error.**

#### Per Curiam:

The foregoing opinion by Faris, J., in division is adopted by the court in banc.

All concur, except Woodson, J., who dissents. Bond, Ch. J., not sitting.

### ANNOTATION.

**Insurance: presumption and burden of proof as to accident in case of death from poison.**

As to presumption against suicide in Workmen's Compensation cases, see annotation to *Chandler v. Stearns & C. Lumber Co.* 5 A.L.R. 1680.

The general rule that the burden of proving that death was the result of an accident rests upon plaintiff in an action on an accident policy applies where the insured died from taking poison. *Preferred Acci. Ins. Co. v. Fielding* (1905) 35 Colo. 19, 83 Pac. 1018, 9 Ann. Cas. 916; *Carnes v. Iowa State Traveling Men's Asso.* (1898) 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *BRUNSWICK v. STANDARD ACCI. INS. CO.* (reported herewith) ante, 1213; *Grosvenor v. Fidelity & C. Co.* (1918) 102 Neb. 629, 168 N. W. 596; *Hodgson v. Preferred Acci. Ins. Co.* (1918) 182 App. Div. 381, 169 N. Y. Supp. 28. Where, however, the circumstances of the death are such as to reasonably negative every hypothesis except that of accident or suicide, the plaintiff may be aided by the presumption against suicide.

It will be observed that in the reported case (*BRUNSWICK v. STANDARD ACCI. INS. CO.* ante, 1213) it was held that the fact that one in good health was seen a few minutes before his death to fold a handkerchief which contained poison similar to that which killed him, and which he knew to be poison, was not sufficient to exclude every reasonable hypothesis favoring

accidental death, and that the case therefore, because of the presumption against suicide, should be left to the jury, and an instruction that there was no presumption that the taking of the poison was accidental and that the burden was upon the plaintiff to show that death resulted from accident was held error where the evidence did not establish suicide.

In *Preferred Acci. Ins. Co. v. Fielding* (Colo.) supra, the evidence was held to support a finding that the insured's injuries resulted from an accident, there being testimony that he died from burns caused by acids on a hot object, but nothing showing how the burns occurred, and there also being evidence that the insured stated that the burns resulted from natural causes. The court said: "In actions on policies of insurance of this character the burden of proof is upon the plaintiff to show that the death of the assured was caused by external violence and by accidental means; but when is this burden discharged in making a *prima facie* case? When death by unexplained, violent, external means is established, the law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased or by some third person; and hence, with the proof indicated, by reason of the presumption which attaches against self-

destruction or the violation of the law, prima facie proof is also made of the fact that the injuries were accidental without direct or positive testimony on that point. . . . But it is urged by counsel for defendant that from the testimony the inference might be drawn that the injuries were not the result of an accident. In support of this contention our attention is directed to the fact that the deceased claimed that he had not been injured, but that what was said to be burns upon his body resulted from natural causes; that in attempting to treat himself he may have applied lotions which caused what was afterwards denominated burns upon his body; and that the injuries may have been inflicted intentionally by someone in circumstances which the deceased did not care to disclose. If it be conceded that the statements of the deceased that he had not been injured are material (a question, however, which we do not determine), we are of the opinion that none of the inferences which counsel attempt to deduce from the testimony will justify the conclusion that the verdict of the jury to the effect that the injuries to deceased were accidentally received is not supported by the evidence. We think the testimony is conclusive that deceased had been burned or injured in one of the ways indicated by the physician. It must be inferred from the testimony that he received his injuries either between 6 and 10:30 P. M. April 10 or between 6:30 A. M. and 7:30 P. M. of the next day. A short time prior to the first date he was in good health. It is not rational to presume that he would intentionally cause the injuries inflicted, nor is there any testimony tending to prove that these injuries were inflicted by some third person. Giving the testimony and the inferences which might be drawn, the widest scope, the most that can be said is, that it is possible the injuries were not accidentally received; but it falls far short of establishing conclusively that they were intentionally inflicted by the deceased or some third person. On the contrary, under the rules which obtain in cases of this char-

acter it at least supports the presumption that the deceased was accidentally injured. In such circumstances it was, therefore, the province of the jury under the settled rules of evidence, from the testimony, the facts, and circumstances, to determine whether or not the injuries were accidental, when the testimony elicited on that subject was consistent with the theory of an accident."

In *Carnes v. Iowa State Traveling Men's Asso.* (1898) 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 688, however, where the policy insured against death by accidental means, and the insured died from the effects of opium, and there was no evidence as to whether he took more opium than he intended, or misjudged the effect, or that he intended to take it, it was held that the burden was on the plaintiff to show that death resulted from accidental means and that she had not sustained that burden. The court said: "Now, it is impossible to say, from the evidence, whether Carnes took more morphine tablets than he intended to take, or whether he took just what he did intend, and misjudged their effects. Death might have been occasioned in either way, and one is as likely as the other. Under such circumstances, can it be left to the jury to guess which? The burden of proof was upon the plaintiff to show that death resulted from an accidental cause, and, the evidence leaving this unestablished, she failed to make out a case. It is said, however, that death will be presumed to have resulted from accident, and that the burden of proof is upon the defendant to show the contrary. But an examination of the case does not sustain this contention. They go no further than to hold that, where the insured has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is on the insurer to establish as a defense that the insured was within some exceptions of the policy. . . . The plaintiff wholly failed to prove the cause to have been accidental, and this will not be presumed. It was nec-

essary to do this in order to bring the case within the terms of the policy."

In *Grosvenor v. Fidelity & C. Co.* (1918) 102 Neb. 629, 168 N. W. 596, where the plaintiff in an action on an accident policy alleged that the insured lost his life by accidental carbolic acid poisoning, and the defendant's answer contained a general denial and allegation that the insured took his own life by drinking a deadly poison, and the reply contained a denial and admission that the insured died by means of drinking a deadly poison, it was held that the burden was on the plaintiff to show that death was accidental, and that she must do so by evidence of the actual facts, or a situation from which accident is the reasonable inference, not a reasonable inference or possibility, and that the plaintiff having offered no evidence, a directed verdict in her favor was error. The court said: "Assuming that the burden is upon the plaintiff to prove death by accidental means, and that the mere fact of death raises a presumption or inference that the death was accidental, was the trial court right in its conclusion based upon the facts shown by the pleadings? Our opinion is to the contrary. Because men love life and fear death, they instinctively avoid obvious danger. This fact, drawn from experience, is the basis of a presumption, relied upon by plaintiff, that when the cause or manner of death is unknown we infer that it was not suicidal. The inference is not based upon a law of nature which is invariable. Men do frequently commit suicide. It is one of a multitude of legitimate inferences, in which we infer the unknown from the known, having greater or less degrees of probability, which we use in reasoning to arrive at the ultimate fact. Being a probability resting upon human experience, in its nature, it is controlling only in the absence of evidence of the actual. When, knowing only that one has died from drinking carbolic acid, you say you are in doubt as to cause, and then, bringing into service the presumption against suicidal intent, you finally conclude that the death

was accidental, are you not guilty of that error known in logic as *petitio principii*? Had you not, in reaching your first conclusion, given the theory of accident the benefit of the truth upon which the presumption is founded? Had you assumed as a fact that the deceased contemplated suicide or was indifferent to life, you might not have entertained the doubt. Let us suppose experience has shown that of all the persons who have died from drinking carbolic acid three out of four were cases of suicide; then, would it not be palpably absurd to infer in the given case that the death was not intentional? The rule invoked arises when we are ignorant of the intent, and loses its force as a presumption in presence of actual facts bearing upon intent. The presumption then comes in conflict with other presumptions or facts which may overcome it. There is the almost conclusive presumption that when one drinks he drinks voluntarily; the presumption that when one drinks he knows what he is drinking, especially so if he is drinking carbolic acid; the presumption that when one drinks carbolic acid he knows the poisonous character of the liquid; and the presumption that one intends the natural consequences of his own act. These presumptions bear upon the question of intent, and the force of the original presumption must be lessened by the force given to them. While it may well be argued that we are still uncertain as to the actual intent, the presumption against intentional death can no longer prevail as *prima facie* proof. The burden was and remained upon plaintiff to prove his case. *Clark v. Bankers Acci. Ins. Co.* (1914) 96 Neb. 381, 147 N. W. 1118. Without evidence being produced by the plaintiff to show that the death was not intentional, the jury would be left to mere conjecture for determining the actual facts. It will not do to say that as long as there is room for doubt as to the intent the defendant must offer evidence. Rather the contrary. The burden is upon the plaintiff to show that the death was accidental; or, in

other words, that it was not suicidal. This he must do by evidence of the actual facts or a situation from which

accident is *the* reasonable inference, not a reasonable inference or possible one." J. T. W.

W. H. DODGE

v.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY COMPANY,  
Plff. in Certiorari.

*Tennessee Supreme Court—October 29, 1919.*

(— Tenn. —, 215 S. W. 274.)

**Bailment — liability of railroad company maintaining parcel stand.**

1. A railroad company, which for compensation receives and checks parcels for safe-keeping, is liable for losses caused through negligence of its servants.

[See note on this question beginning on page 1234.]

— care required of bailee for hire.

2. A bailee for hire is required to use, in keeping and caring for the property intrusted to him, that care which a capable and reasonably prudent person engaged in the same business is accustomed to exercise.

[See 3 R. C. L. 96.]

— limitation of liability — necessity of notice.

3. One checking baggage at a parcel

stand is not bound by a stipulation limiting liability of the bailee, which is printed upon the check, unless his attention is called to it.

Notice — stipulation on check.

4. One checking a parcel at a parcel stand is not chargeable with notice of a stipulation printed upon the check given him, limiting the liability of the bailee.

CERTIORARI to the Court of Civil Appeals to review a decree affirming a decree of the Chancery Court for Hamilton County in favor of complainant in a suit to recover the value of a suit case and contents, checked by plaintiff at defendant's station, and alleged to have been lost through the negligence of its servant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Brown, Spurlock, & Brown for plaintiff in certiorari.

Messrs. James M. Trimble and F. L. Martin, for defendant in certiorari:

Defendant had no right to limit its liability.

Healy v. New York C. & H. R. R. Co. 153 App. Div. 516, 138 N. Y. Supp. 287, 210 N. Y. 646, 105 N. E. 1086; Maxwell Operating Co. v. Harper, 138 Tenn. 640, L.R.A.1918C, 672, 200 S. W. 515.

After a carrier's responsibility has become that of a warehouseman, it cannot rebut the presumption of negligence raised by proof of its failure to deliver the goods upon demand, by mere proof that they cannot be found, without any affirmative explanation for their disappearance.

Aaronson v. Pennsylvania R. Co. 23 Misc. 666, 52 N. Y. Supp. 95; Southern R. Co. v. Aldredge, 142 Ala. 368, 38 So. 805; Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; Fraam v. Grand Rapids & I. R. Co. 161 Mich. 556, 29 L.R.A.(N.S.) 884, 126 N. W. 851, 21 Ann. Cas. 96, 3 N. C. C. A. 211.

What may be reasonably carried as personal baggage is determined by the length of the journey, the station in life of the passenger, and, in short, covers everything not carried for merchandise or business.

Oakes v. Northern P. R. Co. 20 Or. 392, 12 L.R.A. 318, 23 Am. St. Rep. 126, 26 Pac. 230.

A contract releasing a carrier from liability "for loss or damage to bag-

gage" does not, in terms, release it from liability for negligence, and, being capable of a construction which will render it legal, will be so construed and held to exclude loss or damage so arising.

*Saunders v. Southern R. Co.* 62 C. A. 523, 128 Fed. 15; 3 Thomp. Neg. § 3417.

A contract limiting the extent of the carrier's liability by means of a stipulation as to the value of the property must be fair and reasonable.

*Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031.

A common carrier cannot, by contract, limit the extent of his liability for negligence.

*Southern Exp. Co. v. Owens*, 146 Ala. 412, 8 L.R.A. (N.S.) 369, 119 Am. St. Rep. 41, 41 So. 752, 9 Ann. Cas. 1143; *Blum v. Monahan*, 36 Misc. 179, 73 N. Y. Supp. 162; *Paul v. Pennsylvania R. Co.* 70 N. J. L. 442, 57 Atl. 139; *Gardner v. Southern R. Co.* 127 N. C. 293, 37 S. E. 828.

Where goods are lost the burden is on the carrier to show want of negligence, where liability is limited in amount by contract.

*Chicago G. W. R. Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34; *Blum v. Monahan*, 36 Misc. 179, 73 N. Y. Supp. 162.

Where the passenger produces his check, and proves the value of the goods and their nondelivery, he has made out at least a prima facie case.

*Zeigler v. Mobile & O. R. Co.* 87 Miss. 367, 39 So. 811.

A contract fixing the liability of a common carrier, as to amount, to an arbitrary sum of money not fixed with reference to the value of the property, is void.

*Ullman v. Chicago & N. W. R. Co.* 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41.

Time limitations and conditions stamped or printed upon the back or face of a general ticket are not binding upon a passenger unless his attention is called to them when or before he purchases the ticket, and he assents thereto.

*Louisville & N. R. Co. v. Turner*, 100 Tenn. 213, 43 L.R.A. 140, 47 S. W. 223.

A common carrier cannot lawfully stipulate for exemption from liability for the consequence of its own negligence. Such a contract is void because contrary to public policy.

*New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; *Inman v. South Carolina R. Co.* 129 U. S. 138, 32 L. ed. 615, 9 Sup. Ct. Rep. 249; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Coward v. East Tennessee, V. & G. R. Co.* 16 Lea, 225, 57 Am. Rep. 226; *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 397, 6 Am. St. Rep. 847, 6 S. W. 881; *Louisville & N. R. Co. v. Wynn*, 82 Tenn. 320, 14 S. W. 311; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 436, 7 L.R.A. 162, 12 S. W. 1018; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Bird v. Southern R. Co.* 99 Tenn. 719, 63 Am. St. Rep. 856, 42 S. W. 451.

*Hall, J.*, delivered the opinion of the court:

The bill in this cause was filed by the complainant against the defendant in the chancery court of Hamilton county to recover the sum of \$224.50, the alleged value of a suit case and its contents, which the complainant deposited with the defendant at its parcel or check room in its station at Chattanooga, Tennessee, and which suit case and contents were not returned to the complainant.

Upon the hearing of the cause the chancellor rendered a decree in favor of the complainant, and against the defendant, for the amount sued for and costs. From this decree the defendant appealed to the court of civil appeals, and assigned a single error.

By that assignment it was insisted that the chancellor erred in decreeing that complainant was entitled to recover the sum of \$224.50, because the uncontradicted proof showed that, upon depositing his suit case with the defendant at its check room, it issued to him a receipt which expressly limited defendant's liability, in the event of the loss of, or damage to, the property, to the sum of \$10, and it was insisted by defendant that because of this limitation, which was a part of the contract with complainant, it was not liable to him in an amount exceeding \$10.

This assignment of error was overruled by the court of civil ap-

peals, and the decree of the chancellor was affirmed. The cause is now before this court upon the defendant's petition for writ of certiorari, which has heretofore been granted, and the cause has been duly and carefully considered upon the errors assigned in said petition, and brief accompanying the same, to the action of the court of civil appeals in affirming the decree of the chancellor.

The facts presented by the record are uncontroverted and are substantially as follows: On March 6, 1917, complainant and his wife were passing through the city of Chattanooga en route from Florida to their home in Cincinnati. They were compelled to lie over in Chattanooga for a few hours, waiting for the train which was to carry them to their destination. Complainant carried a suit case, the contents of which consisted of both ladies' and gentlemen's wearing apparel, a watch and chain, and several other small articles of jewelry. The undisputed value of the suit case was \$6, and its contents \$218.50. The defendant maintained in its station or depot, for the convenience of the public and for profit to itself, a parcel or check room at which persons were invited to deposit their baggage for safe-keeping; the defendant making the small charge of 10 cents for each twenty-four hours that the baggage remained on deposit in said check room. Upon receiving baggage from a person desiring to deposit same in its check room, defendant issued to such person a numbered check and placed a duplicate or correspondingly numbered check upon the piece of baggage so deposited, and upon the subsequent demand of the owner of the baggage and the presentation of the numbered check, which he held, his baggage was identified and delivered to him.

Upon arriving at Chattanooga, complainant presented his suit case at the window of the defendant's check room to be checked, paid the fee of 10 cents, and a numbered check was issued to him by the

young lady in charge. A few hours after having left the suit case in the check room, the complainant returned, presented the numbered check which had been given him, and asked the young lady in charge for his suit case. Upon making an examination, the young lady, who, it is admitted, was the servant and agent of the defendant, discovered that she had previously surrendered the suit case to some other person for a check different in number from that held by the complainant, and different from the duplicate that was attached to the complainant's suit case. The number of complainant's check was 19,853. The evidence discloses that the young lady in charge of the check room surrendered the complainant's suit case to the holder of check number 19,658. On the face of the check issued to the complainant was printed the following in red letters: "Notice.—Not responsible for an amount to exceed \$10 on any article covered by this check."

As before stated, it was the contention of the defendant in the court of civil appeals, and it is the sole contention made here, that the above-quoted provision became a part of the contract between complainant and defendant, and was a valid limitation of the defendant's liability for the loss of said suit case to the amount therein stipulated. So the question to be determined by this court is whether said limitation is valid and binding upon the complainant. If it is, then the complainant is only entitled to recover for his suit case and contents the sum of \$10. Otherwise he is entitled to recover the full value of the property lost, which, the undisputed proof shows, was \$224.50.

It is insisted by the defendant that its liability, under the contract of deposit, was that of a bailee or warehouseman only, and that it had the right to restrict its liability for the property so deposited, in case of loss or damage, to the amount stipulated on the face of the check.

This insistence is grounded upon

the holding of the supreme court of South Carolina, reported in *Terry v. Southern R. Co.* 81 S. C. 279, 18 L.R.A. (N.S.) 295, 62 S. E. 249. It makes no question as to its liability for the stipulated \$10.

That case involved the liability of the railroad company for the value of a suit case and its contents, which had been received by its servant at its station room in Spartanburg for safe-keeping, for which it issued to the plaintiff a numbered check or receipt, upon which was printed the following:

The party accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of ten dollars (\$10) shall be made against the railroad company for loss of, or injury to, any package, valise, or other article which may have been deposited with it, and for which this ticket has been issued.

W. H. Tayloe,

General Passenger Agent.

The printing on the check also provided that a charge of 10 cents should be paid by the person depositing his baggage with the defendant, for each twenty-four hours or fraction thereof that it should remain with the defendant. The plaintiff's suit case was lost while in the possession of the defendant under said deposit contract, and was never recovered by the plaintiff. In an action by the plaintiff to recover the value of said suit case and its contents, the supreme court of South Carolina had the following to say: "There can be no doubt of defendant's liability. . . . It is equally clear the liability was limited to \$10 as stated in the receipt. We are not called on to decide whether a common carrier is bound to have a higher and lower freight rate, and express that a limitation of the amount of its liability for goods is in consideration of the lower rate, in order to make a contract for such limitation of liability valid. That point is not involved, for respondent's counsel well concedes the keeping of a room for the depos-

it of parcels is not a part of the business of a common carrier; and that the defendant, as to packages received therein, contracted as a warehouseman. As such warehouseman, in receiving the goods, it had a right to contract for the limitation of the amount of its liability in case of loss, and the receipt expressing such limitation was binding on the owner of the goods"—citing *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353; *Dunbar v. Port Royal & A. R. Co.* 36 S. C. 110, 31 Am. St. Rep. 860, 15 S. E. 357; *Hill v. Georgia, C. & N. R. Co.* 43 S. C. 462, 21 S. E. 337.

The facts of that case do not show that the plaintiff did not have notice, either express or implied, of the limitation printed on the check at the time his suit case was left with the defendant for safe-keeping, and is not, therefore, decisive of the question presented in the instant case.

We think the question of notice is a very important one, and is controlling of the question presented for determination.

The complainant testified that nothing was said to him by the young lady in charge of the defendant's check room concerning the limited liability clause printed on the check given him, and that his attention was not called to said stipulation. While he does not expressly say so, we think it is inferable from the complainant's testimony that he did not read or know of the statement printed on the check until after the loss was discovered.

A bailee for hire is required to exercise only "ordinary care" in keeping and caring for property deposited with him—that care which a Bailment—care required of bailee for hire. capable and reasonably prudent person engaged in the same business is accustomed to exercise. *Swift & Co. v. Memphis Cold Storage Warehouse Co.* 128 Tenn. 82, 158 S. W. 480; *Claypool v. Patrick*, 6 Tenn. C. C. A. 457.

That the loss of the complainant's

suit case and its contents was due to the negligence of the defendant's servant is conceded by its counsel.

In 6 C. J. 1112, the rule with respect to the right of the bailee to restrict or diminish his liability by special contract with the bailor is stated as follows: "The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses, if he gives the bailor notice that there are special terms, and the means of knowing what they are; and if the bailor chooses to make the bailment, he is bound by them, provided the contract is not in violation of law or of public policy, and that it stops short of protection in case of fraud or negligence of the bailee; and provided, further, that the terms of the contract are clear, such stipulations being to be strictly construed."

To the same effect is the rule stated in 3 R. C. L. 301, and cases there cited.

In the case of *Healy v. New York C. & H. R. Co.* 153 App. Div. 516, 138 N. Y. Supp. 287, and affirmed in 210 N. Y. 646, 105 N. E. 1086, it was held that one checking a hand bag in a parcel room in a railroad station, and receiving a check on the back of which, in fine print, was a provision that the depositor, in accepting said check, agreed not to hold the railroad company liable for more than \$10, to which his attention was not called, could recover the real value of the hand bag. The majority opinion in that case, upon the question of the plaintiff's right to recover, said: "The plaintiff having had no knowledge of the existence of the special contract limiting the liability of the defendant to an amount not exceeding \$10, and not being chargeable with such knowledge, the minds of the parties never met thereon, and the plaintiff cannot be deemed to have assented thereto, and is not bound thereby."

Judge Houghton, who wrote a separate opinion in the case, concurring in the result reached by the

7 A.L.R.—78.

majority, bases his conclusion of liability upon the ground that the numbered check received by the plaintiff from the railroad company was a mere token to enable him to identify his baggage when called for, and that in no sense did he have any reason to believe that it embodied a contract exempting the company from liability, or limiting the amount thereof. Upon this point his opinion states: "The business of checking hand baggage at railway stations has become a large and important one. It seems to me that anyone in the ordinary course of business, checking his baggage at such a place, would regard the check received as a mere token to enable him to identify his baggage when called for, and that in no sense would he have any reason to believe that it embodied a contract exempting the bailee from liability or limiting the amount thereof. If the plaintiff knew that the defendant had limited its liability to \$10, either by his attention being called to it, or otherwise, then, of course, the law would deem him to have assented to it, so that a binding contract would be effected. If he did not know it, I think the law imposed no duty upon him to read his check to find whether or not there was a contract printed thereon, or that he was guilty of neglect in not so reading it, for he had no reason to apprehend that a contract was printed thereon."

We think this statement of the law is sound and should control the case at bar. In the absence of notice to the complainant of the stipulation printed upon the check, restricting the liability of the defendant, we do not think that he should be bound thereby. It is hardly probable that, if the complainant had known that the defendant was limiting its liability for his suit case and contents to \$10, he would have deposited it with the defendant. The uncontradicted evidence is that the value of the suit case and contents were

—limitation of liability—  
necessity of notice.



more than twenty-two times the amount for which the defendant would be liable if the limitation is held binding. We do not think that

the complainant, by receiving the numbered check, was chargeable with notice of the printed stipulation thereon. We do not think that he was bound to regard it as a receipt containing a printed stipulation restricting the liability of the company, in the absence of his attention being called to such stipulation, but was warranted in regarding it as a mere check or token that would enable him and the agent of the defendant to identify his suit case upon his return and making demand therefor. We do not think that an ordinarily prudent man would have regarded it as more, and the complainant was not guilty of a breach of duty in failing to apprise himself of such limitation. It was not similar to the usual warehouseman's receipt, or the receipt of an express company or railway company, issued for goods received on deposit or for transportation containing various printed stipulations which the depositor or shipper, as the case may be, is supposed to read and acquaint himself with. It was simply a numbered check showing that the holder had deposited a parcel of some character with the defendant, which enabled the defend-

Notice—  
stipulation on  
check.

ant to identify the parcel by comparing the number on the check with the number of the duplicate attached to the parcel.

In receiving baggage for deposit at its check room the defendant held itself out as a bailee for hire, and said to the public: "I will receive your baggage for safe-keeping, giving you a numbered check, a duplicate of which will be attached to the baggage deposited that will enable identification and delivery upon your calling for same."

It was for safe-keeping that the complainant deposited his suit case with the defendant, for which he was given the check of identification by the young lady in charge. He had no reason to suspect that said check contained any statement restricting the liability of the company, in the absence of his attention being called thereto, and to hold the company liable for only \$10, when the proof shows that the suit case and contents were worth more than twenty-two times that much, and were lost through the admitted negligence of the defendant's servant, would be to encourage the defendant in its failure to exercise proper care in the performance of its duties as such bailee.

Bailment—  
liability of rail-  
road company  
maintaining  
parcel stand.

The judgment of the Court of Civil Appeals is affirmed, with costs.

## ANNOTATION.

### Carrier's liability in respect to baggage checked in parcel room.

- I. Introductory, 1234.
- II. Liability in absence of express limitation, 1234.
- III. Effect of clause or notice limiting liability, 1235.

#### I. Introductory.

The discussion in this note is confined to the liability of a carrier in respect to baggage checked in a parcel room or cloak room conducted on its premises for that purpose, and does not include the question of liability for baggage checked for the purposes

of transportation, either before or after arrival at its destination, in a baggage room. The question seems to be one of rare impression in America, despite the fact that the checking of parcels and baggage in a depot parcel room is an established custom in the large cities of the United States.

#### II. Liability in absence of express limitation.

There seems to be no dissent from the rule that, in the absence of a printed condition on the duplicate parcel

check limiting liability, a carrier accepting baggage checked in its parcel room, on payment of a nominal sum, becomes a bailee for hire, and as such is bound to exercise ordinary care in the keeping and safeguarding of the property confided to its care, and is liable for ordinary negligence resulting in damage to or the loss of the property. *Fraam v. Grand Rapids & I. R. Co.* (1910) 161 Mich. 556, 29 L.R.A.(N.S.) 834, 126 N. W. 851, 21 Ann. Cas. 76, 3 N. C. C. A. 211; *Stallard v. Great Western R. Co.* (1862) 2 Best & S. 419, 121 Eng. Reprint, 1129, 31 L. J. Q. B. N. S. 137, 8 Jur. N. S. 1076, 6 L. T. N. S. 217, 10 Week. Rep. 488; *Roche v. Cork, B. & P. R. Co.* (1889) Ir. L. R. 24 C. L. 250.

Thus, in *Fraam v. Grand Rapids & I. R. Co.* (Mich.) *supra*, it appeared that the plaintiff checked a case of goods in the defendant's parcel room, paying a small sum, and receiving as a receipt a parcel check. The case was lost while in the defendant's possession. It was held that the contract of bailment was one for the mutual benefit of the parties, and, therefore, that the defendant, as the bailee, was bound to exercise ordinary care with respect to the subject-matter of the bailment, and was liable for ordinary negligence, the question being for the jury. Among other things, the court said: "Railways commonly maintain parcel rooms at their depots in considerable cities, where passengers and others may, for a nominal charge, have their belongings cared for. This service is performed not only for the accommodation of the person using it, or the immediate profit arising therefrom, but may, and probably does, result in increased patronage of and profit to the road, because of the knowledge of the traveling public that such service is afforded. This service is not rendered by the railroad company in its capacity as a common carrier, for the articles are not checked for transportation, but for safe-keeping and redelivery at the place of deposit. In this phase of its activity, the company acts rather in the capacity of a warehouseman, who, for compensation, receives and stores the

goods of another. . . . Ordinary care means such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances, and whether it is exercised or not is a question of fact for the determination of the jury, under proper instructions."

In *Roche v. Cork, B. & P. R. Co.* (Ir.) *supra*, wherein it appeared that the plaintiff's bag, which had been checked in the defendants' parcel room, contained money which was stolen while the bag was in the bailee's possession, the court held that the loss of the property threw on the defendants the burden of proving that it was not lost through their negligence, and, no evidence to that effect having been given, the proper inference to be drawn was that the loss was the result of the defendants' negligence.

In *Stallard v. Great Western R. Co.* (1862) 2 Best & S. 419, 121 Eng. Reprint, 1129, 31 L. J. Q. B. N. S. 137, 8 Jur. N. S. 1076, 6 L. T. N. S. 217, 10 Week. Rep. 488, it was held that a railroad company was bound to deliver property checked in its parcel room within a reasonable time after demand was made therefor, and that what was a reasonable time was a question for the jury. In that case, it appearing that the plaintiff was delayed forty-eight minutes, causing him to miss his train, a verdict was returned holding the defendant liable.

### III. Effect of clause or notice limiting liability.

The majority of cases hold that, while a carrier who accepts baggage in its parcel room on payment of a fee is liable for ordinary negligence, the bailor or depositor is presumed to have knowledge of a condition or stipulation printed on the duplicate parcel check, limiting the carrier's liability to a sum stated thereon, and is bound by the provisions printed on the check. *Terry v. Southern R. Co.* (1908) 81 S. C. 279, 18 L.R.A.(N.S.) 295, 62 S. E. 249; *Van Toll v. South Eastern R. Co.* (1862) 12 C. B. N. S. 75, 142 Eng. Reprint, 1071, 8 Jur. N. S. 1213, 31 L. J. C. P. N. S. 241, 6 L. T. N. S. 244, 10 Week. Rep. 578; *Harris v. Great*

Western R. Co. (1876) L. R. 1 Q. B. Div. (Eng.) 515, 45 L. J. Q. B. N. S. 729, 34 L. T. N. S. 647, 25 Week. Rep. 63; Pratt v. South Eastern R. Co. [1897] 1 Q. B. (Eng.) 718, 66 L. J. Q. B. N. S. 418, 76 L. T. N. S. 465, 45 Week. Rep. 503; Lyons v. Caledonian R. Co. [1909] S. C. 1185, 46 Scot. L. R. 848; Pepper v. South Eastern R. Co. (1868) 17 L. T. N. S. (Eng.) 469; Skipwith v. Great Western R. Co. (1888) 59 L. T. N. S. (Eng.) 520; Henderson v. North Eastern R. Co. (1861) 9 Week. Rep. (Eng.) 519, 4 L. T. N. S. 216; Dorion v. Grand Trunk R. Co. (1917) Rap. Jud. Quebec 53, C. S. 106. Compare Parker v. South-eastern R. Co. (1877) L. R. 2 C. P. Div. (Eng.) 418, 46 L. J. C. P. N. S. 768, 36 L. T. N. S. 540, 25 Week. Rep. 564.

In Terry v. Southern R. Co. (1908) 81 S. C. 279, 18 L.R.A.(N.S.) 295, 62 S. E. 249, it appeared that the plaintiff checked a suit case at the defendant's parcel room, receiving a receipt therefor, containing the following stipulation: "The party accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of ten dollars (\$10) shall be made against the railroad company for loss of or injury to any package, valise, or other article which may have been deposited with it, and for which this ticket has been issued." The suit case having been lost while in the possession of the bailee, the court held that the defendant was clearly liable for its negligence, but that its liability was limited to \$10 as stated in the receipt, saying: "We are not called on to decide whether a common carrier is bound to have a higher and lower freight rate, and express that a limitation of the amount of its liability for goods is in consideration of the lower rate, in order to make a contract for such limitation of liability valid. That point is not involved, for respondent's counsel well concedes the keeping of a room for the deposit of parcels is not a part of the business of a common carrier; and that the defendant, as to packages received therein, contracted as a warehouse-

man. As such warehouseman, in receiving the goods, it had a right to contract for the limitation of the amount of its liability in case of loss, and the receipt expressing such limitation was binding on the owner of the goods." The question of knowledge or notice of the limitation on the part of the bailor was not discussed by the court in arriving at its decision.

In Dorion v. Grand Trunk R. Co. (1917) Rap. Jud. Quebec 53, C. S. 106, the court held that a contract entered into between a railroad company and a person who checked a trunk in its "bureau de colis," and received in return a receipt therefor on the payment of 10 cents, was not a contract to carry, but a contract of bailment in which the bailee was liable for the loss of the article, and it was incumbent on the bailor to prove its loss. The court held further that a limitation of liability printed on the check bound the bailor, where it appeared that he was accustomed to traveling over the defendant's railroad and checking his baggage in the "bureau de colis," it being presumed that he had knowledge of the conditions printed in the French and English languages on the receipt.

In Van Toll v. South Eastern R. Co. (1862) 12 C. B. N. S. 45, 142 Eng. Reprint, 1071, 8 Jur. N. S. 1218, 31 L. J. C. P. N. S. 241, 6 L. T. N. S. 244, 10 Week. Rep. 578, it appeared that a passenger deposited a bag containing certain valuable articles in the defendant's cloak room, maintained for that purpose at its depot, and, on payment of a small charge, received in return a receipt which contained thereon a stipulation printed in large type, to the effect that the company would not be responsible for articles of value in excess of £10. The court held, it appearing that the bag and its contents amounted to more than the sum specified, that the defendant was not liable for the loss, as the plaintiff bailor was bound by the terms printed on the check, she being presumed to know the provisions thereof. See to the same effect Henderson v. North Eastern R. Co. (1861) 9 Week. Rep. (Eng.) 519, 4 L. T. N. S. 216.

In Harris v. Great Western R. Co.

(1876) 45 L. J. Q. B. N. S. (Eng.) 729, L. R. 1 Q. B. Div. 515, 34 L. T. N. S. 647, 25 Week. Rep. 63, wherein it appeared that the plaintiff deposited her luggage in the defendant's cloak room and received a check which stipulated that it was issued and received subject to certain limitations of liability printed thereon, the court held that, although the plaintiff had not read the conditions printed on the receipt, it must be presumed that she deposited her luggage subject thereto, and that, not having complied therewith, she could not recover the value of her baggage.

In *Pratt v. South Eastern R. Co.* [1897] 1 Q. B. (Eng.) 718, 66 L. J. Q. B. N. S. 418, 76 L. T. N. S. 465, 45 Week. Rep. 503, the court held that a provision on a parcel check, to the effect that the company would not be responsible for an article above a certain designated value, meant that it would assume no liability for an article exceeding that value, and that the provision was a good defense to an action to recover damages for an injury to an article of greater value than that stipulated in the check. See to the same effect *Skipwith v. Great Western R. Co.* (1888) 59 L. T. N. S. (Eng.) 520, wherein the article deposited was lost by misdelivery to another person.

In *Lyons v. Caledonian R. Co.* [1909] S. C. 1185, 46 Scot. L. R. 848, it appeared that a hamper was deposited in the defendant's luggage room, and the depositor received, as a means of identification, a check which contained a provision to the effect that the defendant would not be liable for an amount in excess of a specified sum unless the value of the luggage was declared an additional fee paid. The court held that the plaintiff was bound by the conditions printed on the check, and, not having complied therewith, the defendant was not liable for the loss of the hamper.

In *Pepper v. South Eastern R. Co.* (1868) 17 L. T. N. S. (Eng.) 469, the court held that provisions limiting the liability of a railroad company to articles of a specified value checked in its parcel room were a good defense

to an action for damages occasioned by delay in delivering the article on demand, where it appeared that the delay was not caused by the wilful act or default of the company.

But in *Parker v. South Eastern R. Co.* (1877) 46 L. J. C. P. N. S. (Eng.) 768, L. R. 2 C. P. Div. 416, 36 L. T. N. S. 540, 25 Week. Rep. 564, it appeared that the plaintiff deposited luggage in the defendant's cloak room and in return received, on the payment of a small sum, a receipt containing certain printed limitations of the company's liability. It appeared further that the depositor did not read these conditions. The court held, relative to the question of the bailor being bound by the stipulations on the receipt, that the proper direction to leave to the jury in such a case was that, if the person receiving the ticket did not see or know that there was any writing on the ticket, he was not bound by the conditions; that if he knew there was a writing, and knew or believed that the writing contained conditions, then he was bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing on it was, in the opinion of the jury, reasonable notice that the writing contained conditions. Among other things, the court said: "Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them; I think they are entitled to assume that he can read, and that he understands the English language, and that he pays

such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company does is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability."

In at least one case, however, in addition to the reported case (*DODGE v. NASHVILLE, C. & ST. L. R. CO.* ante, 1229) it has been held that, in the absence of proof of express knowledge on the part of the bailor of the provisions of a clause or notice limiting liability, printed on the duplicate parcel check, the liability of the carrier is not affected by such clause or notice. Thus, in *Healy v. New York C. & H. R. R. Co.* (1912) 153 App. Div. 516, 138 N. Y. Supp. 287, affirmed in (1914) 210 N. Y. 646, 105 N. E. 1086, an action to recover the value of a handbag and contents, it appeared that the plaintiff checked the bag at a parcel room conducted by the defendant in one of its principal stations, and received in receipt thereof, and on payment of a nominal charge of 10 cents, a duplicate check, on which was printed, among other things, the following stipulation: "The depositor in accepting this duplicate coupon expressly agrees that the company shall not be liable to him or her for any loss or damage of any piece to

an amount exceeding \$10." This condition was in fine print with the exception of the last two words, and the plaintiff, on receiving the check, did not read it or otherwise receive notice of the provision, but placed the coupon in his pocket. Subsequently he returned and demanded his bag, but found that through the mistake of the person in charge of the parcel room the coupons had been mismatched and his bag had been delivered to another. The court held that the relation between the parties was that of bailor and bailee for a mutual benefit, and therefore that the defendant was obliged to exercise that degree of care in the safe-keeping of the goods intrusted to it that a reasonably careful man would exercise in regard to similar goods of his own, and that the condition printed on the receipt was illegal and void, as impairing this obligation imposed on the bailee. The court said: "I think that the decision of this appeal should be placed upon the broader ground that, under the circumstances disclosed by the record, the unreasonable condition printed upon the coupon attempting to limit the liability of the defendant to not exceeding \$10 was void. Had notice been given by the bailee to the bailor of the condition limiting the liability of the former, and the latter then seen fit to enter into the bailment, a different question would be presented. But in the case at bar no notice whatever was given to the bailor of the existence of this condition, neither was there anything connected with the transaction, which was for the mutual benefit of both parties, which would tend in any way to suggest to a reasonably prudent man, or lead him to suspect, the existence of such a special contract, or tend to put him on guard or on inquiry relative thereto."

W. J. K.

MAYOR AND COUNCIL OF HAGERSTOWN, Appt.,  
v.  
HAGERSTOWN RAILWAY COMPANY of Washington County,  
Maryland.

*Maryland Court of Appeals — March 31, 1914.*

(123 Md. 183, 91 Atl. 170.)

**Estoppel — municipal corporation — removal of electric plant from street.**

A municipal corporation which, under statutory authority, permits a street railway company, as assignee of rights granted an individual, to erect a plant to furnish light to it and its inhabitants and maintain the same for a number of years, is estopped to revoke the license and compel a removal of the poles from the street on the theory that its consent was invalid because the original grantee was not a corporation as required by statute, and the assignee did not secure municipal consent to operate the plant as required by statute after it secured charter authority to conduct such business.

[See note on this question beginning on page 1248.]

**APPEAL** by complainant from a decree of the Circuit Court for Washington County (Henderson, J.) dismissing a bill filed to enjoin defendant from erecting or replacing poles in the city streets and stringing wires thereon for the purpose of conducting an electric light and power business. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. S. S. Field, for appellant:

Defendant could not plant poles in the streets without the consent of the municipal authorities.

Northern C. R. Co. v. Baltimore, 21 Md. 93; Baltimore County Water & Electric Co. v. Baltimore County, 105 Md. 162, 66 Atl. 84.

Consent of the municipal authorities of Hagerstown could only be given by ordinance.

Levin v. Hewes, 118 Md. 624, 86 Atl. 233; Jacksonville v. Ledwith, 26 Fla. 196, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885; 1 McQuillin, Mun. Corp. § 173; Purnell v. McLane, 98 Md. 592, 56 Atl. 830; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 385, 20 L.R.A. 126, 26 Atl. 510; Lake Shore & M. S. R. Co. v. Ohio, 178 U. S. 294, 43 L. ed. 705, 19 Sup. Ct. Rep. 465; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Mealey v. Hagerstown, 92 Md. 750, 48 Atl. 746.

The city is not estopped from setting up that its agent who attempted to act had no power to act because the appellee may have spent money on the faith of the unauthorized act.

Mealey v. Hagerstown, 92 Md. 753, 48 Atl. 746; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874.

Mr. Alexander R. Hagner also for appellant.

Messrs. Carey, Piper, & Hall, for appellee:

The Powell Evans ordinance of May 10, 1895, created a valid franchise by which the said Evans and his assigns (Hagerstown Railway Company) acquired the perpetual right to use the streets, etc., of Hagerstown for the purpose of furnishing electric light and power to its citizens.

Northern C. R. Co. v. Baltimore, 21 Md. 93; Sinclair v. Baltimore, 59 Md. 592; Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 153, reversed in 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 67, 69, 74, 57 L. ed. 1389, 1894, 1895, 1897, 33 Sup. Ct. Rep. 988; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Morristown v. East Tennessee Teleph. Co. 53 C. C. A. 182, 115 Fed. 304; Elliott, Roads & Streets, 3d ed. § 505; Baltimore v. Scharf, 54 Md.

499; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 567, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653; *East Tennessee Teleph. Co. v. Frankfort*, 190 Fed. 346; *Chesapeake & P. Teleph. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

Entirely apart from the Powell Evans franchise the railway company has a perpetual right and franchise to use the streets of Hagerstown for an electric light and power business.

Joyce, *Electric Law*, § 355a; *Barhite v. Home Teleph. Co.* 50 App. Div. 25, 63 N. Y. Supp. 659; *Michigan Teleph. Co. v. Benton Harbor*, 121 Mich. 512, 47 L.R.A. 104, 80 N. W. 387; *Consolidated Gas Co. v. Baltimore County*, 98 Md. 689, 57 Atl. 29; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 153; *Hooper v. Creager*, 84 Md. 195, 35 L.R.A. 202, 35 Atl. 967, 1103, 36 Atl. 359; *Whitman v. State*, 80 Md. 410, 31 Atl. 325; *Keasbey, Electric Wires*, 2d ed. § 50; *Anne Arundel County v. United R. & Electric Co.* 109 Md. 377, 72 Atl. 542.

Equity and good conscience will not permit the city, after acquiescence in the railway company's use of its streets for a period of fifteen years, at this late date, to question its right to use the same.

*People ex rel. Beardsley v. Rock Island*, 215 Ill. 438, 106 Am. St. Rep. 179, 74 N. E. 437; *Dakota Cent. Teleph. Co. v. Huron*, 165 Fed. 226; *Missouri River Teleph. Co. v. Mitchell*, 22 S. D. 191, 116 N. W. 67; *People ex rel. New York & R. Gas. Co. v. Cromwell*, 89 App. Div. 291, 85 N. Y. Supp. 877; *Louisville v. Cumberland Teleph. & Teleg. Co.* 224 U. S. 649, 662, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 62, 27 L.R.A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106; *Bradford v. New York & P. Teleph. & Teleg. Co.* 206 Pa. 582, 58 Atl. 41; *Pembroke v. Canada C. R. Co.* 3 Ont. Rep. 503; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Raynolds v. Cleveland*, 28 Ohio C. C. 463, affirmed in 76 Ohio St. 619, 81 N. E. 1182; *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 83 Pac. 1072; *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; *Sanitary Dist. v. Metropolitan West Side Elev. R. Co.* 241 Ill. 622, 89

N. E. 800; *London Mills v. White*, 208 Ill. 239, 70 N. E. 313; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; *Jordan v. Washington & C. R. Co.* 25 Pa. Super. Ct. 564.

Thomas, J., delivered the opinion of the court:

The appeal in this case is from a decree of the circuit court for Washington county dismissing the bill of complaint of the mayor and council of Hagerstown to enjoin the Hagerstown Railway Company of Washington county, Maryland, from erecting or replacing poles in the streets, etc., of Hagerstown and stringing wires thereon for the purpose of supplying light and power to the citizens of that city, and from furnishing electric light and power therein. The case was heard upon bill, answer, and evidence, and while there is very little, if any, dispute as to the material facts, a statement of them is necessary for a clear and accurate presentation of the propositions involved.

The charter of Hagerstown (§§ 171 and 182 of article 22 of the Code of Public Local Laws of 1888) provided that the mayor and council should have power to pass all ordinances necessary for the good government of the town; to prevent, remove, and abate all nuisances or obstructions in or upon the streets, alleys, etc.; "to make and establish grades upon the streets and highways of the town;" to cause the sidewalks along the streets to be graded and paved and "curbs to be set and gutters laid;" to grant licenses to hawkers and peddlers, and regulate the sale of wares and merchandise on the streets; to regulate and tax carriages and other vehicles used in the town; and to provide for laying out, opening, closing, etc., any street, etc., in the town. Section 183 provides for the appointment of street commissioners, who are required to elect one of their number as president, to keep a full and accurate record of all

their proceedings, and to report every three months to the mayor and council an itemized account of all money expended by them. The clerk of the mayor and council is required to serve as "clerk of the board of street commissioners" who have charge of the repairs and improvements of the streets, alleys, etc., and, by § 191 and the Act of 1892, chap. 65, are given control of the lighting of the town, with power to provide the material, employ the necessary labor, and make all needed provisions therefor, and the further power "to contract with any person, corporation, or association for such lighting," provided that the cost of lighting under any contract does not exceed \$5,000 per year, and the contract is not made for a longer period than ten years.

In 1898, the board of street commissioners entered into a contract with the Schuyler Electric Company for the lighting of the streets of the city. On the 10th of May, 1895, the mayor and council passed an ordinance authorizing Powell Evans, his heirs and assigns, "for the purpose of supplying electric current for all purposes, to erect and maintain poles on all streets, alleys, and city properties within the city limits of Hagerstown, and to string and maintain electrical conductors and other wires, and to place and maintain all necessary apparatus on said poles for said purposes; . . . to make connections with all buildings in the city limits, and erect and maintain in the city limits power plants for providing for the distribution of electric current; to connect with any system or systems outside of the city limits for supplying electric current, and to sell, lease, or rent electric current and apparatus for making use of the same; "provided that electric current for motive power for machinery be supplied in the city of Hagerstown as a necessary condition of the use of the powers conferred in this ordinance." Section 2 of the ordinance provided that the location of the poles should be

approved by a committee consisting of the mayor and two members of the city council, to be selected by the mayor, who were authorized to order the location of the poles to be changed. Section 8 required Evans, his heirs and assigns, to enter into a bond to remove the poles if they were not used "in one year after erection for supplying electric current," etc. By § 4 the mayor and city council reserved the right to string on said poles the wires connected with the fire alarm system of the city, and provided that the franchise granted by said ordinance was to be accepted upon that condition, and § 6 authorized Evans, his heirs and assigns, to purchase, etc., any system for supplying electric current then "constructed in the city limits," and authorizing the corporation owning any such system to sell the same to Evans, his heirs or assigns.

Powell Evans entered into a contract with the Schuyler Electric Company for the purchase of its plant, contracts, etc., and on the 11th day of November, 1895, the board of street commissioners passed an order in which, after referring to the contract made with the Schuyler company, and reciting that said company had contracted to sell its plant, franchises, contracts, etc., to Evans, it was ordered that the following contract "take the place" of the contract which the board had entered into with the Schuyler Company. The contract referred to in the order was executed on the 11th of November, 1895, by Evans and the street commissioners. It provided that Evans should "have the contract for lighting the streets . . . with the Schuyler or any other equally as good system" for the term of five years, beginning on or before January 1, 1896, as set out in said order, provided Evans, in the meantime, purchased, by deed duly recorded, the "present electric plant complete in this city," and "has given" a bond to the commissioners, in the penalty of \$5,000, to secure the faithful performance of his con-



tract. After specifying the kind of lights to be furnished, the amount to be paid by the city for each light, that the lights were to be located and maintained on good wooden poles, etc., satisfactory to the commissioners, at the points on the streets where they were then located, unless otherwise ordered by the commissioners, and that the commissioners should designate the places at which new lights were to be located, the contract further provided that Evans should also furnish and maintain in the city "an incandescent lighting system," satisfactory to the street commissioners, "of not less than 1,200 lights, for commercial and private purposes," and furnish lights to consumers in the city on terms not to exceed the rates therein stated, and that Evans should have the right to sell "his property and rights in Hagerstown," including his rights under that contract, and to have his bond released, provided his assignee gave a bond in the penalty of \$5,000 for the faithful performance of said contract.

The appellee, the Hagerstown Railway Company, was incorporated under the General Incorporation Law in 1896 for the purpose of constructing and operating a passenger railway in Hagerstown and Washington county. Its charter was amended by the Act of 1896, chap. 419, which authorized the company to issue bonds and to acquire by purchase or condemnation land necessary for the construction of its railway. Section 111 of article 28 of the Code of 1888 was amended by the Act of 1894, chap. 308 (Code 1904, art. 23, § 143), so as to provide that any electric light company formed under that article should have the power to manufacture, furnish, and sell electric light and power in any city or town of Kent, Somerset, Carroll, Montgomery, or Washington counties for lighting the streets, roads, public or private buildings, or for motive power or other purposes, and authority to build its lines along and upon the

streets, roads, etc., subject to such ordinances as might be passed by any city or town for filling up or restoring such streets or roads to their normal condition, provided that "in the construction, maintenance, removal and repair of all such lines and appliances in Washington county, the same shall be done under such regulations as the mayor and city council of Hagerstown, or the county commissioners of said county, having jurisdiction, shall prescribe." On the 28th of February, 1898, the certificate of incorporation of the appellee was amended under the provisions of the General Incorporation Law, and the new certificate declared that the corporation was formed for the purpose of constructing and operating a railway, etc., and also "for the purpose of manufacturing, generating, selling, and furnishing electricity for lighting, heating, power, and other purposes, and to buy, purchase, construct, build, equip, and operate such plants, works, and machinery as may be necessary for such purposes." The railway company then acquired by assignment the electric plant, contracts, and franchises of Powell Evans in Hagerstown, and on the 1st day of March, 1898, executed its bond to the mayor and council of Hagerstown, in the penalty of \$5,000, for the faithful performance by it of the contract between Evans and the board of street commissioners. On the 29th of March, 1898, the board of street commissioners passed the following resolution: "Whereas, Powell Evans has sold to the Hagerstown Railway Company of Washington county, Maryland, the electric light plant in Hagerstown and has requested the board of street commissioners to accept the bond of the said railway company in the penalty of \$5,000 in lieu of a bond filed by him, the said Powell Evans. Now, therefore, be it resolved, that the board of street commissioners of Hagerstown, Maryland, do hereby accept the bond of the Hagerstown Railway Company of Washington

county, Maryland, principal, and the Fidelity & Deposit Company of Baltimore, Maryland, as surety, in the penalty of \$5,000 in lieu of the bond heretofore accepted by the said board of street commissioners from Powell Evans and now on file in the office of the mayor and council of Hagerstown, and that the contractual obligations now existing by and between Powell Evans and the board of street commissioners are hereby accepted by the board of street commissioners, to be performed and carried out by and on the part of the Hagerstown Railway Company of Washington county, Maryland, in lieu of the said Powell Evans, and as referred to in the bond filed by the Hagerstown Railway Company of Washington county, Maryland, and being a part thereof."

By the Act of 1898, chap. 479, approved April 9th, entitled "An Act to Amend the Charter and to Extend the Powers of the Hagerstown Railway Company of Washington County, Maryland, so as to Confer upon Said Company," powers, "in addition to the powers heretofore granted," the charter of the appellee was again amended, and it was provided "that the said company shall have the right to carry over its railway or any of its connections, for hire, express matter, and merchandise, and shall also have power to manufacture, furnish, and sell to persons or corporations electric light, electric heat and power, and to contract for, and to furnish, electric light for lighting streets, roads, private or public buildings in said county, and to furnish electricity for motive power and other purposes, to any and all persons and corporations; . . . and by and with the consent of the municipal authorities or town officers, in any city or town in said county, to lay, purchase, construct, and build lines, conductors, and conduits under, along, upon, or over the streets or alleys in any town in said county, . . . and to connect said lines, conductors, and conduits with any

manufactory or private buildings, lamps, or other structures, objects, cars, or conveyances in Washington county."

After the assignment by Powell Evans to the railway company of his plant, contracts, etc., the railway company operated that plant, lighting the streets and furnishing light and power to the citizens of Hagerstown, in accordance with the provisions of the ordinance and contract, until the fall of 1898, when it built a new and very much larger plant for that purpose. After the erection of the new plant the appellee continued to furnish electricity for lighting the streets of the city until the expiration of the contract referred to, and ever since it purchased the Evans plant it has been engaged in furnishing light and power to private consumers in the city and suburbs of Hagerstown. During that time, in addition to the establishment of the new plant, new poles have been erected, lines have been extended, and new contracts have been obtained for furnishing light and power to individuals and corporations. The poles erected or maintained by the railway company for supplying light and power were from time to time changed, replaced, and painted in accordance with resolutions passed by, and an agreement with, the mayor and council, and have been used by the city in connection with its fire alarm system.

By the Act of 1898, chap. 381, the mayor and council of Hagerstown were authorized "to issue bonds to raise a sum of money to erect a plant for the purpose of supplying the town with electric light and power, or either, in the discretion of the mayor and council," and by the Act of 1900, chap. 75, provision was made for the establishment by the city, with the approval of a majority of the voters of the city, of an electric light plant of sufficient capacity to light the streets and to supply the citizens with light. The plant was completed in 1902, and since then the mayor and council

have been furnishing light to private consumers in the city. In 1910 and 1913, the mayor and council notified the railway company to cease furnishing light and power to the citizens of Hagerstown, and to remove all poles used by it for that purpose from the streets and alleys of the city, and upon the failure of the railway company to comply with said notices the mayor and council on the 17th of January, 1913, filed a bill of complaint in this case for an injunction as we have stated.

The contentions of the appellant are: (1) That the mayor and council had no power to pass the Powell Evans ordinance, and that the ordinance is void; (2) that the Act of 1894, chap. 308, did not confer upon the mayor and council of Hagerstown any power to grant a franchise for furnishing electric light and power in the city, did not give any right to Powell Evans because he was not an "electric light company," and did not confer any power upon the railway company because at the time that act was passed the railway company was not an "electric light company formed under" that article; (3) that after the railway company became, by an amendment of its certificate of incorporation, an electric light company, it did not apply to the mayor and council for an ordinance prescribing the regulations under which it could exercise the rights granted by the Act of 1894; (4) that after the passage of the Act of 1898, chap. 479, the railway company could no longer exercise the right to furnish electric light and power in the city without the consent of the mayor and council, which could only be given by an ordinance regularly passed for that purpose; and (5) that the use of the streets by the railway company for the purposes stated is a trespass and a nuisance.

Even if we assume, without so deciding, that the Powell Evans ordinance is void as a grant of a franchise to use the streets for the purpose of furnishing electric light and

power to private consumers, that the appellee, after the amendment of its certificate of incorporation, failed to avail itself of the powers granted to electric light companies by the Act of 1894, and that after the amendment of its charter by the Act of 1898 the rights and powers thereby granted could only be exercised "with the consent of the municipal authorities or town officers" of Hagerstown, the question remains whether the consent referred to in that act must, under the circumstances disclosed by the record, be evidenced by an ordinance of the mayor and council.

It is not necessary to determine in this case whether an electric light company, with such authority as was granted the appellee by the Act of 1898, must secure from the mayor and council of Hagerstown an ordinance consenting to the exercise of its powers before attempting to do so, and the only question we need determine is whether, under all the circumstances, the city is estopped from denying that its consent was obtained by the appellee.

Learned counsel for the appellant insist that the erection and maintenance of the poles of the appellee in the streets of the city amount to a trespass and a nuisance which cannot ripen into a franchise, and they cite cases to the effect that an encroachment upon a highway cannot grow by prescription into a private right, that franchises must be obtained by legislative grants, and that a municipal corporation cannot be estopped from asserting that it had no power to grant the particular franchise. *Baldwin v. Trimble*, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176; *Burnell v. McLane*, 98 Md. 594, 56 Atl. 830; *Baltimore County Water & Electric Co. v. Baltimore County*, 105 Md. 159, 66 Atl. 34; *Mealey v. Hagerstown*, 92 Md. 753, 48 Atl. 746.

In the case of *Mealey v. Hagerstown*, supra, the court said: "A municipal corporation may set up a plea of ultra vires or its own want of power under its charter or con-

stituent statute, to enter into a given contract or to do a given act in excess of its corporate powers and authority," and held that it could not be estopped from doing so because the other party to the contract expended money "on the faith of the agreement." The rule there stated has not been questioned and may be regarded as settled in this state. Here, however, there is no question as to the *power* and *authority* of the mayor and council of Hagerstown under the Act of 1898, chap. 479, to consent to the exercise by the railway company of the rights therein granted, and the application of the doctrine of equitable estoppel to the facts of this case does not operate to confer upon the mayor and council powers not vested in the municipality by its charter or the statute, or to exact from it rights and privileges it had no power to grant. The Act of 1898 expressly authorized the railway company to erect its poles and furnish light and power in the city with the consent of the "municipal authorities," and the authority of the mayor and council to give that consent cannot be, and is not, disputed.

The distinction between a case in which the municipality has the power to grant the franchise in question, and a case in which it has no such authority, is well recognized. It is said in 4 McQuillin, Mun. Corp. § 1687, "that a municipality cannot be estopped to question the use of its streets without a franchise, or the validity of a franchise, where it has no *power* to grant such a franchise. . . . On the other hand, if a municipality has the power to grant a franchise, and a public service company uses the streets with the knowledge of the municipality, the latter may be estopped to question the right to use the streets without a franchise, or the validity of the franchise granted where it does not violate statutory or charter requirements. For instance, a municipality, which has acquiesced for years in the use of its streets by a public service company, which has spent thousands of dol-

lars in connection with such use, and which has received the benefits of such use of the streets and has regulated the use and levied licenses and granted permission as to certain uses, cannot contest the right of the company to use the streets. Likewise acquiescence by a municipality in the use of streets by a railroad company, pursuant to a grant of such right by the legislature, precludes the municipality from objecting thereto."

In 3 Dillon, Mun. Corp. 5th ed. § 1242, Judge Dillon says: "And if the municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the *municipality will*, in a proper case, *be estopped by the acts and conduct of its officers* and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far, at least, as concerns its own failure to pass an ordinance or take steps necessary to effectuate the grant."

The same principle has been repeatedly recognized and applied by this court. Baldwin v. Trimble, supra; Arey v. Baer, 112 Md. 541, 76 Atl. 843; Cushwa v. Williamsport, 117 Md. 306, 83 Atl. 889; Whittington v. Crisfield, 121 Md. 387, 88 Atl. 282. In Baldwin's Case, Chief Judge McSherry, after stating that an encroachment upon a highway can never grow by prescription into a private right, said that that rule was in perfect harmony with the doctrine that an equitable estoppel may be asserted even against the public in favor of individuals, where justice requires it, and quoted the statement of Judge Dillon (2 Dill. Mun. Corp. 2d ed. § 433) that "there is no danger in recognizing the principle of an estoppel in pais as applicable to such cases, as this

leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

In *Arey's Case*, Judge Burke said: "The statute has long since become a complete bar to the assertion by anyone against the appellees of rights in the alley, and, if it be conceded that it were a public alley, under the circumstances of the case an equitable estoppel would be created against the public to assert a right to the use of the highway."

In *Cushwa's Case*, Chief Judge Boyd refers with approval to the statement of the court in *Baldwin's Case*, and in *Whittington's Case* the court adopts Judge Dillon's statement of the principle in the 4th edition of his work (§ 675). It is true that in *Baldwin's Case* there was evidence of an abandonment of the highway, but the principle announced is not founded upon an abandonment of a street or highway, and may be applied whenever, under all the circumstances, justice requires it. Nor does the doctrine conflict with the rule stated in *Purnell v. McLane*, 98 Md. 594, 56 Atl. 830, and *Baltimore County Water & Electric Co. v. Baltimore Co.* 105 Md. 159, 66 Atl. 34, that the assertion of the existence of a franchise must be supported by a grant from the municipality or legislature. It rests upon the principle that the municipality may, in obedience to the demands of justice, be estopped by its own conduct, or the conduct of its officers, from denying the existence or validity of such a grant.

Numerous cases from other jurisdictions support the rule, and many of them are cited in the briefs of counsel for the appellee; but the principle is so clearly approved in this state that only a few of them are referred to here. In the case of *People ex rel. Beardsley v. Rock Island*, 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437, the supreme court of Illinois said: "It has frequently been decided that the doctrine of estoppel in pais is applicable to mu-

nicipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party, acting in good faith under affirmative acts of a city, has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine."

In the case of *Louisville v. Cumberland Teleph. & Teleg. Co.* 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, the court, speaking through Mr. Justice Lamar, said: "The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the Consolidation Statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland company, at an expense of more than a million dollars, erected many new poles, laid additional conduits, and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (*Boone County v. Burlington & M. R. Co.* 189 U. S. 684, 693, 35 L. ed. 319, 322, 11 Sup. Ct. Rep. 687) from claiming that the ordinance was inoperative, and it also prevented the council from denying that the Cumberland company had succeeded to every right and obligation of the Ohio Valley Company."

In *Bradford v. New York & P. Teleph. & Teleg. Co.* 206 Pa. 582, 56 Atl. 41, the case is stated in the syl-

labus as follows: "A city filed a bill to compel a telegraph and telephone company to remove its poles and wires from the streets which it had occupied for more than twenty-one years without objection, after an expenditure of about \$100,000. Many resolutions of the city council had given permission for the erection and use of the poles and cross-arms on the streets. In consideration of the privileges, the city had obtained a right to the use of the poles for the carrying of the fire-alarm system, and had also levied licenses and pole taxes, and had used telephones furnished by the company down to the date of the hearing, and had regulated by ordinance the manner in which the poles should be erected under the direction of the street committee of council or the city engineer."

There the supreme court of Pennsylvania, in dismissing the bill, said: "In the present case, the acquiescence and the laches of the appellant are clearly in the way of any equitable relief to it."

In the case at bar the mayor and council passed the ordinance authorizing Powell Evans and *his assigns* to erect and maintain poles in the streets of the city for the purpose of "supplying electric current for all purposes," and providing that the city should have the right to string the wires of its fire-alarm system on the poles. The board of street commissioners entered into the contract with Evans for the lighting of the streets; requiring him to establish an "incandescent lighting system," and to furnish light to the citizens of Hagerstown at the rates therein mentioned, and authorizing him to assign said contract upon the conditions therein stated. The railway company, with the knowledge of the mayor and council and the street commissioners, became the assignee of the Evans Plant and his contract with the city, executed its bond to the mayor and council, as required by the contract, and, in order to provide for the existing and future needs of the city, erected a new and very much larger plant for

the purposes stated in said agreement and ordinance. The appellee extended its lines, entered into new contracts for furnishing light and power to private consumers in the city and suburbs, and erected new poles with the knowledge of the mayor, and council and street commissioners. The poles were replaced, changed, and painted when and as directed by the mayor and council, and the city has used the poles in maintaining its fire-alarm system. After the appellee has used the streets of the city, under the circumstances and for the purposes stated, for more than fourteen years, it would be most inequitable to permit the city to assert that it did not give its consent to such use of the streets. To compel the appellee to remove its poles and to abandon the business which it has established at much cost, and which the city encouraged and regulated, would impose a great hardship upon the appellee. Such demands cannot appeal to a court of equity, and upon no principle of right and justice can the relief prayed in this case be granted.

While the Act of 1900, chap. 75, provided that, after the erection of the plant therein mentioned, there should be "no lighting," at the expense of the city, of the streets and alleys of the city, "except" by the plant "owned and maintained by the mayor and council," there is nothing in that act or the Act of 1898, chap. 381, to indicate any intention of the legislature to give the city the exclusive right to furnish electric light and power to private consumers in the city, or to abridge the right of the appellee to do so.

For the reasons stated, we must hold that the appellant is estopped from asserting that it did not give the consent referred to in the Act of 1898, chap. 479, and the decree of the court below, dismissing its bill, must therefore be affirmed.

Decree affirmed, with costs to the appellee.

Estoppel—  
municipal  
corporation  
—removal of  
electric plant  
from street.

## ANNOTATION.

**Estoppel of municipality to deny that it gave its consent to street franchise.****I. In general:**

- a. Scope, 1248.
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**I. In general.****a. Scope.**

The annotation does not include cases dealing with the question whether the state may be estopped to oust a corporation of its rights and franchises. See, for example, *State ex rel. Caldwell v. Lincoln Street R. Co.* (1907) 80 Neb. 333, 14 L.R.A. (N.S.) 336, 114 N. W. 422, 118 N. W. 326. Nor does it include, in general, cases decided on other grounds than that of estoppel, as laches, limitation of actions, presumption of consent, or ratification, unless it is clear that the court meant to apply the principles of estoppel and merely used another name. As an example of possibly other cases not included, but closely related to those in the annotation, see *People ex rel. New York & R. Gas Co. v. Cromwell* (1903) 89 App. Div. 291, 85 N. Y. Supp. 878, holding that where a gas company occupied the streets for distribution of gas for nearly fifty years, consent would be presumed under a statute authorizing it to do so with the consent of the municipal authorities.

The annotation does not include cases generally dealing with the question of estoppel of a city by a contract not granting a franchise. See, as an illustration of such cases, *Des Moines*

*v. Welsbach Street Lighting Co.* (1911) 110 C. C. A. 540, 188 Fed. 906, holding that a city was estopped to assert the invalidity of a contract for street lighting on the ground of irregularities in its inception, as the failure to advertise for bids. The court stated that the contract in question clearly was not the grant of a franchise.

**b. Where franchise is not ultra vires.**

It is well settled that while, generally speaking, a municipal corporation cannot be estopped to assert its governmental power as to acts within its governmental capacity, it may be estopped in the exercise of its contractual powers; and a distinction is recognized between acts of the municipality or governing body which are not within the scope of its general power, and such as may be open to the objection that they are lacking in some technical and formal regularity in their adoption, or that there has been a nonobservance of some collateral act or formality prescribed, not jurisdictional in character; while the former are clearly and always void, the latter, if they lead to a perpetration of a fraud upon contracting parties acting upon the faith of laws and ordinances apparently regular and valid, will be binding on the municipality, and it must be estopped to deny their validity (10 R. C. L. § 34).

Applying these principles to cases involving the grant by a municipality of a street franchise, it is well settled that a municipality may be estopped, as to matters within its power, to deny that it gave its consent to a street franchise claimed by a public service corporation occupying its streets or public grounds:

*United States.—City R. Co. v. Citizens' Street R. Co.* (1896) 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Louisville v. Cumberland Teleph. & Teleg. Co.* (1911) 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; *Den-*

ver v. Mercantile Trust Co. (1912) 120 C. C. A. 100, 201 Fed. 790.

Georgia.—Atlanta v. Gate City Gas-light Co. (1888) 71 Ga. 106.

Illinois.—Chicago, R. I. & P. R. Co. v. Joliet (1875) 79 Ill. 25; Chicago & N. W. R. Co. v. People (1878) 91 Ill. 251; Chicago v. Union Stock Yards & Transit Co. (1896) 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430; People ex rel. Rinne v. Blocki (1908) 203 Ill. 363, 67 N. E. 807; London Mills v. White (1904) 208 Ill. 289, 70 N. E. 813; People ex rel. Beardsley v. Rock Island (1905) 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437; People ex rel. Fitz Henry v. Union Gas & E. Co. (1913) 260 Ill. 392, 103 N. E. 245; and see Sanitary Dist. v. Metropolitan West Side Elev. R. Co. (1909) 241 Ill. 622, 89 N. E. 800 (use of land of city by elevated railroad for bridge abutment); also Winnetka v. Chicago & M. Electric R. Co. (1903) 204 Ill. 297, 68 N. E. 407 (where city sought to reduce the width of street occupied by street railway viaduct).

Iowa.—Marion Water Co. v. Marion (1903) 121 Iowa, 306, 96 N. W. 883.

Indiana.—New Castle v. Lake Erie & W. R. Co. (1900) 155 Ind. 18, 57 N. E. 516.

Louisiana.—New Orleans, S. F. & L. R. Co. v. New Orleans (1902) 109 La. 194, 33 So. 192.

Maryland.—HAGERSTOWN v. HAGERSTOWN R. Co. (reported herewith), ante, 1239.

Missouri.—Union Depot Co. v. St. Louis (1882) 76 Mo. 393.

New Jersey.—North Jersey Street R. Co. v. Street & Water Comrs. (1907) 73 N. J. Eq. 106, 67 Atl. 691.

New York.—Wakefield v. Theresa (1908) 125 App. Div. 38, 109 N. Y. Supp. 414; and see People ex rel. New York & R. Gas Co. v. Cromwell (1903) 89 App. Div. 291, 85 N. Y. Supp. 878.

Ohio. — Raynolds v. Cleveland (1906) 28 Ohio C. C. 468, affirmed in (1907) 76 Ohio St. 619, 81 N. E. 1182.

Pennsylvania.—Jordan v. Washington & C. R. Co. (1904) 25 Pa. Super. Ct. 564; and see Bradford v. New York & P. Teleph. & Teleg. Co. (1903) 206 Pa. 532, 56 Atl. 41 (laches); also Pennsylvania R. Co. v. Montgomery 7 A.L.R.—79.

County Pass. R. Co. (1895) 167 Pa. 62, 27 L.R.A. 766, 46 Am. St. Rep. 677, 31 Atl. 468 (obiter).

South Dakota. — Missouri River Teleph. Co. v. Mitchell (1908) 22 S. D. 191, 116 N. W. 67.

Washington.—Spokane Street R. Co. v. Spokane Falls (1893) 6 Wash. 521, 33 Pac. 1072; and see Seattle v. Columbia & P. S. R. Co. (1893) 6 Wash. 879, 33 Pac. 1048; also State ex rel. Grinsfelder v. Spokane Street R. Co. (1898) 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719 (recognizing doctrine).

Canada.—Pembroke v. Canada C. R. Co. (1883) 3 Ont. Rep. 503; Winnipeg Electric R. Co. v. Winnipeg (1912) — Can. —, 4 D. L. R. 116, reversing (1910) 20 Manitoba L. R. 337, 16 West. L. R. 62.

Where no particular mode of manifesting municipal consent to the use of streets by a public service corporation, such as a telephone company, is prescribed by the Constitution or statutes, such consent may be either express or implied; a municipal corporation having power to act may estop itself by its conduct, as well as a natural person; and a municipality may be estopped to deny the validity of an ordinance which it has led others to believe was legally adopted. Missouri River Teleph. Co. v. Mitchell (S. D.) supra.

*c. Where franchise is ultra vires.*

The distinction above noted between acts of the municipality not within the scope of its general powers, and those within such powers, is made in a number of cases involving the application of the principles of estoppel to deny consent to the granting of a street franchise. The general rule is well settled that a municipality is not estopped from denying the validity of a contract made by its officers when there was no authority for making such a contract (19 R. C. L. § 350). The class of cases under consideration illustrates the application of this rule, the obvious reasons for which are that every person dealing with municipal corporations is bound to know the extent of their authority, and that the principle of estoppel should not be applied so as to



permit the doing indirectly of that which could not be done directly. Without attempting to exhaust this class of cases, it seems sufficient for the purpose of the distinction above noted, to refer to the following decisions to the effect that if the franchise rights claimed are *ultra vires* the municipality, it cannot be estopped from denying that it consented thereto:

**United States.**—*Detroit v. Detroit City R. Co.* (1893) 56 Fed. 867, rehearing in (1894) 60 Fed. 161, reversed in (1894) 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, on the question of *ultra vires*.

**Illinois.**—*Snyder v. Mt. Pulaski* (1897) 176 Ill. 397, 44 L.R.A. 407, 52 N. E. 62; *Rice v. Chicago, B. & N. R. Co.* (1888) 30 Ill. App. 481.

**Iowa.**—*State ex rel. Fullerton v. Des Moines City R. Co.* (1913) 159 Iowa, 259, 140 N. W. 437.

**Maryland.**—*Mealey v. Hagerstown* (1901) 92 Md. 741, 48 Atl. 746.

**Missouri.**—*State ex rel. St. Louis Underground Service Co. v. Murphy* (1896) 134 Mo. 548, 34 L.R.A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1182.

**New York.**—*Rhinehart v. Redfield* (1904) 93 App. Div. 410, 87 N. Y. Supp. 789, affirmed in (1904) 179 N. Y. 569, 72 N. E. 1150.

**Rhode Island.**—*Smith v. Westerly* (1896) 19 R. I. 437, 35 Atl. 526.

**Washington.**—*State ex rel. Spring Water Co. v. Monroe* (1905) 40 Wash. 545, 32 Pac. 888.

A city council having no power to grant a perpetual franchise to a street railway company, the doctrine of estoppel will not aid the company in its claim to a perpetual franchise. *State ex rel. Fullerton v. Des Moines City R. Co.* (Iowa) *supra*.

It was held in *Smith v. Westerly* (R. I.) *supra*, that a town which did not have the power to grant the exclusive right to lay water pipes in the streets could not be estopped to deny that it had granted such right.

Municipal authorities without power to grant an extension of a street railway franchise beyond the life of the corporation cannot be estopped to

deny the validity of such grant; so that the facts that such extension ordinance was accepted and acquiesced in by both parties for a period of ten years, and that, on the faith thereof, the railroad company expended large sums of money in the improvement of its tracks on the streets, will not estop the municipality from asserting the invalidity of the extension ordinance. *Detroit v. Detroit City R. Co.* (1893) 56 Fed. 867, rehearing in (1894) 60 Fed. 161, which is reversed in (1894) 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, on the question of *ultra vires*, it being held by the circuit court of appeals that the power of the city to grant the street railway franchise was not limited as above indicated.

Where a board of county commissioners had no power to grant a franchise purporting to permit a water company to lay pipes under or along a highway, it was held that the doctrine of estoppel could not be invoked to prevent assertion of the invalidity of the franchise. *State ex rel. Spring Water Co. v. Monroe* (Wash.) *supra*.

The principle that a municipality is not estopped to deny that it granted a street franchise, if the company claiming such franchise had no capacity to take and hold it, was applied in *Holmes Electric Protective Co. v. Armstrong* (1916) 97 Misc. 184, 162 N. Y. Supp. 770, where a company operating a burglary alarm system, incorporated under an act for the incorporation of telegraph companies, claimed the right to use the street for electrical conductors. It was held that as the company was not a telegraph company it had no capacity to take and hold the franchise rights claimed, and that therefore the city could not be estopped to deny such rights; also, that so far as concerned the use of the streets for a series of years by the company, the city authorities, who had no actual knowledge of the facts, were under no duty to make inquiry, or to assume that the company's business was without warrant of law and that its use of the streets was that of a trespasser, but that they might, without being subject

to the principle of estoppel, accept the pretended rights of the company at their face value and impose upon it such taxes and other general obligations as were imposed on all corporations of that character.

## II. Applications.

### a. Acquiescence of municipality.

For cases of acquiescence after an attempt to grant franchise rights, see II. b, *infra*.

In *Bangor Twp. v. Bay City Traction & Electric Co.* (1907) 147 Mich. 165, 7 L.R.A.(N.S.) 1187, 118 Am. St. Rep. 546, 110 N. W. 490, 11 Ann. Cas. 293, it was held that township officers were not estopped to require the removal from a highway of a street railway track, by the fact that they stood by and saw the rails laid in the highway without objection. In this case the township board, being informed that the railway was being constructed in the highway, held a meeting at which it decided to postpone action in view of the proposal of the railway company to secure additional lands for the highway adjacent thereto, the proposal, however, never being carried out. The court said: "If private persons can create easements by estoppel, under our Statute of Frauds and our decisions, or if a license may be implied from the acquiescence of a private person who stands by and sees, without protest, his land used for a railway, the same cannot be said of township officers, who have no authority except such as the statute gives; and if it could be, the testimony does not justify such a finding."

To a similar effect is *Morris & E. R. Co. v. Newark* (1855) 10 N. J. Eq. 352, where a railroad company, without any complaint on the part of a city, laid its tracks along certain streets therein. It was not claimed by the railroad company that it had either a parol or written consent from the municipality to the occupancy of the streets; but the company contended that, the public authorities having stood by and seen the company expend its money without objection, the city was estopped to deny the railway company's right to the easement

which it claimed. This contention, however, was not sustained, it being held that such acquiescence did not amount to a license, and that fraud could not be inferred from the fact that the city did not interfere, but stood by in silence while the railroad company expended its money in the construction of its road in the public streets. It was held also that the railway company could not set up an estoppel on the part of a city, in that the company had always conformed to the requirements of the council in respect to the manner of keeping the tracks, had laid required street paving, and paid paving assessments amounting to several thousand dollars. These facts, the court said, so far from showing an acquiescence on the part of the city in the legal right of the railway company, as asserted, amounted to an assertion on the part of the city of its continued control of the streets, and to an admission by the railway company that it occupied the streets as a matter of indulgence, subject to the control and pleasure of the city.

In *Morris & E. R. Co. v. Newark* (N. J.) *supra*, the court stated that to ascertain how far the railway company could set up the silence or acquiescence of the city as a constructive fraud, so as to entitle the company to the application of the principle of estoppel, the court must look at the circumstances which induced such silence and acquiescence. And in this case it appeared that the city did not remonstrate because, at the time the railway was constructed, it was, owing to the small population of the city, of no serious detriment to the public. But this indulgence, it was held, should not be construed as operating as a fraud on the railway company, if the growing population and increased demands on the public thoroughfares demanded the removal of the railway tracks therefrom.

But the doctrine of estoppel to deny the grant of franchise rights has been applied as against a municipality, where there were positive acts or declarations on the part of the municipality recognizing or approving the

use made of the streets, which coupled with the city's acquiescence and the expenditure of large sums in reliance on the implied consent of the city, made it inequitable for the latter to deny that it had given its consent.

Thus, it was held that a municipality could not raise the question of lack of consent by it to the crossing of its streets by a railroad company and compel removal of the track, the company having charter power to construct its road across the streets with the city's consent, where for more than twenty years it had acquiesced in the operation of the railroad across the streets, had passed many orders and regulations recognizing the railroad tracks as established, and the company, in obedience to the orders of the municipal authorities, had expended large sums of money in improvements at the street crossings, erecting and maintaining safety gates and lights, constructing sidewalks, and other improvements beneficial to the public as well as to the railroad company. *Chicago v. Union Stock Yards & Transit Co.* (1896) 164 Ill. 224, 35 L.R.A. 281, 45 N. E. 430.

And acquiescence by a municipality in the operation of a railroad in a street for four years, coupled with recognition by the city of the company's rights through the passage of a resolution, complied with by the company, requiring it to fill up the ditches on the sides of the track and construct crossings, was held in *Pembroke v. Canada C. R. Co.* (1883) 3 Ont. Rep. 503, to prevent the municipality from compelling the removal of the track from the streets on the ground that it had not consented to such use of the streets, under statutes providing that no railroad should be laid in a highway unless leave was obtained from the proper municipal or local authorities.

The doctrine of estoppel was held to apply, where a city stood by and saw a gas company make an outlay of \$140,000 in the exercise of rights under a charter granted by the legislature to lay gas pipes in the streets of the city, without intimating to the

company that objection would be made to its use of the streets for the purposes authorized, such use being essential to the undertaking, and a denial thereof involving the company inevitably in the loss of its entire outlay and financial ruin. *Atlanta v. Gate City Gaslight Co.* (1883) 71 Ga. 106.

In *Bradford v. New York & P. Teleph. & Teleg. Co.* (1903) 206 Pa. 582, 56 Atl. 41, the decision that a municipality could not restrain the erection of poles and stringing of wires by a telephone company, and compel the removal of those already placed in the streets, is based on the laches of the municipality in permitting the company and its predecessors for more than twenty years to occupy the streets with poles and wires, and to make large improvements without objection by the city, and acts of recognition of the rights of the company during this period. See quotation from this case in the reported case (*HAGERSTOWN v. HAGERSTOWN R. Co.* ante, 1239.)

*b. Grants and permits irregular or invalid, or not covering asserted rights.*

In numerous cases the question of estoppel of a municipality to deny that it consented to franchise rights has arisen where there was an attempt made to grant such rights, but the grant or permit, it was claimed, was invalid, or did not cover the rights asserted.

Thus, where township supervisors, without objection on their part or on the part of the general public, stood by and permitted a street railway company to expend large sums of money in the construction of its railway along a highway under a permit given by their predecessors in office who were de facto supervisors, it was held that they were estopped to deny the validity of the grant on the ground that those giving permission were not duly elected officers of the township. *Jordan v. Washington & C. R. Co.* (1904) 25 Pa. Super. Ct. 564.

Where a city, having power to grant a street railway franchise to a horse street railway or one propelled

by dummy engines, passed an ordinance purporting to grant a street franchise to an electric street railway company, but, after a change in its charter powers giving it the right to grant a franchise to an electric railway, passed ordinances recognizing the validity of the former franchise, it was held that both on the ground of ratification and of estoppel, in view of the large expenditures made by the company in good faith, in reliance on the validity of the ordinance, the city could not assert its invalidity. *Denver v. Mercantile Trust Co.* (1912) 120 C. C. A. 100, 201 Fed. 790.

And where a municipality, in the exercise of power granted by the territorial legislature to allow railroad companies to lay tracks on a street, passed an ordinance purporting to grant to a railroad company the right to lay its track on a street on tideland, and the railroad was constructed, and the action of the municipality was confirmed by a provision of the state Constitution, authorizing the city to extend its streets over tidelands, it was held that the city could not set up the invalidity of the ordinance on the ground that the title to the tidelands was in the territory in trust for the future state, and that the city could not burden the same with an easement. *Seattle v. Columbia & P. S. R. Co.* (1893) 6 Wash. 379, 33 Pac. 1048.

It was held that a municipality was estopped from claiming that its consent to the use of the city streets by a telephone company was inoperative, or that the rights thereunder had passed to a consolidated company, in which, by statute, was vested all the property of the original company, where the municipality demanded and accepted from the consolidated company the bond previously required of the original company, and the consolidated company expended large sums of money in extending and improving the telephone system, with the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights. *Louisville v. Cumberland Teleph. &*

*Teleg. Co.* (1911) 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572.

And it was held in *New Orleans, S. F. & L. R. Co. v. New Orleans* (1902) 109 La. 194, 33 So. 192, that the doctrine of estoppel would prevent a municipality, after it had judicially enforced against a grantee of franchise rights the obligations which the grantee had undertaken in consideration of the grant made, from singling out and repudiating that part of the ordinance evidencing the grant which provided for an extension of the time limit of the franchise.

And where a village granted a franchise for street lighting for the term of five years, with the option on the part of the grantee to continue the same after the five-year period if the city did not purchase the plant, but, at the end of that period, although there was no formal renewal of the agreement, the grantee continued to operate the plant and transferred it to one who made substantial improvements in the erection of poles and the stringing of wires, with the knowledge and acquiescence of the village authorities, it was held that the latter could not object that the franchise had not been renewed and compel a removal of the poles, wires, etc., from the streets. *Wakefield v. Theresa* (1908) 125 App. Div. 38, 109 N. Y. Supp. 414.

It was held in *City R. Co. v. Citizens' Street R. Co.* (1896) 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, that a city was estopped to assert that an ordinance extending the franchise of a street railway company was invalid for want of consideration, as against bondholders who in good faith had invested their money in the bonds of the company, relying on the validity of the ordinance.

A municipal corporation, which, under statutory authority, permits a street railway company as assignee of rights granted an individual, to erect a plant to furnish light to it and its inhabitants and maintain the same for a number of years, is estopped to revoke the license and compel a removal of the poles from the street on the theory that its consent was invalid be-

cause the original grantee was not a corporation, as required by statute, and the assignee did not secure municipal consent to operate the plant, as required by statute, after it secured charter authority to conduct such business. *HAGERSTOWN v. HAGERSTOWN R. Co.* (reported herewith) ante, 1239.

The doctrine of estoppel was held to apply also as against a municipality, so as to prevent it from compelling the removal of properties of public service corporations from the streets,—

—where a village by resolution authorized a telephone company to establish its lines along its streets, and, after the company had acted on the resolution by erecting poles and stringing wires in the streets and alleys, the village board attempted to repeal the permit granted, the claim being that the right to use the streets for the purposes in question could be lawfully granted only by ordinance, *London Mills v. White* (1904) 208 Ill. 289, 70 N. E. 313 (see also *Quincy v. Chicago, B. & Q. R. Co.* (1879) 92 Ill. 21, where a similar question was involved in the case of a railroad company, but the principle of estoppel was not discussed);

—where a street railway company, which had been granted the right to construct and operate a street railroad on certain streets, laid down, under the direction of the superintendent of streets, a portion of its track on a street which was not included in the grant, and the track in such street was used as a part of its system for more than two years, and was assessed for municipal taxes, *Spokane Street R. Co. v. Spokane Falls* (1893) 6 Wash. 52, 33 Pac. 1072;

—where for nearly fifty years, under express grants from the city, a railroad company occupied a part of a street for railroad purposes, including depot uses, leaving sufficient room for public travel, and the company and its predecessors in title, in reliance on the grants, some of which were for a valuable consideration, had expended large sums in improvements on the property. *People ex*

*rel. Beardsley v. Rock Island* (1905) 215 Ill. 488, 106 Am. St. Rep. 179, 74 N. E. 437. See quotation from this case in the reported case (*HAGERSTOWN v. HAGERSTOWN R. Co.* ante, 1239).

It has been held that a municipality will be estopped to assert the invalidity of a street franchise which it had power to grant, on the ground of irregularities or informalities in attempting to exercise the power, where the grantee in good faith acted on the grant in the incurring of expenditures and it would be inequitable to compel removal of its properties from the streets. *People ex rel. Rinne v. Blocki* (1903) 203 Ill. 363, 67 N. E. 809; *People ex rel. Fitz Henry v. Union Gas & E. Co.* (1913) 260 Ill. 392, 103 N. E. 245; see also earlier appeal in (1912) 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916B, 201; *Marion Water Co. v. Marion* (1903) 121 Iowa, 306, 96 N. W. 883; *Raynolds v. Cleveland* (1906) 28 Ohio C. C. 463, affirmed in (1907) 76 Ohio St. 619, 81 N. E. 1182; *Missouri River Teleph. Co. v. Mitchell* (1908) 22 S. D. 191, 116 N. W. 67; *Winnipeg Electric R. Co. v. Winnipeg* (1912) — Can. —, 4 D. L. R. 116, reversing (1910) 20 Manitoba L. R. 337, 16 West L. R. 62.

Thus, where the board of trustees of a town granted a permit to lay a switch railroad track in the street, and the permit was acted on by the construction of the switch, the town, it was held in *People ex rel. Rinne v. Blocki* (Ill.) supra, was estopped to raise the question whether the petitions presented to the board for the permit were accompanied by maps showing the location of the proposed track.

And where a waterworks system had been installed and operated for twenty years in reliance on an ordinance giving the company the right to lay pipes in the streets and supply the city and its inhabitants with water, the city was held estopped to assert the invalidity of the ordinance on the ground that it contained matters not included in the title, in violation of statute. *Marion Water Co. v. Marion* (1903) 121 Iowa, 306, 96 N. W. 883. The court, after conceding

the defectiveness of the ordinance in question, stated that the irregularity did not involve a want of power; that "had such been the case the other contracting party might well be held to have acted in the premises at his peril. But it cannot be true in reason or authority, that he may be despoiled of the fruits of the contract after the same has been fully performed on his part, simply because the city council is now able to point out that the draftsman employed by it had unintentionally and carelessly omitted to make reference in the title of the ordinance adopted by it to certain of the provisions contained therein. Every principle upon which the law of estoppel is based may be invoked to override a defense thus sought to be interposed."

It was held that a municipal corporation, having power to grant a street railway franchise, was estopped to assert the invalidity of such a franchise on the ground of failure to publish notice for three consecutive weeks as required by ordinance, where the ordinance granting the franchise recited such publication, and the company in good faith expended large sums of money in prosecution of the work in reliance on the grant. *Raynolds v. Cleveland* (1906) 28 Ohio C. C. 463, affirmed in (1907) 76 Ohio St. 619, 81 N. E. 1182.

Also where an ordinance granting permission to a telephone company to use the city streets was presented and read at a special meeting of the council at which six of the eight councilmen were present, was subsequently passed at a regular meeting at which all of the councilmen were present, was approved by the mayor, recorded and published, and acted on by the company, which expended a large sum of money in the construction of its lines, requesting and receiving directions from the city authorities as to the location of its poles, it was held that the city, having power to grant the permission which it attempted to grant by the ordinance, was estopped to assert the invalidity thereof on the ground of irregularities in passing the ordinance, in that notice of the

special meeting was not given to the absent members, and that it was held pursuant to an ordinance, never legally adopted, relating to special meetings. *Missouri River Teleph. Co. v. Mitchell* (1908) 22 S. D. 191, 116 N. W. 67.

Where a city, with power to grant a gas and light company the use of its streets for the purposes for which the company was using them, not only failed to compel the cessation of such use by the company, but took affirmative action of recognition or approval which led the company to expend large sums of money in improvements on the faith that permission to use the streets had been granted it, the principle of equitable estoppel was held to apply, and the city could not claim that the right to use the streets had not been granted because there were no frontage petitions authorizing the grant of the privilege. *People ex rel. Fitz Henry v. Union Gas & E. Co.* (1913) 260 Ill. 392, 103 N. E. 245. See also earlier appeal in (1912) 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916B, 201, applying the principle of estoppel.

And the fact that the city did not know the extent of the liabilities incurred in reliance on its acts was held not to affect the question of estoppel. *Ibid.*

In *Winnipeg Electric R. Co. v. Winnipeg* (1912) — Can. —, 4 D. L. R. 116, reversing (1910) 20 Manitoba L. R. 337, 16 West. L. R. 62, it was held that a city could not challenge the validity of permits for the placing of poles of an electric company in a street on the ground that they should have been granted by a by-law in each instance, and not under general law, as in fact granted, where the permits had been acted on by the expenditure by the company of large sums of money in furtherance of the purposes thereof.

In some cases, however, it has been held that the doctrine of estoppel did not apply, the position being taken that the omissions in the attempted exercise of the powers of the city to grant a franchise were not mere irregularities, or that the circumstances

were not such as required the application of the principle of estoppel.

Thus, it was held that a municipality was not estopped to deny the validity of the franchise, where, without complying with statutory requirements as to advertising and receiving bids, it granted a franchise to a telephone company which at once constructed its plant. *Tri-State Teleph. & Teleg. Co. v. Thief River Falls* (1911) 183 Fed. 854. The court took the view that the failure to comply with these requirements was not a mere irregularity, and that the city lacked the power to grant a franchise without compliance therewith. It was said that the purpose of the law was to correct the common corrupt practice of selling or giving away franchises without due consideration of the public interest, and that, in case the doctrine of estoppel were applied, it would be very easy for a city council and a corporation, desiring a franchise, entirely to nullify the law by the city granting a franchise without notice, without solicitation of proposals, and without advertising, and the corporation beginning at once the installation of its plant, thereby making the estoppel complete while the council granting the franchise was in office, and before the general public had an opportunity to know what had been done or to become aroused to the necessity of action.

And in *Farmers' Teleph. Co. v. Washta* (1911) 157 Iowa, 447, 183 N. W. 361, it was held that a town was not estopped to assert the invalidity, on account of failure to comply with statutory requirements as to the recording to the yea and nay votes of the council and the publication of notice submitting the question to the electors, of an ordinance purporting to grant a telephone company the right to establish its system in the streets of the town, where for ten days after the ordinance was passed the company did not establish a telephone system in the town, but merely extended a toll line into it from adjoining towns which formed a part of its system, and, under the protection of an injunction in the proceedings then

pending, had set poles, strung wires, and established a local exchange.

And a city which, by contract, granted to a railway company the use of a street for railway purposes, was held in *Cleveland v. Cleveland, C. C. & St. L. R. Co.* (1899) 93 Fed. 113, reversed on other grounds in (1906) 77 C. C. A. 467, 147 Fed. 171, not estopped to dispute a construction of the contract claimed by the railroad company which would give it an absolute title to the property, by the fact that for nearly forty-five years it permitted, without objection, the company to expend large sums, amounting to more than a million dollars, in tracks and terminal structures on the property, where the improvements were not of such a nature as to advise the city that the company claimed rights beyond those given by the contract, and, in an action by a third party against the company four years after the contract was made, the latter had set up claims showing that it regarded itself merely as a licensee, and no notice of a different claim than that asserted in such suit was given to the city.

A municipality which had granted permission to a corporation to use its streets for electric lighting purposes was held, in *Omaha Electric Light & P. Co. v. Omaha* (1909) 172 Fed. 494, not estopped to deny that it had granted the right to use the streets for purposes of transmission of heat and power also, by the facts that it had passed general ordinances regulating companies using electricity for light, power, and heat, and had accepted from the company in question, which had invested a large sum of money to produce electric current for power and heat, a tax on its gross income derived from the sale of electricity for power as well as lighting purposes. The decision was affirmed, without discussion of the above question, in (1910) 102 C. C. A. 601, 179 Fed. 455, and an appeal to the Federal Supreme Court dismissed in (1913) 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974, on the ground of want of jurisdiction; but on rehearing in (1914) 133 C. C. A. 52, 216 Fed. 848,

the decision was reversed, on grounds not within the scope of the annotation.

*c. Effect of express statutory restriction on mode of consent by municipality.*

The view has been taken that consent of a municipality to the grant of a franchise cannot arise by estoppel, where the statute restricts the mode of giving consent to the passage of an ordinance duly enacted for that purpose. Taft, Ch. J., in *Detroit v. Detroit City R. Co.* (1894) 60 Fed. 161. In this case the city attempted to grant a street railway franchise for a period beyond the corporate life of the company. The grant was held void, and the municipality not estopped to deny that it had consented to the grant of the franchise, which had been acted upon by the company for a number of years. The statute provided that any street railway company organized under the provisions of the act might, "with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose," construct, maintain, and own a street railway, upon the lines designated in the ordinance granting such consent. The decision was reversed in (1894) 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, on the ground that the franchise, which was to the company and its "successors or assigns," was not void.

And in *Louisville Trust Co. v. Cincinnati* (1896) 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296, where, under statute, no street franchise could be granted, renewed, or extended except by ordinance, it was held that a city was not estopped to deny the right of an inclined plane railroad company to occupy the streets after the expiration of its franchise, by the fact that, after the franchise had expired, it had expended a large sum of money in changing the motive power from horse to electricity, pursuant to a resolution of the board of public works authorizing such change, the consent of the board being granted under a statute providing that no other motive power than animals should be used by

an inclined plane railroad company occupying the city streets, without the consent of the board of public works.

It was held that a street railway company could not by estoppel acquire the right, as against a township, to maintain a switch in a public highway 1,700 feet from the point where it was authorized to maintain the switch, as shown on a map accompanying the ordinance giving it the right to construct the road, although the switch had been used by it without objection from the township authorities for twelve years, where the statute provided for the giving of consent in cases of original location of tracks, as in this instance, by ordinance, "and not otherwise." *Trenton & M. County Traction Corp. v. Ewing Twp.* (1919) — N. J. —, 107 Atl. 416, reversing (1917) 87 N. J. Eq. 397, 101 Atl. 1037. The court said: "The elements of an estoppel are not present, since there is no proof that the railway company was induced to place the switch where it did by anything said or done, even by individual members of the committee, although that would not raise an estoppel against the public. The municipality, in granting the consent originally, could act only by ordinance, 'and not otherwise,' as the statute is careful to say. 4 Comp. Stat. p. 5040. This clearly forbids action by way of estoppel, which, if permitted, would nullify the statutory prohibition."

In *Brush Electric Light Co. v. Jones Bros. Electric Light Co.* (1891) 5 Ohio C. C. 340, the court said that it was difficult to see how the alleged grant of the franchise to an electric light company was made valid and binding on the city by a mere acquiescence of the public authorities in its use for a time, when the statute expressly provided that it could be granted in but one mode. It was held, however, that there was no such proof of continued acquiescence on the part of the municipal authorities as justified the claim to the franchise in question. The statute provided that no grant of the use of a street should be made for any purpose, unless first recommended by the board of public works, and that no resolution or ordinance recommend-



ed to the council by such board, and there amended, should take effect until approved by the board, and that a franchise granted must be approved by four members of the board.

*d. Effect of taxation or assessment of corporate property by municipality.*

The assessment and payment of city taxes by a street car company may constitute a ground for an estoppel against the city to deny that it consented to the use of the streets by the company, even though such payment extends only over a period of several years. *Spokane Street R. Co. v. Spokane Falls* (1893) 6 Wash. 521, 33 Pac. 1072. In this case the assessments had been levied, it appears, only for two or three years, but the court said that the assessment of taxes was a deliberate and formal matter, and there was no reason why an estoppel should not grow as well out of one assessment as many.

So, where a right of way for a railroad was granted by the county supervisors over a public square of an unincorporated town, the railroad was constructed, the conditions of the grant as to improvements on the square were fulfilled by the company, and the city, after its incorporation, for nearly twenty years assessed and collected local taxes against the square as the property of the county, and recognized the rights of the railroad company by the vacation of streets and alleys, it was held that the city was estopped to deny that it had consented to the use of the land in question by the railroad. *Chicago, R. I. & P. R. Co. v. Joliet* (1875) 79 Ill. 25.

And it was held in *Chicago & N. W. R. Co. v. People* (1878) 91 Ill. 251, that a city was estopped from compelling

the removal of a stone arch in a street, built by a railroad company as a part of its roadbed, where the same had been used by the company without objection for nineteen years, and the city had agreed that the arch should remain until such time as it should be rebuilt, and, in addition to these acts of recognition by the city to the company's use of the street in this manner, it had, from year to year, assessed for taxation the right of way of the company, including the property in controversy.

See also *Omaha Electric Light & P. Co. v. Omaha* (Fed.) under II. b, *supra*, where receipt of a tax by a municipality on the gross income of an electric company was held not to give rise to an estoppel to deny the grant of a franchise; and for a case where the municipality was held not estopped to deny consent to the grant of a franchise to a street railway company, by the fact that the company had paid street paving assessments, see *Morris & E. R. Co. v. Newark* (N. J.) under II. a, *supra*.

*e. Miscellaneous.*

It was held in *St. Louis, A. & T. H. R. Co. v. Belleville* (1887) 122 Ill. 376, 12 N. E. 680, that acts of a committee of a city council, appointed to confer with a railroad company, but not clothed with authority to vacate streets, or the conduct of the city attorney, who was equally destitute of such authority, could not estop the municipality so as to enable the railway company, on the ground of estoppel, to defend an action for obstructing a street crossing under the claim that the street had been vacated and the city had consented to the use of the same for railroad yards.

R. E. H.

THOMAS RAWLINGS, Appt.,

v.

EARL RAWLINGS et al.; by Next Friend.

*Mississippi Supreme Court (In Banc) — November 10, 1919.*

(— Miss. —, 83 So. 146.)

**Parent and child — right to sue for support.**

1. An infant cannot maintain a bill in equity against his father to determine in advance the amount of support and maintenance to which he is entitled, and secure an order requiring the father to furnish it.

[See note on this question beginning on page 1277.]

**— duty to support.**

2. A father is bound to support his infant child.

[See 20 R. C. L. 622.]

**Lien — of child for support.**

3. A child has no lien on his father's homestead or other land for support.

(Ethridge and Holden, JJ., dissent.)

APPEAL by defendant from a decree of the Chancery Court for Adams County (Cutrer, Ch.) in favor of plaintiffs in a proceeding to have fixed in advance a monthly allowance for their support, to require the defendant to pay the sum fixed, and for a lien upon his estate for the amounts ordered to be paid. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Ernest E. Brown, for appellant:

A child cannot successfully maintain in Mississippi a suit in any court against his father for support.

East v. King, 77 Miss. 738, 27 So. 608; Hewlett v. George, 68 Miss. 703, 13 L.R.A. 682, 9 So. 885; Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799.

Mr. L. T. Kennedy for appellees.

Stevens, J., delivered the opinion of the court:

The six minor children of Thomas Rawlings, appellant, exhibited, by next friend, their bill of complaint against their father, alleging that the defendant had not lived with them or their mother for a number of years; that their father had not for a long period contributed anything to their support; that the mother was not able to care for them and that they were without means of support; that the defendant was the owner of a certain plantation, and that this plantation "is liable to them for a support." The prayer of the bill is that upon final hearing "the court will ascer-

tain what amount is sufficient for the monthly support of said minor children, and order and decree that such amount be paid monthly by the defendant, and that the same be made a lien upon the property of the defendant," etc. The alleged plantation of the defendant is not described in the bill, but a lis pendens notice was filed, indicating in a general way the real estate upon which a lien is sought. The defendant demurred to the bill, the demurrer was overruled, and this appeal prosecuted.

This is not an action for board and lodging furnished the minors, either by the mother or a third person. This is a proceeding in equity to have the chancellor fix in advance a monthly allowance for the infant children of the defendant, to enter a decree requiring the defendant to pay the sum fixed, and to adjudge a lien upon the defendant's real estate for the sums so ordered to be paid. The law as known and expounded for centuries fails to sanc-

tion any such proceeding. We recognize to the fullest extent the obligation of a parent to support his infant child, and nothing said in this opinion would discount in the least this primary obligation, imposed by the law of nature. The question before us is one as to the remedy in the case made by the bill. Does the existence of the obligation on the part of the parent justify a court of equity in entertaining a bill or action by the child against its father to determine in advance the amount of support and maintenance, and compel obedience to its orders in the premises by imposing a lien upon property or otherwise? On this point the authorities are in accord. In 21 Am. & Eng. Enc. Law, 2d ed. 1052, it is said: "The moral obligation of a parent to support his child is not directly enforceable, and a court of equity cannot compel the performance of this duty. The duty may be enforced, however, under statute, or indirectly, as where a stranger supplies an infant with necessities and recovers therefor against the parent."

Parent and child—duty to support.

—right to sue for support.

In 20 R. C. L. ¶ 31, it is said that "the civil remedy is more commonly worked out by holding that, if the father leaves his children destitute, he confers on anyone who finds them in that condition an agency to supply them with necessities; the volunteer can therefore recover the cost of the supplies from the father in a civil action."

Practically the same declaration is made in the text of Cyc. (vol. 29, p. 1614), and on page 1663 it is pointed out that "actions by children against their parents are not to be encouraged, . . . and a minor child has no right of action against a parent for the tort of the latter." In the footnotes to the text last quoted is our own case of Hewlett v. George, 68 Miss. 703, 13 L.R.A. 682, 9 So. 885. In this case, our court, by Woods, J., in forcible language declared: "The peace of

society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

This language was quoted with approval by the supreme court of Tennessee in McKelvey v. McKelvey, 111 Tenn. 388, 64 L.R.A. 991, 102 Am. St. Rep. 787, 77 S. W. 664, 1 Ann. Cas. 130. There has been brought to our attention no case which, based upon the common law or general equity jurisdiction, sanctions this proceeding. On the contrary, the exact question was elaborately considered, and the point ruled adversely to the contention of complainants, in the case of Huke v. Huke, 44 Mo. App. 308. In the Huke Case a daughter seventeen years of age, by next friend, filed her petition in equity against her father for support and maintenance. It was there, as here, contended that the chancellor has full jurisdiction over the persons and property of infants, but the court of appeals of Missouri observed: "This action proceeds in the face of elementary principles."

The court further said: "No instance is found in the books, where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any Popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the Lord Chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 Wm. III. chap. 4. The very enactment of this statute—the necessity in the state of the law for such a statute—shows that a father

was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced Christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. *St. Andrew's Undershaft v. Mendez de Breta*, 1 Ed. Raym. 699, 91 Eng. Reprint, 1366. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the Lord Chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, chap. 30; 1 Bl. Com. 449. . . . No court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced."

And in *Alling v. Alling*, 52 N. J. Eq. 92, 27 Atl. 655, ¶ 1 of the headnotes reads: "1. A court of chancery has no jurisdiction to compel a parent to support an infant child."

In the opinion by Pitney, V. C., the following language by the supreme court of Connecticut in *Finch v. Finch*, 22 Conn. 411, is quoted with approval: "Connected with this obligation of maintenance there is a parental privilege. The parent is entitled to the custody and care of the child which he sustains, and to such service as it can render, and he has a right to exercise his own discretion in determining the fitness and necessity of the allowances to be made and of the support to be fur-

nished to his children, for which he is to be made chargeable."

If the jurisdiction of equity has been enlarged in any of the states of the Union, it is certainly based upon some statute. We have in our state two statutes which indirectly bear upon the subject. Section 3571, Code of 1906 (§ 6188, Hemingway's Code), imposes a duty upon certain relatives to support pauper members of their family. By this statute the father of a pauper child is made liable to the county in the sum of \$8 per month for each month the father has failed or refused to provide the necessary support and maintenance, and furthermore is made liable to any person in like sum who supplies such poor relatives with necessaries. By § 5055 (§ 3332) every person who abandons his wife or family without just cause, leaving her or them without support, or in danger of becoming a public charge, is declared a vagrant, and punishable as such. Statutes for the protection of the poor have been enacted in England, and in most, if not all, the states of the Union. The English Statute of 43 Eliz. chap. 2, provides: The father and mother, grandfather and grandmother, of poor, impotent persons, shall maintain them, if of sufficient ability, according as the quarter session shall direct.

In considering the Connecticut statute, declared to be "nearly a transcript of the English statute on this subject," the supreme court of Connecticut ruled that their statutory provisions "embrace as well minor as adult children." *Finch v. Finch*, supra, 22 Conn. 416. Poor infants cannot then be said to be without some remedy. If a father, though able, becomes so depraved as wilfully to abandon his offspring, he is answerable to the criminal laws of our commonwealth. But such cases must be few indeed. When they exist, they are generally the result of differences between husband and wife and a home broken up by domestic troubles. And in cases of divorce the chancery court is given

jurisdiction by statute (Code 1906, § 1673; Hemingway's Code, § 1415) to "make all orders touching the case, custody, and maintenance of the children of the marriage" that "may seem equitable and just," and afterwards may "change the decree, and make from time to time such new decrees as the case may require."

We are not justified in enlarging the jurisdiction of chancery beyond that indicated by the statute, and in opening the door of the courts to any unruly or disobedient child who may complain at either the amount or kind of support and maintenance provided by the father. The same reasons that led the court to the conclusion reached in *Hewlett v. George*, 68 Miss. 703, 13 L.R.A. 682, 9 So. 885, are persuasive here. "The repose of families and best interests of society forbid" any such action. If the chancellor can fix in advance the amount of support each dissatisfied child must receive, then is parental authority superseded by judicial fiat, parental discipline swept away by self-assertion and disobedience on the part of children, and the integrity of the home, the corner stone of society, is undermined. The bill even prays that a lien be fixed upon the father's real estate. By no provision of law is the child given an interest, such as the wife has, in the homestead or other lands of the father.

**Lien—of child for support.**

For the reasons indicated, the decree of the learned Chancellor will be reversed, the demurrer sustained, and decree entered here in appellant's favor.

**Ethridge, J., dissenting:**

After profound consideration of the question presented by this record, I find myself unable to agree with my brethren. In my opinion their exegesis is erroneous, and fruitful of evil consequences to the helpless and unfortunate children of this state who have cruel, shiftless, heartless parents. The courts,

and especially courts of equity, should be diligent to discover and swift to remedy the wrongs of helpless children. It is the function of government to protect the weak and helpless from the wrongs of the strong, the cunning, and the vicious; and the fact that the strong, cunning, and vicious may happen to be the parents of the weak and helpless, instead of removing the protection, should be an additional reason for the exercise of diligence and the extending of the remedial aid of the court of equity. In order that my position may be better understood, I shall state the facts, and then my view of the law applicable to them, and afterwards consider the views of the majority, and the authorities cited sustaining that opinion, hoping to point out the errors therein contained.

The petition in this case was filed by the mother of the children as their next friend, and alleged that the petitioners were the children of the defendant (appellant), and that they were without means of support, and unable to earn a support; that they lived with their mother, away from their father; that the mother was unable to support them, and that their father was able to support them, and that it was his duty to do so; that he had repeatedly promised to support them, but that for several years he had contributed nothing to their support; that he was the owner of a plantation in the county of their residence—and prayed that the court inquire into their complaint and fix a reasonable sum for their support, adjudge the same against defendant, and impress a lien upon his property for the security of their support and for general relief. The defendant demurred to the bill, thus confessing the truth of the allegations contained therein; the demurrer was overruled by the court below, and appeal granted to this court to settle the principles of the case. The majority of this court has decided that the suit is not maintainable, and that no relief can

be granted by equity. The children have asked for bread, and the court has given them a stone. In my opinion the parental obligation to support children can be enforced in equity at the suit of the children, suing by next friend, and that this is the only effectual remedy to insure their support. Section 24 of the state Constitution reads as follows: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

Section 512, Hemingway's Code (§ 729, Code 1906), reads as follows: "The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contain sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different."

Under these two sections it was intended by the lawmaking power of this state to grant a judicial remedy for the enforcement of every legal right, and that all forms of actions should be abolished, to the end that the court should not be embarrassed in enforcing rights where it had the facts before it, and should grant justice according to law, and not according to forms. It does not mean that any particular court has jurisdiction of a particular controversy, but it does mean that some court must be able to grant relief, where a legal right involving person, property, or reputation is presented. The constitutional provision, § 24 above quoted, is followed by a partition of the judicial powers among different courts, and providing in § 147 of the state Constitution that this court should not reverse a cause solely on the ground that the action was brought in the wrong court, but that, if the correct result was reached, the judgment should be af-

firmed, and the relief granted. The trial court retained jurisdiction, and if there be any legal right our duty is to either remand to the chancery court from which the cause came, or to send it to the proper court for a trial on the merits. The jurisdiction of the chancery court is contained (so far as it affects this controversy) in § 159 of the Constitution of 1890, which reads as follows:

"The chancery court shall have full jurisdiction in the following matters and cases, viz.: . . .

"(a) All matters in equity;

"(b) Divorce and alimony;

"(c) Matters testamentary and of administration;

"(d) Minor's business;

"(e) Cases of idiocy, lunacy, and persons of unsound mind;

"(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation."

The Constitution grants jurisdiction to the circuit court in § 156, which reads as follows: "The circuit court shall have original jurisdiction in all matters, civil and criminal, in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

It will be seen from the sections quoted that there is jurisdiction vested in these courts for the enforcement of all rights affecting person, property, or reputation. Does this suit lie? The majority opinion concedes that it is the legal duty of a parent to support the child. There can be no legal duty without a corresponding legal right. It would be idle, yea, impossible, to declare a duty without at the same time declaring a corresponding right in the person or persons to whom the duty was owed. The one necessarily implies the other. Section 1415, Hemingway's Code (§ 1673, Code 1906), provides: "When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature

of the case, as may seem equitable and just, make all orders touching the care, custody, and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife, or any allowance to be made to her, and may, if need be, require sureties for the payment of the sum so allowed; and the court may afterward, on petition, change the decree, and make from time to time such new decrees as the case may require."

Is it reasonable to construe this section so as to make it inapplicable to other suits than divorce suits? I think not. The cases of *Garland v. Garland*, 50 Miss. 694, and *Verner v. Verner*, 62 Miss. 260, are persuasive for a different construction. There the law was as to alimony in a suit by the wife for her support, and the law, as it then existed, was that alimony was allowed as an incident of some other suit, like a divorce suit; but the court, in an opinion of great reason and strength, held that the suit would lie, even though no other suit was pending.

The most powerful and pressing considerations, it occurs to me, present themselves in favor of a like construction here. Why should the husband escape the duty to support his children in case no divorce is asked, and be compelled to do so where a divorce is asked? Would not such construction encourage, rather than discourage, divorce? And is it not the settled public policy to discourage divorce, and encourage the discharge of legal duty?

Section 6188, Hemingway's Code (§ 3571, Code 1906), reads as follows: "The father and grandfather, the mother and grandmother, and brothers and sisters, and the descendants of any pauper not able to work, as the board of supervisors shall direct, shall, at their own charge, relieve and maintain such pauper; and, in case of refusal, shall forfeit and pay the county the sum of \$8 per month, for each month they may so refuse, to be recovered in the name of the county; and

shall be liable to any person who supplies such poor relative, if abandoned, with necessaries, not exceeding said sum per month."

Does this section provide an exclusive remedy in case no divorce proceedings are pending? Clearly not. It will be noted that the legal duty is clearly fixed upon the father to support and maintain his children at his own expense. If he does not discharge this legal duty, the board of supervisors may, if the child is maintained by the county, sue him for as much as \$8 per month, and no more. Any private person furnishing such child support cannot recover more than \$8 per month. If this is the exclusive remedy, the child would starve, or its living expense would have to be made up by the public, even though the heartless father might have millions of dollars' worth of property. No person would, in this day of high cost of living, furnish a child enough to live on when he would be limited to \$8 per month recovery against the father under this statute. The absurdity of so holding is evident. The lawmaking power never intended to so limit the amount that a parent should furnish, nor relieve him of any duty in the premises. What is the criminal law referred to in the majority opinion, by which this parental duty may be enforced and the child protected? Section 805, Hemingway's Code (§ 1078, Code 1906), provides: "If the father or mother of any child under the age of six years, or any other person having the lawful custody of such child, or to whom such child shall have been confided, shall expose such child in any highway, street, field, house, outhouse, or elsewhere, with intent wholly to abandon it, such person shall, upon conviction, be punished by imprisonment in the penitentiary not more than seven years, or in the county jail not more than one year."

It will be seen that this section is very limited in its scope. It does not apply at all to children over six years of age, and is then limited to particular acts, and does not apply

to mere neglect. If that is the remedy for helpless children, God have mercy on them!

What about vagrancy proceeding? Section 5055, Code of 1906 (§ 3332, Hemingway's Code), defines who are vagrants, and paragraph (k) of this section is the one that provides that "every person who shall abandon his wife or family, without just cause, leaving her or them without support, or in danger of becoming a public charge."

And paragraph (m) provides: "All persons who are able to work and do not work, but hire out their minor children or allow them to be hired out, and live upon their wages."

These are the only provisions pertinent to the suit before us. The proceedings for dealing with vagrants are contained in § 3335, Hemingway's Code (§ 5058, Code 1906) and § 3338, Hemingway's Code (§ 5061, Code 1906).

It was provided in § 3335, Hemingway's Code, that whenever any person is arrested on a charge of vagrancy he shall be carried before a justice of the peace, and on satisfactory evidence of being a vagrant that the justice of the peace shall commit such person to jail for not less than ten nor more than thirty days, and that such person so committed shall serve his sentence, unless he shall give bond with sufficient surety for future industry and good conduct for a period of one year, and that such bond, if given, may be put in suit, and that whenever the bond so taken be forfeited there shall be no recovery less than the face value of the bond, unless the vagrant shall be delivered up to the circuit court for future trial, in which case the court may limit the amount of recovery on the bond to the cost of suit and a penalty of \$50. This bond nowhere provides for the recovery thereon by the infant or the wife. The suit must be in the name of the state, and it provides no support whatever for the dependents of the vagrant. If the alleged

vagrant refuses to give bond, he may be imprisoned for thirty days, and no longer. Clearly this proceeding affords no certainty of relief for the dependents of the vagrant. Section 3338, Hemingway's Code (§ 5061, Code 1906), provides for a second conviction, and provides that in such case the vagrant shall be committed to jail for not less than ninety days nor more than six months, and shall serve such sentence, and not be liberated from such sentence by payment for the time required to be served by such sentence. This section clearly makes no provisions for the children and dependents of the vagrant.

So we say that these criminal and vagrant sections do not provide for their support. In 1 C. J. p. 985, § 93, it is said: "The violation of a right, as defined or recognized by the substantive law, constitutes a wrong, and it has long been a settled principle and maxim of the law that for every right, or as otherwise, and perhaps more accurately, stated, for every wrong, or for the vindication or violation of every right, there is a remedy, or, in other words, that wherever the law recognizes a right it gives a remedy to enforce it, or to redress its violation, and in the application of this principle it is immaterial whether the right is a common-law right or exists by virtue of statute. Right and remedy are reciprocal, and to deny the remedy is, in substance, to deny the right."

For essentials of an action, see 1 C. J. p. 927, and page 935, § 28. At page 986, same volume (§ 95), it is stated by this same authority, under heading "Statutory Rights:" "The rule that wherever the law recognizes a right it gives a remedy applies to statutory as well as to common-law rights; and so whenever a statute creates a new right or duty, and does not prescribe any particular remedy for its enforcement, the party entitled to the benefit of the statute may resort to any existing remedy which will afford adequate and proper redress,



whether it be a common-law or a statutory remedy."

Section 96, under the same chapter, under heading "Framing New Remedies," says: "In order to afford a remedy for every wrong, it became necessary during the formative period of the common-law actions, as new cases arose under recognized principles, to frame new writs, where none appropriate to the case could be found. These writs were formerly issued out of chancery and directed to the common-law courts; but it is now well recognized that the court in which an action is brought may, in order to prevent a failure of justice, or to enforce a recognized principle of law, devise or adopt such new remedy or mode of procedure as the case may require, and that it is its duty to do so; but a new remedy or mode of procedure should not be resorted to, when there is an appropriate and adequate remedy already known to the law."

In § 99, p. 987, under heading "Nature and Form of Remedy," it is said: "The rule that there shall be a remedy for the enforcement of every right, although it be a new right created by statute, does not have reference to any one particular remedy, but to such form of remedy as is appropriate to the nature of the particular case; and in some cases there may be more than one appropriate remedy."

In § 100, p. 988, of the same authority, under heading "Statutory Remedies," it is said: "It is competent for the legislature to provide a remedy in cases where none existed at common law, or in creating a new right to prescribe the remedy by which it is to be enforced, and limit jurisdiction of it to a particular tribunal, or to provide new remedies for pre-existing rights, and make such new remedies exclusive. Where a statutory remedy is prescribed for a particular purpose, it will be limited accordingly and cannot be used for other purposes, and in pursuing a statutory remedy the

proceedings must conform to the provisions of the statute."

In § 101, same authority, at pages 988, 989, under heading "Cumulative or Exclusive Remedies," it says: "Unless governed by some general statutory provisions, the question as to whether a statutory remedy is exclusive or merely cumulative depends primarily upon the intention of the legislature, as shown by a construction of the statute prescribing the remedy. The question is ordinarily determined according to whether the remedy is given for the enforcement of a new right created by the statute, or is merely a new remedy for a pre-existing right; but while, unless a contrary intention appears, the remedy will in the former case be construed as exclusive, and in the latter as merely cumulative, this distinction is not in all cases controlling."

In § 102, pp. 989, 990, same authority, under heading "New Right Created with Remedy," it says: "Where a statute creates a new right, and also provides a remedy for its enforcement, it is ordinarily held that such remedy is exclusive. This rule seems to have been first laid down with reference to remedies under criminal and penal statutes; but it applies equally to civil actions of a personal nature, and where the statute providing such a remedy confers jurisdiction thereof upon a particular court or tribunal, such jurisdiction, as well as the remedy, is exclusive. The rule is not, however, of universal application, particularly in the case of statutes which are not penal, for it is based merely upon a presumed prohibition of other remedies, and will yield where a contrary intention appears."

In § 103, p. 990, under heading "New Remedy for Pre-existing Right," this authority says: "Where a statute providing a remedy does not create a new right, but merely provides a new remedy for a pre-existing right, it is ordinarily held that such remedy is not exclusive, but merely cumulative, wheth-

er the right is one previously enforceable at common law, or by virtue of some other statute or constitutional provision, and whether it was previously enforceable at law or in equity, and notwithstanding the new remedy may be preferable to or more efficient than the old."

In § 105, p. 991, under heading "Adequacy of Statutory Remedy," this authority says: "The rule that a new remedy for a pre-existing right will not be regarded as exclusive is particularly applicable where such new remedy is not an adequate one."

Testing the present case by these rulings, we are bound to conclude, it seems to me, that these penal and criminal statutes do not provide an exclusive remedy for the enforcement of the rights of children to support by their parents. The obligation existed independent of the statute. In 20 R. C. L. p. 622, under heading "Liabilities of Father," it is said: "It has already been pointed out that correlative to the father's right to the custody, control, and earnings of his minor child is his duty to support such child. This duty is recognized and discharged, even by the higher orders of the animal world, and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as of law. And yet it was held in some early American cases, supported by eminent English authority, that 'there is no legal obligation on a parent to maintain his child' unless by force of some statute. But this doctrine, admitted to seem startling and opposed to the innate sense of justice by the court which gave to it its first American support, has been repudiated by the great majority of American courts. A father of sufficient ability is bound to support his minor child, though the latter has an estate of his own.

And at page 623 the same authority said: "The practical difficulty which undoubtedly led some courts to hold that the father's duty

of support was only a moral duty is as to the method of enforcement. The very similar duty of the husband to support his wife is easily enforced by imputing to her an agency to procure necessities on his credit, if he leaves her destitute; but in the case of the infant he is legally incapable to contract, and in most cases actually unable to contract with wisdom and prudence."

While a person who furnishes an infant may recover from the father in this state to the extent of \$8 a month, "and no more," he is under no obligation to do so, especially when he might have trouble in collecting from the father. At page 625, 20 R. C. L., it is said: "But if a father abandons his duty to his infant child, so that he is forced to leave his house, he is liable for a suitable maintenance. The principle of the distinction is that in one case the father is blameless and in the other blamable. Whether, from all the circumstances, authority from the father should be imputed to the child or to a third person to procure or furnish necessities on the father's credit is a question of fact for the jury. If a father permits his child to live with its mother, her adultery is no bar to an action by her to recover for support furnished to the child."

See also *Van Valkinburgh v. Watson*, 13 Johns. 480, 7 Am. Dec. 395; *Schouler*, Dom. Rel. pp. 327-331; *Johnson v. Johnson*, 11 S. C. Eq. (2 Hill) 277, 29 Am. Dec. 72; *Owen v. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572; *Ward v. Goodrich*, 34 Colo. 369, 2 L.R.A. (N.S.) 201, 114 Am. St. Rep. 167, 82 Pac. 701; *Alvey v. Hartwig*, 106 Md. 254, 11 L.R.A. (N.S.) 678, 14 Ann. Cas. 250, 67 Atl. 132; *Spencer v. Spencer*, 97 Minn. 56, 105 N. W. 483, 2 L.R.A. (N.S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, and note; *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L.R.A. (N.S.) 1270, 12 Ann. Cas. 138, and note; *Lukowski v. Lukowski*, 108 Mo. App. 204, 83 S. W. 274; *Biffle v. Pullam*, 114 Mo. 50, 21 S. W. 450; *Re Scarritt*, 76 Mo.

at page 584, 43 Am. Rep. 768; Lilley v. Dunwiddie, 98 Wis. 428, 40 L.R.A. 579, 67 Am. St. Rep. 820, 74 N. W. 126; Watts v. Smylie, 116 Miss. 12, 76 So. 684 (where this court said the husband was charged by law with the child's support and after his death it was the moral and legal duty of the mother to support it). See also Dick v. Grissom, Freem. Ch. (Miss.) 428; 5 Wait, Act. & Def. pp. 50 et seq.; id. vol. 8, p. 971; Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307, 9 Atl. 623; National Valley Bank v. Hancock, 100 Va. 101, 57 L.R.A. 728, 93 Am. St. Rep. 933, 40 S. E. 611; De Brauwere v. De Brauwere, 203 N. Y. 460, 38 L.R.A. (N.S.) 508, 96 N. E. 722; Rogers v. Rogers, 93 Kan. 114, L.R.A. 1915A, 1137, 143 Pac. 410; Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; Graham v. Graham, 38 Colo. 453, 88 Pac. 852, 8 L.R.A. (N.S.) 1270, 12 Ann. Cas. 137, and note; Cory v. Cook, 24 R. I. 421, 424, 53 Atl. 315.

The majority opinion concedes that it is the legal as well as the moral duty of the father to support his minor children, but concludes that there is no remedy for the enforcement of this legal duty at the suit of the child. In *Garland v. Garland*, 50 Miss. 694, this court laid down the following general rule pertaining to equity jurisdiction and procedure: "Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate, and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal relations. If a wife is abandoned by her husband without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce."

This rule has been cited with approval in the following cases: *Deweese v. Deweese*, 55 Miss. 319; *Verner v. Verner*, 62 Miss. 263; *McFarland v. McFarland*, 64 Miss.

449, 1 So. 508; *Scott v. Scott*, 73 Miss. 580, 19 So. 589; *Moseley v. Larson*, 86 Miss. 294, 38 So. 234; *Ross v. Ross*, 89 Miss. 66, 42 So. 383.

Prior to this decision the authorities had treated alimony for the wife as an incident to some suit, such as divorce, and it was earnestly contended that, as there was no statute granting the suit without the pendency of a divorce, the relief could not be granted. In *Garland v. Garland*, 50 Miss. 711, 712, the court quoted from *Story's Equity Jurisprudence*, § 1423a, with approval as follows:

"In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may, in all cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted.' No sufficient reason can be offered in answer to the broad proposition of Mr. Story, and the objector must rely upon the technical fact that it has not obtained in England. *Purcell v. Purcell*, 4 Hen. & M. 507, presented three questions, marriage, desertion, and the right of the wife to a separate maintenance. The two first averments were established. As to the third the chancellor said: 'I hold that in every well-regulated government there must somewhere exist a power of affording a remedy when the law affords none, and this peculiarly belongs to a court of equity; and as husband and wife are considered as one person in law, it is evident that in this case the law can afford no remedy, which is universally admitted to be a sufficient ground to give this court jurisdiction, and therefore it must entertain the bill, if there be suf-

ficient proof of the marriage.' In the opening of his opinion, the chancellor said: 'I shall leave the clashing of the English judges to be reconciled among themselves, and take up the question upon first principles.' The marriage was sustained and the prayer for a separate maintenance granted. The decree required an annual payment by the husband to the wife 'until he should restore her to the comforts of her bed and board, and give satisfactory assurances for her enjoyment thereof.' This decree was enforced by committing the husband to prison for neglecting compliance. He purged himself of the contempt by paying to his wife the amount due and in arrear, and giving security for his future performance of the decree.

"Precisely the same question under consideration was before the courts of South Carolina in the case of *Prather v. Prather*, 4 S. C. Eq. (4 Desauss.) 83. The opinion is a searching review of the English decisions, and a very emphatic assertion of the equity of the rule, which, Story says, 'it might be wished it were generally adopted.' The court in that case observe: 'It might be sufficient to say that, as there have been cases on both sides of the question, . . . I should feel myself at liberty to select those cases for my guide which applied to the circumstances of this country, and would best promote the purposes of justice. . . . The subject has been discussed, and the court has decreed that the wife should have a separate estate from her husband, in the case of ill usage, and a consequent separation or desertion by the husband, though no agreement for a separate maintenance and no divorce. . . . I allude to several cases which were decided in this court some years since, expressly on the ground that no other tribunal could give redress, and that it would be unseemly and highly mischievous if this court did not interfere.' See also *Anonymous*, 2 S. C. Eq. (2

Desauss.) 198, and cases in South Carolina therein referred to."

In 50 Miss. 713, the court also quote the supreme court of Alabama as follows: "*The supreme court of Alabama, in Glover v. Glover*, 16 Ala. 440, use this language: 'No one will deny but that the husband is bound by the strongest obligations, resulting not alone from the contract of marriage, but founded upon the highest moral consideration, to support his wife. And if it be true that the law, as well as enlightened conscience, creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation, then indeed has one class of cases been found which falsifies the boasted maxim "that for every wrong there is a remedy, and for every injustice, an adequate and salutary relief."' And after advert- ing to the disagreements of the English chancellor, the court also say: 'So stands the law in England, and since her learned chancellors have not been able to reconcile their own decisions, we feel that we shall not be wanting in respect for them in adopting a rule of decision for ourselves, which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based.'"

In 50 Miss. 714, our court, quoting from the Kentucky court in *Butler v. Butler*, 4 Litt. (Ky.) 202: "'But in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy, where the conscience and the law acknowledge a right, but know no remedy. Why, then, should the chancellor shrink at this case and refuse a remedy? It is evident that this arose in England for fear of intruding upon the ground occupied by the ecclesiastical courts.' And in this quotation the whole case at bar is embraced. With us, marriage rests in contract, and the obligation is both to the wife and to society. That the remedy at law, in case of

a breach of this contract, is neither full, adequate, nor complete, is plain to ordinary experience. The law's delays are proverbial. The credit of a man, stubbornly determined not to support his wife, will not feed the hungry nor clothe the naked. A man might be worth a large fortune, yet so situated as to defy judgment and execution. The credit of one so disposed would avail nothing in the market in the way of procuring supplies, as merchants will not part with their goods upon such uncertain security."

In 50 Miss. 715, 716, the court said: "Support of the wife is the legal duty of the husband. The wife has a right to demand it; but, as her remedy, when this right is denied, is not full, adequate, and complete at law, equity ought to enforce it. In abandoning the wife without good cause, and refusing to support her, the husband violates a legal duty and commits a breach of contract, which entitles the wife to redress, either by divorce, or to the enforcement of the marriage contract by compelling restitution of conjugal rights to the extent of maintenance, at her option. If she chooses the latter, she ought not to be starved into the former, for that would force her to abandon the marriage contract against her will."

In the subsequent case of *Verner v. Verner*, 62 Miss. 263, the court again held that the wife could file suit for alimony without suit for divorce.

The case of *Johns v. Williams*, 66 Miss. 350, 6 So. 207, was a suit by complainants against their mother and Williams & Black. It was alleged that the complainants were minors, except one of them, and that they had not a guardian; and the land in controversy was conveyed in and for their use, and the suit was to enforce the trust against Williams & Black and their mother. Williams & Black demurred to the bill, and the chancellor sustained the demurrer and dismissed the bill. This court reversed, for proper relief to be granted.

In *Williams v. Duncan*, 44 Miss. 375, the court said: "If there were no other reason, the infancy of the complainants brings the case within the jurisdiction of a court of equity."

In *Johns v. Smith*, 56 Miss. 727, this court held that the chancery court had full jurisdiction over minors and their property, which must be exercised whenever non-action would result prejudicially to the minor, and if there is no guardian the court must act without one.

In *Hurt v. Southern R. Co.* 40 Miss. 391, it was held that an infant could sue in a court of law by next friend. See also 22 Cyc. 627, where it is said that infants may sue at law or in equity.

Minors are peculiarly wards of the chancery court, and it was held in *Price v. Crone*, 44 Miss. 571, that it is the duty of the chancellor to protect the interest of minors, whether the proper defense be made or not; and for this purpose they should look to the record in all its parts, and, of his own motion, give to the infant the benefit of all objections and exceptions as fully as if specially pleaded. The infant can waive none of its rights.

In *Story's Equity Jurisprudence*, 10th ed. § 1341, at page 595, it is said: "The jurisdiction of the court of chancery extends to the care of the person of the infant, so far as necessary for his protection and education; and to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. It is upon the former ground, principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children. For although, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of,

and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed, whenever (for example) it is found that a father is guilty of gross ill treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, . . . the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education."

In *Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627, it was held that suit would lie in equity against the father for the support of his minor children, independent of any statute. In that case the suit was filed by the wife for the support and custody of their minor children; the only distinction between that and this being that this suit is merely for the support without any suit as to custody. The proceeding did not conform to a statutory proceeding in Indiana. At page 61 of 158 Ind., the court said: "This proceeding, however, was not brought under the Act of 1881, nor does the sufficiency of said second paragraph depend upon that act. The power of a court of chancery to control not only the estate, but the person and custody, of infants, is well settled,"—citing 2 Story's Eq. 13th ed. §§ 1341, 1341a, 1345, 1346; 3 Pom. Eq. Jur. 2d ed. § 1807; *Cowls v. Cowls*, 8 Ill. 435, 44 Am. Dec. 708.

In 3 Pomeroy's Equity Jurisprudence, 2d ed. § 1307, it is said: "In addition to its power to appoint guardians, the court of equity will also exercise its jurisdiction, in a proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the person of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. By

the common law, as well as by the law of nature, the father is the natural guardian of his infant children. It is not only the father's right, but his imperative duty, to have custody of the persons of his infant children, and to educate and train them so as to promote their future well-being as members of society. The equitable jurisdiction over the persons of infants is based upon this parental duty, and is an indirect means of enforcing it by furnishing a remedy for its violation. The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court, and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants, and remove them from the custody and control of their father or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles, or when the parent is neglecting their education suitable for their condition in life, or is endangering their property, or is guilty of ill treatment or cruelty towards them."

In discussing the jurisdiction of the chancery court pertaining to its control over minors, Lord Eldon, in English chancery, in the case of *Wellesley v. Beaufort*, 2 Russ. Ch. 23, 38 Eng. Reprint, 244, says: "Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere; if it be not in this court, where does it exist? Is it an eligible thing that children of all ranks should be placed in this situation—that they shall be in the custody of the father, although, looking at the quantum of allowance which the law can compel the father to provide for them, they may be regarded as in a state little better than that of starvation? The courts of law can enforce the rights

of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in this his Majesty's court for centuries past. Having thus shortly alluded to some of the cases, and referring to the cases themselves for a more large exposition of the grounds upon which this jurisdiction stands, I repeat that I find myself in this seat humbly representing his Majesty, and bound by the settled law of the land. I cannot now retire from the discharge of this duty—I dare not violate the principles which grow out of the practice of the court. My duty is to apply those principles honestly, to look diligently to all the circumstances of the case, and, with judicial integrity (by which must be always meant an integrity of the purest nature), to determine manfully, and manfully to declare what my opinion is."

Again, at page 28 it is said: "I was anxious upon that point for another reason, namely, because, reflecting upon the nature of the jurisdiction as connected with property, it appears to me that whilst the court looks at the duties of the father, it considers those duties as duties that impose upon him thus much,—that if he be himself of ability to maintain the children (be their fortunes what they may), and to provide for them according to their expectations, it says, 'You shall provide for them out of your own means, and not encroach upon the property of the children.' What does the court do further with respect to the maintenance of children in a certain class of society? Can any court of law do that which this court is in the constant habit of doing, and of doing most usefully for families and the public? In many great families, the eldest infant is in the possession of a large property; the younger infants have some little property; and in such a case the court does not measure the duty of maintaining the eldest child by looking at him only, but it considers that it is for his interest

that his brothers and sisters should be brought up in respectable stations; and it says, 'We will go the length of giving them maintenance, or a part of maintenance, out of his provision, as a part of the maintenance made for him, though to be applied to them,'—and upon this ground, that it is for his benefit, not that this portion of his fortune should be saved, but that it should be applied to bringing up his brothers and sisters to such situations as to reflect honor upon him."

In the case of *Prather v. Prather*, 4 S. C. Eq. (4 Desauss.) 33, the South Carolina court was called upon to deal with a situation analogous to the present case. Bill was filed in this case by a wife who lived separate from her husband, to recover alimony on the ground of ill usage and being turned away by her husband. The defendant demurred to the bill, and the court held that it had jurisdiction and made allowance in proportion to the husband's fortune. At page 35 it is said, after setting out the allegations of the bill: "This bill makes a very shocking case, outrageous to humanity, and disgraceful to civil society. The question then arises: Is there no remedy for such enormous evils? and if there is, where is it to be had? The ecclesiastical courts are the tribunals to whom this delicate trust is committed, in the country from whence we have borrowed our jurisprudence, though in particular cases the court of equity has interposed to give relief, as shall be more particularly noticed hereafter. But there are no ecclesiastical courts in this country which can give relief. It is equally clear that the courts of law cannot give any relief. The nature and constitution of those courts, and their forms of proceeding, render it impossible for them to interfere in such cases. We are brought, then, to this conclusion,—either that these gross injuries must pass without redress, or this court must interpose and give relief. It is shocking to think that such conduct, so inhuman

in itself, so injurious to innocent and helpless women, and so mischievous to society, should pass unheeded and unchecked in a civilized country. It is the boast of our jurisprudence that for every wrong there is a remedy, and for every injustice an adequate and salutary redress. But this would be a vain and empty boast, if for such a case as this there was no remedy."

And at page 38, discussing the wife's right, the court said: "She acquires by her marriage, in return for the comfort she brings, the right to maintenance and support, and to a participation in the enjoyment of her husband's property, according to his degree and situation in life, while she demeans herself correctly; and this right she may exercise in an irregular, unsettled, vexatious manner, by running in debt for necessities, upon his deserting her, which he would be compelled to pay. But this is a very uncertain method, and full of inconvenience and productive of constant litigation. Few will trust a woman under such circumstances, when they are sure of not being paid without suits, and the measure is entirely uncertain."

The same may be said with increased emphasis of the condition of the helpless children in the present case. Few would be willing to trust them with a sufficiency for their comfort, if they must depend upon the result of the suit and the consequent uncertainty of the amount to be received, or of receiving anything at all. At page 39 of the case of *Prather v. Prather*, in 4 S. C. Eq. (4 Desauss.) *supra*, the court said: "The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases, as in executory agreements. A court of equity will compel them to be carried into strict execution (unless where it is improper or impossible), instead of giving damages for non-performance. So, too, in questions that may be tried at law in a great multiplicity of actions. A court of

equity assumes a jurisdiction to prevent the expense and vexation of endless litigation and suits. Now, if the court of equity has concurrent jurisdiction with the courts of law, merely because it can give more ample or complete relief with less litigation, surely it follows that it will be justifiable to interfere where the courts of law can give no relief at all, as is acknowledged in the case under consideration."

In most of the cases dealing with this subject the suit has been brought by the wife, and generally for moneys or credits expended by her for the support of the children. But manifestly the right of action, whoever may bring it, is rooted in the legal obligation of the father for their support, and it is not a right of the wife as such, but it is the right of the children, and the judgment is made to her as the trustee for their benefit. Many of the cases already cited furnish ample authority for the procedure, and the authorities in this state, which I have already cited, show that children may sue for any right which they have, at least in the equity court.

I proceed now to a consideration of the authorities cited in the majority opinion, the principal of which is *Huke v. Huke*, 44 Mo. App. 308. The basis of this decision, and the only theory upon which it can be upheld on legal reasoning, is that the duty of the father to support his child is a mere moral obligation, as distinguished from a legal obligation. The court said (44 Mo. App. 312): "By the common law of England a father is not bound to support his infant child, in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable, as upon an implied contract, to a stranger who furnishes necessities for the support of his infant child."

If this statement were true, and if there were no legal obligation on the part of the father to support the



child, then the conclusion of the majority would be sound. As is shown above, the overwhelming weight of authority is against this announcement, and as the majority opinion confesses that there is a legal obligation on the part of the father to support the child, this authority does not sustain the reasoning of that opinion. At pages 313, 314, of 44 Mo. App. the Missouri court of appeals said: "But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the Chancellor of England had, in virtue of a delegated authority from the King as *parens patriæ*, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the King as *parens patriæ*."

It is settled that a court of equity of this country and of this state has the power that a court of chancery in England had, and represents the state as *parens patriæ*, exercising the same jurisdiction that the English chancery courts exercise. The judge delivering the opinion in *Huke v. Huke*, 44 Mo. App. at page 314, after the above recital, said: "In the exercise of that jurisdiction it will appear that the English Court of Chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries,—in France and America,—and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England."

It will be seen from a careful reading of this opinion that the decision would have been otherwise, had the court recognized the duty of a father as a legal duty, instead of a moral duty. There are only a few states in America that agree that a duty is not a legal duty, and Missis-

sippi is not one of those that consider it a mere moral duty. Legal and moral obligations frequently coexist. In such cases the courts will enforce the obligation, and it is a legal duty to enforce them, but the courts will not enforce a mere moral duty. This case of *Huke v. Huke* has been cited by many textbooks for the proposition that a child cannot sue a parent, and the text-writers in some of the courts have cited it without referring to the reason underlying the decision, and without pointing out the different results which will flow from a recognition of the duty as a legal one. This is the only case which I have found directly holding that proposition. It ought not to prevail in any jurisdiction recognizing the legal obligation of the parent to support the child. The other cases referred to in the majority opinion are not applicable to this suit.

The case of *Alling v. Alling*, 52 N. J. Eq. 92 et seq., 27 Atl. 655, cited in the majority opinion, in which it was said that a court of chancery has no jurisdiction to compel a parent to support an infant child, was a suit brought by the mother against her only child and daughter, alleging that the mother has been a widow since 1876, and that the daughter was born in 1874. The claim was for support, maintenance, and education furnished by complainant from the time of the death of her husband and until date, and for an order for allowance of support during the minority of the daughter out of the fortune of the infant. The daughter had recently come into a small fortune from two sources, namely, a part of her father's estate, which is in her mother's hands as administratrix, and a part from an uncle, in the hands of her guardian. The funds coming from her father were vested in him before his death under the will of his father, the grandfather of defendant, but were subject to a life estate in the widow of the testator, who died in 1889. Under the will the executor paid the complainant

as administratrix about \$11,500. Of this sum the complainant is entitled to one third, leaving her daughter, the defendant, less than \$8,000. The other fund from her uncle amounted to \$6,850. At page 99 of 52 N. J. Eq. of the opinion, it is said in reference to the obligation of parents to support their children: "By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved; and thus the children will have a perfect right of receiving maintenance from their parents." This duty and this obligation have been variously modified by the positive laws of civilized countries, but fully recognized by all. Connected with this obligation of maintenance there is a parental privilege. The parent is entitled to the custody and care of the child which he sustains, and to such service as it can render, and he has a right to exercise his own discretion in determining the fitness and necessity of the allowances to be made, and of the support to be furnished to his children, for which he is to be made chargeable."

At page 110, 52 N. J. Eq., it is said: "In looking over the account, I find that the child was maintained in a style which, in my judgment, was quite beyond her pecuniary expectations, and I cannot approve its payment out of her fortune. If the mother chose to support her in such style, I think she must pay a part of the expense from her own income, which was nearly three times that of the child."

The case of *Finch v. Finch*, 22 Conn. 411, referred to in the majority opinion, is a suit by a wife against her husband on a book debt, after divorce, in which she had been awarded the custody of the children. The suit was for the entire support and education of such children after such decree had been granted. The court held that the entire account could not be recovered. The majority opinion, at page

421, said: "It seems to a majority of the court that the sole obligation of supporting the children, which was thrown upon the husband and father by the state of coverture, is essentially changed, or modified, by the dissolution of the marriage; and now their pecuniary condition and ability may be equal or otherwise. The mother may have ample means, and the father none; and in such case, surely, it would be inequitable to charge the father with the entire maintenance of the children, while they remain in their mother's service, and under her exclusive control; and we do not believe the common law imposes any such obligation."

Two of the judges dissented. It is clear from this case that it is not in point here, and does not sustain the holding of the majority.

In the case of *Hewlett v. George*, 68 Miss. 703, 13 L.R.A. 682, 9 So. 885, Judge Woods, of this court, said: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

This utterance, as applied to the facts of that case, is a correct pronouncement. The facts show a condition that was very grave facing the parents to control their minor daughter, who was guilty of practices that would bring irreparable wrong and shame to her family. She was committed to an insane asylum, and most people would sympathize with the family in the step taken. I apprehend that this court would never hold that a suit by a child against a parent for a permanent injury, wilfully and maliciously inflicted, would not lie.

I have a great regard for the dis-

tinguished judge who wrote the opinion in *Hewlett v. George*, and I cannot bring my mind to believe that he and his distinguished associates would have held that in no condition could a minor child sue a parent. I think that the true rule is that the parent has a right to exercise reasonable restraint and inflict chastisement for the purpose of correcting a child; and, in the discharge of his duties, while acting within the limits of reason, he has the discretion as to what chastisement and the kind of support he will furnish, and is not to be required to maintain his children in luxury and ease, even though he may have ample means to do so; and that the parent is the judge, within reasonable limits, as to the amount of chastisement that he will inflict, and is not responsible for an error in judgment so long as the facts bring the case within the limits within which reasonable men may differ. The court is not, in such case, to substitute its judgment for that of the parent; but when the father refuses to perform his duties, and makes no effort to supply the needs of his children, then the court, acting as the *parens patriæ* for the state, looking out for the child's welfare, will, and of right ought to, compel him to do so. The language in *Hewlett v. George* went beyond the calls of the case.

The state will not rely entirely upon criminal law for the protection of children from neglect and maltreatment by parents for several reasons: First, it is wholly inadequate for that purpose. The children are under the control and restraint of the parents, and have not sufficient intelligence and opportunity to set the criminal law in motion or to attend and prosecute. It is contrary to human nature for them to want to prosecute. It accomplishes nothing for the child, as the placing of parents in jail does not clothe the body, nor satiate the pangs of hunger, nor nourish the body. It does not protect the body from the bleak bites of the wintry winds, nor stay the pangs of

starvation. If the parent has to pay a fine, his ability is diminished to that extent. If he is placed in jail, he is not able personally to look after his children, and in either event his resentment is aroused and his anger is enkindled, and the child will suffer more, instead of less, by trying such remedies. If the remedy at law is inadequate, equity ought to take jurisdiction, and it is one of the maxims, both of the common law and of the equity court, that no wrong will be allowed without a remedy. See *Broom, Legal Maxims*, pp. 191-195; 16 Cyc. 30, 133.

The majority quotes from 29 Cyc. 1614, and on page 1663 says: "It is pointed out that 'actions by children against their parents are not to be encouraged, . . . and a minor child has no right of action against a parent for the tort of the latter.'"

The majority fails to quote that part of Cyc. which quotes from the case of *Bird v. Black*, 5 La. Ann. 189, where the court said: "Suits of children against parents are not to be encouraged, unless to redress clear and palpable injustice."

I heartily concur in the opinion from Louisiana on the facts there presented.

I cannot concur in the holding that the repose of society would be adversely affected by maintaining the suit in the present case. Any society that can consent to see children neglected by able parents, and whose repose would not be more disturbed by seeing children starved, maimed, and brutally handled, than it would be by seeing the law make the parent fulfil his duties and obligations to his child, at the suit of the child, ought not to be tolerated at all. What philosophy is this, now promulgated, which says that suits in chancery will disturb society when criminal prosecutions of parents by children will not disturb it? What kind of society is it that will be more disturbed by a suit in equity than it will be when the helpless children are allowed to go hungry and unclothed, their vitality so lowered by starvation and exposure

as to make them invalids, unable to perform the functions of citizenship, but, on the contrary, make them a burden, and perhaps a menace, to society? If there be such society in existence, it ought to be

kicked off the earth, and forced to do its reposing in the abysmal pits of Gehenna, where children do not go.

Holden, J., concurs.

## ANNOTATION.

### Bill by or in behalf of child against parent for support.

**RAWLINGS v. RAWLINGS** (reported herewith) ante, 1259, holding that a child cannot maintain a bill against a parent for the purpose of obtaining a decree for future support, presents a question that has seldom arisen in the courts, the usual form of action being for a judgment for necessities furnished the child, or for a decree for support of the children in a divorce suit, or by criminal proceedings.

The case of *Huke v. Huke* (1891) 44 Mo. App. 308, holding that a child cannot maintain an action against its father for support and maintenance, is set out in the reported case (**RAWLINGS v. RAWLINGS**, ante, 1259). It will be observed, as is pointed out in the dissenting opinion in the **RAWLINGS CASE**, that this decision is based apparently on the theory that the obligation of the parent to support the child is a merely moral one. And there seems to be much force in the view taken in the dissenting opinion referred to that, where a legal right on the part of the child to support by its parents is recognized, the child should not be left without remedy in a court of equity to enforce this obligation.

The view that a child cannot maintain a bill against its parents for support is sustained also by statements of the court in several cases, which were, however, not strictly necessary to the decisions.

Thus, it was said, *arguendo*, in *Alling v. Alling* (1893) 52 N. J. Eq. 92, 27 Atl. 655, that "the question of the extent of the duty of a parent to support and maintain an infant child can be raised in this court only when the child has a fortune of its own. This court has no jurisdiction to compel a parent to support an infant child." The suit, however, was by a mother

against her daughter, who had recently come into a small fortune, for compensation for maintenance in the past and for an allowance for future support during minority.

And it was said, *arguendo*, in *Footo v. De Poy* (1905) 126 Iowa, 366, 68 L.R.A. 302, 106 Am. St. Rep. 365, 102 N. W. 112, that "certainly the law recognizes no right in the child or in the divorced wife to compel him [the father] to set aside the greater part, or indeed, any part, of his estate to provide against such child's future needs. It was to be presumed that if, during his lifetime, his young daughter should present any just claim upon him for her maintenance or education, he would respond thereto in proportion to his ability and her needs; and until he refused to do so, neither she, nor anyone for her, had any right of action against him." The suit, however, was between the children, after the father's death, to set aside a trust agreement made by him in favor of one of the children, on the ground that it was obtained by fraud and duress.

Where a child sought to obtain from a court of equity an order directing the trustee of his mother's estate to pay to him, from time to time, such sums as should be necessary for his support out of the income of an estate devised to her for life, the court in *Re Ryder* (1844) 11 Paige (N. Y.) 185, 42 Am. Dec. 109, in holding that the child had not such interest either in the income or the principal of the estate as warranted the relief sought, stated that the remedy to compel a parent to furnish necessities for infant children was not by a petition to that court, but that the performance of the duty must be enforced by a proceeding under the statute by an ap-

plication to the general sessions for an order upon the parent for the support of his child; or, a stranger might, under certain circumstances, furnish necessities for the child and recover compensation therefor from the parent.

On the other hand, adult, dependent children were held in *Paxton v. Paxton* (1907) 150 Cal. 667, 89 Pac. 1083, entitled to enforce in equity the obligation imposed by statute on the parents of any poor person unable to maintain themselves by work, to maintain such persons to the extent of their ability. In this case a son who had attained his majority brought an action against his parents for support, on the ground that he was an invalid, totally blind, was a poor person and unable to maintain himself by work. The statute provided: "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability." It was held that a court of equity had jurisdiction to enforce this statute, no other remedy being provided by statute, and that the court had power to make orders necessary for maintenance of the action, including orders for suit money, counsel fees, and maintenance pendente lite. The court said: "It will be observed that § 206 of the Civil Code does not provide any procedure or machinery for enforcing its provisions, and no special procedure is prescribed elsewhere. On account of this absence of procedure appellant contends that there is no method by which § 206 can be judicially enforced. According to this contention said section is merely an ornamental enunciation of a moral principle which ought to be observed by good people under the circumstances referred to in the section, but is not a law in the sense of a rule of action which such people are legally bound to obey. We do not think that this conclusion is maintainable." And the court referred to the principle that where a right exists, and there is no adequate legal remedy, equity will take jurisdiction. It was further said: "It is true that courts have not generally undertaken to enforce the obliga-

tions of parents to maintain their infant children. Indeed, in England, under the common law, the maintenance of minor children was considered merely a moral obligation not enforceable at law. It was generally there held that an action against the parent for necessities furnished the child could not be maintained. This view has also been taken in some American decisions; although in others the other, and we think the better, rule has been declared that an action for necessities against a parent is maintainable. . . . It is probable that these later decisions rest on the proposition that the obligation is only a moral one, but that this moral obligation is a good consideration for the furnishing of necessities, and a sufficient foundation for an action to recover for necessities which have been actually furnished, although no sufficient foundation for a decree for future maintenance. But in the case at bar we are not concerned with moral obligations. Statutory law does not deal with mere moral obligations. When it declares a duty or a right it means a legal duty or right. Section 206 of the Civil Code is a part of the substantive law of the land, and establishes and declares a legal duty of the parent to maintain their children who are within its provisions, and establishes the right in such children to have such maintenance. As the duty runs to the children, the latter are the persons to whom the right imposed by the duty accrues; and they are the proper parties to an action to enforce such right and compel the performance of such duty."

It was held also in *Paxton v. Paxton* (Cal.) supra, that a court of equity, in a suit by a child against its parents to enforce the statutory obligation above referred to, might reserve in the judgment the power to modify it in the event that changed conditions in the future demanded a modification, so as to meet the objection that, because of a change of circumstances, the child might become financially able to care for himself or the parents become financially unable to comply with the judgment. R. E. H.

CHARLES LAPPLEY, Plff. in Err.,  
v.  
STATE OF WISCONSIN.

*Wisconsin Supreme Court — December 2, 1919.*

(— Wis. —, 174 N. W. 913.)

**Perjury — verification of pleading.**

1. The verification of a pleading is within the operation of a statute providing punishment for anyone who, being lawfully required to depose the truth on his oath, shall wilfully and corruptly swear falsely to any matter or thing respecting which such oath is by law authorized or required.

[See note on this question beginning on page 1283.]

**Evidence — pleading — use in criminal cases.**

2. A statutory provision that no pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading does not prevent the admission in evidence in a prosecution for perjury of a pleading having a wilfully false verification on which the prosecution is founded.

— handwriting — copies made at instance of court commissioner.

3. Upon prosecution for perjury in verifying a petition to set aside a mortgage foreclosure, based on payment as evidenced by an alleged forged receipt, evidence is admissible of copies of the receipt made by petitioner upon direction of a court commissioner, as a basis for comparison by handwriting experts.

[See 11 R. C. L. 626; see annotation 1 A.L.R. 1304.]

**Perjury — trial — instruction — assumption of proof.**

4. An instruction in a prosecution for perjury in verifying a false petition in a law action that there is no question but that the oath was administered legally in the legal proceedings, and that all the elements of perjury, so far as the court and officers administering the oath are concerned, are proven, does not convey the idea that all the facts necessary to prove the crime of perjury are proven.

[See 14 R. C. L. 738.]

**Appeal — statement that facts are proven.**

5. It is not error to state to the jury that certain material facts are proven beyond controversy, when they are established by the undisputed evidence.

[See 14 R. C. L. 739.]

**ERROR** to the Municipal Court for Milwaukee County (Clementson, J.) to review a judgment convicting defendant of perjury. *Affirmed.*

Statement by Siebecker, J.:

Plaintiff in error (defendant) was tried and convicted of perjury, and brings error to reverse this judgment.

On December 30, 1892, defendant and his wife, Wilhelmina Lappley, borrowed from George Hook, the complainant and plaintiff in the mortgage foreclosure proceeding out of which this action arose, the sum of \$800, giving their note for that amount. At the same time a real estate mortgage securing the pay-

ment of the note was given to George Hook and signed by Charles Lappley and Wilhelmina Lappley, dated December 30, 1892. The complainant George Hook testifies that the note was never paid; that no claim was ever made by the defendant that the note was paid until some time in July, 1914, after foreclosure proceedings had been commenced and when the defendant asked for an extension of time from the complainant's attorney. The defendant admits paying interest on

the note up to the year 1914, but claims that he discovered in July of that year that the note had been paid on June 30, 1900, by his wife. The wife became insane shortly after that date, and was committed to an insane asylum in October, 1900. He admits that she experienced lucid periods up to the time of her death in 1918, and that he conversed with her in regard to business matters a number of times, but claims that she never told him of having paid the note in 1900, and that he knew nothing of the matter until he found a receipt bearing the date June 30, 1900, signed by George H. Hook. Mr. Hook denied that the receipt, either signature or body, is in his handwriting, or that he had written it, or that it was in the handwriting of his wife or his children or anyone employed as his agent.

On January 30, 1915, the plaintiff, Mr. Hook, was awarded judgment in the foreclosure proceeding against the defendant, which judgment was entered on the same day. On January 16, 1916, defendant instituted a proceeding in connection with the foreclosure action, by verified petition, setting up the alleged receipt and payment of the note, and praying that the foreclosure judgment be vacated and set aside. By stipulation this motion was dismissed upon its merits, and on September 26, 1918, the defendant commenced a civil action by swearing to a complaint which is the basis for this prosecution for perjury. This civil action is based upon the same alleged receipt from George Hook. On October 5, 1918, this criminal action of perjury against Charles Lapple was commenced.

The case was tried before the court and a jury, and the defendant was found guilty. He was sentenced to serve a term of three years in the house of correction of Milwaukee county, which judgment he now seeks to reverse.

Messrs. Gugel & Kline, for plaintiff in error:

The action is not one in which the crime of perjury can be committed by

the verification of a pleading, and a verdict should have been directed for the defendant.

Clark, *Crim. Law*, 2d ed. § 142; *Beacher v. Anderson*, 45 Mich. 543, 8 N. W. 539; *People v. Gaige*, 26 Mich. 30; *United States v. Lamson*, 165 Fed. 80; *Patterson v. United States*, 104 C. C. A. 434, 181 Fed. 970; *Nickell v. United States*, 88 C. C. A. 562, 161 Fed. 702; *People v. Howard*, 111 Cal. 655, 44 Pac. 343; *Klug v. McPhee*, 16 Colo. App. 39, 63 Pac. 709; *State v. Houston*, 103 N. C. 383, 9 S. E. 699, 8 Am. Crim. Rep. 625; *United States v. Bedgood*, 49 Fed. 54; *United States v. Maid*, 116 Fed. 650; *United States v. Babcock*, 4 McLean, 113, Fed. Cas. No. 14,488.

A confessedly simulated handwriting is not the "genuine" handwriting of a party, and cannot be used, under the statute, as a standard of comparison, to prove that the original or disputed writing is the handwriting of the party who made the imitation or simulation.

*State v. Miller*, 47 Wis. 530, 3 N. W. 31; *Hazleton v. Union Bank*, 32 Wis. 34; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *Merritt v. Campbell*, 79 N. Y. 625; *Miles v. Loomis*, 75 N. Y. 291, 31 Am. Rep. 470; *Williams v. State*, 61 Ala. 33; *Brobston v. Cahill*, 64 Ill. 356; *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573; *Travis v. Brown*, 43 Pa. 9, 82 Am. Dec. 540; 20 Cyc. 1187; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Dow v. Spenny*, 29 Mo. 386; *Smeltzer v. White*, 92 U. S. 390, 23 L. ed. 508; *Corn Exch. Bank v. American Dock & T. Co.* 149 N. Y. 174, 43 N. E. 915; *Cox v. Northwestern Stage Co.* 1 Idaho, 376.

A person who sees another write, or examines his writing, expressly for the purpose of testifying, is, in general, an incompetent witness.

*Reese v. Reese*, 90 Pa. 89, 35 Am. Rep. 634; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Nunes v. Perry*, 113 Mass. 275; *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. 318.

The court erred in unduly limiting the defendant's cross-examination of the state's handwriting expert.

2 Jones, *Ev.* § 570; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *Colbert v. State*, 125 Wis. 435, 104 N. W. 61.

A charge directing a conviction is not proper, where the evidence upon any material question of fact is conflicting or doubtful, where the incriminating evidence is wholly circumstan-

tial, and material inferences are to be drawn therefrom by the jury, or where the evidence is vague, unsatisfactory, and unconvincing.

Townsend v. State, 137 Ala. 91, 34 So. 382; State ex rel. Rowe v. District Ct. 44 Mont. 318, 119 Pac. 1103, Ann. Cas. 1913B, 396; State v. Vance, 29 Wash. 435, 70 Pac. 34; People v. McCord, 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117; Wicker v. State, 107 Miss. 690, 65 So. 885.

It is error for the court, in its charge to the jury, to assume, either directly or indirectly, the existence or nonexistence of any material fact in issue on which there is either no evidence, or on which the evidence is controverted, or, if undisputed, is such that different inferences reasonably might be drawn therefrom.

Newton v. State, 51 Fla. 82, 41 So. 19; Cupps v. State, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546; Benedict v. State, 14 Wis. 424; Dingman v. State, 48 Wis. 485, 4 N. W. 668; 11 Enc. Pl. & Pr. 116.

Messrs. John J. Blaine, Attorney General, Winfred C. Zabel, and Arthur H. Bartelt, for the State:

The civil complaint may be admitted in evidence to show that in swearing to the allegation the party committed perjury.

Wolecott v. Winston, 8 Abb. Pr. 422; People v. Christopher, 4 Hun, 807; Voorhies, N. Y. Anno. & Rev. Code 1873, § 157.

Perjury can be committed by knowingly and maliciously swearing to a material allegation in a complaint.

McClain, Crim. Law, § 859; Com. v. Kimball, 108 Mass. 473; People v. Christopher, 4 Hun, 807; Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, L.R.A.1916A, 386, 142 N. W. 271, Ann. Cas. 1915B, 877; People v. Ostrander, 64 Hun, 835, 19 N. Y. Supp. 324, 328.

The handwritings in question were admissible.

State v. Miller, 47 Wis. 530, 3 N. W. 31; 3 Chamberlayne, Ev. § 2273.

The scope of cross-examination comes within the administrative power of the trial court, and the action thus taken will not be reversed unless the discretion has been abused.

Sloss-Sheffield Steel & I. Co. v. House, 157 Ala. 663, 47 So. 572; 1 Chamberlayne, Ev. § 378.

An instruction is not erroneous as invading the province of the jury because  
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cause it presumes the existence of facts which are admitted by the parties, especially by the accused, or which are established clearly by uncontradicted evidence.

Burns v. State, 145 Wis. 373, 140 Am. St. Rep. 1081, 128 N. W. 987; Cupps v. State, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546.

If there is any credible evidence which supports the verdict in any reasonable view, it cannot be disturbed on appeal.

Lam Yee v. State, 132 Wis. 527, 112 N. W. 425; Van Haltren v. State, 142 Wis. 143, 124 N. W. 1039.

Siebecker, J., delivered the opinion of the court:

It is contended that the perjury charged in the information does not constitute a crime within the provisions of § 4471, Stat., upon the ground that perjury cannot be committed in verifying a pleading. The statutes provide: "Any person, being lawfully required to depose the truth, on his oath, . . . legally administered, who shall wilfully and corruptly swear, . . . to any matter or thing, respecting which such oath . . . is by law authorized or required . . . shall be deemed guilty of the crime of perjury. . . ."

No claim is made that the oath was not administered by an officer, as charged. But it is argued that the verification by defendant of his complaint as a pleading in the civil action on which the charge is predicated was a wholly immaterial oath within the contemplation of the Perjury Statute, because under § 2665 pleadings may or may not be verified, and, whether verified or not, the facts therein stated to which defendant swore do not, by operation of law, make such oath a material matter or thing in such action. This claim wholly disregards the terms and significance of § 4471. A complaint in a civil  
Perjury—  
verification of  
pleading.

action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it is one in regard to a matter before a court, and is authorized by law. The facts



of this case show that the verification by defendant of this complaint in question will, in law, sustain a prosecution for perjury under our statute, if the defendant wilfully and falsely and corruptly swore to the material facts stated therein. *Com. v. Kimball*, 108 Mass. 473; *Jones v. Ludlum*, 74 N. Y. 61; *McClain*, *Crim. Law*, § 859; *People v. Christopher*, 4 Hun, 805; *Taylor v. Robinson*, 26 Wis. 545.

It is claimed that the court erred in admitting the complaint and the verification thereof, on which the charge of perjury is predicated, as evidence in this criminal prosecution. The point is made that the provision of § 2665, Stat., makes it incompetent. The provision relied on reads: "And no pleading can be used in a criminal prosecution against the party, as evidence of a fact admitted or alleged in such pleading."

The complaint was not received as "evidence of a fact admitted or alleged," but was received to show that it was a verified pleading and that defendant swore that the facts stated therein were true. Proof of the truth or the falsity of the facts thus sworn to in the complaint was required to be made by evidence other than by the contents of the complaint. Such use of the complaint is using it as evidence to show that the defendant did depose to the truth, on his oath, of the material matters therein stated in a proceeding before a court. An exception is urged to the reception in evidence of the alleged forged receipt in connection with copies thereof that the defendant had made at the direction of the court commissioner in an adverse examination of him under § 4096, Stat., in a proceeding to vacate the judgment of foreclosure in the action of *Hook v. Lapple*. The defendant was there required to produce the alleged forged receipt showing payment of the mortgage, and upon its production he was directed by the commissioner to make copies of the receipt in the presence

Evidence—  
pleading—  
use in criminal  
cases.

of the commissioner and counsel. These copies were offered in evidence, and used as the genuine handwriting of the defendant in the trial of this criminal action, and were so used and submitted to the witness called as an expert on handwriting, and were submitted to the jury. We discover no error in so receiving and using these copies, nor was it error for the court to receive the expert's opinion as to the similarity of the handwriting of these copies and the alleged forged receipt. We think the expert was properly held by the court to be qualified to give his opinion in the matters elicited from him.

—handwriting  
—copies made  
at instance  
of court  
commissioner.

An objection is urged to the following instruction given the jury: "There is no question but what the oath was administered properly in a legal proceeding by an officer authorized to administer it, and that all the elements of perjury, so far as the court and officer administering the oath and the character of the proceeding in which it was administered is required—every such requirement is indisputably proved by the evidence of the case."

It is averred that this instruction conveyed the idea to the jury that all the facts necessary to prove the crime of perjury charged were undisputed. We cannot so regard the instruction. It is plainly limited to refer to certain material facts as undisputed in the case, and the record sustains the court in this assumption.

Perjury—trial—  
instruction—  
assumption of  
proof.

It is, therefore, not an objectionable instruction in view of the evidence in the case. Furthermore, the court fully brought to the attention of the jury, in clear and explicit terms, the other issues of fact which were required to determine upon the evidence in the case and to justify them in finding the defendant guilty of the crime charged.

Appeal—  
statement that  
facts are proven.

It is not error to state to the jury

that certain material facts are proven beyond controversy, when they are established by the undisputed evidence. *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996, 97 N. W. 210, 98 N. W. 546.

We have examined the exceptions called to our attention, and find no reversible error in the record. The defendant had a fair and legal trial, and the conviction must stand.

The judgment is affirmed.

## ANNOTATION.

### Perjury in verifying pleadings.

It seemingly is well settled that one who wilfully swears to a pleading in chancery, knowing it to contain false statements as to material facts, thereby commits perjury, provided the pleading was one which he was legally bound to verify by oath. The following authorities support this rule: *Com. v. Warden* (1846) 11 Met. (Mass.) 406; *Com. v. Kimball* (1871) 108 Mass. 473; *People v. McCaffrey* (1889) 75 Mich. 115, 42 N. W. 681; *State v. Luper* (1908) — Or. —, 95 Pac. 811; *Rex v. Morris* (1761) 2 Burr. 1189, 97 Eng. Reprint, 781; *Rex v. Morris* (1761) 1 Leach, C. L. (Eng.) 50; *Rex v. Benson* (1810) 2 Campb. (Eng.) 508; *Reg. v. Yates* (1841) Car. & M. (Eng.) 132, 5 Jur. 636. And see the dictum in *Jones v. Ludlum* (1878) 74 N. Y. 61, to the effect that a party can be held responsible for a general denial in an answer made under oath in a proceeding in equity upon an indictment for perjury, in case of its falsehood.

This rule has been applied to an oath to a false answer to a bill of discovery (*Com. v. Warden* (Mass.) supra); a petition for a supersedeas of an execution, sought to be annulled by a writ of audita querela (*Com. v. Kimball* (1871) 108 Mass. 473); a wilfully false answer to a bill seeking to enjoin the suing out of an execution on a judgment (*Reg. v. Yates* (Eng.) supra); to a bill for divorce to which the statute required that an oath be taken (*People v. McCaffrey* (1889) 75 Mich. 115, 42 N. W. 681; *State v. Luper* (1908) — Or. —, 95 Pac. 811); to an answer to a bill in chancery, seeking to establish an equity in the property of a bankrupt (*Rex v. Benson* (1810) 2 Campb. (Eng.) 508; and to an answer to a bill in chancery, the nature of which was not reported

(*Rex v. Morris* (1761) 1 Leach, C. L. (Eng.) 50).

And a similar rule to that supported by the preceding cases has been laid down with respect to cases on the law side of the court. This was the effect of the decision in the reported case (*LAPPLEY v. STATE*, ante, 1279). And in *People v. Christopher* (1875) 4 Hun (N. Y.) 805, it was held that perjury could be predicated on a verification of an answer to a complaint upon a promissory note, where such answer contained positive, but false, assertions of facts which, if true, would have constituted a defense to the note, and which, therefore, were material. And again in *State v. Roberts* (1851) 11 Humph. (Tenn.) 589, it was held that perjury could be assigned upon a false oath on a plea of non est factum to a suit on a note, the oath to the plea having been required by statute.

And falsely swearing to a complaint charging a crime, before a magistrate having jurisdiction of such a crime, has been held to constitute perjury, since such complaint inaugurated the prosecution. *People v. John* (1902) 137 Cal. 220, 69 Pac. 1063.

And in Alabama it has been held that a false oath given in swearing to a petition for letters of administration before the probate court constitutes perjury. *Cowan v. State* (1916) 15 Ala. 87, 72 So. 578.

And that a false oath as to matters contained in a petition in insolvency may constitute perjury, see *People v. Maxwell* (1897) 118 Cal. 50, 50 Pac. 18.

And see dictum in *Taylor v. Robinson* (1870) 26 Wis. 545, to the effect that an attorney falsely verifying a complaint, in an action brought to re-

cover a balance due on an account for goods and merchandise sold, may be convicted of perjury.

On the other hand, however, it is well established that where the pleading is of a character which the law does not require shall be verified by oath, perjury cannot be assigned upon a false oath made in verifying such a pleading. *People v. Gaige* (1872) 26 Mich. 30; *Beecher v. Anderson* (1881) 45 Mich. 543, 8 N. W. 539; *Silver v. State* (1848) 17 Ohio, 365.

Nor can a charge of perjury be based on a false oath relating to matters which are irrelevant or immaterial. *Rex v. Benesech* (1796) Peake, N. P. Add. Cas. (Eng.) 93; *Rex v. Dunstan* (1824) Ryan & M. (Eng.) 109. And see *People v. Christopher* (1875) 4 Hun (N. Y.) 805, wherein it was held that no perjury was committed in the verification of an answer interposed in an action brought upon a promissory note, which answer contained no direct and positive denial, or matter material to the issue to be tried.

In case the matter to which the oath relates is immaterial or irrelevant, or the law does not require verification by oath, an oath is wholly immaterial and extrajudicial, and serves no purpose whatever. *People v. Gaige* (Mich.) supra. In fact, it does not change the rule that the falsity of the oath was wilful, even though it related to material facts, the test being whether the oath itself was material. *Beecher v. Anderson* (1881) 45 Mich. 543, 8 N. W. 539, supra. In this case, the court, in construing the common-law rule that perjury is committed "when a lawful oath is administered in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question," said: "By this is meant that the oath must be material. The facts sworn to may be material, and yet the false swearing be no perjury because the oath performed no office in the case, and was wholly unimportant and immaterial. . . . It does not appear from the complaint [habeas corpus proceedings] that the answer was to

be used for any purpose for which an oath to it could be of any importance. So far as appears, therefore, the oath of W. [the accused] to the answer was wholly an idle ceremony. The answer was no better with it than without it; it affected the issue in no manner whatever; it strengthened no statement made by the answer, and it made no statement evidence that would not have been evidence without it, and gave no statement weight or force that it would not otherwise have possessed. As an information the complaint would, therefore, have been fatally defective." And in *Silver v. State* (Ohio) supra, in holding that an affidavit of the truth of an answer in equity did not constitute ground for a charge of perjury where the bill did not call for an answer under oath, the court said: "To constitute perjury, the oath or affirmation must be material or be required by, or have some effect in, law. Under the late act, an affidavit of the truth of an answer in chancery has no legal effect unless the bill expressly calls for such answer on oath. Unless called for on oath, the affidavit of the truth of the answer is wholly immaterial; it neither benefits the respondent nor injures the complainant. The answer has the same effect, and nothing more, that it would have had, had it not been sworn to. Hence to assign perjury upon an answer in chancery, the indictment should aver that the bill called for an answer under oath."

In *People v. Gaige* (1872) 26 Mich. 30, it was held that an information for perjury, alleged to have been committed in swearing to a bill in equity, was insufficient both at common law and under a statute which required verification by oath only when the bill was one which did not ask that any preliminary injunction or other order be based on the verification, the information not showing in any way that the bill was of a character required by law to be verified by oath. It was further held in this case that an allegation in the information that the defendant was "lawfully required to declare and depose the truth" in the

proceeding in equity was insufficient, at least, when the oath was not taken upon the trial to show that a verification by oath was either "required or authorized by law." And in *Beecher v. Anderson* (1881) 45 Mich. 543, 8

N. W. 539, where the court arrived at a similar conclusion, the accused, the general manager of a corporation, swore to the answer of the corporation to a bill in equity, instead of attesting it by the corporate seal. G. J. C.

MIKE SLYCORD, Appt.,

v.

GEORGE HORN.

*Iowa Supreme Court — April 5, 1917.*

(*Sylcord v. Horn*, 179 Iowa, 936, 162 N. W. 249.)

**Workmen's compensation — farm labor — employer independent contractor — effect.**

1. Upon the question whether or not a hand on a corn shredder is engaged in farm labor within the exception of the Workmen's Compensation Act, the further question, whether or not, as between his employer and the one for whom the work was being done, the employer was an independent contractor, is immaterial.

[See note on this question beginning on page 1296.]

**Pleading — requiring more specific allegation — absence of prejudice.**

2. One suing for injuries received while at work on a farm, who comes within the provision of the Workmen's Compensation Act which excepts farm laborers from its operation, is not prejudiced by a ruling of the court requiring him to make his petition more specific by showing negligence on the part of his employer and absence of negligence on his own part.

[See 2 R. C. L. 244.]

**Definition — independent contractor.**

3. An independent contractor is one who, exercising an independent employment, contracts to do work according to his own methods, without being subject to the control of his employer except as to the results of his work.

[See 14 R. C. L. 67.]

**Workmen's compensation — application to independent contractor.**

4. An independent contractor is not

within the operation of the Workmen's Compensation Act.

— application to one employed on corn shredder.

5. One employed to work on a corn shredder, which is moved from farm to farm as its services are needed, is a laborer engaged in agricultural pursuits within the provision of the Workmen's Compensation Act excepting such employees from its operation.

**Definition — agricultural.**

6. Agricultural means pertaining to, connected with, or engaged in agriculture.

**Pleading — action against master — necessary allegation.**

7. To hold an employer liable at common law for injury to his employee the petition must allege negligence on the part of the employer, freedom from contributory negligence, and that the negligence was the proximate cause of the injury.

[See 20 R. C. L. 136.]

**APPEAL** by plaintiff from an order of the Superior Court of Grinnell (Norris, J.) sustaining a motion to strike certain parts of the amended petition and a motion for a more specific statement, in a proceeding under the Workmen's Compensation Act to recover compensation for personal injuries sustained by plaintiff while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Ross R. Mowry, Harold L. Beyer, and M. R. Hammer, Jr., for appellant.

Mr. J. H. Patton for appellee.

Preston, J., delivered the opinion of the court:

There was a motion to strike parts of the original petition and for more specific statement, which was sustained in part and overruled in part, and thereafter an amendment to petition was filed, and defendant filed a demurrer to the petition as amended, setting up twenty grounds or more, and the demurrer was sustained. Thereafter, a substituted petition was filed, and it is conceded by both sides that the only questions presented on this appeal are in regard to the rulings of the trial court on defendant's motion to strike certain parts of the substituted petition, and on the motion for more specific statement.

The substance of the allegations in the substituted petition is that, about November 13, 1914, defendant was the owner of a certain corn shredder and other appurtenances thereto belonging, and was engaged as an independent contractor in the business of operating said corn-shredding machine for profit; that, while the defendant was engaged in operating said corn shredder for one Swaney on said Swaney's farm in Poweshiek county, Iowa, the plaintiff, while in the employ of the defendant and engaged in operating said shredder, was injured by his hand being caught therein, and the thumb of his right hand was cut and his hand was otherwise injured; that the plaintiff, at the time he received the injury, was operating said shredder under the immediate direction of the defendant, and in the presence of the defendant; that, as a result of said injury, plaintiff's right hand was seriously and permanently injured, and he has suffered intense pain and anguish, both physical and mental, and has been, and will be, partially incapacitated for work; that he has incurred expense for medicine, nursing, and for physician; that at the time of the

injury he was an able-bodied man, engaged in the occupation of an engineer and general laborer, receiving, on an average, \$18 per week as compensation for his labor; that said injury was not intentional on the part of plaintiff, or the result of intoxication on his part. The damages claimed are particularly set out. It is then alleged "that the defendant, at the time of the accident to the plaintiff resulting in the injury of the plaintiff, had not insured his liability, under chap. 147 of the laws of the thirty-fifth general assembly of the state of Iowa, in any corporation, association, or organization approved by the state department to such insurance department, satisfactory to the insurance department and Iowa industrial commissioner of his solvency and financial ability to pay the compensation and benefits as by such act provided, and to make such payments to the parties entitled thereto; nor had the defendant deposited with such insurance department and the Iowa industrial commissioner security satisfactory to such insurance department and the Iowa industrial commissioner as would secure the payment of such compensation."

He asks damages in the sum of \$10,000.

Defendant moved to strike that part of the petition in which it was alleged that defendant was an independent contractor, and for profit, but this was overruled. The defendant also moved to strike that part of the petition alleging that defendant had not insured his liability under chap. 147 of the acts of the thirty-fifth general assembly, and that he had not deposited security with the insurance department, for the reason that the same is immaterial and redundant matter and surplusage, it appearing on the face of the substituted petition that plaintiff, at the time the alleged injuries were sustained, was a laborer engaged in an agricultural pursuit, and within the exception of § 1, chap. 147, Acts Thirty-fifth General Assembly (Code Supp. 1913, § 2477—

m). This ground of the motion was sustained.

As a part of the motion, appellee moved for a more specific statement, upon the following grounds, among others: (3) Let him be required to state whether or not negligence in the premises by the defendant was the proximate cause of the alleged injury to plaintiff, and, if he alleges that it was, let him be required to state in what respect or particular, and in what manner, the defendant was negligent in the premises. (4) Let him be required to state whether or not the plaintiff was free from contributory negligence. These two grounds of the motion were sustained. It will be observed that it is not alleged in the petition that defendant was guilty of negligence, nor that plaintiff was free from contributory negligence. It is not claimed by appellant that the allegations of his petition would entitle him to recover as for negligence at common law. But he does claim that he has brought himself within the Workmen's Compensation Act, while defendant's contention is that plaintiff is within the exception contained in the act, which provides: ". . . But this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits," etc.

It does not appear from the record, but seems to be conceded in argument, that neither the employer nor the employee had given notice of an election to accept or reject the terms of the Compensation Act; that appellee, as an employer of labor, did not give notice in writing to his employees of an election not to provide, secure, and pay compensation under said act to employees for injuries sustained, arising out of and in course of the employment, by posting said notice or by filing same with the industrial commissioner.

Incidentally, the issue is raised, and there is some argument upon the point, as to whether or not appellee rejected the Workmen's Compensation Act by failing to insure his

liability thereunder or by failing to deposit security, and thus brought himself within the provisions of said Workmen's Compensation Act. Appellant contends that appellee, not having insured his liability as required by the provisions of the Employers' Liability and Workmen's Compensation Act, as contained in § 2477-m41, Code Supp. 1913, was liable in the instant case for the injury of appellant, under part 1 of the act, to the same extent as though he had rejected the provisions of the act. And the inquiry, as appellee puts it, is whether, by such failure or omission, he rejected the act, and whether he is, by reason thereof, deprived of the common-law defenses of assumption of risk, contributory negligence, etc. It is said in argument that, if this question has not already been raised and decided, the opinion of this court upon this phase of the matter will doubtless be helpful to the profession as a whole, in dealing with the Workmen's Compensation Act in the future. But, as we shall see in a moment, we think the question is not in the case, and it will be time enough to decide the point when it is properly raised, and we have argument upon that point. It is doubtful whether the question is raised by the pleadings, but if it is, the argument is limited to two questions, and they are: Whether the rights of the parties are affected by the claim that defendant was an independent contractor, and whether or not plaintiff was engaged in agricultural pursuits, and thus comes within the exception to the statute. If the fact that defendant, as between himself and Swaney, was an independent contractor, is not material, then the question presented is narrowed still further to the one question as to whether or not plaintiff was engaged in agricultural pursuits.

One of the assignments of error is that the lower court erred in striking from appellant's substituted petition the paragraph averring that the appellee had not insured his liability under the Employers' Lia-

bility and Workmen's Compensation Act, for the reason that the appellee, in operating the corn shredder as an independent contractor for profit, was not engaged in agricultural pursuits. In support of this, they cite §§ 2477-m and 2477-m41, Code Supp. 1913; *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886. They put it another way, and they concede in argument that "if the appellee, in operating said corn shredder, was engaged in agricultural pursuits, and the appellant was employed by appellee as a farm or other laborer engaged in agricultural pursuits, then the trial court was right in sustaining appellee's motion to strike and for more specific statement. If not, the lower court was in error."

Appellee makes substantially the same concession. He contends that appellant, at the time his alleged injuries were sustained, was a laborer engaged in an agricultural pursuit, and he sustained said injuries while engaged in an agricultural pursuit as a farm laborer, and that the other points must stand or fall with this, and that, if this point is sustained, then the rulings of the lower court as to the other points are correct.

Before taking up these two points, it should be said that in the assignment of errors appellant complains that the court erred in sustaining the motion for more specific statement, requiring plaintiff to state whether defendant's negligence was the proximate cause of the injury, and to state the manner in which appellee was negligent, and in requiring plaintiff to state whether he was free from contributory negligence. He calls attention again to § 2477-m, which provides, among other things: "In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that

the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence."

We do not quite understand the theory of the trial court as to the rulings on the motion for more specific statement. It may be that the parties were themselves in doubt as to how to proceed under this new law. But if the ruling of the court on the motion for more specific statement is erroneous, it is without prejudice to plaintiff, if the holding here is against his contention on the two points relied upon, which have been before stated. If the trial court was of opinion that defendant was within the exception to the statute, because a farm laborer, it would have been proper for the court to require plaintiff to allege negligence of the defendant and that plaintiff was free from contributory negligence, if plaintiff was seeking to recover at common law, independently of the statute; but such was not the case. If, as we hold, plaintiff comes within the exception to the statute, no prejudice could result to him from the ruling sustaining the motion to make the petition more specific, because plaintiff could not recover under the Compensation Act; and this is so, whether defendant had rejected the provisions of the act or not. If plaintiff should now seek to recover independently of the act, it would be necessary that he allege negligence of the defendant and his own freedom from contributory negligence; so that, in either event, the ruling at this point is without prejudice. We shall now take up the two points relied upon. No authorities are cited by either side on these points, except the statutes before set out and the *Hunter Case*.

1. As to plaintiff's claim that the defendant was an independent con-

Pleading—  
requiring more  
specific allegation—absence  
of prejudice.

tractor, we think the petition pleads only a conclusion that defendant was an independent contractor. An independent contractor has been defined or described as one who, exercising an independent employment, contracts to do work according to his own method, without being subject to the control of his employer except as to the result of the work. Bodwell v. Webster, 98 Neb. 664, 154 N. W. 229, Ann. Cas. 1918C, 624.

The facts as stated in the petition do not show that the defendant was an independent contractor within this definition, but, as said, it is stated as a general conclusion that he was such. But this point is not made by appellee, so that we should not, perhaps, consider the question. We think that, under the circumstances of this case, it is not material that, as between the defendant and Swaney, defendant was an independent contractor.

Workmen's compensation—  
farm labor—  
employer  
independent contractor—  
effect.

If defendant was seeking to recover from Swaney, then the question might be material as bearing

on the question as to whether, being an independent contractor, he was a laborer or employee. Or, if plaintiff was seeking to recover from Swaney, the question as to whether defendant Horn was an independent contractor might be material on the question as to whether plaintiff was an employee of Swaney's. Even though defendant Horn was an independent contractor as between himself and Swaney, defendant Horn could be engaged in an agricultural pursuit, and if so, plaintiff, Horn's employee, could be so engaged. It appears to us that it is not so much a question as to the relations between defendant Horn and Swaney, as it is between plaintiff and the defendant; that is, whether the relation of master and servant, or employer and employee, existed. As stated, plaintiff alleges that he was in the employ of defendant. If he was an independent

contractor, such relation would, of course, not exist. There is no claim, as between plaintiff and defendant, that plaintiff is an independent contractor. It is alleged in the petition, and admitted by the demurrer, that at the time of the injury complained of plaintiff was in the employ of defendant, engaged in the occupation of an engineer and general laborer, receiving, on an average, \$18 per week as compensation for his labor. The question is whether plaintiff, the injured party, was an independent contractor. It has been held that the term "workman" does not include an independent contractor for work wherever done, and that the injured party was not an independent contractor, in a case where many of the elements of the relation appeared, but the employers specially agreed to compensate such person in case of injury by accident. Boyd, Workmen's Comp. § 444.

—application to  
independent  
contractor.

Without further discussion of this question, the following cases may be cited as having a bearing upon the question in regard to independent contractors: See note to Rayner v. Sligh Furniture Co. L.R.A.1916A, 22, at page 118; Thompson v. Twiss, 90 Conn. 444, L.R.A.1916E, 506, 97 Atl. 328; Tuttle v. Embury-Martin Lumber Co. 192 Mich. 885, 158 N. W. 875, Ann. Cas. 1918C, 664.

2. This brings us to the other question relied upon,—and really the only question in the case,—and that is, whether plaintiff was a "farm or other laborer engaged in agricultural pursuits." If so, he is within the exception contained in § 2477-m, Code Supp. 1913, and not within the Compensation Act. It seems to us it is hardly a debatable question. No authorities are cited by either party on this point. The petition alleges that, at the time of his

—application to  
one employed  
on corn  
shredder.

injury, he was engaged as an engineer and laborer in defendant's employ, operating a piece of farm machinery, a corn shredder. In 2 C. J.



982, and Century Dictionary, we find this definition of agricultural: "Pertaining to, connected with, or engaged in agriculture." We also find, at page 988, 2 C. J., that

**Definition—  
agricultural.**

"the term 'agriculture' has been defined to be the 'art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming.'"

In the last citation, the note cites *Dillard v. Webb*, 55 Ala. 468, 474, where it is held, as to the comprehensiveness of the term "agriculture:" "The variety of products of the earth, of agricultural implements, and of domestic animals, invited and put on exhibition at agricultural fairs, attests the comprehensiveness of the term 'agriculture.' It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied, products."

The note also cites *Simons v. Lovell*, 7 Heisk. 510, 516, as holding: "It is equivalent to husbandry, and husbandry Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces."

In *Shafer v. Parke, D. & Co.* 192 Mich. 577, 159 N. W. 304, it was held that the employee of a company manufacturing drugs, serums, and other pharmaceutical preparations, and maintaining a farm and stock in the preparation of serums, but from which it sold surplus grains, etc., who was employed on the farm to perform ordinary farm labor, and was injured by being

kicked by a horse, was a farm laborer, within the Workmen's Compensation Act.

There can be no doubt that shredding corn is a part of carrying on a farm. Swaney could have employed defendant to plow a 40-acre field, and defendant could have employed plaintiff to assist him. The fact that defendant may have agreed to plow the entire field by contract would not change the character of the work, and both he and his assistant would still be engaged in farming operations.

It is our conclusion that, under the allegations of the petition as it now stands, plaintiff has not brought himself within the Compensation Act, but that he is a farm laborer, or other laborer engaged in agricultural pursuits, and within the exception of § 2477-m. This being so, it is not material to his rights that defendant failed to insure his liability or deposit security, and the trial court properly sustained defendant's motion to strike that part of the petition. Since plaintiff does not come within the Compensation Act, he may wish to amend and seek to recover as for negligence at common law, and in that case it will be necessary that he allege the matters which the trial court required him to allege as to defendant's negligence and plaintiff's freedom from contributory negligence.

It is our conclusion that the case ought to be, and it is, affirmed.

Gaynor, Ch. J., Ladd and Evans, JJ., concur.

**Pleading—  
action against  
master—  
necessary  
allegation.**

#### NOTE.

The application of Workmen's Compensation Acts to employees engaged in farming is considered in the note following *MILLER & LUX v. INDUSTRIAL ACCL. COMMISSION*, post, 1296.

MILLER & LUX INCORPORATED, Plff. in Certiorari,  
v.  
INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF  
CALIFORNIA.

*California Supreme Court (In Banc) — February 17, 1919.*

(— Cal. —, 178 Pac. 960.)

**Workmen's compensation — classified work on farm.**

1. The mere fact that because of the great extent and complexity of farming operations on a given ranch, the work of the farmers is classified and each is given a limited rather than a diversified duty, does not make some of them artisans rather than agriculturists within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 1296.]

— review of finding of Commission.

2. Where the ultimate finding of the Industrial Accident Commission that an injured employee was within the operation of the statute allowing compensation is based on probative facts found by it which fail to establish the ultimate facts found, the court may annul the finding.

— constitutionality of act.

3. The Workmen's Compensation Act is constitutional only because it imposes a charge, not upon the in-

dividual employer, but upon the branch of the industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance.

— farming — repair of implements.

4. One employed by a farmer to devote his entire time to the repair of farming implements in a shop devoted to such repairs is engaged in farming within the meaning of the Workmen's Compensation Act, excluding farming from the operation of the act.

**CERTIORARI** to review an award of respondent in favor of applicant in a proceeding by him under the Workmen's Compensation Act to recover compensation for personal injuries sustained while in the employment of petitioner. *Award annulled.*

The facts are stated in the opinion of the court.

Messrs. Edward F. Treadwell and Berkeley B. Blake, for petitioner:

A person regularly employed on a farm and engaged in the repair of agricultural machinery used upon the farm is engaged in farm labor.

Shafer v. Parke, D. & Co. 192 Mich. 577, 159 N. W. 304; Coleman v. Bartholomew, 175 App. Div. 122, 161 N. Y. Supp. 560; Stevenson v. Magill, 35 N. D. 576, L.R.A.1917D, 377, 160 N. W. 700; Winslow v. Uiquhart, 39 Wis. 260; Breault v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; Olesen v. Rogers Development Co. 2 Cal. Industrial Acci. Dec. 560.

Mr. Christopher M. Bradley, for respondent:

The finding of the Commission that the injured employee was not engaged in farm labor is a finding of fact.

Smith v. Coles [1905] 2 K. B. 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754, 8 W. C. C. 116; Miller & Lux v. Industrial Acci. Commission, 32 Cal. App. 250, 162 Pac. 651; George v. Industrial Acci. Commission, 178 Cal. 733, 174 Pac. 653; Shafer v. Parke, D. & Co. 192 Mich. 577, 159 N. W. 304; Coleman v. Bartholomew, 175 App. Div. 122, 161 N. Y. Supp. 560; Slycord v. Horn, 179 Iowa, 936, ante, 1285, 162 N. W. 249, 16 N. C. C. A. 592; White v. Loades, 178 App. Div. 236, 164 N. Y. Supp. 1023; Re Boyer, — Ind. App. —, 117 N. E. 507; Vincent v. Taylor Bros. 180 App. Div. 818, 168 N. Y. Supp. 287; State ex. rel. Bykle v. District Ct. 140 Minn. 398, L.R.A.1918F, 198, 168 N. W. 130; Brockett v. Mietz, 184 App. Div. 342, 171 N. Y. Supp. 412.

**Melvin, J.**, delivered the opinion of the court:

Certiorari to review an award of the Industrial Accident Commission in favor of **W. V. Fish** and against petitioner **Miller & Lux Incorporated**.

The findings of the Industrial Accident Commission upon which the attack of petitioner's counsel is directed, are as follows:

"(1) That **W. V. Fish**, hereinafter called the employee, the applicant herein, was injured on the 15th day of December, 1917, at Buttonwillow, Kern county, California, while in the employment of defendant, **Miller & Lux Incorporated**, hereinafter called the employer, as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employee being given to said occupation.

"(2) That said injury arose out of and in the course of said employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, as follows: His right hand was caught in a moving planer, the wound becoming infected.

"(3) That at the time of said injury the employee was not engaged in any of the occupations or employments excluded by § 14 of the Workmen's Compensation, Insurance and Safety Act of 1913 from the provisions of said act, and that said injury was not caused by wilful misconduct or intoxication of the employee."

It is argued by the counsel for respondent that the third finding is conclusive,—that in such cases we cannot go behind the determination of the commissioners upon matters of fact. In this behalf he cites *Smith v. Coles* [1905] 2 K. B. 827, 93 L. T. N. S. 754, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 8 W. C. C. 116. It is true that in that case, in which the county court judge had found that a car-

penter employed about a farm as a handy man was a workman in agriculture, certain of the justices held that, there being evidence to support the finding, they might not upset it, but in the matter at bar the learned commissioners found as a probative fact that the applicant was employed "as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employee being given to said occupation." It is clear, therefore, that the ultimate finding is really based upon the probative facts found, and if they fail to establish the jurisdiction of the Commission, petitioner must succeed. Findings of

*Workmen's compensation—review of finding of Commission.*

fact by which the Industrial Accident Commission determines itself clothed with jurisdiction are reviewable by this court. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466. The sole question, therefore, is whether or not a workman whose sole duty is to repair wagons in a shop operated on a farm for the purpose of keeping the agricultural implements and vehicles used on the farm in order is engaged in farm or agricultural labor within the meaning of § 14 of the Workmen's Compensation Act. Stat. 1913, p. 284.

At the threshold of the inquiry we should keep in mind the fact that the Compensation

Act is held constitutional only because it imposes a charge, not upon the individual employer, but upon the branch of industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1. The law of California has exempted the farming industry from the operation of this statute, and if a worker upon a farm may be reasonably classified as one engaged in agricul-

*—constitutionality of act.*

ture, his employer is clearly entitled to the benefit of this exemption. While it is true that an employer may be engaged in several sorts of industry, some of them within and some of them without the purview of the Compensation Act, and that an employee may at different times do work of one kind or the other, it is equally a fact that where, from the great extent and complexity of farming operations on a given rancho, the work of the farmers is

classified, and each —classified work is given a limited, on farm.

rather than a diversified, duty, that circumstance alone will not make some of them artisans rather than agriculturists. Numerous illustrations suggest themselves. If the mower who stops to use a whetstone on his scythe remains a farmer, is the boy who is set to work sharpening all the farming tools used on the place engaged in an occupation entirely outside of farming? Clearly not. So it has been held that a woodchopper or one removing stumps or brush from a farm is not an artisan within the contemplation of the act. *Miller v. Algar*, 2 Cal. Industrial Acci. Dec. 558; *Martin v. Russian River Fruit & Land Co.* 1 Cal. Industrial Acci. Dec. (part 2) p. 18; *Whitney v. Peterson*, 1 Cal. Industrial Acci. Dec. 306. Commenting upon two of the authorities last cited, this court (all the justices participating) has used the following language: "The Accident Commission has held that a woodchopper engaged in cutting and burning trees in clearing land for farming purposes is engaged in farm labor. *Whitney v. Peterson*, 1 Cal. Industrial Acci. Dec. 306. It has also been held that when land has been cleared for agriculture, one who operates a saw to cut the wood on the cleared land into suitable lengths for sale is engaged in farm labor. *Miller v. Algar*, 2 Cal. Industrial Acci. Dec. 584. If Snow had been found to be an employee on the farm who, as part of his duties, was required to repair the tractor, we could not see how he

could be adjudged not a farm laborer under those decisions." *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, at page 750, 158 Pac. 1032.

This aspect of the matter has been aptly discussed by the supreme court of New York in the case of *Coleman v. Bartholomew*, 175 App. Div. 122, 124, 161 N. Y. Supp. 560, 561, as follows: "It was the clear intent of the legislature to exclude farm laborers from the benefits of the Workmen's Compensation Law, and it only remains for us to define 'farm laborers.' . . . The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting, and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair,—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market, and innumerable other familiar duties."

In that case the farm laborer was engaged, when injured, in repairing the roof of a barn.

But, at the outset of the argument in his brief, counsel for the Industrial Accident Commission insists that the question before us has been settled in California adversely to petitioner's contention, and cites in that behalf *George v. Industrial Acci. Commission*, 178 Cal. 733, 174 Pac. 653, and *Miller & Lux v. Industrial Accident Commission*, 32

Cal. App. 250, 162 Pac. 651. We cannot agree with that view. In the George Case the claimant was found to be engaged in two occupations for the same employee, and his duty at the time of the accident was found to be that of a gardener. This court sustained the Industrial Accident Commission upon the finding that in his capacity as a gardener the applicant might not recover,—a conclusion which supports rather than opposes the argument of petitioner in the matter now before us. The other proceeding dealt with a case in which a man was and had been for many months engaged in the building of a house and was injured while so occupied. The Industrial Accident Commission found that petitioner was engaged in the business of wholesale and retail butcher, wholesale and retail merchandising, farming, horticulture, and real estate dealing. It did not appear that the house which the injured man was helping to build was to be used for any particular sort of fellow workmen. In this state of the record the learned district court of appeal used the following language in the opinion: "We are unable to follow the refinement of the petitioner's reasoning so far as to hold that because the operations of the petitioner are so diversified and extensive as to require regular employment of carpenters in the construction, improvement, and repair of buildings upon the ranch properties, that such artisans when so employed are to be regarded as engaged in farm labor."

In the matter now under discussion there was an entirely different record involving the employment of the workman upon repair of vehicles used in the farming operations of his employer alone.

While the authorities on this branch of the compensation statutes of the various jurisdictions are somewhat in conflict, the weight and the better reasoning support the contention of petitioner that the repairing of farming

machinery on the farm, in a shop devoted to such repairs, is an agricultural pursuit, and is one of the employments excluded by provisions similar to § 14 of the Workmen's Compensation Insurance & Safety Act.

In *Shafer v. Parke, D. & Co.* 192 Mich. 577, 159 N. W. 304, the workman was injured while engaged in caring for horses on a farm. While the farm was one owned by a manufacturer of chemicals and was conducted principally for the production of serums for the laboratory, the supreme court of Michigan held that the injured man was a farm laborer. Respondent's counsel insists that this case supports his contention that the statute does not classify the employee by the ordinary business of his employer, but by the kind of work he, himself, is employed to do. This is only partly true because in determining the class of labor in which an employee is engaged, it is often necessary to take into consideration the work ordinarily done by persons in the kind of business which the employer is conducting. A man repairing broken harness for use on a farm is, in a sense, doing the same sort of work to which he might be assigned in a saddler's shop in town, but that mere fact does not classify him as a person engaged in manufacturing because the custom of farmers, from time immemorial, has been to make minor repairs of that sort. There are good examples of the rule that laborers may be classified as farm workers, although not actually tilling the soil. Such illustrations are to be found in those decisions upon statutes giving to agriculturists liens for their work. A cook for a threshing crew, who asserted a lien as a farm laborer, was held to be entitled to it, as her work contributed directly to the garnering of the crops. *Stevenson v. Magill*, 35 N. D. 576, L.R.A.1917D, 377, 160 N. W. 700. In *Winslow v. Urquhart*, 39 Wis. 260, a cook for a logging crew was held to be performing labor in cutting and moving logs;

and in *Breault v. Archambault*, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348, a cook for the men in a logging camp and a blacksmith employed to mend the tools and sleds and to shoe the horses used in the logging business were both held to be entitled to liens under a like statute. Our own Industrial Accident Commission of California has decided that a cook employed on a cattle ranch to prepare meals for the workmen was engaged in farm labor and stock raising, and was excluded from the provisions of the Compensation Act. *Olsen v. Rogers Development Co.* 2 Cal. Industrial Acci. Dec. 560.

In *Sylcord v. Horn*, 179 Iowa, 936, ante, 1285, 162 N. W. 249, 16 N. C. C. A. 592, it was decided that one assisting in the operation of a corn shredder on a farm is a "laborer engaged in agricultural pursuits."

In *State ex rel. Bykle v. District Ct.* 140 Minn. 398, L.R.A.1918F, 198, 168 N. W. 130, a man who fell from a harvester upon which he had been making repairs was held to be a "farm laborer," the court following *Sylcord v. Horn*, supra, and citing without approval *White v. Loades*, 178 App. Div. 236, 164 N. Y. Supp. 1023, which was a case of a man injured while putting a threshing machine in a barn. While it is declared in the opinion in the case last cited that "a man who is traveling through the country with a machine, and stopping from place to place to thresh out the grain and beans of the farmers for a compensation, is not engaged in farming, and his employees are not farm laborers," compensation seems to have been awarded upon the theory that at the time of the accident the employee was engaged in the "operation of a vehicle," and was thus brought within the scope of the Compensation Statute of New York.

In *Vincent v. Taylor Bros.* 180 App. Div. 818, 168 N. Y. Supp. 287, a workman connected with a traveling thresher was injured while feeding bundles into that machine on a farm on which his employer had

undertaken to do the threshing. The work was found not to be "milling," as the Commission had declared it to be, and the award was therefore set aside. The court held that the facts did not bring the accident under the rule of *White v. Loades* as to vehicles, but followed that case upon the dictum that the employee was not a farm laborer. However, the case was sent back for further hearing, Mr. Justice Lyon, who prepared the opinion, using the following language: "Whether facts may have been disclosed by the investigation of the Commission which do not appear in the record, but which influenced the deputy commissioner, before whom the proofs were heard, to make the award—for instance, that the employers were in fact engaged in the milling business, and that the threshing was incidental to their acquiring the grain for such business—does not appear, nor has the Commission so found."

*Re Boyer*, — Ind. App. —, 117 N. E. 507, holds squarely, however, that a man is not a farm laborer who works on a separator that goes from farm to farm, and is operated as an independent business, although the injury was received while the claimant was threshing wheat. The decision really rests upon an analogy between the threshing by an independent contractor and the work of a miller. The following sentence in the opinion illustrates well the fact that the "threshing machine cases" are of small value in deciding the question now before this court: "If farmers generally owned threshing outfits, and were in the habit of threshing their own grain, and the claimant had been employed by the farmer to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented."

That a farm laborer who assists his employer during the winter in getting out logs cut on the farm is nevertheless a farm laborer when so doing was held in *Brockett v.*

Mietz, 184 App. Div. 342, 171 N. Y. Supp. 412.

It was held, however, that a country club which cut and sold lumber regularly from a large tract of land owned by it was engaged in logging for pecuniary gain, although the work was incidental to the main business of operating a country club. *Uhl v. Hartwood Club*, 221 N. Y. 588, 116 N. E. 1000.

From the foregoing it appears,

we think, that the great weight of authority, as well as the better reasoning, brings the claimant who was repairing vehicles and implements on the farm within the class of persons excluded from the operation of the Compensation Act because engaged in "farm labor."

The award is annulled.

We concur: Angellotti, Ch. J.; Shaw, J.; Wilbur, J.; Lennon, J.

### ANNOTATION.

#### Workmen's compensation: application to employees engaged in farming.

Farm laborers do not fall within the operation of the great majority of the compensation statutes. In many of these, farm laborers, together with domestic employees and persons engaged in a few other designated employments, are expressly excluded from the act, while other acts are made applicable only to designated employments, which do not ordinarily include farm labor. The present English statute, however, includes farm laborers the same as workmen in other occupations, and in a few of the elective statutes adopted by different states, the farmer and his employees may come within the operation of the act if they so elect.

The exclusion of farm laborers from the operation of the statutes does not render them unconstitutional as class legislation. *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 151 Pac. 398; *Hunter v. Colfax Consol. Coal Co.* (1915) 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1087, 157 N. W. 145, Ann. Cas. 1917E, 808, 11 N. C. C. A. 886; *Opinion of Justices* (1911) 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Mackin v. Detroit-Timkin Axle Co.* (1915) 187 Mich. 8, 153 N. W. 49; *Mathison v. Minneapolis Street R. Co.* (1914) 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; *Sayles v. Foley* (1916) 38 R. I. 484, 96 Atl. 340, 12 N. C. C. A. 949; *Middleton v. Texas Power & Light Co.* (1916) 108 Tex. 96, 185 S. W. 556, 11 N. C. C. A. 873, affirmed by the United States Supreme Court in (1919) 249 U. S.

152, 63 L. ed. 527, 39 Sup. Ct. Rep. 227.

The exclusion of farm laborers, together with certain other classes of workmen, from the operation of the Texas act, does not render that act unconstitutional as in violation of the equal protection clause of the Federal Constitution. *Middleton v. Texas Power & Light Co.* (1919) 249 U. S. 152, 63 L. ed. 527, 39 Sup. Ct. Rep. 227, affirming the decision of the state supreme court (1916) 108 Tex. 110, 185 S. W. 556, 11 N. C. C. A. 873.

In *Western Indemnity Co. v. Pillsbury* (Cal.) supra, the court said: "That casual employees form a special class which might fairly be regarded as not requiring the protection of the new law is obvious enough, and is indeed not questioned by the petitioner. A more serious question is presented by the exclusion of employees in the various branches of agricultural pursuits and in domestic service. But here, too, in view of the very liberal rules established by our decisions on the legislative power of classification, it must be held that the lawmaking body might reasonably have found that the conditions of agricultural and of domestic employment were so far different from those surrounding other employments as to justify the limiting of the new compensation law to these other employments."

So, in *Mackin v. Detroit-Timkin Axle Co.* (1915) 187 Mich. 8, 153 N. W. 49, the court said: "The law is unquestionable that it is within the pow-

er of the legislature to classify both employers and employees, if the classification is not fanciful or arbitrary, and for reasons of public policy is based upon substantial distinctions, is germane to the object sought to be accomplished by the act, not limited to existing conditions only, and applies impartially and equally to each member of the class."

In view of the exclusion of farm laborers from the statutes, the question frequently arises as to whether the injured employee was a farm laborer, so as to be outside the protection of the statute.

A man employed on a farm who does all kinds of farm work is a "farm laborer," within the meaning of the Massachusetts statute, and is not within its protection, although the farmer who employs him carries on other business which may be within the statute. *Keaney's Case* (1914) 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556.

So, a farm laborer who, while in the performance of his duties, was injured in filling an ice house with ice for use on the farm, is a farm laborer, where the ice was being stored for use on the farm and only as incidental to farm purposes. *Mullen v. Little* (1919) 186 App. Div. 169, 178 N. Y. Supp. 578.

So, too, the work of getting out logs on a farm in the winter time is farm work, and the mere fact that the farmer is going to sell the lumber is immaterial; so that a farm hand injured while engaged in drawing logs for the farmer is excluded from the operation of the New York statute, although lumbering and logging are especially designated as hazardous employments in the statute. *Brockett v. Mietz* (1918) 184 App. Div. 342, 171 N. Y. Supp. 412.

And the work of spreading manure as fertilizer over farm lands is farming, and consequently is not one of the occupations classified as hazardous within the meaning of the Illinois act, providing that the act shall apply to hazardous employment unless the employer gives notice to the contrary. *Seggebruch v. Industrial Commission* (1919) 288 Ill. 168, 123 N. E. 276.

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But one employed as the keeper of hunting preserves, whose duty it is to apprehend trespassers and to protect wild game from poachers, is not engaged in "farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising," although the acts of the poachers in hunting, if permitted, would expose domestic animals to the danger of being accidentally shot. *O. L. Shafter Estate Co. v. Industrial Acci. Commission* (1917) 175 Cal. 522, 166 Pac. 24.

In *Maryland Casualty Co. v. Industrial Acci. Commission* (1918) 178 Cal. 491, 178 Pac. 993, it was held that an employee who stood at night holding a lantern at one end of the field to guide the engineer of a caterpillar engine used to draw a harrow was not engaged in the "operation of farm machinery, nor was he when, the engine having returned, he was placing his lantern on the tool box of the harrow.

In *Hackelberry v. Sherwood Land & Cattle Co.* (1919) — Cal. App. —, 180 Pac. 37, it was held that the doctrine of assumed risk was abolished by the so-called Roseberry Act of 1911, and that that provision of the act was not repealed by the present act so far as it related to agricultural employees, since this class of employees was expressly excluded from the operation of the present act.

The question has arisen in several cases whether an employee who was engaged in farm work or other excluded employment, and also in another employment, which was within the statute, was entitled to compensation for injuries received while doing agricultural or other excluded work.

Thus, in *George v. Industrial Acci. Commission* (1918) 178 Cal. 733, 174 Pac. 653, it was held that one employed as a janitor in a school cannot recover compensation for injuries received while he was trimming a tree near the schoolhouse, since such work was "horticultural work" and excluded from the operation of the statute, where the purpose of the trimming was to improve the appearance of the tree, although its unsightly appearance had been caused by a former



trimming done for the purpose of increasing the light in the school building.

So, a man employed in two capacities, one that of janitor, which falls within the terms of the California act, and the other as a house and garden laborer, which employment is excluded from the act, cannot recover compensation for an injury received while acting as a gardener in pruning trees, where such pruning has no connection in any way with his work. *Kramer v. Industrial Acci. Commission* (1916) 31 Cal. App. 673, 161 Pac. 278. The court said: "The New York Compensation Act does not apply to all employees, but to those only engaged in certain occupations there designated as extrahazardous, while the California act applies to all except those designated as being excluded when engaged in certain work."

A man employed on a farm to do the general farm work, including care for horses, who was injured by the kick of a horse while so engaged, is not entitled to compensation under the Michigan act, merely because his employer was engaged in another business as to which he had elected to come in under the act, where he had taken no steps to come within the act so far as the farm operations were concerned. *Shafer v. Parke, D. & Co.* (1916) 192 Mich. 577, 159 N. W. 304.

So, an employee on a farm who is injured by the kick of a horse is not entitled to compensation, where the employer had not elected to come in under the act, although he might have been engaged elsewhere in another occupation pronounced hazardous by the Illinois act, and as to which occupation he would be presumed to have elected in the absence of affirmative action upon his part. *Vaughan's Feed Store v. Simonini* (1916) 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075.

And see *Kaney's Case* (1914) 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556, *supra*.

Whether or not an employee at the time of his injury was engaged in horticultural work or other employment excluded from the operation of the

statute is a question of fact to be determined by the Commission, and if supported by any rational view of the evidence, is beyond review by the courts. *George v. Industrial Acci. Commission (Cal.) supra*.

The repair of farm buildings is part of the routine work of a farm laborer, and such a laborer injured while at work is excluded by the express provisions of the New York act. Thus, a farmer is not liable in compensation for injuries to a workman employed by him to make repairs on his barn, since the farmer was not engaged in structural carpentry or the construction and repair of buildings for pecuniary gain. *Coleman v. Bartholomew* (1916) 175 App. Div. 122, 161 N. Y. Supp. 560.

So, a workman employed by a farmer to help build a corn crib is not employed in extrahazardous work within the meaning of the Illinois statute, although the statute includes the building of structures, since the legislature could never have intended to call working on every farm structure, no matter how small, extrahazardous employment. *Uphoff v. Industrial Bd.* (1915) 271 Ill. 312, L.R.A.1916E, 329, 111 N. E. 128, Ann. Cas. 1917D, 1, 13 N. C. C. A. 80.

One employed by a farmer to devote his entire time to the repair of farming implements in a shop devoted to such repairs is engaged in farming within the meaning of the California act excluding farming from the operation of the act. *MILLER & LUX v. INDUSTRIAL ACCI. COMMISSION* (reported herewith) ante, 1291.

So, in *Maryland Casualty Co. v. Pillsbury* (1916) 172 Cal. 748, 158 Pac. 1030, in holding that a workman employed to repair a tractor on a farm was not within the provision of the California statute, since he was but a casual employee, the court said: "The Accident Commission has held that a woodchopper engaged in cutting and burning trees in clearing land for farming purposes is engaged in farm labor. *Whitney v. Peterson*, 1 Cal. Industrial Acci. Dec. 306. It has also been held that, when land has been cleared for agriculture, one who

operates a saw to cut the wood on the cleared land into suitable lengths for sale is engaged in farm labor. *Miller v. Algar*, 2 Cal. Industrial Acci. Dec. 584. If Snow had been found to be an employee on the farm who, as part of his duties, was required to repair the tractor, we could not see how he could be adjudged not a farm laborer under those decisions. But the Industrial Accident Commission has determined that he was engaged for the single purpose of repairing the tractor, and there is basis in the evidence for that decision."

The building of a corn crib cannot be properly classed as the business or occupation of a farmer. *Uphoff v. Industrial Bd.* (Ill.) *supra*.

There is a decided conflict of authority as to whether an employee who goes from farm to farm with some portable machinery, such as a threshing machine or ensilage cutter, is, while engaged in that work, within the operation of the statutes.

The New York and Indiana courts have held that an employee of the owner of a threshing outfit, who goes from farm to farm threshing wheat, oats, and other grain for the various farmers, is not a farm or agricultural laborer, outside of the application of the Compensation Acts. *White v. Loades* (1917) 178 App. Div. 286, 164 N. Y. Supp. 1028; *Vincent v. Taylor Bros.* (1917) 180 App. Div. 818, 168 N. Y. Supp. 287; *Re Boyer* (1917), — Ind. App. —, 117 N. E. 507.

Farm laborers are expressly excluded from the New York statute, and the business of threshing grain was not included in the hazardous employments enumerated in that statute when the decisions of the New York courts were handed down. A recovery was allowed, however, in the *White Case*, because the injury was received while the employee was engaged in operating a vehicle, that is, while putting the threshing machine, which was mounted on wheels, into the barn; in the *Vincent Case* the employee was injured while feeding bundles of grain into the threshing machine, and the award of compensation was reversed, as not being within the operation of

the statute, the court rejecting the contention of the applicant that the operation of a threshing machine was "milling business." In the *Boyer Case*, the employee was held entitled to an award under the Indiana statute, since that statute applies to occupations generally, not being restricted to specified hazardous occupations, but excluding merely a few designated cases, including "farm or agricultural laborers."

And an ensilage cutter, used to cut feed to fill a silo, to furnish food for cattle kept for dairy purposes, is a feed mill within the express provisions of the Oregon statute, and the operation of such machinery is a hazardous occupation within the meaning of the Oregon statute, although merely incidental to farming. *Raney v. State Industrial Acci. Commission* (1917) 85 Or. 199, 166 Pac. 523. The court said: "Where, however, a person engaged in farming operates for himself and others any machine or agency that the statute has declared brings such employer automatically within the hazardous occupations, unless he has given, in the manner prescribed, notice that he will not be governed by the provisions of the act, he is not immune from making to the State Industrial Accident Commission the small contributions which the law exacts from the product of business of that kind, in order to create a fund, as a partial compensation to the laborers who have been injured by such means."

On the other hand, the Iowa court has held that an applicant must be found to be a "farm or other laborer engaged in agricultural pursuits," expressly excluded from the operation of the Iowa statute, where he was the employee of the owner of a corn shredder, who was engaged in the business of operating the said machine for profit, going from farm to farm. *SLYCORD v. HORN* (reported herewith) ante, 1285. The court said that no authorities were cited by either party on this point; the decisions of the Indiana and New York cases are subsequent in point of time. The Indiana court in the *Boyer Case* cites both the

New York and Iowa cases, and expressly adopts the position taken by the New York court.

The Minnesota court has also held that an employee of one who owns a steam thresher, and threshes grain for farmers under contract, is, while employed about the threshing machine, in the course of threshing grain upon a farm, a "farm laborer," and is exempted from the operation of the Compensation Act. *State ex rel. Bykle v. District Ct.* (1918) 140 Minn. 398, L.R.A.1918F, 198, 168 N. W. 180. The court cites both the New York and Iowa cases, and adopts the position taken by the Iowa court. The court said: "The important question is: What is the nature of the work? The work is done upon a farm. It is done upon farm crops. The purpose of growing the crops is to provide food for consumption or market. Threshing is as necessary in order that the farmer may consume or market the crop as is sowing or harvest. Surely, the man who, years ago, threshed grain with a flail, was doing farm labor, as much as the man who cradled the grain. So is the man who, now, threshes beans with a flail. The fact that more complicated mechanical devices are used in this case does not change the character of the work. Much farm work is done by the use of complicated machinery. There are tractor plows, self-binders, and even combination harvester-threshers by means of which harvesting and threshing are done as one operation. These and other operations may be done for others by one who is able to own the more complicated and expensive machinery. But it is all, nevertheless, farm work, and the employee who does such work is a 'farm laborer' within the meaning of the Compensation Act."

In *Jones v. Industrial Commission* (1920) — Utah, —, 187 Pac. 833, an employee was held an "agricultural laborer" within the exclusion of the Utah Workmen's Compensation Act where he was employed in connection with a threshing machine bought by several farmers primarily for threshing their own grain, although some

custom work was done for other persons during the season.

The original English Act did not apply to agricultural laborers, but was made to apply to such workmen by the Act of 1900. This latter statute is supplanted by the general Act of 1906. There are but few decisions under the Act of 1900 before it was repealed.

Threshing was held to be agricultural work within the meaning of this act. *Proctor v. Cumisky* (1904) 6 Sc. Sess. Cas. 5th series, 832, 41 Scot. L. R. 636, 12 Scot. L. T. 172.

So, a workman, although a portion of his time was spent in acting as a gamekeeper, might be found to be engaged in agricultural employment within the meaning of the act, where he lent a hand to other duties of a strictly agricultural character. *Smith v. Coles* [1905] 2 K. B. (Eng.) 327, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754, 8 W. C. C. 116.

But the mere keeping of horses and cutting up hay for them by a hotel proprietor was not agricultural work. *Bolt v. Haywood* (1903) 114 L. T. Jo. (Eng.) 294, 5 W. C. C. 151.

So, the work of a man hired by a sawmiller to cut down trees and cart them to a sawmill was not forestry. *Meally v. McGowan* (1902) 4 Sc. Sess. Cas. 5th series, 883, 39 Scot. L. R. 662, 10 Scot. L. T. 145.

A groom looking after horses kept in stables in an inclosed yard was not within the act, since the "land," as used in the act, means open land. *Grant v. Ward* (1904) 7 W. C. C. (Eng.) 128.

Under the provisions of this act the workman need not be on the premises owned by the employer to be within its protection. *Smithers v. Wallis* [1903] 1 K. B. (Eng.) 200, 72 L. J. K. B. N. S. 57, 67 J. P. 381, 51 Week. Rep. 261, 87 L. T. N. S. 556, 19 Times L. R. 111.

In *Krobitzsch v. Industrial Acci. Commission* (1919) — Cal. —, 185 Pac. 396, one employed to look after the propagation of the trout for domestic purposes was held not within the provision of the Workmen's Com-

pensation Act "excluding any employee engaged in . . . farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising," since by the language used the legislature showed an intention to restrict the exclusion to the particular lines specified.

In *C. C. Slaughter Cattle Co. v. Pastana* (1919) — *Tex. Civ. App.* —, 217 S. W. 749, it was held that if at the time of the injury an employee of a company engaged in cattle raising, to which farming was incidental, was performing labor for the company in its farming operations, or in furtherance thereof, he would be a farm laborer, and the provisions of the Workmen's Compensation Act would not apply, but the injured employee in this case was held not engaged in farm labor at the time of his injury, where there was evidence that he was em-

ployed to poison ground squirrels, and was going after grain for this purpose.

Lumbering carried on solely to secure a supply of lumber is not forestry or agricultural work within the meaning of the Quebec statute. *Pelletier v. Pronovost* (1916) *Rap. Jud. Quebec* 51 C. S. 97; *Larocque v. James MacLaren Co.* (1916) *Rap. Jud. Quebec* 51 C. S. 285; *Baie St. Paul Lumber Co. v. Tremblay* (1914) *Rap. Jud. Quebec* 25 B. R. 1; *Provost v. St. Gabriel Lumber Co.* (1910) 12 *Quebec Pr. Rep.* 285; *Duquette v. Lake Megantic Pulp Co.* (1911) 12 *Quebec Pr. Rep.* 359; *Novico v. E. B. Eddy Co.* (1911) 12 *Quebec Pr. Rep.* 319; *Michaud v. Tremblay* (1915) *Rap. Jud. Quebec* 48 C. S. 289.

A creamery is not an agricultural industry within the meaning of the Quebec act. *Laperreire v. Paquet* (1916) *Rap. Jud. Quebec* 51 C. S. 99.  
W. M. G.

**BELLE CENNEL, Admr., etc., of Thomas Cennell, Deceased,**  
v.

**OSCAR DANIELS COMPANY et al., Plffs. in Certiorari.**

**JOSEPH BOISSINEAU**

v.

**SAME, Plffs. in Certiorari.**

**FRANK BUVIA**

v.

**SAME, Plffs. in Certiorari.**

*Michigan Supreme Court — September 27, 1918.*

(203 Mich. 73, 168 N. W. 1009.)

**Workmen's compensation — injury due to curiosity.**

1. An injury to one employed to transport articles by boat through the explosion of refuse, which, while awaiting a chance to unload at a wharf, he goes out of mere curiosity to see unloaded by a public scavenger at an adjoining wharf not under his master's control, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 1305.]

— injury must arise out of employment.

2. To entitle an employee to compensation under the Workmen's Compen-

sation Act, his injury must arise out of the employment as well as in the course of the employment.

— when injury arises out of employment.

3. An injury arises out of the employment, within the meaning of the Workmen's Compensation Act, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

— public risk — right to compensation.

4. Employees injured by the explosion of refuse which is being dumped by a public scavenger, to the risk of every member of the general public within the zone of the blast, are not entitled to compensation under the Workmen's Compensation Act if their employment was in no way connected with the handling of the refuse.

CERTIORARI to the Industrial Accident Board to review its decision affirming a decision of the committee of arbitration in favor of claimants in proceedings brought under the Workmen's Compensation Act to recover compensation for the death of claimant's husband, and for personal injuries sustained by the other claimants while in the employ of the defendant company. *Awards set aside.*

Statement by Brooke, J.:

These three cases all grow out of the same accident in which Thomas Cennell, husband of Belle Cennell, claimant, lost his life, and claimants Joseph Boissineau and Frank Buvia were injured. The three men were, at the time of the accident, employees of the Oscar Daniels Company. On May 15, 1917, the three men were directed to take thirteen iron mixer wings, weighing about 140 pounds each, from the dock of the Oscar Daniels Company on the fourth lock at Sault Ste. Marie to Brady pier on the river front, where the wings were to be unloaded. The next morning the three men loaded the mixer wings from the dock of the Oscar Daniels Company onto the deck of the launch Ralph T., and proceeded to the Brady pier on the river front for the purpose of unloading them. When they arrived at the pier, they found that the United States buoy tender Clover was moored opposite the point on Brady pier where the Oscar Daniels Company was permitted to unload heavy material for transportation. They moored the Ralph T. a short distance behind or east of the Clover, but opposite the Brady pier. This pier is built of concrete, and is under control of the United States Engineers' Department. Immediately to the east of Brady pier and adjoining it is an old wooden dock. Whether, when moored, the launch

Ralph T. was wholly in front of the concrete pier, or lay partially opposite the wooden dock, is a matter somewhat in dispute in the record. For the purpose of determination, however, the divergence of the testimony upon this point is insignificant. Having moored their boat, Cennell, who was the owner of the Ralph T., ascertained by inquiry that the Clover would soon move out. He told the other two claimants that they would wait the ten or fifteen minutes until the Clover departed. While the three men were awaiting the departure of the Clover, a city scavenger drove upon the wooden dock adjoining the Brady pier, and started to unload some rubbish through a hole in said dock at a point about 60 feet from the face of the dock and about 20 feet east of the east line of Brady pier. The load of rubbish contained a large quantity of dynamite caps. The three men, apparently curious to watch the dumping of the scavenger wagon, walked in the direction of the point where it was being unloaded, and must have reached a point very close to the wagon when an explosion of great violence occurred, resulting in the deaths of one member of the United States Coast Guard, two employees of the city scavenger, and of Thomas Cennell, husband of Belle Cennell, and in the injury of claimants Buvia and Boissineau. Neither the Brady pier

nor the wooden dock adjoining was owned or controlled by the Oscar Daniels Company. Liability having been denied by the Oscar Daniels Company, a committee on arbitration heard the matter and rendered a decision in favor of all three claimants, which was later affirmed on appeal to the Industrial Accident Board. Defendants now review said awards in this court.

Messrs. Davidson & Hudson and F. T. Witmire, for plaintiffs in certiorari:

The injuries to Cennell, Buvia, and Boissineau did not arise out of the employment in which they were engaged, nor in the course of the employment in which they were engaged.

Hopkins v. Michigan Sugar Co. 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325; Sheldon v. Needham [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 58 Sol. Jo. 652, 30 Times L. R. 590; McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Fitzgerald v. W. G. Clarke & Son [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; Rayner v. Sligh Furniture Co. L.R.A.1916A, 232, note; Klawinski v. Lake Shore & M. S. R. Co. 185 Mich. 643, L.R.A. 1916A, 342, 152 N. W. 213; Spooner v. Detroit Saturday Night Co. 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647; De Philippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761; Manor v. Pennington, 180 App. Div. 130, 167 N. Y. Supp. 424; Griffith v. Cole Bros. — Iowa, —, L.R.A.1918F, 923, 165 N. W. 577, 3 N. C. C. A. 674; Kelly v. Kerry County Council, 1 B. W. C. C. 194; Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; Amsys v. Barton [1910] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117; Craske v. Wigan [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35; Bateman v. Albion Combing Co. 7 B. W. C. C. 47; Parker v. Pout, 105 L. T. N. S. 493; Smith v. Morrison, 5 B. W. C. C. 161; Curtis v. Talbot & K. Infirmary Committee, 5 B. W. C. C. 41; Warren v. Hedley's Colliery Co. 6 B. W. C. C. 136; Bates v. Davis, 126 L. T. Jo. 454, 2 B. W. C. C. 459; Weighill v. South Hetton Coal Co. [1911] 2 K. B. 757, note; M'Luckie v. John Watson [1913] S. C. 975, 50 Scot. L. R. 770, 6

B. W. C. C. 850; Thomson v. Flemington Coal Co. [1911] S. C. 823, 48 Scot. L. R. 740, 4 B. W. C. C. 406; William Baird & Co. v. Burley [1908] S. C. 545, 45 Scot. L. C. 416, 1 B. W. C. C. 7; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 8 N. C. C. A. 585; Newman v. Newman, 169 App. Div. 745, 155 N. Y. Supp. 665; Milliken's Case, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; Mitchinson v. Day Bros. 6 B. W. C. C. 190; Bischoff v. American Car & Foundry Co. 190 Mich. 229, 157 N. W. 34.

Mr. Albert E. Sharpe, for defendants in certiorari Cennell and Buvia.

The accident arose "out of" and in the course of the employment, and the award should be sustained.

Kunze v. Detroit Shade Tree Co. 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851; Beaudry v. Watkins, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; Haller v. Lansing, 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335; Kimbol v. Industrial Acci. Commission, 173 Cal. 351, L.R.A.1917B, 595, 160 Pac. 150, Ann. Cas. 1917E, 312; John Stewart & Son v. Longhurst [1917] A. C. 249, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 33 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196; Thom v. Sinclair [1917] A. C. 127, 86 L. J. P. C. N. S. 102, 116 L. T. N. S. 609, 33 Times L. R. 247, 61 Sol. Jo. 350, 10 B. W. C. C. 220, Ann. Cas. 1917D, 188; Riley v. Mason Motor Co. 199 Mich. 233, 165 N. W. 746; Albert S. Albrecht Co. v. Whitehead & K. Iron Works, 200 Mich. 109, 166 N. W. 855; Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 8 N. C. C. A. 585; Sponat-ski's Case, 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; Northwestern Iron Co. v. Industrial Commission, 160 Wis. 633, 152 N. W. 416; Moore v. Lehigh Valley R. Co. 169 App. Div. 177, 154 N. Y. Supp. 620; Zabriskie v. Erie R. Co. 86 N. J. L. 266, L.R.A.1916A, 315, 92 Atl. 385; Newark Paving Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91; Bett v. Hughes, 52 Scot. L. R. 93, 8 B. W. C. C. 362; Anderson v. Adams, 50 Scot. L. R. 855, 6 B. W. C. C. 874; Morgan v. Zenaida, 25 Times L. R. 446; 2 B. W. C. C. 19; Culshaw v. Crows Nest Pass Coal Co. 7 B. W. C. C. 1050; M'Neice v. Singer Sewing Mach. Co. 48 Scot. L. R. 15, 4 B. W. C. C. 351; Sheehy v. Great Southern & W. R. Co.

47 Ir. L. T. 161, 6 B. W. C. C. 927; May v. Ison [1914] W. C. & Ins. Rep. 40, 110 L. T. N. S. 525, 7 B. W. C. C. 148; Harrison v. Whitaker Bros. 16 Times L. R. 108, 64 J. P. 54; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16.

Messrs. Wiley & Green, for defendant in certiorari Boissineau:

Claimant was subjected to risk by his employer, and that risk was directly traceable to his employment, which had taken him to the scene of the explosion and exposed him to injury.

Kimboll v. Industrial Acci. Commission, 173 Cal. 351, L.R.A.1917B, 595, 160 Pac. 150, Ann. Cas. 1917E, 312; Beaudry v. Watkins, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; Kunze v. Detroit Shade Tree Co. 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851; Haller v. Lansing, 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335.

The accident arose out of the "employment."

Papinaw v. Grand Trunk R. Co. 189 Mich. 441, 155 N. W. 545, 12 N. C. C. A. 243; Meyers v. Michigan C. R. Co. 199 Mich. 134, 165 N. W. 703; St. Louis, A. & T. R. Co. v. Welch, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529; John Stewart & Son v. Longhurst [1917] A. C. 249, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 33 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196; Thom v. Sinclair [1917] A. C. 127, 86 L. J. P. C. N. S. 102, 116 L. T. N. S. 609, 33 Times L. R. 247, 61 Sol. Jo. 350, 10 B. W. C. C. 220, Ann. Cas. 1917D, 188.

Brooke, J., delivered the opinion of the court:

It is the contention of appellants:

(1) That the injuries did not arise out of the employment.

(2) That such injuries did not arise in the course of the employment in which claimants were engaged.

We have frequently held that, in order to entitle the injured person

to compensation under the act, the injury must arise out of the employment as well as in the course of the employment. Tarpper v. Weston-Moot Co. 200 Mich. 275, L.R.A.1918E, 507, 166 N. W.

587, and cases cited. An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required

—when injury arises out of employment.

to be performed and the resulting injury. McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. The injury must be the result of one of the risks incident to the employment. Applying these rules to the case under consideration, how can it be said that the employment of Cennell, Boissineau, and Buvia subjected them to the risk of death or injury from which they suffered? Their duties required them to load the mixer wings from defendants' dock on the fourth lock at Sault Ste. Marie, and to transport them to Brady pier and there unload them. Their duty to their master neither required them to, nor warranted them in, wandering from the immediate scene of the contemplated operation and gratifying an idle curiosity. The premises where the accident occurred, and where they had no business, were not under the control of their common master. The scavenger whose possible negligence caused the disaster was a municipal employee. We feel bound to determine, therefore, that the accident causing

the injuries did not arise out of the employment. Assuming, however,

—injury due to curiosity.

that the presence of claimants in the vicinity of the scavenger's wagon was justified, which cannot properly be done, then in suffering death and mutilation from the explosion the claimants were subjected to no greater or different risk than that sustained by every member of the general public within the zone of the blast. Three other persons were killed, one totally unconnected with the operation. An injury resulting from a risk common to the general public may not

—public risk—right to compensation.

Workmen's compensation—  
injury must arise out of employment.

be compensated. *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325; *Worden v. Commonwealth Power Co.* Mich. W. C. Cas. p. 14, July 19, 1916. While the accident in the cases under consideration cannot be treated as "an act of God," as was the one considered in *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 646, L.R.A.1916A, 342, 152 N. W. 213, the argument sustaining the decision in that case is, a fortiori, applicable here. See also *Spooner v. Detroit Saturday Night Co.* 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647.

The two cases principally relied

upon by claimants are *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851, and *Haller v. Lansing*, 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335. Neither is controlling or applicable to the facts in the cases under consideration. In the first case the claimant was injured while in the actual performance of his duties, and in the second case the claimant was injured while within the ambit of his employment, actually upon his master's premises, and using such facilities as his master had provided.

The awards are set aside.

Petition for rehearing denied.

### ANNOTATION.

#### Workmen's compensation: injury through curiosity as arising out of and in the course of employment.

It will be observed that in the reported case (*CENNELL v. OSCAR DANIELS Co.* ante, 1301) it was decided that an injury to one employed to transport articles by boat, through an explosion of refuse which, while awaiting a chance to unload at a wharf, he had gone out of curiosity to see unloaded by a public scavenger at an adjoining wharf not under his employer's control, did not arise out of his employment within the meaning of the Workmen's Compensation Act. The facts involved present rather a close case, and it would appear that a decision might have been rendered either way.

But one case has been disclosed involving the exact question under consideration (*Maronofsky's Case* (1920) — *Mass.* —, 125 N. E. 565), where a workman had been called from his work to a telephone on his employer's premises, and while on his way back to his work he stopped to talk with a fellow workman on matters not connected with the employment, and when so engaged leaned on an iron table and took hold of an electric lamp to enable him to look into a tank, merely for the purpose of satisfying his curiosity, and in so doing

received a shock which killed him, it was held that it could not be properly found that the accident arose out of, or in the course of, his employment within the meaning of the Workmen's Compensation Act.

A few cases involving somewhat similar situations have been considered of sufficient value to warrant their insertion.

In this connection, it may be noted that it is very generally held that, as the Compensation Acts are remedial, they should be liberally construed in harmony with the humane purposes of the act, notwithstanding they are in derogation of the common law. *Industrial Commission v. Aetna L. Ins. Co.* (1918) — *Colo.* —, 3 A.L.R. 1336, 174 Pac. 589; *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — *Ind. App.* —, 116 N. E. 330; *Re Ayers* (1918) — *Ind. App.* —, 118 N. E. 336; *Re Betts* (1918) — *Ind. App.* —, 118 N. E. 551; *Indian Creek Coal & Min. Co. v. Calvert* (1918) — *Ind. App.* —, 119 N. E. 519; *Re Loper* (1917) — *Ind. App.* —, 116 N. E. 324; *Brienen v. Wisconsin Pub. Service Co.* (1917) 166 Wis. 24, 163 N. W. 182; *White v. Industrial Commission* (1918) 167 Wis. 483, 167 N. W. 816.



It has been held that a workman who was instructed to get a barge at a wharf, and who, upon going for it, found that he would not be able to get it for sometime because the tide was not right, did not go outside of the course of his employment in attempting to get into a small boat near by, in which he could sit down and watch the tide until it was favorable for him to do his work. *May v. Ison* [1914] W. C. & Ins. Rep. (Eng.) 41, 110 L. T. N. S. 525, 7 B. W. C. C. 148.

And it has been held that an injury to an employee arose in the course of his employment, where he was employed in a shipping room and was

engaged in loading material onto cars, although when he was injured he was not at work, but was waiting for more material to come to be loaded. *Dzikowska v. Superior Steel Co.* (1918) 259 Pa. 578, L.R.A.1918F, 888, 103 Atl. 351.

It has also been held that it might be found that an injury suffered was by accident arising out of the employment, where the injury was received when the employee was sitting near a fire warming himself while he was waiting for the arrival of some trucks, which it was his duty to oil. *Harrison v. Whittaker* (1899) 16 Times L. R. (Eng.) 108, 64 J. P. 54. J. T. W.

CATHERINE BRADY, Admr., etc., of Pat Brady, Deceased,

v.

CARL HAW, Appt.

*Iowa Supreme Court — October 23, 1919.*

(— Iowa, —, 174 N. W. 331.)

**Damages — wrongful death — funeral expenses.**

1. The funeral expenses cannot be allowed as such as part of the damages to be recovered by a personal representative for the negligent killing of his intestate, but the item may be considered by the jury in determining the present worth of what he would have accumulated had he been permitted to live out his expectancy.

[See note on this question beginning on page 1314.]

**— hospital expenses and doctors' bills.**

2. Hospital expenses and doctors' bills may be allowed as part of the damages to be awarded a personal rep-

resentative for the negligent killing of his intestate.

[See 8 R. C. L. 841.]

(Weaver and Evans, JJ., dissent.)

**APPEAL** by defendant from a judgment of the District Court for Wapello County (Cornell, J.) in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. *Reversed.*

**Statement by Gaynor, J.:**

This is an action to recover damages resulting from a wrongful act causing death. The only controversy is as to whether or not the administrator of the deceased can recover for funeral expenses. The court held against the defendant on this proposition, and the defendant appeals.

Messrs. Roberts & Webber and Frank T. Roberts for appellant.

Messrs. Jaques, Tisdale, & Jaques, for appellee:

Under the statute the father can recover for funeral expenses of a minor child whose death was caused by negligence.

*Carnego v. Crescent Coal Co.* 164 Iowa, 552, 146 N. W. 38, Ann. Cas. 1916D, 794.

Under the Iowa rule, a recovery can be had for nursing, medical attention, etc.

Niemeyer v. Chicago, B. & Q. R. Co. 143 Iowa, 127, 121 N. W. 522; Scurlock v. Boone, 142 Iowa, 684, 121 N. W. 369; Morris v. Chicago, B. & Q. R. Co. 45 Iowa, 29; Parkhill v. Bekin's Van & Storage Co. 169 Iowa, 455, 151 N. W. 506; Worez v. Des Moines City R. Co. 175 Iowa, 1, 156 N. W. 867.

In a suit for the death of an adult caused by negligence, recovery can be had for nursing, medical attendance, and funeral expenses.

13 Cyc. 189-220; 6 Thomp. Neg. § 7093, p. 198; Murphy v. New York C. & H. R. R. Co. 88 N. Y. 445, 5 Am. Neg. Cas. 238; The Mauch Chunk, 139 Fed. 747; Dean v. Oregon R. & Nav. Co. 44 Wash. 564, 87 Pac. 824; Secard v. Rhinelander Lighting Co. 147 Wis. 614, 133 N. W. 45; Clark v. London General Omnibus Co. 92 L. T. N. S. 691; Pennsylvania R. Co. v. Bantom, 54 Pa. 495; Owen v. Brockschmidt, 54 Mo. 285; Roeder v. Ormsby, 22 How. Pr. 270; Gates v. Beebe, 170 Mich. 107, 135 N. W. 934.

Gaynor, J., delivered the opinion of the court:

This action is brought by the administratrix of the estate of Pat Brady to recover for injuries causing his death. It is admitted that he came to his death through the negligence of the defendant. The plaintiff included in her claim for damages the sums necessarily expended for funeral expenses, doctor and hospital bills, and introduced evidence as to the same. The necessity for such expenditures, and that the amounts expended are reasonable, is not questioned.

At the conclusion of the evidence the defendant moved "to strike from the record and take from the jury all testimony relating to the matters of funeral expenses, nurse hire, doctor bills, and hospital bills as incompetent, irrelevant, and immaterial, and not presenting a proper measure of damages." This motion was overruled. Thereupon the plaintiff filed an amendment to her petition claiming \$160 for funeral expenses, \$15 for doctor bills, \$10 for hospital bills, and \$15 for church

expenses connected with the burial. A motion to strike this amendment was filed and overruled, and exception taken.

Before the argument was begun, the defendant asked the court to withdraw from the jury all evidence relative to funeral expenses, hospital and doctor bills, the same not being within the nature of damages which the law authorizes in cases of this kind. This request was refused, and the refusal excepted to by the defendant.

Thereupon the court gave the jury the following instruction: "If, under the evidence and the instructions given, you should find for the plaintiff, you will then proceed to determine from the evidence the amount of her recovery herein. The measure of such recovery, if any, will be the present worth or value of the estate which deceased would reasonably be expected to have saved and accumulated, if he had been permitted to live out the natural term of his life. The measure of recovery, in cases of this character, is the amount estimated at its present worth which, under all the circumstances disclosed in the evidence, you believe would have been added to the estate which he left at the end of his natural life. Also, such amount as you find from the evidence to be the reasonable funeral expenses, doctor's bill, and hospital bills, not exceeding the amount claimed for such funeral expense, doctor's and hospital bills."

To this instruction proper exceptions were taken.

With this instruction the court submitted the following special interrogatories:

(1) What amount, if anything, do you find that the deceased, Pat Brady, would reasonably be expected to have saved and accumulated had he lived out his natural life? A. \$500.

(2) What was the actual amount of the funeral expenses of the deceased, Pat Brady? A. \$185.

The jury returned a verdict in favor of the plaintiff for \$685. Judgment was entered upon this verdict.

The defendant in his argument here now concedes that there was sufficient competent evidence introduced on the trial to justify the general verdict and judgment to the amount for which the same was rendered, if, under the law, funeral expenses are properly allowed as an element of damage in such cases as this, and the defendant bases his appeal solely upon the ground that funeral expenses are not a proper element of damage, hence are not properly allowable in such cases. So the only question presented for our consideration at this time is whether funeral expense is an element of damage for which an administrator of an estate may recover. This expenditure came as a proximate result of the wrongful act of the defendant in causing death. But death is inevitable. It comes to all. Undoubtedly this expense is one that would have been incurred by this estate had deceased been permitted to live out his expectancy. The estate, however, is called to meet it now. It is an expenditure which the estate was required to liquidate out of the funds passing into the hands of the administrator immediately upon his death and burial. It was an expense made immediately necessary by the negligent act of the defendant. Ordinarily, the wrongdoer is legally bound to reimburse the injured party, or his estate, for all damages which come as a proximate result of the wrong. Whatever measurable injury the wrong produces, traceable to the wrong as its proximate cause, the wrongdoer in law and in good conscience ought to be called upon to meet. However, it is in the law of nature that all must die, and we assume that in all Christian countries the dead receive decent burial, and that this is attended with some expense to the estate. We assume that the estate of Pat Brady would have been called upon

to bury him and pay the expenses incurred in such burial had he been permitted to live out his expectancy, and we assume that the estate would be diminished to that extent then. We must assume that the funeral expenses and burial in this case were the proximate result of the wrong done to Patrick during his life. This expenditure must be met, and the property that comes into the hands of the administrator reduced accordingly, and this, whether death comes now, or whether it comes later. In either event the estate is diminished to the amount of this expense. The question then is: Shall the person who caused this expenditure be called upon to reimburse the estate for it in any sum?

This expenditure which the estate is now called upon to make might not have been incurred for many years, had Pat Brady been permitted to live out his expectancy. If it is not considered against this defendant, the estate must pay it now, though, in the ordinary course of nature, payment might be postponed many years. It is the wrongful act of the defendant that takes this money out of the estate now. What is the wrong that is done to the estate for which compensation ought to be made? The wrong lies in the fact that the wrongful act of the defendant has compelled the estate to make an expenditure, which, in the ordinary course of nature, it would not be required to make perhaps for many years. If we relieve the defendant of all liability for this expenditure, we place a burden on the estate in requiring it to pay now what in the course of nature it would not be required to pay perhaps for many years. There therefore is some loss to the estate. It has suffered some wrong from the negligent act of the defendant. This wrong must be compensated for. It is apparent the estate has lost the use of the money which it is forced to expend now for burial purposes. The use of the money is lost to the estate during the period

between the forced death and the time when, in the course of nature, the estate would be called upon to make this expenditure. This, at legal interest, might or might not affect the amount of plaintiff's recovery in a considerable sum, depending upon the expectancy of the deceased at the time of his death. The jury

**Damages—  
wrongful death  
—funeral  
expenses.**

therefore should be instructed to consider this item in determining the present worth of what plaintiff would accumulate and save to his estate if permitted to live out his expectancy. If the jury be not allowed to consider this item at all in estimating the amount which the injured party is entitled to recover from the wrongdoer, there certainly is some loss to the estate for which no compensation is made, for it is apparent that even though death is inevitable, and even though the estate may, at some time, be called upon to incur these expenses, the fact that it is called upon to make the expenditure now, long before the time when death would, under natural conditions, claim the deceased, with its incident of burial, is a fair matter to be considered in determining the amount of plaintiff's recovery.

As to hospital and doctor's bills we say that the deceased suffered physical injuries at the hands of the defendant. These injuries sent him to the hospital for care. These injuries made it necessary to employ the aid of physicians and surgeons. There is no assurance that had he lived out his expectancy he would have ever suffered like injuries resulting in like expenditures,

or even approximately like expenditures, or that he would ever have <sup>—hospital expenses and doctors' bills.</sup> suffered the injuries that called upon him for these expenditures. These were properly allowed.

The court, however, erred in allowing the full amount of expenditures for funeral and burial. It should have instructed the jury that this expenditure is an element to be considered by the jury in determining the present worth of that which the plaintiff would, if permitted to live out his expectancy, have accumulated and left to his estate. They should consider that these expenses were forced upon the estate in anticipation of a time when, in the course of nature, they would be incurred.

We find the decisions of other states not in harmony on this question.

For the error pointed out, the case is reversed.

Ladd, Ch. J., and Preston, Salinger, and Stevens, JJ., concur.

Weaver and Evans, JJ., dissent.

#### NOTE.

The question as to the measure of damages for death in an action for the benefit of the decedent's estate is the subject of a note appended to *FLORIDA EAST COAST R. CO. v. HAYES*, post, 1314. Subdivision IV. of this note deals with the question considered in the reported cases (*BRADY v. HAW*) ante, 1306, as to the right to include the funeral expenses of the deceased as an element of damage to his estate. A reference to this note will indicate that the cases are not in harmony upon the matter.

FLORIDA EAST COAST RAILWAY COMPANY, Plff. in Err.,  
v.

H. W. HAYES, Admr., etc., of M. S. Hayes, Deceased.

*Florida Supreme Court — February 11, 1914.*

(67 Fla. 101, 64 So. 504.)

**Damages — death — suffering.**

1. Under the statute the damages that may be recovered by the administrator of a person for the wrongful death of the decedent do not include and have no relation to physical or other suffering of the decedent or his relatives, or to the claims of anyone for present or future support or solatium. The administrator may recover only the present monetary worth of the decedent's life to an estimated prospective estate, to compensate for the estate that the decedent probably would have accumulated to leave at his death.

[See note on this question beginning on page 1314.]

**New trial — failure to follow instructions.**

2. Where a finding of legal liability under the pleadings has substantial basis in competent evidence adduced at the trial, but it is obvious that, in determining the amount of the verdict, the jury were not governed by the evidence or the proper charges of the court thereon, or by any reasonable estimates or computations, and the amount awarded is manifestly inadequate or excessive, it is the duty of the court to grant a new trial, that the error in the verdict may be remedied, and justice administered in due course of law. In proper cases a remittitur may be permitted.

[See 20 R. C. L. 272, 282.]

**Remittitur — allowance — interference with judgment of jury.**

3. In permitting a remittitur of the portion of the judgment for damages  
Headnotes 1-3 Per Curiam.

regarded as excessive, the court does not substitute its judgment for that of the jury, but merely indicates the amount the court would not pronounce excessive; and the privilege of a remittitur is given to avoid further litigation.

[See 20 R. C. L. 316.]

**New trial — grant by court — invasion of constitutional right.**

4. The granting of a new trial by a court does not invade the constitutional right of trial by jury.

**Damages — for death of child — amount.**

5. An award of \$15,000 for death of a boy with a life expectancy of about forty years, after reaching majority, is excessive by all above \$2,000, although he was active, with good industrious habits.

[See 8 R. C. L. 850.]

**ERROR** to the Circuit Court for Duval County (Simmons, J.) to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate. *Affirmed on condition.*

The facts are stated in the opinion of the court.

Mr. Alex St. Clair-Abrams for plaintiff in error.

Messrs. A. H. King and Roswell King for defendant in error.

**Per Curiam:**

This writ of error was taken to a judgment obtained by the administrator of M. S. Hayes, deceased, an infant, in an action brought under

§§ 3145 and 3146 of the General Statutes of Florida, to recover for the wrongful death of said infant "such damages as the party . . . entitled to sue may have sustained by reason of the death of the party killed."

The assignments of error predicated upon the overruling of a de-

murrer to the declaration, and upon the denial of a motion for a directed verdict in favor of the defendant below, are sufficiently covered by the discussion of similar questions in *Florida East Coast R. Co. v. Hayes*, 66 Fla. 589, 64 So. 274.

The declaration alleges actionable negligence, and the demurrer thereto was properly overruled. As there is evidence upon which the jury could legally find for the plaintiff, the court correctly refused to give an affirmative charge for the defendant.

The jury returned a verdict of liability against the defendant, and the finding of liability does not appear to be wholly without legal basis in the evidence. It is, therefore, necessary to determine the proper rule for the measure for damages recoverable under the statute in an action brought by an administrator as the legal representative of the estate of a deceased minor, in order to adjudicate the questions presented as to the propriety of the amount of the judgment. The object of the statute giving the right of action is compensation to those who have sustained damages or loss by reason of the death of a person caused by the fault of another. By the terms of the statute, giving a right of recovery that did not exist at common law, the administrator of the decedent cannot maintain an action, unless the decedent left no husband or wife and no minor child, and no other person dependent on him for support. A husband or wife, a minor child, and a dependent person each occupies his or her particular intimate personal relation of dependence during the life expectancy, and, by the wrongful death, such husband or wife, minor child, or dependent person sustains loss or damage that is not wholly monetary, but such as is peculiar to the relation that existed, and that is concurrent with the life expectancy. See *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 So. 388. But the administrator, as the legal representative of the de-

cedent's estate, can sustain no loss or damage by reason of the wrongful death, except the pecuniary value of the life to the prospective estate of the decedent, which damage or loss does not include, and has no relation to, physical or other suffering of the decedent or his

Damages—  
death—  
suffering.

relatives, or to claims of anyone for present or future support or solatium. Such loss or damage to the estate is wholly monetary, and any compensation therefor, after the payment of debts, passes to the decedent's general heirs as of the end of his life expectancy, to compensate for the estate that the decedent probably would have accumulated to leave at his death to such general heirs. *Louisville & N. R. Co. v. Jones*, 45 Fla. 407, 34 So. 246; *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 15 L.R.A.(N.S.) 451, 45 So. 755; *Hively v. Webster County*, 117 Iowa, 672, 91 N. W. 1041, 12 Am. Neg. Rep. 590; *McAdory v. Louisville & N. R. Co.* 94 Ala. 272, 10 So. 507. Where the decedent was an infant, the loss or damage to the estate would not begin until after the time he would have become of age, since, under the statute, the father recovers for the loss of his minor child's service to the adult age, as well as for the mental pain and suffering of the parents caused by the infant's wrongful death. *Florida East Coast R. Co. v. Hayes*, supra; Gen. Stat. 1906, § 3147.

Where the infant leaves no husband or wife, and no minor child, and no person dependent on him or her for support, the administrator of the deceased infant's estate may, under the statute, maintain an action to recover "such damages" as the estate "may have sustained by reason of the" wrongful death; and the proper measure of such damages is the present worth of the decedent's life to an estimated prospective estate that he probably would have earned and saved after becoming of age, and during his life expectancy, to be left at his death. A determination of the proper

amount of such damages requires a consideration of the contingency whether the decedent probably would have lived to become of age and to some given time afterwards, as well as an estimate of the value of the estate he probably would have earned and saved after he would have become of age, and would probably have left at the end of his life expectancy, and also an estimate of the present money value of the decedent's life to the estimated prospective estate. In making this determination, no exact rule of reasoning or computation is afforded by law, but the jury have no arbitrary discretion. The finding should be the result of a fair consideration of all the matters that should, under the circumstances of the particular case, properly enter into the estimate and computation. Among other proper elements that may be considered are the age, mental capacity, habits of life, and industry, and thrift, means, business, earnings, health, probable duration of life, skill, and environment, and reasonable expectations of the decedent. If the jury find that the deceased infant probably would have lived to some given period after he would have become of age, and also find an estimated value of an estate he probably would have accumulated and left for distribution among his heirs at the end of his life expectancy, the present money value of the decedent's life to his estimated prospective estate may be ascertained with some degree of accuracy as a practical or mathematical proposition. In cases of this character, it is left for the jury, in the fair exercise of a sound discretion, in the light of all the information properly available, to ascertain and fix the probable amount of the damage sustained by the plaintiff, or by those whom he represents, "reserving at all times the authority of the court to guard against manifest injustice by way of excessive estimates." See *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 15 L.R.A.(N.S.) 451, 45 So. 755; *An-*

*draws v. Chicago, M. & St. P. R. Co.* 86 Iowa, 677, 53 N. W. 399; *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119; *Walters v. Chicago, R. I. & P. R. Co.* 36 Iowa, 458; *Sherman v. Western Stage Co.* 24 Iowa, 515; 18 Cyc. 366. The plaintiff has the burden of adducing proper evidence from which the jury may find "such damages as the" decedent's prospective estate "may have sustained by reason of the death." When future expectations are to be compensated by anticipated present recoveries, the plaintiff is entitled to only the present value of such future expectations.

In effect, the court instructed the jury, if they find for the plaintiff, to award such sum as the evidence shows the decedent would probably have accumulated during his life expectancy from his probable earnings after he would have reached the age of twenty-one years, reduced to a money value, and its present worth be given as damages; and also that, if the decedent and the defendant were both at fault, the plaintiff may recover, but the damages should be diminished in proportion to the decedent's fault.

The statute requires the appellate court to review orders denying new trials, and to reverse or affirm the judgments of trial courts as may be right, or to give judgment as the court below ought to have given, or as it may appear according to law. Gen. Stat. 1906, §§ 1693, 1694, 1707. The 7th Amendment to the Federal Constitution is not applicable to state courts, though it "is controlling in the Federal courts." *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029. In granting a new trial, the court does not invade the right of trial by jury secured by the state Constitution, since a new trial in cases as at common law is by a jury, unless it is waived. The purpose of granting a new trial is to correct any errors occurring in the proceed-

New trial—grant by court—violation of constitutional right.

ings, including errors in the verdict. Where a finding of legal liability under the pleadings has substantial basis in competent evidence adduced at the trial, but it is obvious that,

in determining the amount of the verdict, the jury were not governed by the evidence or the proper charges of the court thereon, or by any reasonable estimates or computations, and the amount awarded is manifestly inadequate or excessive, it is the duty of the court to grant a new trial, that the error in the verdict may be remedied, and justice administered in due course of law.

The judgment is for \$15,000, obtained more than five years before the decedent would have attained his majority had he lived, and he could not have begun to earn an estate until after he became of age, because his services prior to his majority belonged to his father, and the value thereof is recoverable by the father, under the statute. *Florida East Coast R. Co. v. Hayes*, 66 Fla. 589, 64 So. 274. The deceased was thirteen years and five months old at his death, May 28, 1911, and there is evidence that he had a life expectancy of forty-six years and three months; that he was an active boy, with good, industrious habits, and was earning \$5 a week, or more; that, when compounded periodically at the legal rate of interest, the present value of \$1,000 due in forty years is \$46.02.

Statistical evidence as to life expectancy, and as to the present value of a prospective future estate, is competent; and, while such evidence does not control the reasonable discretion of the jury in making proper estimates, it may tend to show whether the amount of the verdict is reasonable and just. If \$46.02, compounded periodically at the legal rate of interest, is the present value of \$1,000 as of the end of forty years, a person's life expectancy, then \$15,000, the amount of the verdict, is equal to over \$300,000 as of the end of the life expectancy.

Even if the present value of \$1,000 as of the end of forty years is \$100, instead of \$46.02, as shown by the testimony, \$15,000 would be equal to at least \$150,000 at the end of forty years. Or, if the present value of \$1,000 due in forty years is \$200, instead of \$46.02, then \$15,000 would be equal to \$75,000 at the end of forty years. If the decedent would probably have lived ten years from the date of the verdict in 1913, which would have been less than five years after he would have become of age and begun to earn an estate, \$15,000, the amount of the verdict, compounded periodically at the legal rate of interest, would in ten years be equal to at least \$30,000; or, in twenty years, to \$60,000; or, in thirty years, to \$120,000; or, in forty years, to \$240,000.

Guided by the evidence and by common knowledge, observation, and experience as to estates ordinarily acquired and saved, with nothing shown to the contrary, it cannot reasonably be conjectured that the decedent would probably have accumulated such a large estate as the verdict implies. But it is manifest that the award is grossly excessive, and that the jury did not duly consider the evidence, or the charge of the court thereon, or any reasonable estimates, in making their finding of the damages sustained by the deceased minor child's prospective estate, which, but for his wrongful death, he would probably have earned and saved after becoming of age, to leave at the end of his life expectancy.

It must be assumed from the verdict that the jury found that the decedent would probably have lived to become of age, and for a considerable number of years thereafter; but the amount of the damages awarded has no substantial basis in the evidence or in any reasonable estimates, and is not in accord with the applicable charges of the court. The amount of the verdict is, therefore, not authorized by law.

Damages—for  
death of child—  
amount.



In the cases cited in support of the contention that the verdict is not excessive, the administrator was authorized to recover for all beneficiaries, including the widow, minor children, dependents, or others having a present claim to support from the decedents during their life expectancies, and the decedents had established earning capacities as adult men, while, the decedents being adults, there was no recovery by a parent for loss of services, or for mental pain and suffering because of the death of a minor child, as in the case here. See *Florida East Coast R. Co. v. Hayes*, *supra*.

"To the end of saving vexatious, expensive, and prolonged litigation," the defendant in error will be given the privilege of entering a remittitur of the amount considered excessive. In this practice the court is not "substituting its judgment for that of the jury, . . . for this

Remittitur—  
allowance—  
interference  
with judgment  
of jury.

is not indicating what amount the court would have given, but only such amount as it would not feel at liberty to pronounce excessive. *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394, 5 So. 714; *Florida C. & P. R. Co. v. Foxworth*, 45 Fla. 278, 34 So. 270; *Savannah, F. & W. R. Co. v. Davis*, 25 Fla. 917, 7 So. 29; *Florida Southern R. Co. v. Steen*, 45 Fla. 313, 34 So. 571; *Florida C. & P. R. Co. v. Seymour*, 44 Fla. 557, 33 So. 424; *Turner v. Adams*, 39 Fla. 86, 21 So. 575; *Arnau v. First Nat. Bank*, 36 Fla. 395, 18 So.

790; *Gunning v. Haron*, 25 Fla. 846, 6 So. 855; *Florida East Coast R. Co. v. Schumacher*, 68 Fla. 137, 57 So. 603; *Lewis v. Maginnis*, 30 Fla. 419, 12 So. 19; *Harrell v. Darrence*, 9 Fla. 490; *Atlantic Coast Line R. Co. v. Pipkin*, 64 Fla. 24, 50 So. 564.

The judgment of the court is that if the defendant in error, within thirty days after the mandate of this court in the cause is filed in the court below, shall enter a remittitur of the sum of \$13,000 from the judgment as of the date of its rendition in the Circuit Court, that then the residue of such judgment, amounting to \$2,000, shall stand affirmed, otherwise the entire judgment of the Circuit Court shall be reversed.

*Shackleford, Ch. J., and Cockrell and Whitfield, JJ., concur.*

*Hooker and Taylor, JJ., concurring in the result:*

While we still adhere to the views expressed in our dissenting opinions in the case of *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 15 L.R.A. (N.S.) 451, 45 So. 755, as to the measure of damages to an administrator suing for a death by negligence, yet, in order to end vexatious and prolonged litigation, we agree to the judgment announced in the opinion of the court. This same plaintiff, suing on his own behalf as the father of the deceased, recovered a judgment for a large amount against this same defendant for the death of this same child, and we think the litigation should end.

## ANNOTATION.

### Measure of damages for death in action for benefit of decedent's estate.

- I. General rule:
  - a. Pecuniary loss to estate, 1815.
  - b. Pecuniary loss to relatives, 1317.
- II. As to whether basis for computation of pecuniary loss is damage suffered by injured person or loss from his death, 1318.
- III. Computation of damage from destroyed earning capacity:
  - a. In general, 1322.
- III.—continued.
  - b. Gross earnings, 1322.
  - c. Net earnings, 1325.
  - d. Accumulations, 1326.
  - e. Other consideration, 1329.
- IV. Pain and suffering, 1332.
- V. Expense of sickness and death, 1334.
- VI. Where deceased was a married woman, 1334.

**Scope.**

The present note, as indicated by the title, is devoted to the measure of damage in actions under Survival Statutes for benefit of the estate where a person dies as a result of injuries negligently inflicted. As to the measure of damage, where the action is commenced by the injured person in his lifetime and is revived, see note appended to *Murray v. Omaha Transfer Co.* post, 1343. For a consideration of the question as to the basis for assessing the pecuniary loss to the estate of a deceased infant for the latter's wrongful death, see note appended to *Dimitri v. Cienci*, post, 1336.

It will be observed that the question under consideration is quite distinct from the question as to the measure of damages under statutes permitting recovery for the pecuniary loss to a specified class of beneficiaries.

**1. General rule.****a. Pecuniary loss to estate.**

In assessing the damages to the estate of a deceased person for his negligent or wrongful death, the basis of the computation of the damage is very largely affected by the language of the statute authorizing the action. In this regard there are special statutes which are construed to require either a very limited or an enlarged measure of damages. These, however, are the exceptions, for in general the statute merely provides, in substance, for the survival of the cause of action or a pending action which the deceased had. These General Survival Statutes are construed in some jurisdictions to furnish the exclusive remedy for the recovery of damages for a negligent or wrongful killing; while in other jurisdictions they are construed to furnish a remedy concurrent with that given by other statutes, authorizing a recovery in behalf of certain beneficiaries. It is obvious that where a statute is construed to provide a remedy which is exclusive, the measure of damages recoverable in behalf of the estate should not be the same as that recoverable under statutes which are construed to provide concurrent remedies, one for the benefit of the estate of the decedent, and one for the

benefit of his statutory beneficiaries.

It may be said, however, that the different statutes authorizing the recovery in behalf of the estate of deceased persons, of damages for personal injuries, are intended to permit the recovery merely for the pecuniary loss resulting to the estate from the injury complained of, and the damages are confined to compensation for such pecuniary loss.

**United States.**—*Holmes v. Oregon & C. R. Co.* (1881) 6 Sawy. 275, 5 Fed. 523; *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22; *Ladd v. Foster* (1887) 31 Fed. 827; *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed. 43; *Kelley v. Central R. Co.* (1883) 48 Fed. 663; *Linss v. Chesapeake & O. R. Co.* (1899) 91 Fed. 964; *Jennings v. Alaska Treadwell Gold Min. Co.* (1909) 95 C. C. A. 388, 170 Fed. 146.

**Alabama.**—*Tutwiler Coal, Coke & I. Co. v. Enslen* (1900) 129 Ala. 336, 30 So. 600.

**Arizona.**—*De Amado v. Friedman* (1907) 11 Ariz. 56, 89 Pac. 588; *Phoenix R. Co. v. Landis* (1910) 13 Ariz. 80, 108 Pac. 247, rehearing in (1910) 13 Ariz. 279, 112 Pac. 844, affirmed in (1913) 231 U. S. 578, 58 L. ed. 377, 34 Sup. Ct. Rep. 179.

**Connecticut.**—*Broughel v. Southern New England Teleph. Co.* (1901) 73 Conn. 614, 84 Am. St. Rep. 176, 48 Atl. 751; *Wilmot v. McPadden* (1906) 79 Conn. 367, 19 L.R.A.(N.S.) 1101, 65 Atl. 157; *Farley v. New York, N. H. & H. R. Co.* (1913) 87 Conn. 328, 87 Atl. 990; *Kling v. Torello* (1913) 87 Conn. 301, 46 L.R.A.(N.S.) 930, 87 Atl. 987; *Lane v. United Electric Light & Water Co.* (1915) 90 Conn. 85, L.R.A.1916C, 808, 96 Atl. 155.

**Delaware.**—*Macfeat v. Philadelphia, W. & B. R. Co.* (1904) 5 Penn. 52, 62 Atl. 898; *Skonieczny v. Churchman* (1905) 7 Penn. 226, 78 Atl. 634; *Short v. Philadelphia, B. & W. R. Co.* (1908) 7 Penn. 108, 76 Atl. 363.

**Florida.**—*FLORIDA EAST COAST R. Co. v. HAYES* (reported herewith) ante, 1310; *Jacksonville Electric Co. v. Bowden* (1907) 54 Fla. 461, 15 L.R.A.(N.S.) 451, 45 So. 755.

**Iowa.**—*Donaldson v. Mississippi & M. R. Co.* (1865) 18 Iowa, 280, 87 Am.

Dec. 391; *Walters v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 458; *Muldowney v. Illinois C. R. Co.* (1873) 36 Iowa, 462; *Rose v. Des Moines Valley R. Co.* (1874) 39 Iowa, 246; *Hibbs v. Chicago & S. W. R. Co.* (1874) 39 Iowa, 342; *Lawrence v. Birney* (1875) 40 Iowa, 377; *Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71; *Simonson v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 87; *Brown v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 652, 21 N. W. 193; *Beems v. Chicago, R. I. & P. R. Co.* (1885) 67 Iowa, 435, 25 N. W. 693; *Dwyer v. Chicago, St. P. & O. R. Co.* (1892) 84 Iowa, 479, 35 Am. St. Rep. 322, 51 N. W. 244; *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151; *Wheelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119; *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Hively v. Webster County* (1902) 117 Iowa, 672, 91 N. W. 1041, 12 Am. Neg. Rep. 590; *Hammer v. Janowitz* (1906) 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324; *Kelly v. Chicago, R. I. & P. R. Co.* (1908) 138 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 536; *Grace v. Minneapolis & St. L. R. Co.* (1911) 153 Iowa, 418, 133 N. W. 672; *Nicoll v. Sweet* (1913) 163 Iowa, 683, L.R.A.1918C, 1099, 144 N. W. 615, Ann. Cas. 1916C, 661; *Korab v. Chicago, R. I. & P. R. Co.* (1913) 165 Iowa, 1, 146 N. W. 765, Ann. Cas. 1916E, 637; *Hough v. Illinois C. R. Co.* (1914) 169 Iowa, 224, 149 N. W. 885.

**Kansas.**—*Kansas P. R. Co. v. Cutter* (1877) 19 Kan. 83, 9 Am. Neg. Cas. 355.

**Kentucky.**—*Bowler v. Lane* (1860) 3 Met. 311; *Louisville, C. & L. R. Co. v. Case* (1873) 9 Bush, 728; *Louisville & N. R. Co. v. Graham* (1896) 98 Ky. 638, 34 S. W. 229; *Chesapeake & O. R. Co. v. Lang* (1896) 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; *Louisville & N. R. Co. v. Kelly* (1897) 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 1 Am. Neg. Rep. 249; *Louisville & N. R. Co. v. Eakin* (1898) 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; *Louisville & N. R. Co. v. Clark* (1899) 105 Ky. 571, 49 S. W. 323; *Louisville & N. R. Co. v. Creighton*

(1899) 106 Ky. 42, 50 S. W. 227; *Louisville & N. R. Co. v. Taaffe* (1899) 106 Ky. 535, 50 S. W. 850; *Louisville & N. R. Co. v. Hays* (1910) — Ky. —, 123 S. W. 289; *Louisville & N. R. Co. v. Engleman* (1911) 146 Ky. 19, 141 S. W. 374; *Illinois C. R. Co. v. Dallas* (1912) 150 Ky. 442, 150 S. W. 536; *Chicago, St. L. & N. O. R. Co. v. Benedict* (1913) 154 Ky. 675, 159 S. W. 526; *Louisville & N. R. Co. v. Morris* (1892) 14 Ky. L. Rep. 466, 20 S. W. 539; *Louisville & N. R. Co. v. Ward* (1898) 19 Ky. L. Rep. 1900, 44 S. W. 1112; *Louisville & N. R. Co. v. Milet* (1898) 20 Ky. L. Rep. 532, 46 S. W. 498; *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900; *Southern R. Co. v. Evans* (1901) 23 Ky. L. Rep. 568, 63 S. W. 445; *Louisville & N. R. Co. v. Tucker* (1902) 23 Ky. L. Rep. 1929, 65 S. W. 453; *Chesapeake & O. R. Co. v. Dupee* (1902) 23 Ky. L. Rep. 2349, 57 S. W. 15; *Louisville & N. R. Co. v. Sullivan* (1903) 25 Ky. L. Rep. 854, 76 S. W. 535; *Big Hill Coal Co. v. Abney* (1907) 30 Ky. L. Rep. 1304, 101 S. W. 394.

**Michigan.**—*Kyes v. Valley Teleph. Co.* (1903) 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340; *Olivier v. Houghton County Street R. Co.* (1903) 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53, later appeal in (1904) 138 Mich. 242, 101 N. W. 530; *Davis v. Michigan C. R. Co.* (1907) 147 Mich. 479, 111 N. W. 76; *Gates v. Beebe* (1912) 170 Mich. 107, 135 N. W. 934.

**Mississippi.**—*Vicksburg & M. R. Co. v. Phillips* (1887) 64 Miss. 693, 2 So. 537.

**Montana.**—*Beeler v. Butte & L. Copper Development Co.* (1910) 41 Mont. 465, 110 Pac. 528; *Melzner v. Northern P. R. Co.* (1912) 46 Mont. 162, 127 Pac. 146.

**New Hampshire.**—*Clark v. Manchester* (1883) 62 N. H. 577; *Corliss v. Worcester, N. & R. R. Co.* (1885) 63 N. H. 404; *Carney v. Concord Street R. Co.* (1908) 72 N. H. 364, 57 Atl. 218; *Imbriani v. Anderson* (1912) 76 N. H. 491, 84 Atl. 974.

**Oregon.**—*Carlson v. Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 450, 28 Pac. 497; *Wellman v. Oregon Short*

Line & U. N. R. Co. (1892) 21 Or. 530, 28 Pac. 625.

**Pennsylvania.**—*Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548; *Maher v. Philadelphia Traction Co.* (1897) 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; *McCafferty v. Pennsylvania R. Co.* (1899) 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435.

**Rhode Island.**—*McCabe v. Narragansett Electric Lighting Co.* (1905) 27 R. I. 272, 61 Atl. 667; *Underwood v. Old Colony Street R. Co.* (1911) 33 R. I. 319, 80 Atl. 390.

**Tennessee.**—*Trafford v. Adams Exp. Co.* (1881) 8 Lea, 96; *Nashville & C. R. Co. v. Smith* (1882) 9 Lea, 470; *Chicago, St. L. & N. O. R. Co. v. Pounds* (1883) 11 Lea, 129.

**Vermont.**—*Bradley v. Andrews* (1879) 51 Vt. 525.

**Wisconsin.**—*Herning v. Holt* (1913) 153 Wis. 101, 140 N. W. 1102.

In *Holmes v. Oregon & C. R. Co.* (1880) 6 Sawy. 262, 5 Fed. 523, it is held that where the statute gives the administrator the right to sue for the death of the decedent, the measure of damages is the pecuniary loss to the decedent's estate by reason of his death; *Ladd v. Foster* (1887) 31 Fed. 827, holds that where the damages for wrongful death, when recovered, are assets of the estate of decedent, they include nothing but the probable pecuniary loss to the estate through his death.

In *Rose v. Des Moines Valley R. Co.* (1874) 39 Iowa, 246, it is held that the measure of damages recoverable by the personal representative for the wrongful death of his decedent is the amount which will compensate the estate for the pecuniary loss sustained by the death of the deceased.

*b. Pecuniary loss to relatives.*

The right of action is continuous with the right of the deceased, and hence the amount of recovery is the value of his life to decedent's estate, and not the damage to his beneficiaries. *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22; *Ladd v. Foster* (1887) 31 Fed. 827; *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed.

43; *Kling v. Torello* (1913) 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987; *Trafford v. Adams Exp. Co.* (1881) 8 Lea (Tenn.) 96; *Nashville & C. R. Co. v. Smith* (1882) 9 Lea (Tenn.) 470; *Chicago, St. L. & N. O. R. Co. v. Pounds* (1883) 11 Lea (Tenn.) 129; *Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548; *McCabe v. Narragansett Electric Lighting Co.* (1905) 27 R. I. 272, 61 Atl. 667.

No other element of damages can enter into or constitute a part of the recovery than such as were sustained by the deceased himself, and for which he could have recovered had he lived and prosecuted the action, and hence loss or injuries to the children or next of kin of the deceased, occasioned by his death, can constitute no part of the cause of action or element of recovery by the personal representative. *Chicago, St. L. & N. O. R. Co. v. Pounds* (1883) 11 Lea (Tenn.) 129.

And see, to the same effect, *Ladd v. Foster* (1887) 31 Fed. 827, holding that, under the Oregon statute giving a claim to the administrator of a person whose death is caused by the wrongful act or omission of another, the damages, when recovered, are assets of the estate of the deceased, and must be administered accordingly, and hence they are assessed as and for a pecuniary injury to such estate, and not for the sufferings of the deceased, or as solace for the wounded feelings or mental anguish of the survivors. In *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed. 43, it is held that, under the Oregon statute giving the administrator of a person whose death is caused by the wrongful act or omission of another a right to recover damages therefor, the damages, when recovered, are assets of the estate, and they are assessed for the pecuniary injury to the deceased person's estate caused by his death. Nothing is allowed for the sufferings of the deceased, nor as a solace to the survivors. And *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22, holds that, in an action by the administrator for the benefit of the estate of the decedent, the jury cannot award damages for anguish or suffering of the

relatives of the person killed. *Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548, also holds that the value of the life lost is the basis of the estimate of the damages, rather than the injury resulting from it to the survivor entitled to sue, where the action is to recover damages to the estate under a General Survival Statute.

In *McCabe v. Narragansett Electric Lighting Co.* (1905) 27 R. I. 272, 61 Atl. 667, it is held that where the statute provides for the recovery of damages by the personal representative of a decedent killed by the wrongful act of another, and for the division of these damages: first, to the husband, or widow and children, if any, and if not, then to the next of kin, the damages recoverable are such as result to the estate of the decedent by his death, and do not include damages for loss to an infant child of the parental care of the father. And see *Dwyer v. Chicago, St. P. & O. R. Co.* (1892) 84 Iowa, 479, 35 Am. St. Rep. 322, 51 N. W. 244, holding that the measure of damages for a wrongful death, under the Iowa statute, is the loss to the estate of the decedent in a pecuniary way by reason of his death, not taking into account his pain and suffering, or the grief and distress of his family, or the loss of his society. To the same effect is *Wheelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119.

**II. As to whether basis for computation of pecuniary loss is damage suffered by injured person or loss from his death.**

As pointed out, the measure of damages to the estate of a deceased for his negligent death is the pecuniary loss to the estate, as distinguished from any loss to his relatives or dependents. The rule is frequently stated that this loss is to be computed upon the basis of the damage to the deceased himself, that is, the amount the deceased might have recovered, had he survived to prosecute the action. This rule, however, has received different constructions, and is of but little real aid in determining the amount of damage to be awarded in

a given case. Where the action is for the benefit of the estate of the deceased, the real questions presented regarding the amount of damage are (1) whether or not the pecuniary loss to the estate is to be computed from the time of the injury, or begins at the time of the death, and (2) whether it should take into consideration the life expectancy of the deceased, or whether the computation of the loss is limited to the time intervening between the date of the injury and the death. Upon these questions the courts are not in harmony. This conflict of opinion, as heretofore suggested and as will be hereinafter more specifically pointed out, is in part due to the fact that in some jurisdictions the action for the benefit of the estate is exclusive, while in others it is concurrent with an action for the benefit of statutory beneficiaries. The conflict, however, is not entirely traceable to this source, but it is, apparently, in part due to the tendency, especially of the earlier decisions, to give a very limited construction to the Survival Statutes, and to hold that they did not extend the right to the deceased to recover damages for any loss beyond the time of his death.

The following cases hold that, in assessing the damages to the estate of a decedent for his wrongful death, there shall be taken into account the life expectancy of the deceased as it may be determined by the jury from the evidence in the case, including mortality tables:

**United States.**—*Holmes v. Oregon & C. R. Co.* (1881) 6 Sawy. 275, 5 Fed. 523; *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22; *Ladd v. Foster* (1887) 31 Fed. 827; *Kelley v. Central R. Co.* (1883) 48 Fed. 663; *Linns v. Chesapeake & O. R. Co.* (1899) 91 Fed. 964; *Jennings v. Alaska Treadwell Gold Min. Co.* (1908) 95 C. C. A. 388, 170 Fed. 146.

**Connecticut.**—*New York, N. H. & H. R. Co. v. Fair Haven & W. B. Co.* (1898) 70 Conn. 614, 40 Atl. 607, 41 Atl. 169; *Kling v. Terello* (1913) 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987; *Lane v. United Electric Light &*

Water Co. (1915) 90 Conn. 35, L.R.A. 1916C, 808, 96 Atl. 155.

Florida.—FLORIDA EAST COAST R. Co. v. HAYES (reported herewith) ante, 1310.

Georgia. — Atkinson v. Hardaway (1912) 10 Ga. App. 389, 73 S. E. 556.

Iowa.—Simonson v. Chicago, R. I. & P. R. Co. (1878) 49 Iowa, 87; Stulmaller v. Cloughly (1882) 58 Iowa, 738, 13 N. W. 55; Kelly v. Chicago, R. I. & P. R. Co. (1908) 138 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 536; Grace v. Minneapolis & St. L. R. Co. (1911) 153 Iowa, 418, 133 N. W. 672; Hough v. Illinois C. R. Co. (1914) 169 Iowa, 224, 149 N. W. 885.

Michigan.—Kyes v. Valley Teleph. Co. (1903) 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340; Olivier v. Houghton County Street R. Co. (1903) 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; Davis v. Michigan C. R. Co. (1907) 147 Mich. 479, 111 N. W. 76; Gates v. Beebe (1912) 170 Mich. 107, 135 N. W. 934.

Montana.—Johnson v. Butte & S. Copper Co. (1910) 41 Mont. 158, 48 L.R.A. (N.S.) 938, 108 Pac. 1057; Beeler v. Butte & L. Copper Development Co. (1910) 41 Mont. 465, 110 Pac. 528.

New Hampshire.—Imbriani v. Anderson (1912) 76 N. H. 491, 84 Atl. 974.

North Carolina. — Mendenhall v. North Carolina R. Co. (1898) 123 N. C. 278, 31 S. E. 480; Carter v. North Carolina R. Co. (1905) 139 N. C. 500, 52 S. E. 642; Poe v. Raleigh & A. Air Line R. Co. (1906) 141 N. C. 528, 54 S. E. 406; Gerringer v. North Carolina R. Co. (1907) 146 N. C. 35, 59 S. E. 152; Roberson v. Greenleaf Johnson Lumber Co. (1911) 154 N. C. 328, 70 S. E. 630; Ward v. North Carolina R. Co. (1912) 161 N. C. 186, 76 S. E. 717; Gurley v. Southern Power Co. (1916) 172 N. C. 690, 90 S. E. 943.

Pennsylvania.—Pennsylvania R. Co. v. McCloskey (1854) 23 Pa. 626, 12 Am. Neg. Cas. 548.

Rhode Island.—Underwood v. Old Colony Street R. Co. (1911) 33 R. I. 319, 80 Atl. 390.

Upon this point, the court in Kling v. Torello (1913) 87 Conn. 301, 46 L.R.A. (N.S.) 930, 87 Atl. 987, said: "The right of action which the exec-

utor or administrator is permitted to pursue is not one which springs from the death. It is one which comes to the representative by survival. The right of recovery for the death is as for one of the consequences of the wrong inflicted upon the decedent. The amount of recovery is determined from the standpoint of the deceased, and not from that of the statutory beneficiaries. Its measure, within the statutory limitation, is the value of life to him whose life has been cut off.

. . . When one, as the result of injuries inflicted, suffers during life, and death later results, there are not two independent rights of action. There is but one liability, and that is for all the consequences of the wrongful act, including the death. . . . There cannot be two recoveries. . . . If the injured man survives to recover, he recovers once for all; if he dies before recovery, his executor or administrator stands in his place. The Survival Statute operates to transfer to the representative the right of action which the deceased had for his sufferings and disability during life, while the death enlarges his right of recovery by permitting an award of additional damages for the death itself, as one of the harmful results of the wrongful act. The court is by the statute, as it was not by the common law, authorized to take that event into consideration, as it might any other physical development consequent upon the injuries, whether occurring before or after action brought. The new event is not regarded as one which creates a cause of action, but one which has a bearing upon the award of damages. Instantaneous death may of itself bring into existence a right of action, which is confined in the matter of recovery to the event of death. . . . But if the death is not instantaneous, the right of action is not so confined. It reaches back to the antecedent harmful results, and the death is, by force of the statute, made one of the incidents in the story of results, which is material in a determination of the amount of recovery to which the representative is entitled."

It has been held, however, that only such damage can be recovered in behalf of the estate of the deceased as the deceased sustained in his lifetime; that nothing can be allowed for the loss of his life, or for what he might have earned had he lived longer. The recovery may, however, include the loss of the decedent's earnings between the time intervening between the injury and his death. *Ramsdell v. Grady* (1903) 97 Me. 319, 54 Atl. 763; *Bancroft v. Boston & W. R. Corp.* (1865) 11 Allen (Mass.) 36; *Kennedy v. Standard Sugar Refinery Co.* (1878) 125 Mass. 90, 28 Am. Rep. 214.

This rule has been based upon the language of the statute which authorizes the recovery of damage for the injury to the deceased. This is the point made in *Clark v. Manchester* (1883) 62 N. H. 577. In this case the court said: "The rule of damages depends upon the construction to be given to the Statute of 1879, the question being whether damages are given to the surviving relations of the deceased for the loss and injury to them from his death, or for the injury to the deceased which caused his death; whether for the injury resulting from death, or for the injury resulting in death. The statute is that the executor or administrator may recover damages for the injury when the person injured, if death had not ensued, would have been entitled to recover damages. The damages are for the widow and children, in equal shares; and if there be no child, wholly to the widow; and if no widow, to the heirs of the deceased according to the law regulating the distribution of intestate estates. In this case the father of the deceased child will be entitled to the recovery. Prior to the Statute of 1879, no action for an injury resulting in death could be maintained unless commenced before the death of the injured person. The right of action for personal injuries did not survive. . . . The English Statute of 1846, known as Lord Campbell's Act, was, in its first section giving the right of action, substantially like our statute; but a second section provided that 'in every such action the jury may give such

damages as they may think proportional to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought.' This statute, and those of many of the states which have copied the English statute, expressly provide that the damages shall be for the loss to the survivors resulting from death. The prospective value to them of the life of the deceased, had he escaped death, is the measure of damages adopted by these statutes. While our statute reserves the damages recovered for the benefit of the surviving relations of the deceased, it omits the provision for assessing the damages upon the injury to them as a basis of recovery. The ground of recovery in our statute is the injury to the deceased which resulted in or caused his death. 'When the death of a person is caused by the wrongful act or neglect of another, which, if death had not ensued, would have entitled the person injured to recover damages therefor, then, on the death,' etc., 'the executor or administrator may recover damages for the injury.' From a reference in the context to the 'person injured,' and by the natural interpretation of language, the 'injury' must mean the injury which resulted in or caused the death of the person. Damages are given for the injury the same as they would have been if death had not ensued, and that injury must be the injury to the deceased preceding and resulting in his death."

In jurisdictions where statutes in the form of Lord Campbell's Act and General Survival Statutes are construed to provide for coexistent remedies, which, however, do not permit of the recovery of double damages for the same wrongful act, there is recognized the purpose and intent of the statutes to compensate for the actual pecuniary injury inflicted by the wrongful act. To secure this end and avoid any overlapping of the damages, the general statute is construed to authorize a recovery of damages for the injury to the deceased, not including his death, and a statute following the lines of Lord Campbell's Act to

authorize recovery for the pecuniary loss of the statutory beneficiaries. Under the Survival Statute the damages recoverable are held to begin with the wrong and end with the death, and under Lord Campbell's Act the damages are held to begin with the death, and not to include any damages which might have been recovered by the deceased had he lived. *St. Louis & S. F. R. Co. v. Goode* (1914) 42 Okla. 784, L.R.A.1915E, 1141, 142 Pac. 1185; *Smith v. Chicago, R. I. & P. R. Co.* (1914) 42 Okla. 577, 142 Pac. 398; *Bennett v. Spartanburg R. Gas & E. Co.* (1914) 97 S. C. 27, 81 S. E. 189; *Belding v. Black Hills & Ft. P. R. Co.* (1893) 3 S. D. 369, 53 N. W. 750; *Brown v. Chicago & N. W. R. Co.* (1899) 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; *Nemcek v. Filer & S. Co.* (1905) 126 Wis. 71, 105 N. W. 225; *Ehlers v. Automobile Liability Co.* (1919) — Wis. —, 173 N. W. 325.

For example, *Bennett v. Spartanburg R. Gas & E. Co.* (1914) 97 S. C. 27, 81 S. E. 189, holds that, under the General Survival Statute and the statute embodying the principles of Lord Campbell's Act, two different causes of action exist, and the elements of damages recovered are entirely different. In the first action the personal representative is entitled to recover the damages which his decedent sustained by reason of the injury complained of, such as physical and mental suffering, loss of time, and impaired earning capacity, for the time intervening between the injury and the death, while in the other action no damages resulting to the deceased are recoverable, but only such damages may be recovered as are caused the statutory beneficiary.

While it is held in *Brown v. Chicago & N. W. R. Co.* (1899) 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255, that a statute embodying the principles of Lord Campbell's Act, construed in connection with statutory provisions for the survival of actions, or causes of action, for personal injuries, permits two actions, one for the benefit of the statutory beneficiaries, to recover their

pecuniary loss, the other for the benefit of the estate of the decedent, it is nevertheless clear that it was not thereby intended to permit a double recovery for the same wrong. On this point it is said that the trial judge can easily, by proper instruction, limit the recovery in a revival action to the loss actually caused to the deceased prior to his death, including his pain and suffering, and in the action under the statute similar to Lord Campbell's Act, to the pecuniary loss sustained by the statutory beneficiaries; and if the two causes of action are joined, the court may readily require the jury to make separate findings as to the damages.

And see *Davidson Benedict Co. v. Severson* (1902) 109 Tenn. 572, 72 S. W. 967, holding that, under the Tennessee statute, the measure of damages recoverable where a person dies as a result of personal injuries is, first, the damages to the decedent in his own peculiar and personal relations, such as pain and suffering endured by him, and also the pecuniary damages of the widow and next of kin, that is, the pecuniary value of the life of the deceased, as shown by his expectancy of life and earning capacity; and the damages recoverable are not to be duplicated by a recovery of damages to the decedent, not only for pain and suffering, but also for loss to his estate of the pecuniary value of his life, and the pecuniary loss to his widow and next of kin, which in effect is the pecuniary value of the life of the deceased.

In *Belding v. Black Hills & Ft. P. R. Co.* (1892) 3 S. D. 369, 53 N. W. 750, it is held that, under a statute permitting a recovery in behalf of the estate of a deceased person for such damage as the deceased might have recovered had he survived the injury, the amount of recovery is limited to compensation for the pain and suffering of the deceased, and for loss of time and employment between the time of the injury and death, and the expense of medical and surgical attention, nursing, etc., incident to the injury. It is, however, provided by another statute that certain relatives



of the deceased are given the right to recover their pecuniary loss due to his death, which is based upon the decedent's earning capacity.

In *Vicksburg & M. R. Co. v. Phillips* (1887) 64 Miss. 693, 2 So. 537, it is held that the measure of recovery under the Survival Statute is the same as the measure of recovery by the deceased had he commenced an action and died while it was pending. The court said that there was also a right of action to recover for the death, and this was entirely distinct and independent from the action by the personal representative.

In *St. Louis, I. M. & S. R. Co. v. Sweet* (1897) 63 Ark. 563, 40 S. W. 463, 2 Am. Neg. Rep. 295, the facts were that the injured person survived his injuries but a few hours. An action by the personal representative was commenced to recover damages for the benefit of the widow and next of kin of the deceased, and also an action to recover for the mental anguish and bodily pain suffered by the deceased. It was held that the action to recover damages for the pain and suffering of the decedent could be maintained notwithstanding the pendency of the action to recover for the loss to the widow and next of kin of the decedent, since the elements of damage recoverable in the two actions were distinct.

### III. Computation of damage from destroyed earning capacity.

#### a. In general.

Assuming that the basis for compensating the estate of a deceased person for personal injuries which caused his death is the pecuniary loss to the estate, the question arises as to what elements or matters may be taken into account in assessing the damage. As heretofore pointed out, the courts are not agreed as to whether or not account may be taken of the probable earnings of the deceased during his expectancy had it not been for the injury which caused his death. Even in jurisdictions where the earning capacity of the deceased may be taken into account for his life expectancy as fixed by the jury, the courts are not

agreed as to whether the gross earnings, the net earnings, or the probable accumulations of the decedent are to be the basis for the assessment of damage in this regard. Upon this point, see *infra*, b. Neither are the courts in harmony as to whether or not allowance may be made for the pain and suffering of the deceased. See *infra*, IV. And the same lack of harmony exists as to whether account may be taken of the medical and funeral expenses of the deceased, and of other similar matters. See *infra*, V.

#### b. Gross earnings.

Aside from the question hereinafter discussed as to the inclusion of compensation for pain and suffering of the deceased, the principal element of damage, as previously shown, is based upon the earning capacity of the deceased. The courts, however, are not agreed as to just the extent to which the prospective earnings of the deceased are to be taken into account in assessing the damage for his death. In a few jurisdictions it is held that the amount which the deceased would presumably have earned in the future is the basis for the assessment of pecuniary loss to his estate by reason of his death. *Linss v. Chesapeake & O. R. Co.* (1899) 91 Fed. 964; *Jennings v. Alaska Treadwell Gold Min. Co.* (1908) 95 C. C. A. 388, 170 Fed. 146; *Broughel v. Southern New England Teleph. Co.* (1901) 73 Conn. 614, 84 Am. St. Rep. 176, 48 Atl. 751; *Kyes v. Valley Teleph. Co.* (1903) 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340; *Olivier v. Houghton County Street R. Co.* (1904) 138 Mich. 242, 101 N. W. 530; *Davis v. Michigan C. R. Co.* (1907) 147 Mich. 479, 111 N. W. 76; *Gates v. Beebe* (1912) 170 Mich. 107, 135 N. W. 934; *Love v. Detroit, J. & C. R. Co.* (1912) 170 Mich. 1, 135 N. W. 963; *Beeler v. Butte & L. Copper Development Co.* (1910) 41 Mont. 465, 110 Pac. 523; *Imbriani v. Anderson* (1912) 76 N. H. 491, 84 Atl. 974.

In an action by the administrator of the deceased person to recover damages for his wrongful death, the measure of recovery is the earning power

of the decedent, and in estimating this earning power the relationship of husband and wife, child and parent, or other kinship of the beneficiaries to the decedent, or the number dependent upon him, is not to be considered. *Linss v. Chesapeake & O. R. Co.* (Fed.) *supra*.

And see *Jennings v. Alaska Treadwell Gold Min. Co.* (1908) 95 C. C. A. 388, 170 Fed. 146, holding that under a statute permitting an action for death through negligence of another, and providing that the amount recovered shall inure to the benefit of the wife and children of the deceased, and if he leaves no wife or children then such amount shall be administered as personal property, where the deceased left no wife or children, the damage recoverable for the value of his life to his estate is measured by his earning capacity, thrift, and probable duration of life.

*Broughel v. Southern New England Teleph. Co.* (1901) 73 Conn. 614, 84 Am. St. Rep. 176, 48 Atl. 751, also holds that, under a statute providing that causes of action for injury to the person shall survive to the personal representative of the injured person, the measure of damages for loss of life is the value of his life to the decedent, based on his earning capacity as affected by the circumstances of each particular case.

See also *Beeler v. Butte & L. Copper Development Co.* (1910) 41 Mont. 465, 110 Pac. 528, holding that, where a statute authorizes a suit in behalf of the heirs of a person wrongfully killed while working in a mine, giving a right to prosecute and maintain the same action that the injured man could have maintained had he lived, the right of action of the beneficiaries includes damages for the pain and suffering that the decedent endured before death by reason of the injury, and for his diminished and lost earning capacity for the period of his natural expectancy.

In Connecticut, where the Death Statutes are construed to be Survival Statutes merely, and not to create in the personal representative of the deceased a new cause of action, it is held

that the amount of recovery is to be determined from the standpoint of the deceased, and not from that of the statutory beneficiary. Its measure, within the statutory limitation, is the value of life to him whose life has been cut off, and also the right to recover for the suffering of the deceased, and his disability during life. *Kling v. Torello* (1913) 87 Conn. 301, 46 L.R.A.(N.S.) 930, 87 Atl. 987.

The foregoing cases do not make it entirely clear whether it is the gross earnings of the deceased or his net earnings which are to be taken into account in assessing the loss to his estate by his wrongful death. In some jurisdictions, it is clearly the gross earnings which are to be considered.

In *Olivier v. Houghton County Street R. Co.* (1903) 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53, the court approves the rule of damages established in *Kyes v. Valley Teleph. Co.* (1903) 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340, that in an action under the Survival Statute to recover damages to the injured person from the wrongful act complained of, where he dies as a result of the injury after having survived same for an appreciable length of time, it is proper to consider his earning ability and the length of time that he would probably have lived had he not been injured, and the loss he sustained by reason of being deprived by such injuries of the ability to labor and earn money during the time he probably would have lived, had he not been injured. In answering the contention that the damages recoverable in such a case should be only for the feelings of pain and anguish of deceased while he actually lived, and the loss of earnings from the time of the injury to his death, the court said: "This is an unreasonable limitation. We need not discuss the reasoning by which the result is reached. We have long ago held that prospective damages are recoverable. An injured person may recover for loss of earnings for the period during which the evidence fairly shows that he would have lived but for the injury. This rule would apply to one who should live

long enough to try his case, though he should die the following day. But defendant's contention would substitute another rule upon a second trial after his death, should such trial become necessary. Such recovery is based upon the actual damages suffered through the accident. On the first trial the recovery is based upon a probable prospective incapacity for a probable period. After death, such incapacity (and consequent loss) is made certain, where it was only probable before. The period alone remains uncertain. As to pain and mental suffering, it is different. Upon the first trial, the duration of such pain and suffering is uncertain; upon the second, it is definite. As has been already suggested, it is not a new doctrine that prospective damages, when reasonably certain, may be recovered. It is a part of the right that survives under the act, as was held in the *Kyes Case*. Such a construction removes the only objection that can be urged against the view which we have taken of the Death Act. It gives to the representatives the absolute right to the remedy which his ancestor had, instead of leaving it to depend upon the accident of his dependency."

It has been expressly asserted that, under the Survival Act, the measure of damages is compensation for the pain and suffering of the decedent and for loss of earnings during the decedent's probable life, had he not been killed through the injury complained of. The amount that he might have saved during his probable life is not to be taken into consideration. *Davis v. Michigan C. R. Co.* (1907) 147 Mich. 479, 111 N. W. 76.

And see *Gates v. Beebe* (1912) 170 Mich. 107, 135 N. W. 934, holding that an administratrix suing under the Survival Act for the death of her husband is entitled to recover such sum as the deceased would have earned during the remainder of his life.

And *Olivier v. Houghton County Street R. Co.* (Mich.) *supra*, holds that the measure of damages for loss to the decedent's estate from his wrongful death is the amount which the decedent would have earned during

the period he probably would have lived, without any deduction for what it would probably have cost him for food, clothing, and other personal expenditures, the damages in this regard being different from the damages sustained by his next of kin.

See also *Imbriani v. Anderson* (1912) 76 N. H. 491, 84 Atl. 974, holding that the right of the personal representative of the decedent to recover for the decedent's loss of capacity to earn money, as a result of the injury complained of, is not limited to what the deceased would probably have saved, but includes whatever he might have earned for his estate.

It has been held that where the measure of damages, as fixed by the statute, is to be compensation for the full value of the life of the decedent, this is to be determined without any deduction for necessary or other personal expenses of the deceased had he lived. *Atkinson v. Hardaway* (1912) 10 Ga. App. 389, 73 S. E. 556.

But it has been said that it is neither just nor equitable to sum up the probable gross earnings of the deceased for his lifetime, ignoring the items of necessary food, clothing, etc., and also to give no consideration to the fact that old age and sickness may impair the power of the decedent to labor and produce. *Wheelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119. In Iowa, however, the measure of damage to the estate of a deceased person for his negligent or wrongful death is based upon the accumulations which the deceased would probably have made to his estate had it not been for the injury which caused his death. See other Iowa cases, *infra*, d.

According to the Kentucky rule, if an injured person dies of his injuries, his personal representative may recover for his mental and physical sufferings, loss of time, and his surgical and other expenses due to the injury. If, however, the personal representative sues to recover under the other section of the statute for the wrongful death, the measure of damages is limited to compensation to the decedent's estate for the destruction of his power

to earn money, to be assessed in view of all the evidences in the case, including the age of the deceased and his expectancy of life. *Louisville & N. R. Co. v. Stewart* (1913) 156 Ky. 550, 161 S. W. 557; *Louisville & N. R. Co. v. Kenney* (1915) 162 Ky. 403, 172 S. W. 683; *Louisville & N. R. Co. v. Ward* (1898) 19 Ky. L. Rep. 1900, 44 S. W. 1112; *Louisville & N. R. Co. v. Milet* (1898) 20 Ky. L. Rep. 532, 46 S. W. 498; *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900; *Southern R. Co. v. Evans* (1901) 23 Ky. L. Rep. 568, 63 S. W. 445; *Louisville & N. R. Co. v. Tucker* (1902) 23 Ky. L. Rep. 1929, 65 S. W. 453; *Louisville & N. R. Co. v. Sullivan* (1903) 25 Ky. L. Rep. 854, 76 S. W. 525; *Louisville, C. & L. R. Co. v. Case* (1873) 9 Bush (Ky.) 728; *Louisville & N. R. Co. v. Kelly* (1897) 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 1 Am. Neg. Rep. 249; *Louisville & N. R. Co. v. Eakin* (1898) 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; *Louisville & N. R. Co. v. Clark* (1899) 105 Ky. 571, 49 S. W. 323; *Louisville & N. R. Co. v. Taaffe* (1899) 106 Ky. 535, 50 S. W. 850; *Louisville & N. R. Co. v. Simrall* (1907) 127 Ky. 55, 104 S. W. 1011; *Stewart v. Louisville & N. R. Co.* (1910) 136 Ky. 717, 125 S. W. 154; *Louisville & N. R. Co. v. Engleman* (1911) 146 Ky. 19, 141 S. W. 374; *Illinois C. R. Co. v. Dallas* (1912) 150 Ky. 442, 150 S. W. 536; *Kentucky & I. T. R. Co. v. Becker* (1919) — Ky. —, 214 S. W. 900.

And this rule applies, irrespective of whether or not the deceased left surviving him a wife or children. *Louisville & N. R. Co. v. Eakin* (1898) 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872. In this state, it has been expressly held that the jury are not to take into account such sums as the deceased might reasonably have been expected to expend upon himself for his proper maintenance and support. *Lexington Utilities Co. v. Parker* (1915) 166 Ky. 81, 178 S. W. 1173.

However, in *Stewart v. Louisville & N. R. Co.* (1910) 136 Ky. 717, 125 S. W. 154, the court said that the rule that the damages are to be assessed at such a sum as will reasonably com-

pensate the estate of the deceased for the destruction of his power to earn money does not mean that this amount is to be "computed by simply multiplying the earning power of the deceased at his death by his expectancy of life, as shown by the life tables. The life tables are based on the ordinary expectation of life, and are used by insurance companies, but they are not based on what are known as extrahazardous employments. The work of a brakeman on a railroad train is classed among the extrahazardous employments, and, while the life tables are competent evidence in cases like this, for want of any better evidence on the subject, the extrahazardous character of the service should also be taken into consideration, for the deceased was earning \$960 in an extrahazardous employment, and he might not earn so much in an employment less hazardous. The value of a piece of machinery is not to be determined by multiplying its present earning power by the length of its probable use, but the cost of maintenance must be subtracted. The value of the human machine to his estate must be determined in like manner. It must be maintained,—that is, it must be fed, clothed, and supplied with other necessities. What the estate would lose would be the net gain. There is no precise criterion by which this may be measured; it must necessarily be left to the discretion of the jury."

#### c. Net earnings.

It has also been held that the measure of damages is compensation for the loss of the decedent's net income, based on his prospective earnings during his probable life had it not been for the injury which caused his death, taking into consideration his personal expenses and expenditures. *Mendenhall v. North Carolina R. Co.* (1898) 123 N. C. 276, 31 S. E. 480; *Carter v. North Carolina R. Co.* (1905) 139 N. C. 500, 52 S. E. 642; *Poe v. Raleigh & A. Air Line R. Co.* (1906) 141 N. C. 528, 54 S. E. 406; *Gerringer v. North Carolina R. Co.* (1907) 146 N. C. 35, 59 S. E. 152; *Roberson v. Greenleaf John-*

son Lumber Co. (1911) 154 N. C. 328, 70 S. E. 630; *Ward v. North Carolina R. Co.* (1912) 161 N. C. 186, 76 S. E. 717; *Gurley v. Southern Power Co.* (1916) 172 N. C. 690, 90 S. E. 943; *Underwood v. Old Colony Street R. Co.* (1911) 83 R. L. 319, 80 Atl. 390; *Sebille v. Dunn* (1917) — R. L. —, 99 Atl. 831.

In *Underwood v. Old Colony Street R. Co.* (1911) 33 R. L. 319, 80 Atl. 390, it is held that the measure of damages is the pecuniary loss to the estate of the deceased, sustained by reason of his death. This loss is ascertained by obtaining the present value of the net remainder, after deducting the personal expenses from the estimated income of the deceased from his own exertions during his life expectancy, in the management and control of any business carried on by him.

In *Sebille v. Dunn* (R. L.) *supra*, it is held that the damage is based on the present value of the net result remaining after the decedent's personal expenses are deducted from his income or earnings. To ascertain this amount, it is held to be necessary, first, to determine the gross amount of the decedent's prospective income or earnings, then deduct therefrom the amount the deceased would naturally spend for his personal expenditures, taking into account his situation in life, his means, personal habits, etc., and then reduce the net result so obtained to its present value.

It is not entirely clear whether the rule of the Iowa courts is to allow the damage to be based upon the net earnings of the deceased, or upon his accumulations. The two terms seem to be somewhat confused in the opinions. For example, in *Neal v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 690, 130 N. W. 898, the contention was made that an instruction to the jury as to the measure of damages was erroneous, in that it allowed the jury to take into consideration the age of the deceased at the time of his death, his occupation, the wages he was earning, the condition of his health, and his ability to earn money, as well as his expectancy of life, in determining the probable pecuniary loss to his estate by his death, without in any way in-

structing or suggesting to the jury that they should also take into consideration what the deceased would have spent had he lived. In denying this contention the court pointed out that in *Lowe v. Chicago, St. P. M. & O. R. Co.* (1898) 89 Iowa, 420, 56 N. W. 519, the trial court was sustained in rejecting an instruction specifically calling attention to the fact that the allowance should be for the amount the deceased would have accumulated and had, over and above, at his death, and it was said that from this instruction the jury must have understood that the amount of the probable net earnings of the deceased was to form the basis for determining the amount of the verdict, and it was said that the jury should not have been required to estimate the loss to the estate of the deceased by his death, on the basis of what his accumulations had been at that time. See other Iowa cases, *infra*, d.

#### d. Accumulations.

In many jurisdictions, the rule obtains that the measure of damages to the estate of a deceased person for his wrongful or negligent death is to be based on the accumulations he would have made to his estate had he lived out his life expectancy, and his earning power is only considered to the extent that it bears on the matter of accumulations.

United States.—*Kelley v. Central R. Co.* (1888) 48 Fed. 663.

Delaware.—*DiPrisco v. Wilmington City R. Co.* (1904) 4 Penn. 527, 57 Atl. 906; *MacFeat v. Philadelphia, W. & B. R. Co.* (1904) 5 Penn. 52, 62 Atl. 898; *Short v. Philadelphia, B. & W. R. Co.* (1908) 7 Penn. 108, 76 Atl. 363; *Skonieczny v. Churchman* (1905) 7 Penn. 226, 78 Atl. 634.

Florida.—*Jacksonville Electric Co. v. Bowden* (1907) 54 Fla. 461, 15 L.R.A.(N.S.) 451, 45 So. 755; *FLORIDA EAST COAST R. CO. v. HAYES* (reported herewith) ante, 1310.

Iowa.—*Brown v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 652, 21 N. W. 193; *Beems v. Chicago, R. I. & P. R. Co.* (1885) 67 Iowa, 435, 25 N. W. 693; *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151; *Whealan*

*v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119; *Lowe v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, 56 N. W. 519; *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Hammer v. Janowitz* (1906) 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 384; *Kelly v. Chicago, R. I. & P. R. Co.* (1908) 138 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 586; *Grace v. Minneapolis & St. L. R. Co.* (1911) 153 Iowa, 418, 133 N. W. 672; *Hough v. Illinois C. R. Co.* (1914) 169 Iowa, 224, 149 N. W. 885; compare with *Neal v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 690, 130 N. W. 398, *supra*.

**Oregon.**—*Carlson v. Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 450, 28 Pac. 497; *Kuntz v. Emerson Hardwood Co.* (1919) — Or. —, 184 Pac. 253.

**Pennsylvania.**—*Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548.

A statute authorizing compensation for the negligent destruction of a person's life, the amount to cover compensation to relatives who have sustained damage or loss thereby, and providing that, where the decedent left no husband, wife, minor child, or other person dependent upon him for support, the measure of damages should be the pecuniary value of the life of the decedent to his prospective estate, not including or having any relation to physical or other suffering of the decedent or his relatives, or claims of anyone for present or future support or solatium, entitles to the recovery of compensation, based upon the present worth of the decedent's life to an estimated prospective estate, being what he probably would have earned and saved after reaching majority, and during his life expectancy. *Stulmuller v. Cloughly* (1882) 58 Iowa, 738, 13 N. W. 55.

In *Kelley v. Central R. Co.* (1888) 48 Fed. 663, it is held that, under the Iowa statute, the damage recoverable for wrongful death is the amount that probably would have been saved to the decedent's estate had he lived, taking into consideration his occupation, age, and habits as to sobriety, indus-

try, and economy, or the amount of his property and the probable duration of his life. And see *Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22, holding that under the statutes of Iowa providing that, if a person is killed through an accident caused by negligence on the part of another, the pecuniary damages caused to his estate by his death may be recovered in a suit by the administrator of his estate, the jury should take into consideration the age of deceased at the time of his death and his probable accumulations or net earnings after allowing for all expenses.

It has been held that in assessing the damages to the estate of the deceased there is also to be taken into consideration the fact that in the natural course of events the deceased was liable to have died at any time, and there was no certainty that he would have lived out his life expectancy, for it is neither just nor equitable to sum up the probable gross earnings of the deceased for his lifetime, and ignore the items of necessary food, clothing, etc., and give no consideration to the fact that old age and sickness may impair the decedent's ability to labor and produce. *Grace v. Minneapolis & St. L. R. Co.* (1911) 153 Iowa, 418, 133 N. W. 672; *Wheelen v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119; *Simonson v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 87.

So, under a statute giving a right of action to the personal representative to secure compensation to those who have sustained damage or loss by reason of the death of a person, caused by the fault of another, where the decedent left no husband, wife, minor child, or other person dependent upon him for support, the measure of damages is the pecuniary value of the life of the decedent to his prospective estate, not including or having any relation to physical or other suffering to the decedent or his relatives, or claims of anyone for present or future support or solatium. Such damage is the present worth of the decedent's life to an estimated prospective estate that he probably would have earned

and saved after becoming of age, and during his life expectancy, to be left at his death. A determination of the amount of such damages requires a consideration of the contingency whether the decedent probably would have lived to become of age, and to some given time afterwards, as well as an estimate of the value of the estate he probably would have earned and saved after becoming of age, and would probably have left at the end of his life expectancy, and also an estimate of the present money value of the decedent's life to the estimated prospective estate. Among other elements to be considered are age, mental capacity, habits of life and industry, thrift, means, business, earnings, health, probable duration of life, skill and environment, and reasonable expectations. *FLORIDA EAST COAST R. Co. v. HAYES* (reported herewith) ante, 1310.

*MacFeat v. Philadelphia, W. & B. R. Co.* (1904) 5 Penn. (Del.) 52, 62 Atl. 898, holds that the measure of recovery for wrongful death, in an action by the personal representative of the decedent, is such sum as the decedent would probably have earned during his life expectancy, and have left as his estate at the time of his death, taking into consideration his age, reasonable probability of life, his ability and disposition to labor, habits of living and expenditure. To the same effect is *DiPrisco v. Wilmington City R. Co.* (1904) 4 Penn. (Del.) 527, 57 Atl. 906.

And see *Skonieczny v. Churchman* (1905) 7 Penn. (Del.) 226, 78 Atl. 634, holding that in an action by the personal representative to recover for a child's death, the damage recoverable is such a sum as will represent the amount the deceased would have accumulated at the end of his life, and left to be divided among his heirs, considering his condition and probability of life.

In *Florida East Coast R. Co. v. Hayes* (1913) 66 Fla. 589, 64 So. 274, it is held that, for the wrongful death of his decedent, the administrator may recover only the present monetary worth of decedent's life to an estimat-

ed prospective estate, to compensate for the estate the deceased would probably have accumulated had he lived out his life expectancy. And see *Jacksonville Electric Co. v. Bowden* (1907) 54 Fla. 461, 15 L.R.A. (N.S.) 451, 45 So. 755, holding that where there is no widow or husband, minor child or dependent, surviving the deceased, and his personal representative sues for his death under the statute authorizing such suit under the circumstances, the rights of the personal representative are to be determined by the laws regulating the rights and duties of the administrator, where same are not defined in the statute authorizing the suit. As damages, he may recover the value to decedent's estate of the prospective earnings and savings that the evidence shows could have been expected had the decedent continued to live.

*Hammer v. Janowitz* (1906) 131 Iowa, 20, 108 N. W. 109, 20 Am. Neg. Rep. 324, holds that the measure of damages to the decedent's estate for his wrongful death is not a sum which, placed at interest, will yield an amount necessary for the support of his family, but is such an amount as the evidence shows the decedent would have saved and accumulated had he lived out his full expectancy, based on his age, health, ability to earn money, and habits as to industry, thrift, and economy.

In *Neal v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 690, 130 N. W. 398, it is pointed out that while the probable net earnings of the deceased should form the basis for determining the amount of the verdict for his wrongful death, the jury should not be required to estimate the loss of the deceased on the basis of what his accumulations had been at that time.

In *Carlson v. Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 450, 28 Pac. 497, it is held that in an action to recover damages for wrongful death for the benefit of the estate of the decedent, as distinguished from the beneficiaries, under a statute somewhat similar to Lord Campbell's Act, the proper measure of damages is the pecuniary loss suffered by the estate

without any solatium for the grief and anguish of surviving relatives, or pain and suffering of the deceased, and that loss is the amount which the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his life, and which, as representing his net savings, would have gone to the benefit of his estate, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure.

But, in *Carter v. North Carolina R. Co.* (1905) 139 N. C. 500, 52 S. E. 642, it is pointed out that to deduct not only the reasonable personal expenses of the deceased, but also the amount spent for his family or those dependent on him, would deprive the families of a very large majority of men from recovering any damages for their death. The court said: "But a small number of men accumulate estates. Their income or earnings, after paying their actual personal expenses, are expended in the support and education of their children. Certainly, it was not contemplated that for wrongfully causing the death of such a man no damage could be recovered, although his death deprives his family of their sole support, while for the death of one without any family, or who, by miserly living and hoarding, deprives his family of support and education, large damages should be awarded. It cannot, with any show of truth, be said that in the first case the family sustain no pecuniary loss by reason of the death of the husband and father. Such a construction of the statute would place beyond the protection of the law nine tenths of the people."

In *Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548, it is pointed out that it would be wrong to limit the value of a man's life to his probable accumulations, "for many men make none in a lifetime, and many have arrived at an age when they no longer attempt to make any, and many women never make any; and yet everyone is entitled to his life, and we have as yet discovered no standard for its valuation.

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It is not human possessions that are destroyed, but humanity itself; and as this has no market value, it must necessarily be very much a matter of human feeling. Hard, then, as the task may be, and however uncertain its results, it is to be performed by the jury, aided by the cautions and counsels of the judge, who has been trained in the consideration of juridical questions. Looking, on the one hand, to the dignity of human nature, as it has been assailed, and on the other to the position and rights of the defendant, and considering the dignity of their positions as judges of most sacred right, and their own dignity and responsibility as individuals, and loving mercy even while doing justice, the jury must place a money value upon the life of a fellow being, very much as they would upon his health or reputation. The law can furnish no definite measure for damages that are essentially indefinite."

#### *e. Other considerations.*

In jurisdictions where the earning capacity of the deceased is taken into account, there is no exact rule of law for determining compensation for the pecuniary loss to the estate of the decedent by the destruction of his earning capacity. The amount must be left largely to the judgment and common sense of the jury. They may take into consideration the age of the deceased at the time of his death, his health and strength, probable length of life, the business he was engaged in, his habits as to sobriety and industry, his earning capacity at the time of his death, and fix such sum as, being now paid in a lump, and being freed from all the contingencies and uncertainties that inhere in human life, will fairly compensate his estate for what it has been deprived of in the way of the earnings or accumulations of deceased had he lived out his life expectancy.

*United States.*—*Holland v. Brown* (1888) 13 Sawy. 284, 85 Fed. 43.

*Alabama.*—*Tutwiler Coal, Coke & I. Co. v. Enslin* (1900) 129 Ala. 386, 30 So. 600.

*Delaware.*—*Short v. Philadelphia, B*



& W. R. Co. (1908) 7 Penn. (Del.) 108, 76 Atl. 363.

**Florida.**—*FLORIDA EAST COAST R. Co. v. HAYES* (reported herewith) ante, 1310; *Jacksonville Electric Co. v. Bowden* (1907) 54 Fla. 461, 15 L.R.A. (N.S.) 451, 45 So. 755.

**Iowa.**—*Brown v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 652, 21 N. W. 193; *Beems v. Chicago, R. I. & P. R. Co.* (1885) 67 Iowa, 435, 25 N. W. 693; *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151; *Wheelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119; *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227; *Kelly v. Chicago, R. I. & P. R. Co.* (1908) 138 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 536; *Grace v. Minneapolis & St. L. R. Co.* (1911) 153 Iowa, 418, 133 N. W. 672; *Hough v. Illinois C. R. Co.* (1914) 169 Iowa, 224, 149 N. W. 888.

**Kansas.**—*Kansas P. R. Co. v. Cutter* (1877) 19 Kan. 83, 9 Am. Neg. Cas. 355; *Atchison, T. & S. F. R. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60.

**Kentucky.**—*Louisville & N. R. Co. v. Hays* (1910) — Ky. —, 128 S. W. 289; *Southern R. Co. v. Evans* (1901) 23 Ky. L. Rep. 568, 63 S. W. 445.

**Oregon.**—*Putman v. Southern P. Co.* (1891) 21 Or. 230, 27 Pac. 1033; *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497; *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625.

**Pennsylvania.**—*Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548.

In *Nicoll v. Sweet* (1914) 163 Iowa, 683, L.R.A.1918C, 1099, 144 N. W. 615, Ann. Cas. 1916C, 661, it is said that the rule of damages for a death, while sound in principle, in application is beset with many difficulties, since it calls for an estimate or conclusion which must be arrived at by the balancing of mere probabilities and possibilities deduced by way of inference from the age, character, habits, condition, education, employment, surroundings, and apparent capacity of the deceased. It has been said that the only fixed rule to follow in awarding damages for a wrongful death is that

all the elements are to be considered which in their nature affect the value of a human life, as such elements appear in evidence. *Korab v. Chicago, R. I. & P. R. Co.* (1918) 165 Iowa, 1, 146 N. W. 765, Ann. Cas. 1916E, 637.

In *Walters v. Chicago, R. I. & P. R. Co.* (1878) 36 Iowa, 458, it is held that, under a statute giving a right of action to the personal representative of a person whose death results from a wrongful act to recover damages for the estate of the decedent, except that under certain circumstances it shall not be subject to his debts, the measure of damage is such as resulted to decedent's estate, and an estimate thereof may be based upon evidence of decedent's occupation, health, habits, etc., and this rule applies with equal force where the decedent is a minor.

In *Putman v. Southern P. Co.* (1891) 21 Or. 230, 27 Pac. 1033, it is held that, where the statute provides that the damage recoverable is to be administered as other personal property of the deceased, the recovery is the loss of the estate through the death of the decedent, and this is measured, as nearly as can be, by the value of the life lost. As a basis for estimating the damages, the expectancy of life of the deceased, his age, health, habits, occupation or earnings, etc., are important elements to be considered.

In *Pennsylvania R. Co. v. McCloskey* (1854) 23 Pa. 526, 12 Am. Neg. Cas. 548, it is held that under the Pennsylvania Statute of 1851, which, by one section, provides that an action commenced for personal injuries shall not abate by the plaintiff's death, but shall survive by a substitution of the personal representative, and, by another section, that if no suit for damages for personal injury is brought during life by the person injured, then the widow, and if there be no widow, the personal representative, may maintain an action, etc., the measure of damages must necessarily be based upon the value of the life lost, and not upon the pecuniary loss to designated representatives. In estimating these damages, the jury may compute them by the probable accumulations of a man of such age,

habits, health, and pursuits as the deceased, during what would probably have been his lifetime.

In *Kelly v. Chicago, R. I. & P. R. Co.* (1908) 188 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 536, it is held not to be error to refuse to charge the jury, in effect, that in estimating the damages to the decedent's estate they should allow nothing for his pain and suffering, or by way of exemplary damages, but should take into consideration his age at the time of his death, his ability, if any, to earn money, his expectancy, accumulations of property, and other circumstances affording any aid in establishing the present value of his life to his estate, where the court did very fairly and fully state to the jury the general rule that the loss or damage which the plaintiff was entitled to recover, if the issues were found in his favor, was the loss or damage occasioned to the estate of the decedent by the premature death, taking into consideration his age, health, occupation, earnings, his ability to earn, and other matters in evidence tending to show the extent of his loss, and that in arriving at such a result consideration should be given to the fact that the sum allowed was to be paid at once, and not at the end of the decedent's expectancy of life.

In *Kansas P. R. Co. v. Cutter* (1877) 19 Kan. 88, 9 Am. Neg. Cas. 355, it is held that the jury may consider the relations between the decedent and his next of kin, the amount of his property, the character of his business, and the prospect of increase or decrease of wealth likely to accrue to a man of such business and means.

There should be taken into consideration the condition of the decedent's health at the time of the injury which resulted in his death, including any ailments or diseases with which he was afflicted, and also the possibility or probability that, had he lived out his life expectancy, he would not have become a producer of more wealth, but the consumer of some of the wealth he had already produced. *Underwood v. Old Colony Street R. Co.* (1911) 83 R. I. 319, 80 Atl. 390.

Where the action is by the adminis-

trator to recover for the benefit of the estate, and the evidence shows that the decedent's health, habits, or other conditions of life were such that he had no reasonable expectation of an estate, the recovery is merely nominal. *Jacksonville Electric Co. v. Bowden* (1907) 54 Fla. 461, 15 L.R.A.(N.S.) 451, 45 So. 755.

In *Simonson v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 87, it is said that if a man is killed whose earnings have been large, but who has retired from business with no intention of resuming, it is not certain that he is injured with reference to his prospective estate because of his wrongful death; yet, because he might resume his business, the jury would not be justified, where a cause of action existed for the injury, in allowing nothing for the injury sustained by the decedent in reference to his prospective estate.

And see *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151, declaring that the damages allowable are not the subject of exact computation, but are largely a matter of speculation, that the loss to the estate of the deceased is to be estimated from the probable duration of his life, his habits as to industry, his health, character, employment, his earnings, and other facts and circumstances pertinent to the inquiry, and that there is to be taken into consideration, in connection therewith, the contingency of sickness, old age, etc.

In *Grace v. Minneapolis & St. L. R. Co.* (1911) 153 Iowa, 418, 133 N. W. 672, it is held that the jury are limited to the consideration of the present pecuniary loss to the decedent's estate resulting from his death. In assessing same, they may take into consideration the decedent's age, occupation, habits, condition of health, ability to earn money, habits as to industry, and probable duration of life, in connection with the fact that the deceased, in the natural course of events, was liable to die at any time, and there was no certainty that he would have lived until the end of his expectancy.

Where the damages recoverable for death by a wrongful act are those resulting from the death of deceased to

his estate, his age, health, habits, and disposition and capacity to labor and make and save money and acquire property must be considered, and also all losses to his estate, or creditors or next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life. It does not, however, include items of expense for the sickness and burial of the deceased. *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed. 43.

#### *IV. Pain and suffering.*

By the great weight of authority, where the statute provides for the survival of a cause of action for wrongfully causing the death of a human being, the recovery to be in behalf of the testator's estate, the damages recoverable are such as the decedent himself might have recovered had he survived, and hence it includes any pain and suffering he endured because of the injury.

**Connecticut.**—*Kling v. Torello* (1918) 87 Conn. 301, 46 L.R.A.(N.S.) 930, 87 Atl. 987.

**Kentucky.**—*Covington Street R. Co. v. Packer* (1872) 9 Bush, 455, 15 Am. Rep. 725; *Hansford v. Payne* (1875) 11 Bush, 380; *Quinn v. Newport News & M. Valley Co.* (1893) 15 Ky. L. Rep. 74, 22 S. W. 223.

**Maine.**—*Ramsdell v. Grady* (1903) 97 Me. 319, 54 Atl. 763.

**Massachusetts.**—*Bancroft v. Boston & W. R. Corp.* (1865) 11 Allen, 34; *Kennedy v. Standard Sugar Refinery Co.* (1878) 125 Mass. 90, 28 Am. Rep. 214.

**Michigan.**—*Olivier v. Houghton County Street R. Co.* 134 Mich. 367; *Davis v. Michigan C. R. Co.* (1907) 147 Mich. 479, 111 N. W. 76.

**Montana.**—*Beeler v. Butte & L. Copper Development Co.* (1910) 41 Mont. 465, 110 Pac. 528.

**New Hampshire.**—*Corliss v. Worcester & N. & R. R. Co.* (1885) 63 N. H. 404.

**Pennsylvania.**—*Maher v. Philadelphia Traction Co.* (1897) 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; *McCafferty v. Pennsylvania R. Co.* (1899) 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435.

**South Carolina.**—*Bennett v. Spartanburg R. Gas & E. Co.* (1914) 97 S. C. 27, 81 S. E. 189.

**South Dakota.**—*Belding v. Black Hills & Ft. P. R. Co.* (1892) 3 S. D. 369, 53 N. W. 570.

**Tennessee.**—*Davidson Benedict Co. v. Severson* (1902) 109 Tenn. 572, 72 S. W. 967.

**Vermont.**—*Legg v. Britton* (1890) 64 Vt. 652, 24 Atl. 1016.

**Wisconsin.**—*Brown v. Chicago & N. W. R. Co.* (1898) 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 743, 78 N. W. 771, 5 Am. Neg. Rep. 255.

In *Klann v. Minn* (1915) 161 Wis. 517, 154 N. W. 996, an action was sustained to recover damage to the estate of the deceased, based on his pain and suffering from death in a fire.

In *Houston & T. C. R. Co. v. Maxwell* (1910) 61 Tex. Civ. App. 80, 128 S. W. 160, it is held that the measure of damages, where the decedent dies from some cause other than the injury, is to be based upon compensation for his pain and suffering, and necessary and reasonable expense due to or growing out of the injury, and compensation for loss of time and ability to earn money.

A recovery for the mental anguish and physical suffering of the deceased can only be in behalf of his estate. Such damage cannot be included in the recovery in behalf of the decedent's widow. *Smith v. Chicago, R. I. & P. R. Co.* (1914) 42 Okla. 577, 142 Pac. 398.

In Kentucky, the administrator may recover either for the pain and suffering of the deceased or compensation for his death, but he cannot recover for both, and he may be required to elect which he will sue for. *Louisville & N. R. Co. v. Simrall* (1907) 127 Ky. 55, 104 S. W. 1011; *Randolph v. Snyder* (1910) 139 Ky. 159, 129 S. W. 562.

In Arkansas, an action may be maintained to recover in behalf of the estate of the deceased person for his pain and suffering, and also in behalf of the beneficiaries for compensation for the loss of support. *St. Louis, I. M. & S. R. Co. v. Sweet* (1897) 63 Ark. 563, 40 S. W. 463, 2 Am. Neg. Rep. 295; *St. Louis, I. M. & S. R. Co. v. McCain*

(1900) 67 Ark. 377, 55 S. W. 165; St. Louis, I. M. & S. R. Co. v. Dawson (1900) 68 Ark. 1, 56 S. W. 46; St. Louis, I. M. & S. R. Co. v. Stamps (1907) 84 Ark. 241, 104 S. W. 1114; St. Louis, I. M. & S. R. Co. v. Hesterly (1911) 98 Ark. 240, 135 S. W. 876, reversed in (1913) 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; St. Louis, I. M. & S. R. Co. v. Robertson (1912) 103 Ark. 361, 146 S. W. 482. And see *supra*, II. a.

*Beeler v. Butte & L. Copper Development Co.* 41 Mont. 465, 110 Pac. 528, holds that where the statute provides that the right of action, where death results from the injury, shall survive to and may be prosecuted by the heirs of the deceased, the measure of recovery is the same as though he had lived and prosecuted the action, and may include damages for pain and suffering endured by him, and also damages for diminished and lost earning capacity for the period of his natural expectancy.

For the pain and suffering of the decedent in his lifetime, his personal representative is entitled to recover to the same extent as the decedent might have recovered if he had survived, and had obtained perfect and permanent relief at the moment of his death. *Hansford v. Payne* (1875) 11 Bush (Ky.) 380. And see *Covington Street R. Co. v. Packer* (1872) 9 Bush (Ky.) 455, 15 Am. Rep. 725, declaring that the statutory provision permitting the personal representative of a person whose life is lost to institute suit to recover damages in the same manner that the person himself might have done for the injury, had death not ensued, authorized a recovery, as part of the actual damages sustained, for the physical and mental suffering of the deceased caused by the injury, and also his loss of services up to his death, but it does not authorize a recovery for mental suffering of any third person because of such injury.

In some jurisdictions a narrower construction is placed upon the term "pecuniary loss," and it is held to allow compensation only for the destruction of the decedent's earning capac-

ity, and not to include compensation for his pain and suffering.

United States.—*Ladd v. Foster* (1887) 31 Fed. 827 (under Oregon statute); *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed. 43 (under Oregon statute).

Florida.—*FLORIDA EAST COAST R. Co. v. HAYES* (reported herewith) ante, 1310.

Iowa.—*Donaldson v. Mississippi & M. R. Co.* (1864) 18 Iowa, 280, 87 Am. Dec. 391; *Dwyer v. Chicago, St. P. & O. R. Co.* (1892) 84 Iowa, 479, 35 Am. St. Rep. 322, 51 N. W. 244; *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151.

Kansas.—*Kansas P. R. Co. v. Cutter* (1877) 19 Kan. 83, 9 Am. Neg. Cas. 355.

Oregon.—*Carlson v. Oregon Short Line & U. N. R. Co.* (1891) 21 Or. 450, 28 Pac. 497; *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 530, 28 Pac. 625.

Thus, in *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151, it is held that, under the Iowa statute, the measure of damages is different in an action brought originally by the person injured and prosecuted to judgment after his death by the administrator of his estate, and where the action is originally brought by the administrator. In the first case, the jury are authorized to allow damages for bodily pain and mental anguish of the person injured. In the latter action, however, no damages are to be allowed for the pain and suffering. Followed in *Jacobs v. Glucose Sugar Ref. Co.* (1905) 140 Fed. 766, applying Iowa statute.

In *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, 67 N. W. 227, it is also held that nothing is to be allowed for the pain and suffering of the deceased, or for the wounded feelings or grief of his next of kin. In this state the damages recoverable are the pecuniary loss to the estate of the decedent.

And see *Carlson v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 450, 28 Pac. 497, holding that, where the recovery is limited to the pecuniary loss suffered by the estate of the de-

cedent, there can be no recovery for his pain and suffering. *Wellman v. Oregon Short Line & U. N. R. Co.* (1892) 21 Or. 580, 28 Pac. 625, following 21 Or. 450.

In *Kansas P. R. Co. v. Cutter* (1877) 19 Kan. 83, 9 Am. Neg. Cas. 355, it is held that the measure of damages in an action by a personal representative for the wrongful death of his decedent is compensation for the pecuniary loss to his estate. Unless exemplary damages are awarded, the pain and suffering of the decedent are not included.

*V. Expense of sickness and death.*

It has been held that the ordinary grounds of damage, where the cause of action for personal injury survives to the personal representative, and is prosecuted by him, are the expenses of the board, nursing, and medical aid incident to the injury, and compensation for the loss of time and mental and physical pain of the deceased. *Kennedy v. Standard Sugar Refinery Co.* (1878) 125 Mass. 90, 28 Am. Rep. 214; *Corliss v. Worcester, N. & R. R. Co.* (1885) 63 N. H. 404; *Belding v. Black Hills & Ft. P. R. Co.* (1892) 3 S. D. 369, 58 N. W. 750; *St. Louis & S. F. R. Co. v. Goode* (1914) 42 Okla. 784, L.R.A.1915E, 1141, 142 Pac. 1185; *Ehlers v. Automobile Liability Co.* (1919) 169 Wis. 494, 173 N. W. 325.

The expense of nursing the decedent may be included in the damages recoverable for his death. *Muldowney v. Illinois C. R. Co.* (1873) 36 Iowa, 462. Also burial expenses. *St. Louis & S. F. R. Co. v. Goode* (1914) 42 Okla. 784, L.R.A.1915E, 1141, 142 Pac. 1185. Especially where, by statute, they are made a debt of the decedent's estate. *Ehlers v. Automobile Liability Co.* (Wis.) *supra*. See *Herning v. Holt Lumber Co.* (1913) 153 Wis. 101, 140 N. W. 1102, holding that, where the burial expenses of the decedent are by statute made a debt of his estate, they may be included as part of the damages accruing to decedent from the injury resulting in his death.

It has been held that, while funeral expenses of the decedent, as a whole, are not to be taken into ac-

count in assessing the damage to the estate of the deceased for his wrongful death, the interest on the funeral expenses for the term of the life expectancy of the deceased may be taken into account. This holding is upon the ground that the estate of the deceased, at some time, will have to bear his funeral expenses, and hence this expense cannot properly be chargeable to the injury complained of, but since the injury did have the effect of accelerating the time when the estate had to bear this expense, to this extent the loss may be ascribed to the injury. *Brady v. Haw* (1919) — Iowa, —, 174 N. W. 381.

And see *Holland v. Brown* (1888) 13 Sawy. 284, 35 Fed. 43, holding that when damages to the estate of decedent for his wrongful death become assets of the estate, they include only what is consequent on the death, and therefore no allowance can be made for expenses of illness and burial. And in *Wilcox v. Wilmington City R. Co.* (1899) 2 Penn. (Del.) 157, 44 Atl. 686, it is held that the recovery cannot include the funeral expenses of the decedent. And see to the same effect, the reported case (*FLORIDA EAST COAST R. Co. v. HAYES*, ante, 1310).

And see also *Gates v. Beebe* (1912) 170 Mich. 107, 135 N. W. 934, holding that an administratrix, suing under the Survival Statute to recover for her husband's death, is not entitled to recover the amount expended for medical attention for the deceased.

*VI. Where deceased was a married woman.*

It is to be remembered that the scope of the note, as outlined at the beginning, excludes the measure of damages for the death of a married woman under statutes which provide for the recovery of damages sustained by the statutory beneficiaries.

In actions to recover compensation for the benefit of the estate of a married woman for her wrongful or negligent death, in assessing the damage, her earning capacity is, of course, to be considered; but there is also to be taken into consideration the fact that her husband is entitled to her

services. The loss in this regard is to be assessed, after giving due weight to both of these elements.

In *Wilcox v. Wilmington City R. Co.* (1899) 2 Penn. (Del.) 157, 44 Atl. 686, it is held that in an action by the personal representative for the death of his decedent, a married woman, the amount recovered cannot include her funeral expenses, nor the value of her services to her husband, but only compensation for the destruction of her earning capacity, independent of the rights of the husband.

*Stulmuller v. Cloughly* (1882) 58 Iowa, 738, 13 N. W. 55, holds that the jury should not be instructed that, in assessing the damages to the estate of a married woman by reason of her wrongful death, they should be assessed as though she were unmarried, since part of a woman's time must be devoted to her family.

It has been held that, where a married woman had no independent business or occupation, no damage can be recovered for the benefit of her estate for her wrongful death, since, as a mere housewife or homemaker, her services belong to her husband, and hence it cannot be presumed that she would have accumulated any estate had she lived out her life expectancy. *Nolte v. Chicago, R. I. & P. R. Co.* (1914) 165 Iowa, 721, 147 N. W. 192.

In an action for damage to the estate of a married woman by her wrongful death, the value of her time cannot be recovered for, since this belongs to her husband. *Grand Trunk Western R. Co. v. Gilpin* (1918) 125 C. C. A. 278, 208 Fed. 126.

Where a married woman is engaged in business independently of her husband, recovery may be had for her wrongful death, based upon the accumulation that she would be presumed to have made to her estate had she lived out her life expectancy. *Niemeyer v. Chicago, B. & Q. R. Co.* (1909) 143 Iowa, 129, 28 L.R.A. (N.S.) 408, 136 Am. St. Rep. 752, 121 N. W.

521; *Fleming v. Shenandoah* (1885) 67 Iowa, 505, 56 Am. St. Rep. 354, 25 N. W. 752.

In *Walker v. Lansing & Suburban Traction Co.* (1909) 156 Mich. 514, 121 N. W. 271, it is held that where a husband recovered as his damage for the wrongful death of his wife, compensation for the loss of her services and for his expenses attending her injury, he cannot subsequently, as the administrator of her estate, maintain an action to recover damage to her estate for her wrongful death, based upon her pain and suffering and the destruction of her earning power. The holding as to the pain and suffering of the decedent was based upon a statute which remained in force but a short time, and which included recovery for pain and suffering in survival actions. The denial of the right to recover for the destruction of the earning power of the deceased was based upon the ground that the testator, by recovering for the loss of decedent's services, had successfully established the fact that she was not emancipated, and that he was entitled to her services because of the marital relation.

In *Kentucky & I. T. R. Co. v. Becker* (1919) — Ky. —, 214 S. W. 900, on the basis that the only damage recoverable is for the destruction of the earning power of the deceased, a married woman engaged merely in performing her household duties, it is held that evidence of the decedent's age and health, and as to the household duties she performed, was sufficient to support a substantial verdict. The court said: "It is true, of course, such evidence does not furnish figures from which \$16,000, or any other sum, may be adduced as the value of deceased's earning capacity, yet she had earning capacity that defendants negligently destroyed, the value of which her administrator is entitled to recover, even in the absence of direct proof as to value."  
A. G. S.

FRANK DIMITRI et al.

v.

PETER CIENCI &amp; SON.

*Rhode Island Supreme Court — June 27, 1918.*

(41 R. I. 393, 103 Atl. 1029.)

**Damages — for wrongful death of minor.**

The damages recoverable by the next of kin for wrongful death of a minor are the present value of the gross amount of his prospective earnings less what he would have had to lay out as a producer to render the service or acquire the money and also less the money which he would have earned during minority.

[See note on this question beginning on page 1340.]

CERTIFICATION by the Superior Court for Providence and Bristol Counties for determination by the Supreme Court of a question arising in an action brought to recover damages for the death of plaintiffs' son alleged to have been caused by defendants' negligence. *Affirmative answer returned.*

The facts are stated in the opinion of the court.

Messrs. Comstock & Canning and Henry C. Hart, for plaintiffs:

The damages are to be measured by ascertaining the gross amount of the prospective income or earnings of deceased based upon his expectancy of life, after deducting therefrom what he would have to lay out as a producer to render services or to acquire the money or income that he might be expected to produce, computing such expenses according to his situation in life, his means and personal habits, and reducing the net result so obtained to its present value.

McCabe v. Narragansett Electric Lighting Co. 26 R. I. 427, 59 Atl. 112; Reynolds v. Narragansett Electric Lighting Co. 26 R. I. 457, 59 Atl. 398; Sebille v. Dunn, — R. I. —, 99 Atl. 831; Mobile & O. R. Co. v. Watly, 69 Miss. 145, 13 So. 825; Cumberland Teleph. & Teleg. Co. v. Anderson, 89 Miss. 732, 41 So. 263; Florida East Coast R. Co. v. Hayes, 67 Fla. 101, ante, 1310, 64 So. 504; De Amado v. Friedman, 11 Ariz. 56, 89 Pac. 588; McClaugherty v. Rogue River Electric Co. 73 Or. 135, 140 Pac. 64, 144 Pac. 569; Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; Russell v. Windsor S. B. Co. 126 N. C. 961, 36 S. E. 191; Speight v. Seaboard Air Line R. Co. 161 N. C. 80, 76 S. E. 684; Tully v. Philadelphia, W. & B. R. Co. 3

Penn. (Del.) 455, 50 Atl. 95; Maxwell v. Wilmington City R. Co. 1 Marv. (Del.) 199, 40 Atl. 945; Lenkewicz v. Wilmington City R. Co. 7 Penn. (Del.) 64, 74 Atl. 11; Gismondi v. People's R. Co. 2 Boyce (Del.) 577, 83 Atl. 136; Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Linss v. Chesapeake & O. R. Co. 91 Fed. 964; Louisville & N. R. Co. v. Engleman, 146 Ky. 19, 141 S. W. 374; Warren v. Manchester Street R. Co. 70 N. H. 352, 47 Atl. 735; Carney v. Concord Street R. Co. 72 N. H. 364, 57 Atl. 218; Goodsell v. Hartford & N. H. R. Co. 33 Conn. 51; Nelson v. Branford Lighting & Water Co. 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; Wilmot v. McPadden, 78 Conn. 276, 61 Atl. 1069; McCabe v. Narragansett Electric Lighting Co. 26 R. I. 272, 59 Atl. 112; Sweet v. Providence & S. R. Co. 20 R. I. 785, 40 Atl. 237; Wilson v. New York, N. H. & H. R. Co. 29 R. I. 146, 69 Atl. 364; McGarr v. National & P. Worsted Mills, 22 R. I. 347, 47 Atl. 1092; McGarr v. National & P. Worsted Mills, 24 R. I. 447, 60 L.R.A. 122, 96 Am. St. Rep. 749, 58 Atl. 320; Reddington v. Getchell, 40 R. I. 463, 101 Atl. 123; MacGregor v. Rhode Island Co. 27 R. I. 85, 60 Atl. 761; O'Clair v. Rhode Island Co. 27 R. I. 448, 63 Atl. 238.

Mr. John Henshaw, for defendants:  
The measure of damages in this

state is strictly limited to the pecuniary loss which the parents sustain by reason of being deprived of the child's services during his minority.

Sutherland, Damages, 4th ed. § 1278; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Mobile & O. R. Co. v. Watly*, 69 Miss. 145, 13 So. 825; *Agricultural & M. Asso. v. State*, 71 Md. 86, 17 Am. St. Rep. 607, 18 Atl. 87; *State use of Coughlan v. Baltimore & O. R. Co.* 24 Md. 105, 87 Am. Dec. 600; *Deninger v. American Locomotive Co.* 107 C. C. A. 126, 185 Fed. 22; *Scherer v. Schlaberg*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634; *Powell v. Rousseau*, 38 R. I. 295, 94 Atl. 867.

Sweetland, J., delivered the opinion of the court:

This is an action of trespass on the case for negligence to recover damages for the death of one Luigi Dimitri, alleged to have been caused by the wrongful neglect of the defendants and their servants.

The plaintiffs allege that they are respectively the father and the mother, and are all of the next of kin of said Luigi Dimitri, deceased; that they are suing by force of the statute as the next of kin of said Luigi for the benefit of all of his next of kin; that no executor or administrator has been appointed to administer his estate; and that said Luigi at the time of his injury and death was twenty years, ten months, and nineteen days old. The case is before us solely with reference to the proper measure of damages applicable thereto. The specific point is set forth in a question of law certified by the superior court to this court for determination. The question is as follows: "In a case of the character of the one herein, are the damages to be measured by ascertaining the gross amount of the prospective income or earnings of the said Luigi Dimitri, the plaintiffs' intestate, based upon his expectancy of life, after deducting therefrom what said deceased would have to lay out as a producer to render services or to acquire the money or income that he might be expected to produce, computing such expenses

according to his situation in life, his means and personal habits, and then reducing the net result so obtained to its present value?"

The defendants contend that, as the deceased was a minor, the damages recoverable are limited to the pecuniary loss which the father of said Luigi sustained by reason of being deprived of his child's services during the child's minority; and they rely upon the authority of *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634. That case has generally been followed in practice since its determination, and has been approved in the later cases of *Powell v. Rousseau*, 38 R. I. 295, 94 Atl. 867, and *Russo v. Rhode Island Co.* 38 R. I. 323, 95 Atl. 666. *Schnable v. Providence Public Market* was an action brought by a father to recover under the statute for the death of his minor child, five years old, alleged to have been caused by the wrongful neglect of the defendant. In its opinion the court said: "In an action of this sort the parent can only recover the net value of the child's services during his minority."

The contention of the plaintiffs is that the rule for measuring damages in all cases brought under the statute to recover for the death of a person caused by the wrongful act, neglect, or default of another, whether the deceased be a minor or an adult, is that laid down in *McCabe v. Narragansett Electric Lighting Co.* 26 R. I. 427, 59 Atl. 112, as follows: "It is obvious, too, that the loss sustained by the plaintiff here is the present value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this it is, of course, necessary to ascertain first the gross amount of such prospective income or earnings, then to deduct therefrom what the deceased would have to lay out as a producer to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his

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of minor.



station in life, his means and personal habits, and then to reduce the net result so obtained to its present value."

This rule has since been followed without exception in this state in every case brought under the statute to recover damages for the death of an adult. *Reynolds v. Narragansett Electric Lighting Co.* 26 R. I. 457, 59 Atl. 393; *Sebille v. Dunn*, — R. I. —, 99 Atl. 831, and many other unreported cases. If the rule in the *McCabe Case* is one of general application, appropriate in an action involving the death of a minor as well as in one to recover for the death of an adult, then the rule of the *Schnable Case* and that of the *McCabe Case* are clearly in conflict. Both actions were brought under the same statute, which statute is the foundation of the case at bar.

Prior to 1846 no action could be maintained at common law to recover for a death caused by the wrongful act of another. Then Parliament enacted the English statute of 9 & 10 Victoria, chapter 93, known as Lord Campbell's Act. This was "An Act for Compensating the Families of Persons Killed by Accidents." As was pointed out in *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205, Lord Campbell's Act was not for the benefit of an estate, but for the family. Said act provided that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought."

And it was provided that the amount recovered should be divided among said parties in such shares as the jury should direct. After Lord Campbell's Act the states of this country, generally, passed statutes providing for recovery against a person or persons causing the death of another by wrongful act, neglect, or default. The provisions of these acts differ widely. Some clearly have the same purpose as the English act. They give to the parties

for whose benefit an action is provided pecuniary compensation for the loss which they have suffered through the death of the deceased. In others, the action provided may be regarded as one brought in behalf of the decedent's estate to recover the value of the decedent's life, with the provision that the amount recovered shall be distributed among certain named beneficiaries as the statute directs. Such distribution, however, is made without reference to any special pecuniary loss which the beneficiaries may have suffered by reason of the decedent's death. In 1853 the original Rhode Island statute, providing for a recovery on account of a death by wrongful act, was passed. This act has been amended and rearranged from time to time until, when *Schnable v. Providence Public Market*, supra, was decided in 1902, it was substantially in the form in which it now appears as § 14, chap. 283, Gen. Laws 1909. Said section, so far as it relates to the question before us, is as follows:

"Sec. 14. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. Every such action shall be brought by and in the name of the executor or administrator of such deceased person, whether appointed or qualified within or without the state, and the amount recovered in every such action shall one half thereof go to the husband or widow, and one half thereof to the children of the deceased, and if there be no children the whole shall go to the husband or widow, and, if there be no husband

or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate: Provided, that every such action shall be commenced within two years after the death of such person. If there is no executor or administrator, or if, there being one, no action is brought in his name within six months after the death, one action may be brought in the names of all the beneficiaries, either by all, or by part stating that they sue for the benefit of all, and stating their respective relations to the deceased."

The answer which should be given to the question before us depends upon the view we take as to the purpose of our statute. Is it intended to provide recovery in order to compensate the beneficiaries for the loss which they have suffered, or is it an action in behalf of the decedent's estate? If the former, then the decision in the Schnable Case is based upon a sound principle, although perhaps not entirely in accord with the weight of authority in some particulars. Said decision appears to have been rendered after a consideration of a number of cases from other jurisdictions, which cases are cited in the opinion and are considered by the court as having been brought "under statutes similar to ours." It appears from an examination that such statutes are generally of the class which follows Lord Campbell's Act, and provide for the recovery of compensation for the pecuniary loss which results from the decedent's death to the person or persons for whose benefit the action is brought.

In McCabe v. Narragansett Electric Lighting Co: 27 R. I. 272, 61 Atl. 667, the court considered the plaintiff's motion for a reargument after the opinion reported in 26 R. I. 427, 59 Atl. 112, *supra*, analyzed at length the provisions of our statute, and considered its nature and purpose. The court then reached the conclusion that our statute differs

widely from Lord Campbell's Act and the Canada statute of the same kind; that an action under our statute "should be considered as though it were brought in behalf of the estate of the decedent for the damage to that estate caused by the death in question." The reasoning upon which this conclusion is based appears to us to be sound, and, as we have said above, it has been adopted without question in all later cases when the decedent has been of full age. Should a different view of the purpose of the statute be taken, when the decedent is a minor? The statute in its language makes no distinction, and in our opinion a difference in construction, based upon a difference in the ages of decedents, would be entirely unwarranted. If in the case of a minor the recovery provided in the act is for damages to the minor's estate, as we believe it is, then we are forced to the conclusion that the rule for the measurement of damages stated in the Schnable Case is based upon a misconception of the purpose of the act; for that rule proceeds upon the theory that the recovery by the parent is for the pecuniary loss which the parent has suffered by being deprived of the services of his minor child during that child's minority.

After a full consideration of the matter we have reached the opinion that the rule of Schnable v. Providence Public Market is erroneous, and that in so far as said case deals with the measurement of damages it should be overruled. Sweet v. Providence & S. R. Co. 20 R. I. 785, 40 Atl. 237, was an action brought to recover damages caused by the death of a minor, and was decided in 1890. In that case this court apparently took a position as to the purpose of the Rhode Island statute not in accord with the later opinion in Schnable v. Providence Public Market; for in the Sweet Case the court held that the Carlisle Life Tables were properly introduced at the trial. If recovery is to be limit-

ed to damages caused by the loss of a child's services during minority, then the child's expectancy of life is immaterial.

In the consideration of cases brought under statutes similar to ours, the courts in a number of jurisdictions have reached conclusions in accord with that which we have here expressed. *Nelson v. Branford Lighting & Water Co.* 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; *Warren v. Manchester Street R. Co.* 70 N. H. 352, 47 Atl. 735; *Carney v. Concord Street R. Co.* 72 N. H. 364, 57 Atl. 218; *Russell v. Windsor S. B. Co.* 126 N. C. 961, 36 S. E. 191; *Tully v. Philadelphia, W. & B. R. Co.* 3 Penn. (Del.) 455, 50 Atl. 95; *Chesapeake & O. R. Co. v. Hawkins*, 26 L.R.A.(N.S.) 309, 98 C. C. A. 443, 174 Fed. 597; *Chesapeake & O. R. Co. v. Lang*, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; *Louisville & N. R. Co. v. Engleman*, 146 Ky. 19, 141 S. W. 374; *De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588; *Florida East Coast R. Co.*

*v. Hayes*, 67 Fla. 101, ante, 1310, 64 So. 504.

As the deceased was a minor, the amount of his earnings during minority should not be considered in ascertaining the gross amount of his prospective income or earnings, unless it appears that during minority he had been emancipated, in which latter case the amount of his earnings up to the time of his emancipation should not be considered in the computation. For if he had lived, and had not been emancipated, such income or earnings would have belonged to his father until the minor reached the age of twenty-one years; hence the loss of earnings until that time forms no part of the damage to his estate, caused by his death.

With the proviso contained in the above suggestion we answer the question certified in the affirmative.

The papers in the case, with this decision certified thereon, are sent back to the Superior Court for further proceedings.

## ANNOTATION.

### Measure of damage recoverable in behalf of the estate of an infant for his wrongful death.

The general question of the measure of damages recoverable for the benefit of the estate of a person killed through the wrongful or negligent act of another is the subject of a note appended to *Florida East Coast R. Co. v. Hayes*, ante, 1310, and see references therein to notes on related subjects. The question here under discussion is limited to the damage recoverable for the benefit of the estate of an infant, and does not include damages recoverable in behalf of his parents or other beneficiaries.

**United States.**—*Morris v. Chicago, M. & St. P. R. Co.* (1885) 26 Fed. 22; *Linss v. Chesapeake & O. R. Co.* (1899) 91 Fed. 964.

**Alabama.**—*Alabama C. Coal & Coke Co. v. Pitts* (1893) 98 Ala. 285, 13 So. 135; *Tutwiler Coal, Coke & I. Co. v. Eustin* (1900) 129 Ala. 336, 30 So. 600.

**Arizona.**—*De Amado v. Friedman* (1907) 11 Ariz. 56, 89 Pac. 588.

**Connecticut.**—*Nelson v. Branford Lighting & Water Co.* (1908) 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; *Wilmot v. McPadden* (1906) 79 Conn. 367, 19 L.R.A.(N.S.) 1101, 65 Atl. 157.

**Florida.**—*Florida East Coast R. Co. v. Hayes*, ante, 1310.

**Iowa.**—*Walters v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 458; *Rose v. Des Moines Valley R. Co.* (1874) 39 Iowa, 246; *Lawrence v. Birney* (1875) 40 Iowa, 377; *Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71; *Simonson v. Chicago, R. I. & P. R. Co.* (1878) 49 Iowa, 87; *Whelan v. Chicago, M. & St. P. R. Co.* (1892) 85 Iowa, 167, 52 N. W. 119; *Hirley v. Webster County* (1902) 117 Iowa, 672, 91 N. W. 1041, 12 Am. Neg. Rep. 590.

**Michigan.**—*Love v. Detroit, J. & C.*

R. Co. (1912) 170 Mich. 1, 135 N. W. 963.

Montana.—Beeler v. Butte & L. Copper Development Co. (1910) 41 Mont. 465, 110 Pac. 528.

New Hampshire. — Carney v. Concord Street R. Co. (1903) 72 N. H. 364, 57 Atl. 218.

It has been held that the fact that the child's death occurred before he became a wage earner does not foreclose inquiry as to the practical value of his services. In such case a wide latitude must be allowed in the admission of testimony as to the child's status, future prospects, vocation, or remuneration which might reasonably be expected to be open to him. Love v. Detroit, J. & C. R. Co. (Mich.) supra.

Linss v. Chesapeake & O. R. Co. (Fed.) supra, holds that under the Kentucky statute, where the deceased person is an infant, the jury cannot take into consideration his earning power until he has reached his majority, nor can they consider the cost of his maintenance during this period. But see Kentucky cases hereafter referred to.

In Florida East Coast R. Co. v. Hayes (Fla.) supra, it is said that "the administrator as a legal representative of the decedent's estate can sustain no loss or damage by reason of the wrongful death except the pecuniary value of the life to the prospective estate of the decedent, which damage or loss does not include, and has no relation to, physical or other suffering of the decedent or his relatives, or to claims of anyone for present or future support or solatium. Such loss or damage to the estate is wholly monetary, and any compensation therefor, after the payment of debts, passes to the decedent's general heirs as of the end of his life expectancy, to compensate for the estate that the decedent probably would have accumulated to leave at his death to such general heirs. . . . Where the decedent was an infant, the loss or damage to the estate would not begin until after the time he would have become of age, since under the statute the father recovers for the loss of his minor child's service to the

adult age, as well as for the mental pain and suffering of the parents caused by the infant's wrongful death."

In Carney v. Concord Street R. Co. (N. H.) supra, it is held that the damage recoverable for the death of an infant in behalf of the latter's estate is to be based upon not only the earning capacity of the deceased, but there is also to be taken into account the mental and physical pain of the deceased, and the expenses occasioned by the injury. As to the earning capacity, it is pointed out that when the deceased is an infant of tender years, "he has no present capacity for earning money for himself or anyone else; but the capacity referred to is not limited to the time of death; it is the capacity that would exist during life but for the injury. Besides the physical incapacity of an infant, he is under a legal incapacity to earn money for himself or his estate during his minority; for, unless he has been emancipated, his earnings belong to his father, if living, or in case of the father's death, to the mother,—a right arising from the duty of the parent to support and educate the child."

In assessing the damage to the estate of an infant for his negligent death, in most jurisdictions the fact is taken into account that until the infant reaches his majority his services belong to his parents and hence no part of his earnings would go toward the creation of his estate during this period of time. Therefore account is taken only of earnings or accumulations between the time the decedent would have reached his majority and the termination of his life expectancy.

In Walters v. Chicago, R. I. & P. R. Co. (1873) 36 Iowa, 458, supra, it is held that where the decedent is a minor, computation of the life expectancy should be made from the date of the decedent's death, and not from the time when he would have reached his majority, although the recovery dates from this time. To the same effect, see Whelan v. Chicago, M. & St. P. R. Co. (1892) 85 Iowa, 167, 52 N. W. 119, supra. In Hively v. Webster County, 117 Iowa, 672, 91 N. W. 1041, 12 Am.

Neg. Rep. 590, it is held that for the death of a young child the measure of damages to his estate is the present worth of his life to his estate; nothing can be computed for the time prior to the majority of the child; hence the recovery ought not to exceed the present worth of the damages which would be allowed for the wrongful death of a person with similar prospects in life at majority.

In some jurisdictions account is apparently not taken of the fact that the deceased was a minor, and hence his service would have belonged to his parents had he survived the injury causing his death, and the damage for his death is assessed upon the basis of the prospective earning capacity of the deceased without reference to his age.

Thus in *Russell v. Windsor S. B. Co.* (1900) 126 N. C. 961, 36 S. E. 191, it is held that under a statute providing for the recovery of such damages as are fair and just compensation for the pecuniary injury resulting from the death complained of, there is no distinction in the application of the rule between the death of a child and of an adult. The court said that "the measure of damages is the same; but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still, the jury must do the best they can, taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence. Where life is lost by reason of the actionable negligence of another, the measure of damages is the present value of the net pecuniary worth of the life of the deceased, to be ascertained by deducting the probable cost of his own living from the probable gross income derived from his own exertions, based upon his life expectancy." In this case the infant killed was only five years old.

In *Gurley v. Southern Power Co.* (1916) 172 N. C. 690, 90 S. E. 643, it is held that only right of action for the death of an infant is by the administrator, and the recovery is for

the entire loss due to the death including loss of earning capacity both before and after majority. The court said that the question of the right of the parent to a portion of the recovery is between the parent and the administrator.

In *Tully v. Philadelphia, W. & B. R. Co.* (1901) 3 Penn. (Del.) 455, 50 Atl. 95, the court instructed the jury that the measure of damage to the estate of an infant eight years old for its wrongful death was such sum as the deceased would probably have earned in his business during life and which would have gone to his next of kin, taking into consideration the age of the deceased, his ability, disposition to labor, habits of living, and expenditure. And in *Gismondi v. People's R. Co.* (1911) 2 Boyce (Del.) 577, 83 Atl. 136, a similar instruction was given.

In *Chesapeake & O. R. Co. v. Hawkins* (1909) 26 L.R.A. (N.S.) 309, 98 C. C. A. 443, 174 Fed. 597, it is held that under a statute authorizing the recovery of such damages as the jury shall deem fair and just, substantial damages are recoverable in behalf of the estate of an infant, about four years old, killed through the negligent act of the defendant. Without specifically pointing out the elements of damage recoverable, it is said that the jury are vested with absolute control over the question of damage, and the courts are clothed with no authority to disturb their findings, and the law requires no measure of damages other than the opinion of the jury guided by all the facts and circumstances in the particular case.

In Kentucky, the measure of damage to the estate of a deceased person for his wrongful death is compensation for the destruction of the decedent's power to earn money. Applying this rule it is held that where the deceased was an infant, the measure of damage is to be computed from the time of his death. In denying the contention that, since the services of an infant belong to the parents until he reaches his majority, in assessing the damage to the estate of an infant his earning power from the time of death until he reaches his majority

should not be taken into account, the court said that the fault of this argument lies in the fact that the right of a parent to the services of a child ceases with its death. An award in cases of this character is not for services but for the destruction of the decedent's power to earn money. *Chesapeake & O. R. Co. v. Lang* (1896) 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; *Louisville & N. R. Co. v. Creighton* (1899) 106 Ky. 42, 50 S. W. 227; *Louisville & N. R. Co. v. Kimble*

(1910) 140 Ky. 759, 131 S. W. 790; *Louisville & N. R. Co. v. Engleman* (1911) 146 Ky. 19, 141 S. W. 374.

In *Louisville & N. R. Co. v. Engleman* (Ky.) supra, it is held that since the right of the parents to the services of a child ceases on its death, the administrator of the estate of the child, for its death through negligence, is entitled to recover for the benefit of its estate, damages based on the loss of its earning power from the time of its death. A. G. S.

THOMAS B. MURRAY, Admr., etc., of Henry Miller, Deceased,  
v.

OMAHA TRANSFER COMPANY.

*Nebraska Supreme Court—January 30, 1914.*

(95 Neb. 175, 145 N. W. 360.)

#### Abatement — amount of recovery.

1. Where plaintiff dies from personal injuries for which he brought suit, and the action is revived in the name of an administrator, the latter takes the decedent's place in the litigation, and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries.

[See note on this question beginning on page 1355.]

#### — death of plaintiff.

2. Under § 455 of the Code, a pending action for personal injuries does not abate by the death of the plaintiff.  
[See 1 R. C. L. 30.]

#### — revival by administrator.

3. Where the plaintiff dies from personal injuries for which he brought suit, the action may be revived by the administrator of his estate and prosecuted to final judgment for the benefit of such estate.

[See 1 R. C. L. 34.]

#### Appeal — immaterial question.

4. On appeal a question not necessary to a decision may be disregarded, though argued by both parties.

#### Abatement — revival — right to damages.

5. Where the plaintiff dies from personal injuries for which he brought suit, and the action is revived in the name of the administrator of his estate, the damages to which the in-

jured person was entitled follow the order of revivor to the administrator.  
[See 1 R. C. L. 33.]

#### Appeal — harmless error.

6. Harmless error in an instruction is not a ground for the reversal of a judgment.

[See 2 R. C. L. 256.]

#### — objection to evidence.

7. To make error available in the overruling of a motion to suppress a deposition, there must be an objection to such deposition when offered in evidence.

[See 2 R. C. L. 77.]

#### — admission of Carlisle tables.

8. A ruling admitting in evidence that part of the Carlisle table showing the expectancy of life at the age of fifty, held not reversible error, under facts stated in the opinion, where there was direct, uncontradicted evidence that the deceased person was fifty years old, though a physician

who did not know his age testified: "In my opinion he was in the neighborhood of fifty years of age. I do not think he could have been over 55 years."

— admission of photograph.

9. Admission in evidence of the photograph of a deceased person held not prejudicial to appellant.

[See 2 R. C. L. 247.]

(Barnes, Fawcett, and Hamer, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Douglas County (Redick, J.) in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John C. Cowin and Isidor Ziegler, for appellant:

Miller's suit was not entitled to recover.

Austin v. Pittsburg, C. C. & St. L. R. Co. 122 Ky. 304, 5 L.R.A. (N.S.) 756, 91 S. W. 742; Brown v. Electric R. Co. 70 Am. St. Rep. 684, note.

The court erred in holding the plaintiff entitled to recover, and in the instructions with respect to the measure of damages.

Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; Burr v. Hamer, 12 Neb. 483, 11 N. W. 741; Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 5, 78 N. W. 359; Perry v. Philadelphia, B. & W. R. Co. 1 Boyce (Del.) 399, 77 Atl. 725; Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; McCarthy v. Chicago, R. I. & P. R. Co. 18 Kan. 46, 26 Am. Rep. 742; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165; Strode v. St. Louis Transit Co. 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084; Andrews v. Hartford & N. H. R. Co. 34 Conn. 58; McLaughlin v. Hebron Mfg. Co. 171 Fed. 269; Gilkeson v. Missouri P. R. Co. 222 Mo. 173, 24 L.R.A. (N.S.) 844, 121 S. W. 138, 17 Ann. Cas. 763; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Johnson v. Eau Claire, 149 Wis. 194, 135 N. W. 481; Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Quinn v. Johnson Forge Co. 9 Houst. (Del.) 338, 32 Atl. 858; Pittsburgh, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419; Welch v.

Baltimore & O. R. Co. 7 Penn. (Del.) 140, 76 Atl. 50; Nemecek v. Filer & S. Co. 126 Wis. 71, 105 N. W. 225; Peake v. Baltimore & O. R. Co. 26 Fed. 495; Stewart v. United Electric Light & P. Co. 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601; Mageau v. Great Northern R. Co. 103 Minn. 290, 15 L.R.A. (N.S.) 511, 115 N. W. 651, 14 Ann. Cas. 551.

The statutory provisions creating and granting the right to take depositions must be strictly construed, as the right is in derogation of the common law, and the particular mode prescribed by statute must be followed.

Glover v. Millings, 2 Stew. & P. (Ala.) 28; North American Transp. & Trading Co. v. Howells, 58 C. C. A. 442, 121 Fed. 694; The Alexandra, 104 Fed. 904; Bird v. Halsy, 87 Fed. 671; Turner v. Shackman, 27 Fed. 183; Cortes Co. v. Tannhauser, 21 Blatchf. 552, 18 Fed. 667; Jones v. Oregon C. R. Co. 3 Sawy. 523, Fed. Cas. No. 7,486.

The line covering the age of fifty years of Carlisle tables showing the expectancy of a man of fifty years of age was erroneously admitted in evidence.

Swift & Co. v. Haloubek, 55 Neb. 228, 75 N. W. 584, 4 Am. Neg. Rep. 509.

It was prejudicial error to permit the photograph of deceased to be received in evidence and displayed to the jury.

1 Jones, Ev. 2d ed. §§ 581, 597; Selleck v. Janesville, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944; Gilbert v. West End Street R. Co. 160 Mass. 403, 36 N. E. 60, 3 Am. Neg. Cas. 887; Fore v. State, 75 Miss. 727, 23 So. 710; Farrell v. Weitz,

160 Mass. 283, 85 N. E. 783; Harris v. Quincy, 171 Mass. 472, 50 N. E. 1042; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Iroquois Furnace Co. v. McCrea, 191 Ill. 340, 61 N. E. 79; Chicago & E. I. R. Co. v. Crose, 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865.

Messrs. John A. Moore and H. S. Daniel, for appellee:

Miller's suit was entitled to revivor.

Missouri P. R. Co. v. Fox, 56 Neb. 746, 77 N. W. 130; Hendrix v. Rieman, 6 Neb. 517; Underhill v. Crawford, 18 Barb. 664.

The pending action survived.

Webster v. Hastings, 59 Neb. 563, 81 N. W. 510; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A. (N.S.) 186, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; Corson v. Lewis, 77 Neb. 449, 114 N. W. 281; Sheibley v. Nelson, 83 Neb. 501, 119 N. W. 1124; Alpin v. Morton, 21 Ohio St. 536; Ohio & P. Coal Co. v. Smith, 53 Ohio St. 813, 41 N. E. 254; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601; Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387.

It is not a transfer of the right possessed by the person injured, to recover for the injuries received by him, to his representative, but a new cause of action.

Leggett v. Great Northern R. Co. L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784; Bradshaw v. Lancashire & Y. R. Co. L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 81 L. T. N. S. 847, 23 Week. Rep. 810; Barnett v. Lucas, Ir. Rep. 6 C. L. 247; Robinson v. Canadian P. R. Co. [1892] A. C. 481, 61 L. J. P. C. N. S. 79, 67 L. T. N. S. 505; Robinson v. London & S. W. R. Co. 19 C. B. N. S. 51, 144 Eng. Reprint, 704, 34 L. J. C. P. N. S. 284, 11 Jur. N. S. 390, 12 L. T. N. S. 847, 13 Week. Rep. 660; Seward v. The Vera Cruz, L. R. 10 App. Cas. 59, 54 L. J. Prob. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324; Pym v. Great Northern R. Co. 4 Best. & S. 396, 122 Eng. Reprint, 508, 32 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 8 L. T. N. S. 734, 11 Week. Rep. 922; Russell v. Sunbury, 87 Ohio St. 372, 41 Am. Rep. 523; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601; Stewart v. United Electric Light & P. Co. 104 Md. 332, 8 L.R.A. (N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44

7 A.L.R.—85.

L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; Whitford v. Panama R. Co. 23 N. Y. 465; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537; Conners v. Burlington, C. R. & N. R. Co. 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465; Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Hamilton v. Morgan's L. & T. R. & S. S. Co. 42 La. Ann. 824, 8 So. 586; Hulbert v. Topeka, 34 Fed. 510; Needham v. Grand Trunk R. Co. 38 Vt. 294; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44.

Even if two actions could be maintained, there would be no double recovery in an action commenced under the wrongful Death Act.

Nilson v. Chicago, B. & Q. R. Co. 84 Neb. 595, 121 N. W. 1129.

The legislature has the power to give two or more causes of action for the same tort, or to add to those which theretofore existed under the common law.

Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Baltimore & O. R. Co. v. Glenn, 66 Ohio St. 395, 64 N. E. 438, 12 Am. Neg. Rep. 547.

The administrator is entitled to recover for the benefit of the estate what deceased would have been entitled to recover had he survived his injuries.

Maher v. Philadelphia Traction Co. 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435; Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357; The City of Belfast, 135 Fed. 209; Kyes v. Valley Teleph. Co. 132 Mich. 281, 93 N. W. 623, 18 Am. Neg. Rep. 340; Olivier v. Houghton County Street R. Co. 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 8 Ann. Cas. 53, 188 Mich. 242, 101 N. W. 530; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537; Muldowney v. Illinois C. R. Co. 36 Iowa, 462; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Sutherland, Damages, 3d ed. p. 3596, § 1241; 8 Am. & Eng. Enc. Law, 2d ed. 643, 651, 652, 864, 870, 908, 934; Whitford v. Panama R. Co. 23 N. Y. 490.

Mr. John J. Sullivan also for appellee.

Mr. W. A. De Bord, amicus curiæ.



Rose, J., delivered the opinion of the court:

Henry Miller commenced this action August 29, 1910, to recover damages in the sum of \$15,000 for personal injuries alleged to have been negligently inflicted upon him by the Omaha Transfer Company on August 27, 1910. At the intersection of Sixteenth and Cuming streets, in Omaha, he was run over and injured by a horse and wagon in charge of a driver in the employ of defendant. From resulting injuries Miller died August 29, 1910, a few hours after his petition had been filed. Later the action was revived in the name of Thomas B. Murray, administrator. After revivor, an amended petition, also demanding damages for Miller's injuries, was filed by the administrator for the benefit of decedent's estate. In an answer to the amended petition, it was admitted that Miller was struck by a horse and wagon of defendant while they were in charge of one of its employees, and that the resulting injuries were fatal; but defendant denied the negligence imputed to it, and pleaded, among other things, that the injuries were caused by carelessness on the part of Miller. From judgment on a verdict in favor of plaintiff for \$4,000, defendant has appealed.

The judgment is vehemently assailed in an extended argument directed to propositions that the suit for damages arising from personal injuries abated with the death of the original plaintiff, that the action could not legally be revived for the benefit of the estate of Miller, and that after his death there was no existing cause of action except the statutory one for the benefit of the widow and next of kin. It is asserted that the legislation relating to this subject, when considered together, does not authorize a recovery for the benefit of the estate of Miller in an action by the administrator. In this connection defendant refers to §§ 45, 454, and 455 of the Code, relating to the abatement and the survival of actions; to Lord

Campbell's Act (Comp. Stat. 1911, chap. 21, §§ 1, 2), authorizing a suit for the benefit of the widow and next of kin, who have been deprived of the support of one who came to his death by the wrongful act of another; and to the statute (Comp. Stat. 1911, chap. 15a, § 1) adopting as the law of this state applicable and consistent portions of the common law of England. Counsel for defendant state their position as follows: "Section 455 simply provides: 'No action pending in any court shall abate by the death of either or both the parties thereto,' etc. It is not a survivor law. This statute of abatement, and no other statute of abatement, and no statute of survivor create a new cause of action. The Death Act creates an entirely new cause of action. The beneficiaries are entirely different. The rule of damages is different. Therefore, when Miller died, the cause of action then pending died with him, and a new cause of action for the injuries immediately came into being under the Death Act for the benefit of the widow and next of kin. As, therefore, § 455 does not create a new cause of action, it does not, nor any other provision of the statute, authorize the revivor of a cause of action that has become extinct. Section 455, or any other provision of the statute, was not intended to keep the action alive after the death of the injured party, in favor of attorneys and creditors, and deprive the widow and next of kin of the benefits of the so-called Campbell Act. There is no petition in this case based on the death cause of action." In support of the position thus taken, many cases are cited, among them the following: *Brown v. Chattanooga Electric R. Co.* 101 Tenn. 252, 70 Am. St. Rep. 666, 684, 47 S. W. 415; *Perry v. Philadelphia, B. & W. R. Co.* 1 Boyce (Del.) 399, 77 Atl. 725; *Holton v. Daly*, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742;

(95 Neb. 175, 145 N. W. 360.)

Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236; Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797; Martin v. Missouri P. R. Co. 58 Kan. 475, 49 Pac. 605, 3 Am. Neg. Rep. 165; Strode v. St. Louis Transit Co. 197 Mo. 616, 95 S. W. 851, 7 Ann. Cas. 1084; Andrews v. Hartford & N. H. R. Co. 34 Conn. 57; McLaughlin v. Hebron Mfg. Co. 171 Fed. 269; Gilkeson v. Missouri P. R. Co. 222 Mo. 173, 24 L.R.A. (N.S.) 844, 121 S. W. 138, 17 Ann. Cas. 763.

On the contrary, plaintiff relies on § 455 of the Code, providing: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

It is contended by plaintiff that Miller's action for personal injuries is not included in the enumerated actions which abate by the death of a party; that the right of Miller to recover damages for personal injuries survives; that the administrator takes the decedent's place and is entitled to recover what Miller would have been entitled to recover had he survived his injuries.

It is apparent from an examination of analogous cases that the courts of different states are not harmonious in their rulings on the point in controversy. The question, however, does not seem to be an

Abatement—  
death of  
plaintiff.

open one in this  
state, where it has  
been held that, under

§ 455 of the Code, a pending action for personal injuries does not abate by the death of the plaintiff. Webster v. Hastings, 59 Neb. 563, 81 N. W. 510; Cleland v. Anderson, 66 Neb. 252, 270, 5 L.R.A. (N.S.) 136, 92 N. W. 306, 96 N. W.

212, 98 N. W. 1075; Sheibley v. Nelson, 83 Neb. 501, 119 N. W. 1124. The opinions in these cases do not make an exception to the right of revivor, where plaintiff died from the injuries for which he brought suit. The statutes, as already construed, make no such exception, and the court should not. Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601; Frame v. State, 53 Ohio St. 311, 45 N. E. 5; Alpin v. Morton, 21 Ohio St. 536. The action not having abated, the statutes make provision for revivor. Code, §§ 459, 460, 463.

—revival by  
administrator.

It is further argued that the recovery in favor of Miller's estate for personal injuries, if sanctioned, may subject defendant to double damages in another suit for the benefit of the widow and next of kin. This question is not necessary to a decision. If the allowance of an erroneous measure of recovery has been properly challenged on this appeal, the error will be corrected. The record does not disclose any purpose on behalf of the widow and next of kin to sue defendant for damages for the death of Miller.

Appeal—  
immaterial  
question.

Instructions relating to the measure of damages are criticized as erroneous. Having determined that the action did not abate and that its revival was authorized by statute, the damages to which

Abatement—  
revival—right  
to damages.

the injured person was entitled followed the order of revivor to the administrator of his estate. The correct rule seems to be that the administrator takes the decedent's place in the litigation and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries. Maher v. Philadelphia Traction Co. 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; McCafferty v. Pennsylvania R. Co. 193 Pa. 389, 74 Am. St. Rep. 690, 44 Atl.

—amount of  
recovery.

435; *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357; *The City of Belfast*, 135 Fed. 208; *Kyes v. Valley Teleph. Co.* 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340; *Olivier v. Houghton County Street R. Co.* 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *Muldowney v. Illinois C. R. Co.* 36 Iowa, 462; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255. The rules for determining the measure of damages, had Miller survived his injuries, are well settled, and there was no substantial departure therefrom in the instructions.

An instruction of considerable length is pointed out as erroneous, because by it "the jury are told that upon certain facts the defendant was guilty of negligence, while other most material facts bearing upon that issue are entirely omitted." There are a number of reasons why the judgment should not be reversed for the giving of the instruction thus criticized:

**Appeal—harmless error.**

The overwhelming weight of the evidence tends to show that the negligence of defendant's servant was the proximate cause of Miller's injuries. The charge as a whole directed the jury to consider all of the evidence. They found for plaintiff on the issue of negligence. It seems clear from the whole record that the verdict would not have been different without the instruction criticized. An instruction on the same subject, conforming to defendant's view of the law and the proofs, was not offered. Error is not assigned in a manner conforming to the rules of this court. Other instructions are criticized, but no prejudicial error has been found therein.

Complaint is made because the court below, previously to the trial, overruled a motion to suppress a deposition on behalf of plaintiff. Neither the abstract nor the bill of exceptions shows that the objection

to the entire deposition was renewed when it was offered at the trial. Parts of it were read to the jury without objection. This assignment of error is therefore unavailing for the following reason: "Where a motion to suppress a deposition has been erroneously overruled, in order to make such error available, the party against whom such ruling is made must, when such deposition is offered in evidence, object thereto and save his exception." *Dawson v. Dawson*, 26 Neb. 716, 42 N. W. 744; *Starring v. Mason*, 4 Neb. 367.

Was that part of the Carlisle table showing the expectancy of life at the age of fifty erroneously admitted in evidence? The affirmative of this question is argued by defendant, and reference is made to the following testimony of a physician in regard to the age of Miller at the time of his death: "In my opinion, he was in the neighborhood of fifty years of age. I do not think he could have been over fifty-five years." It is insisted that the ruling in regard to the Carlisle table took from the jury the question of Miller's age and arbitrarily fixed it at fifty years, while the evidence was that he was about fifty, and not more than fifty-five. This testimony is merely the opinion of a physician who did not know the age of decedent. Defendant offered no proof on that issue, but there is uncontradicted, direct evidence that Miller was fifty at the time of his death. Plaintiff asserted that this was his age, and had a right to prove his expectancy on that basis. To aid the jury in ascertaining the probable duration of life, had death not resulted from violent means, part of the table was introduced. Defendant did not offer tables showing the expectancy of life between the ages of fifty and fifty-five, nor request an instruction limiting them to its view of the evidence as here asserted. In *Pearl v. Omaha & St. L. R. Co.* 115 Iowa, 535, 88 N. W. 1078, it is said: "The

tables, to be admissible, need not show the precise age, but approximately that of the person involved. As defendant did not ask an instruction limiting the force and effect to be given these tables, it is not in a situation to complain of the court's omission to so instruct." On

—admission of  
Carlisle tables.

the record presented for review, the ruling under consideration does not seem to call for a reversal.

A photograph of Miller, taken after his death, was admitted in evidence, and the ruling is also assailed. Plaintiff attempts to justify the admission of this exhibit by asserting that it was within the discretion of the trial court to admit it as indicating Miller's appearance with respect to age and vigor. However this may be, the jury's consideration of the photograph could only affect the measure of damages. Aside from the questions of negligence and contributory negligence, the manner in which Miller was fatally injured is not in dispute.

—admission of  
photograph.

Unless the recovery is excessive, prejudicial error does not appear, and no substantial ground for interfering with the verdict as excessive has been found.

Affirmed.

Barnes, Letton, and Sedgwick, JJ., not sitting.

A petition for rehearing having been granted, Sedgwick, J., on June 5, 1915, handed down the following additional opinion (98 Neb. 482, 153 N. W. 488):

After our former decision in this case (95 Neb. 175, ante, 1343, 145 N. W. 860), argument was allowed on the measure of damages. Upon this question we have had the assistance, not only of the attorneys engaged in the case, but also of other able attorneys interested in similar cases pending in this and other courts. For this reason, and because of the importance of the question, and the inconsistent, or at least incomplete, provisions of the statute, we have thought it best to state further rea-

sons for our conclusion. The facts are sufficiently stated in our former opinion.

When one is injured in his person by the wrongful act of another, and begins an action to recover damages so sustained, and afterwards dies while his action is pending, what are the elements of damage which can be recovered? Our former opinion holds that, when the "action is revived in the name of an administrator, the latter takes the decedent's place in the litigation, and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries." The opinion cites *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510, and other decisions of this court which could not have been determined as they were, unless this is the law. Sections 8022, 8023, Rev. Stat. 1913, are:

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

"No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

These are sections 463 and 464 of the Code as now numbered, and were enacted in 1858. Rev. Stat. 1866, p. 469. The latter section quoted provides that such an action as this shall not abate by the death of the plaintiff. This language is so direct and clear that it must be conceded that the administrator may continue the action. There seems to be no good reason in the nature of the case to forbid an administrator to begin and prosecute an action and at the same time allow

him to continue an action for the same cause begun by the deceased in his lifetime. It is the duty of the court to construe these statutes together. If the deceased had lived to complete his action, he would have recovered for all damage done him by defendant's wrongful act, including the injury to his earning power during his expectancy of life. What he recovered would, of course, be directly for his own benefit, but it would become a part of his estate; and upon his death, occurring after the receipt of such remuneration, it would benefit his next of kin and all others who would be interested in his estate. His wife and children are interested in his estate while he lives, and his creditors are interested in so much thereof as is necessary to satisfy their claims. The rights of wife and children in a specified and limited amount of his estate are superior to the rights of creditors. The husband and father cannot ignore the rights of his family nor of his creditors in his property. His relation in them is analogous to that of trustee. It would seem, therefore, that, if in his lifetime he recovered full compensation for his injuries, the liability of the wrongdoers would be extinguished.

The supreme court of South Dakota has, in a recent case, considered that there is a double liability; that their Death Act, which is essentially the same as ours, creates a new cause of action. This conclusion is earnestly contested by two of the judges in dissenting opinions. *Rowe v. Richards*, 35 S. D. 201, L.R.A.1915E, 1075, 151 N. W. 1001, Ann. Cas. 1918A, 294. We refer to this as one of the very recent cases in which many authorities are collected and freely quoted. The majority opinion is largely devoted to a discussion of the difference between a "cause of action" and "a right of action," and particularly between the "cause of the injury" and "the injury itself." The opinion considers that the failure to observe this distinction has led to the

view "that there could be but one recovery for one wrong—'one wrongful act.'" There would be much force in this suggestion if the cause of action were the wrongful act. As suggested in the opinion: "A, in negligent disregard of the rights of others, fires a bullet from his rifle."

If the shot does no damage, there is no cause of action; but if it injures B and C, then each have a cause of action against A. B's cause of action is not the wrongful act, but the injury it has done him. But under our Death Act the cause of action is not the wrongful act, but damage that act has caused. It has injured the earning capacity of the deceased. It is not for the death of the deceased that the widow sues. It is for her loss caused by the injury to her husband. That the injury caused the total destruction of his earning capacity and all benefits which she otherwise would have received from her husband is rendered certain by his death as the result of that injury. If one maliciously sets fire to a building in which the property of A and B is stored, their loss is the destruction of their property, and not the "wrongful act." If each owns a separate and distinct part of the property destroyed, each has a distinct cause of action. If the title to the property is in a trustee for their benefit, the trustee may recover the whole loss in one action, and payment of the full value of the property to the trustee would ordinarily satisfy the claims of both A and B. Under our statutes, the wife has an interest in the property and rights of her husband at his decease, of which he cannot deprive her by any act of his. His creditors also have an interest which he cannot ignore. His administrator represents all of those interests. Therefore, there seems to be no reason why the whole matter could not be disposed of in one action. If the petition, in addition to the other allegations of damages, alleged the earning power of the deceased, and who were the

dependents, and what each of them was entitled to recover under Lord Campbell's Act, which is called by some courts the "Death Act," and how much the estate of the deceased ought to recover, and if the verdict of the jury or findings of the court were equally specific, there would be no difficulty in administering the two sections of the statute together. We have alluded to the question actually decided in the South Dakota case, because, as the decision in that case shows, the question of the power of the party injured to collect full compensation, and so bar any future action, is so connected with the question in the case at bar that neither can be satisfactorily determined without reference to the other. The suggestion of a "double recovery" has injected itself into very many decisions. Of course, if a settlement with the party injured is affected with fraud or overreaching, it might be avoided, and, if the amount received was grossly inadequate to the injury suffered, that of itself would be evidence tending to show unfair practice.

By the ancient common law there could be no private action for the felonious killing of a human being. Such damages inhered in the felony and belonged to the Crown. The courts in those times appear to have extended the principle so as to forbid an action for death caused by any wrongful act, whether felonious or otherwise. If the legislature had abolished this rule, and expressly provided for an action for damages caused by an unlawful act, whether death resulted or not, the difficulties of the situation would be removed. Judge Cooley says it is remarkable that the legislatures have not done so. "Why should not the money value of his life, when it has been taken away by unlawful act or negligence, be a right of action in the hands of his representatives?" 1 Cooley, Torts, 3d ed. p. 31 (\*27).

Such a statute could give a preference to the widow or widower and next of kin as our statute does, and, when the entire damage sus-

tained by all parties was recovered by the administrator, the proceeds in the hands of the administrator could be reported to the probate court as other assets to be distributed as the law required, or, perhaps still better, the statute might provide for the determination of the rights of the respective parties upon the trial in the district court, as suggested above.

It has been suggested that if the administrator should prosecute such an action for the benefit of the estate, and also for the benefit of the next of kin (that is, making the claim under the survival statute and the claim under the Death Act in one action), the administrator might be more zealous for the estate than for the widow and next of kin, and so the latter would be wronged. But no action can be brought under the Death Act for the widow and next of kin, except by the administrator; and, if there is danger of discrimination, the probate court can determine the rights of the respective parties in the recovery when the district court has failed to do so.

It would appear from the diversity of judicial decisions that there has been unfortunate and incomplete legislation in the other states as well as in our own. Construing these statutes in the light of history and of present conditions, we conclude that the intention of the legislature was that, when an action has been begun by the party injured to recover damages suffered because of the wrongful act of another, the action does not abate, nor any part thereof, by the death of plaintiff, and the administrator takes the place of the plaintiff therein and can recover any and all damages that the injured party could have recovered if he had survived, including injuries to or loss of his earning power.

We adhere to our former opinion.

Barnes, J., dissenting:

I am unable to concur in either the original opinion by Judge Rose or the present opinion by Judge

Sedgwick, affirming the judgment of the district court.

By the majority opinion the administrator of the estate of Miller is allowed to recover, not only for the pain and mental suffering actually sustained by his decedent, the physical injury suffered by him, the expense incurred for necessary medical and surgical attention in treating him for his injuries, but in addition thereto such sum as decedent would have earned for the whole term of his life expectancy, as shown by the Carlisle table, if he had not died as a result of his injuries. As to this last item of the recovery, I am convinced that the majority of the court is wrong.

By the Act of February 25, 1873 (Gen. Stat. 1873, chap. 15), it was provided:

"Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person, company or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with ref-

erence to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000: Provided, that every such action shall be commenced within two years after the death of such person."

Prior to the passage of that act there was no statutory right for anyone to recover for death by wrongful act; and whatever right accrued to the administrator of the deceased person, or those dependent upon him for support, was that which existed at the common law. By the act above quoted, a new right of action was created, and the widow and next of kin of the deceased were allowed to recover a sum not exceeding \$5,000 for the pecuniary injuries resulting to them by reason of death caused by wrongful act. That statute has remained unchanged to the present time, except by an amendment including the widower, and the repeal of so much thereof as limited the amount of the recovery to the sum of \$5,000.

It appears that the statutes of this state have made no direct provision for a recovery by the administrator of the estate of one who is killed by wrongful act, of any amount whatever, representing the earning capacity of a deceased person after his death, except such recovery as may be had for the benefit of the widow or widower and next of kin of his decedent. Plaintiff decedent, Miller, in the case at bar, left no widow or next of kin, and no one dependent in any manner upon him for support. Therefore the plaintiff in this case could not recover anything representing the earning capacity of decedent after his death occurred. The right of recovery, so far as that matter was concerned, was extinguished at Miller's death. I am satisfied, from a thorough investigation, that no case can be found which holds that the loss of earning capacity can be recovered for the benefit of creditors of the decedent.

It is true that, under the revivor

statute, the action commenced by Miller in his lifetime was properly revived, and it seems clear, from the weight of authority, that the administrator could recover for the benefit of the estate of his decedent for the pain and suffering, both mental and physical, and decedent's loss of wages during the time he survived his injuries, for the necessary hospital charges, and for the value of the medical treatment furnished him by his physician, but the statutes have not made any provision for a recovery for decedent's earning capacity, excepting such as provided for the benefit of the widow and next of kin, above mentioned.

In *Dwyer v. Chicago, St. P. & O. R. Co.* 84 Iowa, 479, 35 Am. St. Rep. 322, 51 N. W. 244, it was said: "The statutes deal with the 'cause of action,' and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied, to the injury to be repaired."

In *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, the court said: "Such damages to the widow and next of kin begin where the damages of the intestate ended, viz., with his death."

And on rehearing (102 Wis. 150): "The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the estate for what belonged to the deceased; in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them." . . . The damages in one right are limited to the loss which accrues to the injured person before death, and the damages in the other to the pecuniary loss of surviving relatives, as before the survival statute. The two rights in no way overlap each other."

See *Johnson v. Eau Claire*, 149 Wis. 194, 135 N. W. 481.

In *Jacobs v. Glucose Sugar Ref.*

*Co. (C. C.)* 140 Fed. 766, it was said: "And, if this be so, then by what logic or reasoning can it be said that two actions cannot be brought against one wrongdoer, the one for pain and suffering and the other for damages to the estate? Both are actions for compensatory damages. The one survives to the administrator under one statute, and the other is given to the administrator under another."

In *Quinn v. Johnson Forge Co.* 9 Houst. (Del.) 338, 32 Atl. 858, the court instructed the jury as follows: "Should you decide in favor of the plaintiff, you should assess damages in such reasonable sum as you deem proper and right under the circumstances, and in fixing that amount you should consider such damages as have been actually proved by reason of loss of wages from the 20th day of July, 1891, up to March 3, 1892, when he died, and also allow such sum as you deem adequate and proper by reason of his physical pain and mental sufferings. As regards the death of Peace as being the result of his injuries, you cannot take that into consideration in the estimation of damages. It has no connection with this case."

In *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369, page 375, 53 N. W. 752, we find the following: "In what manner and under what circumstances could the deceased have recovered had death not ensued? He could have recovered, in addition to his physical and mental suffering, for loss of time and employment, the expenses of medical and surgical attendance, nursing, etc., incident to the injury. . . . Anything more? Certainly not."

In 3 S. D. pages 380, 381: "It does not provide, as we have seen, for the recovery of damages by the widow and heirs, and it is not provided that the personal representative shall institute the action for the use or benefit of such widow and heirs, or that the sum recovered shall be apportioned between the beneficiaries. The section [Lord Campbell's Act] seems to have been adopted



with another object in view, and that was to give the widow, having in the death of a husband sustained the greater loss, the prior right to institute the action and recover the damages she has sustained by reason of the death of her husband.

. . . . To carry into effect the evident intention of the legislature, the widow should have the prior and exclusive right to institute the action and to the damages for the loss of the life of the husband. . . . If the action can be instituted by the personal representative, the damages recovered by him would be assets of the estate, and, in case the estate was insolvent, the money recovered would go to the creditors. This could not have been the intention of the legislature. . . . This seems but reasonable and just. All must concede, we think, that the wife, in the loss of her husband, on whom she is dependent for support, sustains a greater loss by such death than any other person."

The same rule is announced in *Atchison, T. & S. F. R. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Peake v. Baltimore & O. R. Co.* (C. C.) 26 Fed. 495; *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472; *Hilliker v. Citizens Street R. Co.* 152 Ind. 86, 52 N. E. 607; *Sturges v. Sturges*, 126 Ky. 80, 12 L.R.A. (N.S.) 1014, 102 S. W. 884; *Stewart v. United Electric Light & P. Co.* 104 Md. 382, 8 L.R.A. (N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The case of *Mageau v. Great Northern R. Co.* 103 Minn. 290, 15 L.R.A. (N.S.) 512, 115 N. W. 651,

14 Ann. Cas. 551, is to the same effect. The court said in that case: "The administrator recovers damages based upon the reasonable expectation of pecuniary benefit of the persons named by the statute, often not the husband, as the beneficiaries of the action."

In this state, however, the husband is included as one who may recover for the pecuniary injuries sustained by death by wrongful act. The authorities are almost numberless on this question. To summarize the whole matter, I have found by my investigation that the courts of fourteen of our sister states, the Federal courts, and the English cases support the rule announced in this dissenting opinion. The courts of five of the states refuse to allow any damages, stating that the action abates. The courts of last resort in eleven of the states permit a division of the damages, a part to the estate, and a part to the widow and next of kin, while the courts of but four states support the rule stated in the majority opinion. I am therefore constrained to hold that the widow and next of kin are entitled to recover the damages allowed them by Lord Campbell's Act, in an action brought by an administrator of their own choice, without being compelled to resort to the probate or county court for a distribution. Their recovery should be for their benefit alone. The provisions of the statutes have been in force since 1873, and no difficulty has been encountered in enforcing them. They are plain, and are sufficiently explicit to cover all cases without resort to speculation or judicial legislation. It is my opinion that the judgment of the district court should be reversed, and the cause remanded for further proceedings.

*Fawcett and Hamer, JJ.*, concur in above dissent.

## ANNOTATION.

**Measure of damages in action for personal injuries commenced by deceased in his lifetime and revived by personal representative.**

- I. Where action may be maintained concurrently with action under Lord Campbell's Act, 1355.
- II. Where remedy under survival statute is exclusive:
  - a. In general, 1357.
  - b. Illinois rule, 1359.
- III. Revival after verdict, 1360.
- IV. Where injury is not proximate cause of death, 1360.

As indicated by the title this note is limited to cases involving the measure of damage to be assessed in an action commenced by an injured person in his lifetime to recover for personal injuries, and revived after his death, under a general survival statute. For a treatment of the general question of the measure of damage in actions for the wrongful death of a person for the benefit of his estate, see note appended to *Florida East Coast R. Co. v. Hayes*, ante, 1310. And see references therein for notes on related questions.

- I. *Where action may be maintained concurrently with action under Lord Campbell's Act.*

There is some conflict among the courts as to the measure of recovery by a personal representative in an action revived by him which was commenced by his decedent in his lifetime to recover damages for personal injuries which subsequently resulted in his death. This difference is in part, although not wholly, due to the different view with which the court regards general survival statutes under which the case is revived. Where this remedy is regarded merely as concurrent with an action by the personal representative to recover compensation to the decedent's statutory beneficiaries for their pecuniary loss growing out of his death, it necessarily follows that, in order to avoid a double recovery, the damage allowed in the revived action must be limited to such as the deceased might have recovered had he lived, but not extending beyond the time of his death.

A good example of a case within this rule is *St. Louis & S. F. R. Co. v. Goode* (1914) 42 Okla. 784, L.R.A. 1915B, 1141, 142 Pac. 1185. In that case the decedent in his lifetime had commenced an action to recover damage for personal injuries received while a passenger on the defendant's train; while that action was pending he died as a result of the injuries; following his death the decedent's personal representative brought an action to recover damages in behalf of the statutory beneficiaries, in which recovery was had; subsequently the action commenced by the deceased in his lifetime was revived and prosecuted in behalf of his estate. It was held that this action was maintainable, not being barred by the recovery in the other action, but that the damages should be limited to such as accrued to the decedent up to the time of his death. The court said that two causes of action under such circumstances are co-existent; that a recovery on the one does not bar a recovery on the other; that damages to the estate begin with the wrong and cease with the death; that the widow's damages begin with the death; hence they do not cover the same field or overlap. "Both actions are prosecuted in the name of the personal representative, where there is one, and may proceed *pari passu*, without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin, occasioned by the death alone. The death is the end of the period of recovery in one case and the beginning

in the other. In one case the administrator sues as legal representative of the estate, for what belonged to the deceased; in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."

In *Hamel v. Southern R. Co.* (1915) — Miss. —, 66 So. 809, in holding that the administrator was entitled to revive an action brought by the deceased in his lifetime to recover damage for personal injuries, and to prosecute the same to a judgment, without thereby barring his right also to prosecute an action to recover compensation for the statutory beneficiaries for their loss growing out of the decedent's death, the court pointed out that the revived action included damages for the injuries to the decedent, but did not cover damages for the decedent's death, and hence the action did not interfere with the action in behalf of the beneficiaries.

While in *Brown v. Chicago & N. W. R. Co.* (1899) 102 Wis. 137, 44 L.R.A. 579, 78 N. W. 771, 5 Am. Neg. Rep. 255, the case did not involve the measure of damages in an action by the decedent's personal representative, the court, in discussing the construction of a general survival statute, suggested that the objections to permitting the revival of such an action and also the prosecution of an action in behalf of the statutory beneficiaries on the ground of difficulties in administering the law, and the danger of injustice to the defendants, were largely imaginary and will gradually disappear, "as we adapt ourselves to the new conditions which the revival statute creates. The trial judge can easily, by proper instructions, limit the recovery in a revived action to the loss actually caused to the deceased prior to his death; and in the action under § 4255, Rev. Stat., to the pecuniary loss sustained by the surviving relatives entitled to the benefits of that provision. If the two causes of action are joined, the court can readily require the jury to make separate findings as to damages. As the elements entering into each are entirely distinct, it will readily be seen that there is no more danger of a dou-

ble recovery under such circumstances than in any one of the numerous cases that might be suggested where two causes of action result from a single wrong. The injustice of two recoveries for distinct grievances, suggested by the learned counsel, and by some courts that have taken the view pressed upon us, is not perceived. A little dispassionate reflection on the subject, it would seem, would prevent unqualified condemnation of the legislative wisdom that says, if a person be wrongfully injured, the pain and suffering and expenses to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages, even though the damages to his surviving relatives, to satisfy their own grievance, may be recovered."

In *Mahoning Valley R. Co. v. Van Alstine* (1907) 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 88 N. E. 601, it is held that, in an action for the benefit of the statutory beneficiaries, the measure of damages is their pecuniary loss sustained by the decedent's death; and the measure of damages in an action commenced by the deceased in his lifetime to recover for his injuries, and revived by his personal representative, is the loss to the estate of the deceased, being for lost time occasioned by the injuries, the value of the decedent's services for such lost time, and his physical suffering, hence the two causes of action are coexistent and a recovery in the one is not a bar to a recovery in the other.

In *MURRAY v. OMAHA TRANSFER CO.* (reported herewith) ante, 1343, the right is sustained to prosecute an action revived by the personal representative, which was commenced by the deceased in his lifetime, and also an action by the personal representative in behalf of the decedent's beneficiaries. The court said that when an action has been begun by the party injured to recover damages suffered because of the wrongful act of another, the action does not abate nor any part thereof by the death of the plaintiff. The administrator takes the place of the plaintiff therein and can recover

any and all damages that the injured party could have recovered if he had survived, including injuries to and loss of his earning power. In this case it is to be noted that the decedent left no widow or next of kin and no one in any manner dependent upon him for support.

*II. Where remedy under survival statute is exclusive.*

*a. In general.*

Even where the action pending at the time of the death of the deceased is the exclusive remedy, it has been held that the measure of damage recoverable in behalf of the decedent's estate was the amount which he could have recovered had he survived to prosecute the action, and that nothing could be recovered for his death. By denying recovery for the death of the deceased some of the courts apparently mean that the fact of the death cannot be taken into account to increase the damages, rather than to hold that no element of loss can be taken into account beyond the time of the death of the deceased. It has, however, been held in other cases that the computation of the damage must be confined to the different elements of loss intervening between the injury to the deceased and his death, and that no account can be taken even of the prospective earnings of the deceased beyond the time of his death.

For example, in *Quinn v. Johnson Forge Co.* (1892) 9 Houst. (Del.) 338, 32 Atl. 858, it is held that where the injured person brings an action in his lifetime to recover damages for injuries which subsequently resulted in his death, upon the continuance of the action by his personal representative, the death of the decedent cannot be shown as an aggravation of damages. In such case, the damages recoverable are for loss of wages from the time of the injury to the time of death, and for physical pain and mental suffering. It is to be noted that in this jurisdiction there is no choice of remedy, where the injured person has commenced a suit in his lifetime to recover for the injury. In such case the only

remedy open is the survival and prosecution of this action.

And see *Bowen v. Baltimore & P. S. B. Co.* 3 Boyce (Del.) 428, 84 Atl. 1022, holding that the administrator of the plaintiff in an action to recover damages for personal injuries, who revives the suit and prosecutes same to judgment, is entitled to recover for the decedent's pain and suffering, loss of earnings, medical attendance, traveling expenses incident to the injury, but not for the death itself.

In *Swanson v. Pacific Shipping Co.* (1910) 60 Wash. 87, 110 Pac. 795, an action brought in the lifetime of the deceased to recover damages for personal injuries was revived in behalf of the beneficiaries under a statute in effect providing that no action for personal injuries shall abate by reason of the death of the injured person, and that it may be prosecuted for the benefit of certain beneficiaries. The deceased was a man with a family, and it was held that the measure of damages recoverable was such as the decedent would have been entitled to recover had the cause been tried at any time prior to his death. It is apparently assumed that the damage would include compensation for the impaired earning capacity of the deceased; for while it is said that no damage could be recovered for the death itself, it is pointed out that the deceased was a man earning a good salary and in good health prior to the injury; and a judgment in his favor for over \$17,000, reduced to \$10,000, was sustained for the latter amount, though the deceased survived his injuries for less than fourteen months. In *Thompson v. Seattle, R. & S. R. Co.* (1912) 71 Wash. 436, 128 Pac. 1070, however, in a proceeding under the same statute to recover for injuries to a woman who was survived by several children, the trial court said that he intended to make it clear to the jury that the damages sustained by the mother of the plaintiffs, if any, up to the time of her death, would be the only damage to be considered in arriving at the amount of the award, and that no damage resulting from her death could be considered by the jury; and subsequently,

in reply to a question by a juror, the court stated that the damage would be what would have compensated the mother for conditions brought about by the accident, the suffering, mental and physical, which she might have endured simply for the time between the accident and the death. On appeal, the court, in referring to these instructions, said that it was clear that such error as there was in the instructions first given was cured by these subsequent proceedings. Nevertheless, although a judgment for \$10,000 was held excessive and was reduced to \$7,000, it was sustained for the latter amount.

It has been held that the measure of recovery is the actual damage occasioned to the decedent for the injury inflicted, including pain, suffering, and physical inability and inconvenience. *McCabe v. Narragansett Electric Lighting Co.* (1905) 27 R. L. 272, 61 Atl. 667.

In *Legg v. Britton* (1890) 64 Vt. 652, 24 Atl. 1016, in considering the damages to be awarded in an action commenced by the decedent in his lifetime and revived by his personal representative, the court, after pointing out that the damages recoverable are such as the injured person might have recovered if he had survived, including expenses for doctoring and nursing, loss of his services, and compensation for pain and suffering, said that "one element of damages would be the bodily pain and suffering caused to the intestate by the wrongful act or neglect occasioning his death. The natural effect of such pain and suffering is to weaken, and if of adequate intensity, sufficiently continued, to destroy the vital forces. The damages for this element, recovered in the right of the intestate, may be said indirectly, if not directly, to be given for destroying the life of the intestate and ending his earning capacity. Such damages are not given to make up to his estate what it has lost by the wrongful injury. Unless required to pay the debts of the estate they are distributed to the widow and next of kin. But the bulk of the damages recovered in the right of the intestate are different from

those recovered for the benefit of the widow and next of kin."

In *Bradley v. Andrews* (1879) 51 Vt. 525, it is held that where an action to recover damages for personal injuries is pending at the death of the plaintiff and is revived by his administrator, the measure of recovery is the pain, suffering, and personal inconvenience occasioned the decedent by the injury, and also exemplary damages if the act complained of was wanton or reckless.

Under the Iowa statute, it has been held that the measure of damages is different in an action brought originally by the deceased and prosecuted to judgment after his death by his personal representative, than it is in an action originally brought by the latter. In the former action damages may be allowed for bodily pain and mental anguish of the deceased due to the injury. In the latter action, however, no damages can be allowed for these elements. *Muldowne v. Illinois C. R. Co.* (1878) 36 Iowa, 462; *Kinser v. Soap Creek Coal Co.* (1892) 85 Iowa, 26, 51 N. W. 1151.

Under very similar statutes in other jurisdictions, it has been held that the amount recoverable where an action for personal injuries is revived by the administrator of the plaintiff after the latter's death remains the same as if the deceased had lived to prosecute the action, and the recovery may include compensation for decedent's physical and mental suffering, reasonable surgical and medical expense and for time lost, and any permanent impairment of his power to earn money during the remainder of his life expectancy. *Chesapeake & O. R. Co. v. Perkins* (1907) 127 Ky. 110, 105 S. W. 148; *Maher v. Philadelphia Traction Co.* (1897) 181 Pa. 391, 37 Atl. 571, 3 Am. Neg. Rep. 85; *McCafferty v. Pennsylvania R. Co.* (1899) 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693; *Edwards v. Gimbel* (1902) 202 Pa. 30, 51 Atl. 357.

In *McCafferty v. Pennsylvania R. Co.* (1899) 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435, 6 Am. Neg. Rep. 693, *supra*, it is held to be error to permit the jury in an action commenced by

the deceased in his lifetime and revived by his personal representative, who was substituted as the plaintiff, to enter a verdict both for the loss the deceased sustained by reason of his injuries and for the loss his parent sustained by reason of his death. The true measure of damages was held to be the loss sustained by the deceased, that is, the same damage which the deceased could have recovered had he lived to prosecute the action, including compensation for pain and suffering and diminished earning power during the period of the decedent's probable life expectancy.

And in *Maier v. Philadelphia Traction Co.* (1897) 181 Pa. 391, 87 Atl. 571, 3 Am. Neg. Rep. 85, it is held that where an action is brought in the lifetime of the injured party to recover damages for personal injuries, and the action is revived after his death, the damages recoverable are the same as the injured person might have recovered had death not ensued, including damages not only for mental and physical suffering of the injured decedent, but also for the value of his life.

In *Edwards v. Gimbel* (1902) 202 Pa. 30, 51 Atl. 357, it is held that the measure of damages recoverable in an action commenced by the decedent in his lifetime, and revived by his personal representative, is the loss which the deceased sustained by reason of his injuries, not including recovery for his death. But the court apparently intended that the damage assessed should include compensation for loss due to the destruction of the decedent's earning power. See *McCafferty v. Pennsylvania R. Co.* and *Maier v. Philadelphia Traction Co.* (Pa.) *supra*. And to the same effect, applying Pennsylvania statute, *The City of Belfast* (1905) 135 Fed. 208.

#### *b. Illinois rule.*

In Illinois there are acts similar to Lord Campbell's Act, and also a survival act. Under these different acts it is held that the administrator of the plaintiff, in a pending action to recover damages for a personal injury, may revive the action; but there is a vital

difference as to the effect of this revival, dependent upon the statute under which the revival is permitted. Thus, while the revival of the pending action is permitted under the statute similar to Lord Campbell's Act, the plaintiff occupies precisely the same position that he would have occupied had the action not been commenced until after the death of the original plaintiff. His measure of damages which he is entitled to recover are no more or less than had no action been brought by the injured person in his lifetime, and the administrator had commenced an action based upon this statute. In other words he can recover only pecuniary loss to the beneficiaries designated in the statute, resulting to them from the death complained of. On the other hand if he revives the pending action by the injured person under the survival act, his measure of recovery is no more or less than that which the plaintiff might have recovered had he lived to prosecute the action; and it is not a matter of option with the personal representative as to which statute he will proceed under to revive a pending action. This is determined by the cause of the death. If the death results from some cause other than the wrongful act, then revivor can only be by virtue of the general revival act; if death results from the injury, then the action can be revived only by virtue of the act similar to Lord Campbell's Act. *Holton v. Daly* (1882) 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor* (1886) 119 Ill. 586, 9 N. E. 263; *Savage v. Chicago & J. Electric R. Co.* (1909) 238 Ill. 392, 87 N. E. 377; *Prouty v. Chicago* (1911) 250 Ill. 222, 95 N. E. 147; *Ohnesorge v. Chicago City R. Co.* (1913) 259 Ill. 424, 102 N. E. 819; *Merrihew v. Chicago City R. Co.* (1900) 92 Ill. App. 346; *Wetherell v. Chicago City R. Co.* (1902) 104 Ill. App. 357; *Clark v. O'Gara Coal Co.* (1908) 140 Ill. App. 207.

Where the action commenced by the deceased in his lifetime to recover damages for injuries which later resulted in his death is revived and prosecuted by the personal representative for the benefit of the statutory

beneficiaries, the recovery is limited to compensation for the pecuniary loss to such beneficiaries. In such case there can be no recovery for bodily pain and suffering of the deceased in his lifetime by reason of the injury sustained. *Holton v. Daly* (1882) 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor* (1886) 119 Ill. 586, 9 N. E. 263; *Mattoon Gaslight & Coke Co. v. Dolan* (1902) 105 Ill. App. 1.

In *Chicago & E. I. R. Co. v. O'Connor* (1886) 119 Ill. 586, 9 N. E. 263, it is said that actions to recover for personal injuries caused by the negligence of the defendant survive upon the death of the plaintiff, and when death is the result of the injuries for which suit is brought, the action must be prosecuted after the death of the plaintiff for the benefit of the widow and next of kin, and in such case there can be no recovery for bodily pain or suffering, but that where death results from a cause other than the injuries for which the suit is brought, there may be a recovery for precisely the same injuries that the plaintiff could have recovered for had he lived until after final trial.

### III. Revival after verdict.

In *Clay v. Chicago, M. & St. P. R. Co.* (1908) 104 Minn. 1, 115 N. W. 949, where the plaintiff in an action for personal injuries died after a verdict in his favor, and the administratrix was substituted as plaintiff, it was held that the case was controlled by the statute providing that after a verdict fixing the amount of damages for a wrong, such action shall not abate by reason of the death of a party, and not by the provisions of Lord Campbell's Act, which permits generally in actions for personal injuries revived after the death of plaintiff a recovery for the damages sustained by statutory beneficiaries. The result was that a verdict of \$35,000, recovered before the death of the injured person, was upheld, although apparently greatly in excess of what could have been recovered in behalf of the beneficiaries.

In *Wilcox v. International Harvester Co.* (1917) 278 Ill. 465, 116 N. E. 151, the facts were that after a verdict had

been rendered in favor of the plaintiff in an action to recover damages for personal injuries, but before judgment had been rendered on the verdict, the plaintiff died. It was held proper to permit her personal representative to revive the action and to have judgment entered upon the verdict *nunc pro tunc* as of the date of the verdict.

### IV. Where injury is not proximate cause of death.

The right of action for personal injuries, not resulting in the death of the injured person, survives his death, and a suit commenced by him in his lifetime to recover damages occasioned him by such injuries may be continued by virtue of the survival statute by his personal representative after his death with the same effect, according to the same rules, and to recover the same damages as if he were living and prosecuting his action in person. *Chicago & E. I. R. Co. v. O'Connor* (1886) 119 Ill. 586, 9 N. E. 263; *Prouty v. Chicago* (1911) 250 Ill. 222, 95 N. E. 147; *Wetherell v. Chicago City R. Co.* (1902) 104 Ill. App. 357; *Tri-City R. Co. v. Brennan* (1903) 108 Ill. App. 471; *Atchison, T. & S. F. R. Co. v. Rowe* (1896) 56 Kan. 411, 43 Pac. 683; *Atchison, T. & S. F. R. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60; *Rouse v. Michigan United R. Co.* (1911) 164 Mich. 475, 129 N. W. 179; *Clay v. Chicago, M. & St. P. R. Co.* (1908) 104 Minn. 1, 115 N. W. 949.

For example, it has been held that one who suffers an injury to his person as the consequence of the wrongful or negligent act of another has a right of action for the damages resulting from the injury. He may recover for pain and suffering, physical and mental, for expenses of medical treatment and attendance, and the permanent effects upon his person reasonably certain to result. If he dies from some cause other than the injury, the action for the injury to his person survives by virtue of the general survival act to his personal representative, who may recover these damages for the personal injury. *Prouty v. Chicago* (1911) 250 Ill. 222, 95 N. E. 147.

In *Rouse v. Michigan United R. Co.* (1911) 164 Mich. 475, 129 N. W. 719, it is held that where the injured person dies after having commenced a suit to recover damages for his injuries, and his suit is revived by his personal representative under the survival act, and death was the result of some cause other than the injury, the measure of damages is the same as that which would have applied to the decedent had he lived and prosecuted the suit, except that compensation for loss of power to earn money cannot be given for any period after his death, and must not go beyond the time of his last sickness; and where the injury did not cause his last sickness, if this sickness disabled the injured person from working and earning money, no damages can be allowed for any loss of earning power resulting from such sickness or from expenses attending the same, or upon the theory that his life was shortened by his injuries, or for pain and suffering caused by this sickness.

It has been held that although damages for the loss of a limb are usually calculated on the basis of the mortality table, showing the expectation of life of the injured person, where he subsequently dies from some cause other than the injury, in a suit for personal injuries pending at the time of his death and revived and prosecuted by the beneficiaries designated in the statute, such calculation cannot extend beyond the day of his death, and the

substituted plaintiff is entitled to recover damages for the pain and suffering and disfigurement of the deceased and for disability resulting from the loss of his limb during the remainder of his life (fixed by the court at \$2,000). *Payne v. Georgetown Lumber Co.* (1906) 117 La. 983, 42 So. 475. In the latter case it is held that where an action to recover damages for personal injuries is revived by the personal representative of the injured person on his death, the measure of damages is compensation for pain and suffering, physical or mental, of the deceased by reason of the injury, also money expended or liability incurred necessarily and reasonably by the deceased for medical attendance as a result of the injury, and the value of time lost, if any, by the deceased, together with the disability of diminished earning capacity, whether total or partial, as a result of the injury, from the time of the injury to the time of the death.

Where a pending action to recover damage is revived by the personal representative after the death of the plaintiff from some cause other than the injury, the measure of recovery includes the pain and suffering of the deceased, not including, however, any pain and suffering which the decedent might have suffered from the injury had he lived out his life expectancy. *Memphis Street R. Co. v. Prince* (1912) 2 Tenn. C. C. A. 688. A. G. S.

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ERLE WIGHTMAN, Appt.,

v.

HENRY MORSE WIGHTMAN.

*Massachusetts Supreme Judicial Court — March 8, 1916.*

(223 Mass. 398, 111 N. E. 881.)

**Contract — implied — continuing employer's business.**

1. One whose employment by his brother to assist in the latter's dental business is terminated by the latter's insanity is not bound to account for the profits in continuing the business in his own name in the former's office, using his furniture and equipment, but he must account for the profits which accrue so long as he attempts to continue the former's business and credits himself with a salary for so doing.

[See note on this question beginning on page 1365.]



**Master and servant — termination of contract by insanity.**

2. A contract of employment is terminated by the insanity of the employer.

[See 18 R. C. L. 513.]

**— fiduciary relation — good faith.**

3. One employed as an assistant in a dental office is not an agent held to the utmost good faith.

**Incompetent person — duty to continue business of.**

4. One whose employment in his

brother's dental business is terminated by the latter's insanity is not bound to continue the brother's business, either because he was his brother or because he was in his employ.

**Trust — continuing business as employee upon employer's insanity.**

5. An employee of a dentist assisting the latter in the practice of his profession is not guilty of a breach of trust merely because he continues to practise on his own account, in his own name, at the office of the employer, after the latter becomes insane.

**APPEAL** by plaintiff from a decree of the Superior Court for Bristol County (Sanderson, J.) confirming the report of the Master in his favor in part only, in a suit to obtain a reconveyance of certain real estate and for an accounting of money collected by defendant for plaintiff. *Further hearing ordered.*

The facts are stated in the opinion of the court.

Messrs. F. S. Hall and S. P. Hall, for appellant:

Complainant may object to the entry of any decree on the ground that it could not lawfully be entered on the facts found.

*French v. Peters*, 177 Mass. 568, 59 N. E. 449; *First Baptist Soc. v. Dexter*, 193 Mass. 187, 79 N. E. 342; *Briggs v. Sanford*, 219 Mass. 572, 107 N. E. 436.

Defendant could not take to himself the profits of a business which had been developed by his brother, and he could not make use of his brother's equipment for his own personal advantage.

1 *Perry, Trusts*, p. 341; *Little v. Phipps*, 208 Mass. 331, 34 L.R.A. (N.S.) 1046, 94 N. E. 260; *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296; *Quinn v. Burton*, 195 Mass. 277, 81 N. E. 257; *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197, 92 N. E. 42; *Smith v. Townsend*, 109 Mass. 500.

Messrs. John W. Cummings and Charles R. Cummings, for defendant: Defendant's employment or agency was terminated.

*Reinhard, Agency*, § 173; *Story, Agency*, 4th ed. § 481; 31 Cyc. 1313; *Drew v. Nunn*, L. R. 4 Q. B. Div. 661, 48 L. J. Q. B. N. S. 591, 40 L. T. N. S. 671, 27 Week. Rep. 810.

Carroll, J., delivered the opinion of the court:

The plaintiff and the defendant are brothers. From 1898 till April, 1907, the plaintiff (a dentist) prac-

tised his profession in an office in Pawtucket, Rhode Island. The defendant, a younger brother, also a dentist, began working for him in 1898. His wages, beginning at \$10 a week, were increased from time to time, until April, 1907, when he received \$30 a week. Before this last increase, "he had expressed an intention of leaving his brother and starting business on his own account. . . . But he still expressed his desire to quit and had given his brother notice that he should leave in thirty days." The exact time when this notice of the defendant was given does not clearly appear. We infer from the report of the master that it was given either in March, 1907, when the defendant's wages were increased, or a short time before June 1, 1907.

In April, 1907, the plaintiff broke down. As the master reports, "he was evidently mentally unbalanced and utterly incapacitated to do any business that required intelligent thought." He continued in this condition for some time. "During the month of May, 1907, the plaintiff occasionally visited his office, but after that and until after the 1st of January, 1910, he gave no attention at all to the business, and during all that time was mentally incapable of giving any attention to it." In 1908

he was taken to a sanitarium and later to an insane hospital. In January, 1910, he recovered, and since then his condition has been normal.

May 28, 1907, the plaintiff went before a justice of the peace and executed a deed, "purporting to convey to his brother, the defendant, all his real estate and personal effects." After a few days he delivered the deed to the brother, and at this time gave him written orders to collect his money, deposited in different banks. There was no valuable consideration for this deed.

The defendant continued to practise his profession at the same office, using the materials, tools, and furniture therein; "for a few months he sent out bills on the billheads then in the office, in the name of the plaintiff; . . . for a few months also he entered upon the cash book weekly payments to himself of \$30." In January, 1910, the plaintiff being then in normal condition, demanded of the defendant a return of the property which had been intrusted to him, and an account of the work done by him in the office. The defendant delivered to him the bank books, and on July 20th vacated the room in which the plaintiff had previously carried on his practice as a dentist, and in which the defendant practised from June 1, 1907, until that date, July 20, 1910. Thereupon this bill in equity was brought.

The two brothers lived with their mother at Attleboro, the plaintiff paying the necessary family expenses as head of the family. Beginning in June, 1907, and during the plaintiff's disability, the defendant paid the expenses of the home out of his own funds, amounting to \$4,789.03.

The defendant, from money turned over to him by the plaintiff, paid for the latter's expenses while he was mentally unbalanced. The master found "that from and after June 1, 1907, there was no valid contract for services or otherwise, existing between the parties." The plaintiff, on account of his condition, was obliged to give up his busi-

ness, and "he made no contract with his brother as to the future conduct of the business. . . . He simply gave up and went out, and his brother stayed and went on with the business." The master then states the account, showing a balance due the defendant of \$105.77. The master also made the alternative finding: "If, on the other hand, it must be found upon the foregoing facts that the defendant was still in the service of the plaintiff, then the account between them must be stated differently, as follows." Then follows the account, showing a balance of \$1,996.74 due the plaintiff from the defendant.

The bill alleges that the deed of May 28, 1907, was obtained from the plaintiff "by fraud and deception practised upon the complainant, and by undue influence exerted upon the complainant by said respondent." The master made no finding on this question. His report, however, negatives any fraud on the part of the defendant, and as this question was not argued, we take it to have been waived.

The bill, however, states that the plaintiff "gave into the charge of the respondent the office and furnishings and the tools of his profession, his customers and business, for the respondent to take care of until the complainant's return to health and to the duties of his profession." The superior court, upon the master's report, ordered the defendant to reconvey to the plaintiff the real estate described in the deed of May 28th, and to pay the plaintiff the costs of suit, taxed at \$70, and directed that the plaintiff pay to the defendant \$105.77. The case is before us on the plaintiff's appeal from this decree.

The findings of the master show that in June, 1907, the plaintiff was insane. The contract of employment, therefore, between the parties, ended at this time by reason of the insanity of the employer. Where a relation similar to

Master and  
servant—  
termination of  
contract by  
insanity.

that of principal and agent exists, on the insanity of the principal the relation ceases. See *Drew v. Nunn*, L. R. 4 Q. B. Div. 661, 48 L. J. Q. B. N. S. 591, 40 L. T. N. S. 671, 27 Week. Rep. 810; *Story, Agency*, 8th ed. § 481.

The plaintiff argues that, the defendant being in the employ of the plaintiff, upon the latter's insanity, or from June 1, 1907, until January, 1910, he continued to be the agent of the plaintiff, and is chargeable with the profits of the business during that time.

The defendant was employed to assist his brother in his practice as a dentist, on a weekly salary of \$30. While he was in the employ of his brother, he was, strictly speaking, his servant or employee. He did not stand toward him in a fiduciary relation, in the real sense of the expression. He was not an agent held to the utmost good faith. See *Randall v. Peerless Motor Car Co.* 212 Mass. 352 at page 375, 99 N. E. 221.

Leaving out of consideration the question of responsibility of the defendant to the plaintiff during the few months following June 1, 1907, when he charged himself with a weekly salary of \$30 and sent out bills in his brother's name, when the contract between them was ended by the insanity of the plaintiff, the defendant had the right to practise his profession on his own account. No obligation to continue the brother's business for his brother's profit rested upon the defendant because

—Incompetent  
person—duty to  
continue  
business of.

he was his brother, or because he had been in his employ. While he used the machinery, tools, and furniture of the plaintiff, and must pay for them, or their use, and the master has so found in his account, that fact is not enough to make the defendant, a dentist practising his profession in his own name, responsible to the owner of the material for the profits

of the business; nor does the fact that the defendant occupied the room formerly occupied by his brother make him his agent, and

Contract—  
implied—  
continuing  
employer's  
business.

make the business conducted by him, under his own personal supervision and management, the business of his former employer. He was contributing his own personal efforts and ability in the work of his profession, and a servant or employee who has assisted another in the practice of a profession is not guilty of a breach of trust merely because he continues to practise on his

Trust—continuing  
business as  
employee upon  
employer's  
insanity.

own account, and in his own name, at the office occupied by his employer before his insanity. Even if the question were open on the pleadings, there is nothing to show that the defendant was responsible for the good will of the plaintiff. There is no finding of the master that the defendant practised in the plaintiff's name or held himself out as his successor. As stated by Braley, J., in *Foss v. Roby*, 195 Mass. 292, at page 297, 10 L.R.A. (N.S.) 1200, 81 N. E. 200, 11 Ann. Cas. 571, in "the practice of dentistry, the personal qualities of integrity, professional skill, and ability attach to and follow the person, not the place." See *Moore v. Rawson*, 199 Mass. 494, 85 N. E. 586; *Hutchinson v. Nay*, 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974.

We think in one respect there was an error. The master made no finding showing the amount of the business during the period of a few months following June 1, 1907. Nor is there any finding of the master to show when the defendant ceased to manage the office and its business for the benefit of his brother, or when he began to practise his profession on his own account, while the master does find that there was no contract between the brothers after June 1, 1907, and the defendant was not in the service of the plaintiff after that time, and al-

though the plaintiff may have contemplated or intended, so far as he could, that the defendant was to carry on the business for him, the defendant did not agree to this, and in no way bound himself to any such arrangement, except in so far as shown by his conduct, in acting for the plaintiff during this period of a few months.

Notwithstanding the findings of the master, the acts and conduct of the defendant show that, during this period when he sent out the bills in the name of his brother and charged himself with a weekly salary of \$30, he then was carrying on the work of the office for the plaintiff, and must account to him for the profits during that time. It may be the defendant thought his brother's incapacity would be temporary. But whatever his motive, he was, during that period, conducting the work of the office in the interest of and in behalf of the plaintiff.

The findings of the master show there was no fraud or wrong intention on the part of the defendant in acting as he did during the entire period of the plaintiff's absence. In the early part of it, the defendant was seeking to help his brother, expecting the mental trouble would be of short duration. He was not

bound to do as he did. He was not compelled to carry on the business on his brother's account for any length of time; but having done so during this indefinite period, his position is analogous to that of one who voluntarily takes upon himself the duties of an agent, and so becomes responsible to the principal as such. *Dennis v. McCagg*, 32 Ill. 429; *Salsbury v. Ware*, 183 Ill. 505, 56 N. E. 149. See 39 Cyc. p. 190.

When the defendant learned that the plaintiff was not improving and it was uncertain how long he would be incapacitated, he then had the legal right to practise his profession on his own account, solely for his own profit. He could do this, we think, without breaking faith with his former employer, or being in any way responsible to him for the income and profits.

There must be further hearing to determine the time when the defendant began to practise his profession on his own account, the returns of the office from June 1, 1907, to that time, and to state the account between the parties during this period beginning June 1, 1907, and ending when the defendant ceased to carry on the work of the office for the benefit of the plaintiff.

So ordered.

## ANNOTATION.

### **Liability of employee who continues business or profession after death or insanity of employer, to account for profits or good will.**

A search has disclosed no case, other than the reported case (*WIGHTMAN v. WIGHTMAN*, ante, 1361), directly in point on the above subject, the question usually arising, where the employee has continued in the employment after the death or insanity of the employer, being as to the employee's right to recover the contract wages or the reasonable value of his services, and not as to his liability to account for the profits.

In *Sands v. Potter* (1897) 165 Ill. 397, 56 Am. St. Rep. 253, 46 N. E. 282,

one employed for a term of years, for a stated salary and a per cent of the profits, who continued in the employment (butter and cheese business) after the employer became insane, was held entitled to recover the stipulated wages and profits. The contract of employment was held not abrogated by the employer's insanity, notwithstanding a provision therein, giving him an option to terminate it at any time on payment of a certain sum, even if his insanity would prevent the exercise of the option. R. E. H.

## WILLIAM C. COLEMAN

v.

## NEW YORK, NEW HAVEN, &amp; HARTFORD RAILROAD COMPANY.

*Massachusetts Supreme Judicial Court — May 24, 1918.*

(215 Mass. 45, 102 N. E. 92.)

**Carrier — stoppage in transitu — duration of right.**

1. The right of stoppage in transitu endures so long as the goods remain in possession of the carrier by virtue of the contract of carriage and until there has been an actual or constructive delivery to the consignee.

[See note on this question beginning on page 1374.]

**Evidence — title — consignee in bill of lading.**

2. That one was named as consignee in a bill of lading is some evidence that he has title to the property, and possession of the bill of lading by the consignee is evidence of right to immediate possession of the consignment.

[See 4 R. C. L. 15.]

**Trial — ownership of property — matter of law.**

3. The court cannot rule, as matter of law, that the consignee in possession of the bill of lading is the owner of the consignment and entitled to possession of the property.

[See 26 R. C. L. 1067.]

**Evidence — burden of proof — ownership of consignment.**

4. A consignee in possession of the bill of lading seeking damages from the carrier for refusal to deliver the property to him has the burden of showing ownership and right of possession.

[See 4 R. C. L. 941.]

**Trial — right to stoppage in transitu — determination by court.**

5. The court cannot rule, as matter of law, that the right of stoppage in transitu has ceased upon evidence that

the consignment had arrived at destination, that the consignee had been notified, and that he had paid the charges to a certain date.

[See 24 R. C. L. 147.]

**Evidence — termination of transit — payment of freight.**

6. The payment of freight by the consignee is not decisive evidence of the termination of transit.

[See 24 R. C. L. 147.]

**Carrier — stoppage in transitu — insolvency of buyer.**

7. The right of stoppage in transitu by a seller who has transferred title to the buyer can be exercised only when the buyer is insolvent.

[See 24 R. C. L. 133.]

**Damages — loss of goods by carrier — cost to consignee.**

8. It is not against public policy for a bill of lading to fix the damages for loss at the bona fide invoice price of the goods to the consignee.

[See 4 R. C. L. 791.]

**— when provision of bill of lading abrogated.**

9. It is only where the contract of carriage is repudiated by the carrier that the limitation as to the value of the goods in the bill of lading is abrogated.

**EXCEPTIONS** by defendant to rulings of the Superior Court for Suffolk County (Aiken, J.) made during the trial of an action brought to recover the value of certain goods stored by plaintiff with defendant, which resulted in a verdict for plaintiff. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Joseph Wentworth and Edmund S. Kochersperger, for defendant:

There was no evidence that title to the goods alleged to have been converted was in the plaintiff.

Williston, Sales, p. 894; Gardner v. Lane, 9 Allen, 492, 85 Am. Dec. 779; Hopcraft v. Kittredge, 162 Mass. 1, 37 N. E. 768; Clapp v. Thayer, 112 Mass. 296.

There was evidence that the con-

(115 Mass. 45, 102 N. E. 92.)

signor was justified in exercising his right of stoppage in transitu.

Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607; Potts v. New York & N. E. R. Co. 131 Mass. 455, 41 Am. Rep. 247; Wiseman v. Vandeput, 2 Vern. 203, 23 Eng. Reprint, 732; Durgy Cement & Umber Co. v. O'Brien, 123 Mass. 12; Lee v. Kilburn, 3 Gray, 594; Jeffris v. Fitchburg R. Co. 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 228, 54 L.R.A. 435, 60 N. E. 548; Reynolds v. Boston & M. R. Co. 43 N. H. 580; Ilseley v. Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Norfolk Hardwood Co. v. New York C. & H. R. R. Co. 202 Mass. 160, 88 N. E. 664; Naylor v. Dennie, 8 Pick. 198, 19 Am. Dec. 319; Arnold v. Delano, 4 Cush. 33, 50 Am. Dec. 754; Mohr v. Boston & A. R. Co. 106 Mass. 67; Keeler v. Goodwin, 111 Mass. 490; Whitehead v. Anderson, 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; Coventry v. Gladstone, L. R. 6 Eq. 44, 37 L. J. Ch. N. S. 492, 16 Week. Rep. 837; Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Grout v. Hill, 4 Gray, 361; Stanton v. Eager, 16 Pick. 467; Seymour v. Newton, 105 Mass. 272; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Symns v. Schotten, 35 Kan. 310, 10 Pac. 828; Howell v. Alport, 12 U. C. C. P. 375.

The damages were limited by the agreement in the bill of lading to \$110.29, and the instruction of the court that the plaintiff was entitled to the value which the jury set upon it was error.

Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

Mr. Nicholas Samsel, for plaintiff:

The defendant, to relieve itself of liability, must show that the consignor had the right to stop the goods in transit, and that this right was exercised while the plaintiff was insolvent, and before the transit had come to an end.

Durgy Cement & Umber Co. v. O'Brien, 123 Mass. 12; Schotsman v. Lancashire & Y. R. Co. L. R. 1 Eq. 360; Rogers v. Thomas, 20 Conn. 53; Wilmhurst v. Bowker, 7 Mann. & GG. 882, 135 Eng. Reprint, 358, 8 Scott N. R. 571, 12 L. J. Exch. N. S. 475; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 231, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; Foster v. Frampton, 6 Barn. & C. 107, 108 Eng. Reprint, 392, 9 Dowl. & R. 108, 2 Car.

& P. 469, 5 L. J. K. B. 71, 30 Revised Rep. 255; Ex parte Cooper, L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518, 4 Asp. Mar. L. Cas. 63; Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; McLean v. Breithaupt, 12 Ont. App. Rep. 383; Whitehead v. Anderson, 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; Jeffris v. Fitchburg R. Co. 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; 7 Benjamin, Sales, § 846; 3 Blackburn, Sales, 362; Langstaff v. Stix, 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97; McFetridge v. Piper, 40 Iowa, 627; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 231, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; Buckley v. Furniss, 15 Wend. 137; Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768; Reynolds v. Boston & M. R. Co. 43 N. H. 580; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; Guilford v. Smith, 30 Vt. 49.

The measure of damage is the market value of the packing at the time the defendant returned it to the Pennsylvania railroad.

Union P. R. Co. v. Moyer, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639; Bermel v. New York, N. H. & H. R. Co. 172 N. Y. 639, 65 N. E. 1113; Shelton v. Canadian Northern R. Co. 189 Fed. 153; McKahan v. American Exp. Co. 209 Mass. 270, 35 L.R.A.(N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612; Hutchinson, Carr. 3d ed. § 432; Rosenthal v. Weir, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65; 4 Elliott, Railroads, 2d ed. §§ 1510, 1515; Baltimore & O. R. Co. v. McWhinney, 36 Ind. 436; Lawson, Contracts of Carriers, § 150; Carver, Carr. of Goods by Sea, § 77.

Rugg, Ch. J., delivered the opinion of the court:

This is an action to recover the value of goods. The material facts are that in July, 1909, the plaintiff agreed to purchase from the Lake Shore Rubber Works fifty-five bales of scrap packing weighing 4,400 pounds, the invoice price being 2½ cents per pound. The packing was shipped by the Lake Shore Rubber Works, consignor, from Erie, Pa., to William C. Coleman Company, consignee, Boston, Massachusetts. A bill of lading was issued by the initial carrier and sent by the consignor to the plaintiff. The consignment

reached Boston on July 12th, and the plaintiff was notified by the defendant, who was the final carrier. Soon after the plaintiff went to the freight house of the defendant, examined the goods, and on two occasions, the dates of which are not fixed in the report, took samples. On September 20th he paid the freight and storage charges to that date. On November 5th the defendant sent a notice to the plaintiff to the effect that storage charges were running against the consignment, and requesting disposition of the goods. In October, 1909, the consignor drew on the plaintiff by draft on a Boston bank, which was returned to the consignor with notice that the plaintiff was out of the city. On several earlier occasions demand for payment was made on the plaintiff, but he has never paid for the goods. Late in November, 1909, the consignor requested the initial carrier to return the consignment to it, and on November 29th the defendant, on demand by it, returned the goods to that carrier, which delivered them to the consignor. In the latter part of February or early in March, 1910, the plaintiff demanded the goods of the defendant. There were four counts in the declaration, the first and second being for a conversion, and the third and fourth for breach of contract. The first and fourth counts describe the property which is the subject of the action as 1,397 pounds of piston packing, 1,533 pounds of hydraulic packing, 757 pounds of mixed packing, and 704 pounds of special packing, while the second and third counts describe the property as fifty-five bales of rubber packing. At the close of the evidence, the defendant requested that a verdict be directed in its favor on all the evidence and on each of the counts, and made other requests for rulings,—all of which were refused. Upon this evidence (which is stated to be all that is material) the presiding judge instructed the jury that the plaintiff was entitled to recover, and left for determination by the

jury only the fair market value of the goods.

1. The defendant has argued at length that there was no sufficient evidence that the plaintiff was the owner of the goods. But this contention is not sound. The plaintiff was named as consignee in the bill of lading. This was some evidence of title. *Rosenbush v. Bernheimer*, 211 Mass. 146, 149, 97 N. E. 984, Ann. Cas. 1913A, 1317. Possession of the bill of lading in which the plaintiff was named consignee was at least evidence of right to immediate possession of the goods. The question is not presented whether the contract for the sale of fifty-five bales of scrap packing was complied with by the delivery of such property as was described in counts one and four. The evidence is not reported on this point, and hence one cannot say that it ought to have been ruled either that the plaintiff was not the owner, or that the proof did not correspond with the allegations.

Carrier—stop-  
page in transitu  
—duration of  
right.

2. But, on the other hand, it could not have been ruled as matter of law that the plaintiff was the owner or entitled to possession, which was the effect of the direction of a verdict. The burden of proof in this respect was on the plaintiff. Where one party has the burden of establishing certain facts affirmatively, and a substantial part of the evidence offered is either oral or consists of inferences to be drawn from circumstances, it is rarely that it can be ruled as matter of law that the party upon whom rests the burden of proof is entitled to a verdict. The present is not such a case. As the case must go back for another trial we consider such questions as are likely to arise then, which are raised on this record.

Evidence—title  
—consignee in  
bill of lading.

Trial—owner-  
ship of property  
—matter of law.

3. The question of difficulty is whether the transit was at an end as matter of law, so that the vendor's right of stoppage in transitu

was gone. The abstract statement of the law in this particular has been so thoroughly considered that it is not now open to doubt. The right of stoppage in transitu is one favored by commercial law. It endures so long as the goods remain in the possession of the carrier by virtue of the contract

**Evidence—burden of proof—ownership of consignment.**

of carriage and until there has been an actual or constructive delivery to the consignee. No controversy ordinarily can arise when there has been an actual delivery. A constructive delivery may be found when the carrier has recognized the title of the consignee, has attorned to him, and has agreed to hold the goods "not merely as carrier or as a warehouseman pending a complete delivery to the purchaser, but as agent for the purchaser under a contract made and assented to by both the carrier and the purchaser."

Norfolk Hardwood Co. v. New York C. & H. R. R. Co. 202 Mass. 160, 162, 88 N. E. 664; Brewer Lumber Co. v. Boston & A. R. Co. 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548. It was said in Whitehead v. Anderson, 9 Mees. & W. 518, at pages 534, 535, 152 Eng. Reprint, 219: "Where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account and subject to some new or further order to be given to him," then constructive possession is in the vendee, and the transit is at an end. To the same point see Ex parte Cooper, L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518, 4 Asp. Mar. L. Cas. 63; Bethell v. Clark, L. R. 20 Q. B. Div. 615, 57 L. J. Q. B. N. S. 302, 59 L. T. N. S. 808, 36 Week. Rep. 611, 6 Asp. Mar. L. Cas. 346; Lyons v. Hoffnung, L. R. 15 App. Cas. 391, 397, 59 L. J. P. C. N. S. 79, 63 L. T. N. S. 298, 39

Week. Rep. 390, 6 Asp. Mar. L. Cas. 551.

It could not have been ruled rightly as matter of law that under these principles of law the transit in the case at bar was ended. All that had occurred was the arrival of the goods in Boston and two notices, alike in tenor, sent by the carrier to the consignee, and payment of the charges up to a certain time.

It is not certain that the consignee had accepted the goods. **Trial—right to stoppage in transitu—determination by court.**

After paying the freight charges, if his testimony is taken literally, he had examined the bales at least once, for the taking of samples. The purpose of this is not disclosed, but it is not inconceivable that it may have been to ascertain whether the goods corresponded with the terms of the contract of sale to him. The payment of freight is not a decisive evidence of the termination of the transit.

Naylor v. Dennie, 8 Pick. 198, 19 Am. Dec. 319; Reynolds v. Boston & M. R. Co. 48 N. H. 580. **Evidence—termination of transit—payment of freight.**

4. The question whether the consignor had the right of stoppage in transitu was one of fact upon all the evidence, and not properly one of law. This right of an unpaid vendor to enforce his lien by possessing himself of goods whereof the purchaser has acquired the title, but not the possession, can be exercised only when the buyer is insolvent. By insolvency in this connection is meant not an adjudication by a court of competent jurisdiction, but simply inability to pay debts in the usual course of business. Such inability need not be absolute. It may be proved as a rational inference from convincing facts and circumstances. A business man in good standing commonly meets his obligations at maturity. A failure to pay a single debt might occur under such conditions as to constitute persuasive evidence of general inability to pay

**Carrier—stoppage in transitu—insolvency of buyer.**



one's debts. *Lee v. Kilburn*, 3 Gray, 594, 599, 600; *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12; *Peabody v. Knapp*, 153 Mass. 242, 26 N. E. 696; *Jeffris v. Fitchburg R. Co.* 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; *Williston, Sales*, § 522, and cases there cited. There were circumstances in the case at bar tending to throw such doubt upon the solvency of the plaintiff as to require the submission of that question to the jury.

5. If upon a new trial it should be found that the transit had not ended, and yet the plaintiff was not insolvent so that the vendor had no right of stoppage in transitu, the measure of damages may become important. The bill of lading contained the condition that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee . . .)." It was a reasonable contract to base the damages to be recovered in case of loss upon the

**Damages—loss of goods by carrier—cost to consignee.**

genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract. It comes within the principle declared in *Bernard v. Adams Exp. Co.* 205 Mass. 254, 28 L.R.A. (N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351, which has been adopted in *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 33 Sup.

Ct. Rep. 148, as applicable to interstate commerce under Federal statutes. If the plaintiff at a new trial shows himself entitled to recover for breach of the contract to deliver under the bill of lading he must be limited in damages to the amount therein stipulated. It is only when the contract of carriage is repudiated by the carrier that the limitation as to value of the goods is abrogated. *McKahan v. American Exp. Co.* 209 Mass. 270, 35 L.R.A. (N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612.

Exceptions sustained.

#### NOTE.

The reported case (*COLEMAN v. NEW YORK, N. H. & H. R. Co.* ante, 1366) is illustrative of that general class of cases which hold that a constructive delivery of goods by a carrier to the consignee thereof is sufficient to terminate the consignor's right of stoppage in transitu, as well as of the more specific holding that a carrier pursuant to agreement with the consignee may hold as his agent so as to terminate all right of the consignor to stop the goods. The general question where the right of stoppage in transitu ends is treated in the annotation following *NORTHERN GRAIN CO. v. WIFFLER*, post, 1874, the constructive delivery rule is treated in II. b, 2, and the phase as to the carrier acting as special agent of the vendee is discussed in III. a, 8.

NORTHERN GRAIN COMPANY, Appt.,

v.

JOSEPH J. WIFFLER et al., Respts.

*New York Court of Appeals—March 19, 1918.*

(223 N. Y. 169, 119 N. E. 393.)

**Carrier — when right of stoppage in transitu ceases.**

1. The right of stoppage in transitu is not lost by the vendee's taking his bill of lading to the carrier and having it stamped "Canceled by delivery," if he immediately inspects the goods, refuses to accept them, has

the indorsement canceled, and leaves them in the possession of the carrier, which subsequently sells them for freight charges.

[See note on this question beginning on page 1874.]

**Sale — passing of title — recovery of judgment.**

2. The title to goods sold passes to the purchaser upon recovery by the seller of a judgment for the purchase price.

**Carrier — stoppage in transitu — effect of passing of title.**

3. The right of stoppage in transitu is not defeated by the fact that title to the goods had passed to the vendee. [See 24 R. C. L. 150.]

**APPEAL** by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, in favor of defendants, upon submission of a controversy to determine the rights of the parties in the proceeds of a carload of oats sold on credit by plaintiff to defendant Wiffler, and shipped over the line of the defendant railroad company, to which plaintiff claims to be entitled because of its right of stoppage in transitu. *Reversed.*

The nature of the controversy and material facts are stated in the opinion of the court.

Mr. Richard F. Weeks, with Mr. Mortimer Boyle, for appellant:

The proceeds of the oats were in transit at the time they were stopped, because the railroad company had not acknowledged to defendant Wiffler that it held the oats on his behalf and continued in possession as his bailee.

Williston, Sales, § 528; *Ex parte Cooper*, L. R. 11 Ch. Div. 68, 48 L. J. Bankr. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518, 4 Asp. Mar. L. Cas. 63; *Kendall v. Marshall*, L. R. 1 Q. B. Div. 356, 52 L. J. Q. B. N. S. 313, 43 L. T. N. S. 951, 31 Week. Rep. 597; *Whitehead v. Anderson*, 9 Mees. & W. 518, 11 L. J. Exch. N. S. 157; *Harris v. Pratt*, 17 N. Y. 249; *Holbrook v. Vose*, 6 Bosw. 76; *Covell v. Hitchcock*, 23 Wend. 611; *Hutchinson*, Carr. § 415; *Benjamin*, Sales, §§ 1154 et seq.; *Blackburn*, Sales, § 248; *Re New York House Furnishing Goods Co.* 95 C. C. A. 140, 169 Fed. 612; *Brewer Lumber Co. v. Boston & A. R. Co.* 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; *Godts v. Rose*, 33 Eng. L. & Eq. Rep. 268; *Stevens v. Wheeler*, 27 Barb. 662.

The action brought by the plaintiff against Wiffler upon the draft, and the recovery thereon, had no effect upon the right of stoppage in transitu.

Williston, Sales, § 520; *Harris v. Pratt*, 17 N. Y. 249; *Holbrook v. Vose*, 6 Bosw. 76; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Houlditch v. Desanges*, 2 Starkie, 337, 20 Revised Rep. 692;

*Scrivener v. Great Northern R. Co.* 19 Week. Rep. 388; *Wade v. Moffett*, 21 Ill. 110, 74 Am. Dec. 79.

Messrs. Brennan, Curran, & Bleakley, for respondents Wiffler et al:

Title to the oats and the proceeds of their sale vested in the defendant Wiffler, and his rights therein passed to the defendant Dana, by virtue of the assignment.

*Westfall v. Peacock*, 63 Barb. 209.

Plaintiff waived his right to stoppage in transit and the same was never revived.

*Benjamin*, Sales, § 846; *Stevens v. Wheeler*, 27 Barb. 658; *Northern Grain Co. v. Wiffler*, 168 App. Div. 95, 158 N. Y. Supp. 723.

Mr. Alexander S. Lyman for respondent railroad.

**Hiscock, Ch. J.**, delivered the opinion of the court:

This appeal involves a consideration of the right of stoppage in transitu of goods sold on credit and shipped by a common carrier. The question of the existence of the right is to be determined upon an agreed statement of facts.

Plaintiff sold to one Wiffler, on credit, a carload of oats, which were shipped to the latter over the line of the defendant railroad company. A bill of lading covering the shipment was forwarded with a draft for the purchase price of the oats, and upon acceptance by the vendee of the draft the bill of lading was de-

livered to him. He presented the same at the office of the defendant railroad company, where it was received and marked "Canceled by delivery." "Thereupon" the vendee examined and was dissatisfied with the condition of the oats, and "thereupon" withdrew the bill of lading from the railroad company, caused the words "Canceled by delivery" to be stricken from the face of the bill, and "thereupon" returned it to the plaintiff with the statement that he refused to accept the oats or take delivery thereof by reason of their condition, and that he rejected the same.

Nothing more was done by which there is claimed to have been accomplished a delivery to or acceptance by the vendee of the oats. These, after remaining in a car in the possession of the railroad company for six months, were sold at public auction to satisfy its lien for transportation charges, and the surplus of the proceeds over such charges was held by the railroad company, and is the subject of the present controversy.

The draft which had been accepted by the vendee was not paid at maturity, and an action was commenced against him thereon by the vendor, and a judgment recovered which has never been satisfied. In such action the vendee alleged that "the draft was given by defendant in payment of a certain carload of oats which plaintiff sold to the defendant and that the same were good, marketable, and usable (thus written in the agreed statement), and that when defendant received said carload the same were old and musty, and could not be sold and used, and were of no value whatsoever, and for that reason the note was given without consideration." Intermediate the commencement of this action and entry of judgment, the vendee made an assignment for the benefit of creditors to the defendant Dana, and thereafter plaintiff surrendered to the defendant railroad company for cancelation the bill of lading before mentioned, and

served upon it notice asserting the exercise of its right of stoppage in transitu of said oats, claiming that the latter had never been delivered to the vendee.

In the arguments addressed to us there is, of course, no dispute about the general principles applicable to the exercise of the right of stoppage in transitu, and no serious question is presented but that under these principles plaintiff had the right to stop delivery of the oats to its non-paying insolvent vendee, provided they still remained in the possession of the carrier under its original contract of transportation, and had not been delivered either actually or constructively. It is true that some little attempt is made by respondents' counsel to argue the proposition that the surplus proceeds of the oats do not stand in the place of the latter, but we do not regard this as worth discussion. Some attention also has been paid to the fact that plaintiff recovered a judgment against its vendee for the purchase price of the oats, but this circumstance does not seem to be of importance. It may be conceded that by recovery of such judgment the title to the oats passed to the vendee, and that under ordinary conditions the latter would have been entitled to take possession of them. This, however, does not defeat the right which plaintiff is now seeking to exercise.

Sale—passing of title—recovery of judgment.

There has been, at times, debate whether the exercise of a right of stoppage in transitu was the assertion of a right in the nature of a lien against property whereof another held title, or amounted to a rescission of a contract. The preponderance of authority, we think, sustains the former theory. *Babcock v. Bonnell*, 80 N. Y. 244; *Coleman v. New York, N. H. & H. R. Co.* 215 Mass. 45, 49, ante, 1366, 102 N. E. 92. But however this may have been, it is now provided by § 134 of article 5 of the Personal Property

Carrier—stoppage in transitu—effect of passing of title.

Law (Consol. Laws, chap. 41, amended by Laws 1911, chap. 571), relating to sales of goods, that "subject to the provisions of this article, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has . . . (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them."

Thus we come to the question, stripped of accidental conditions, whether plaintiff could and did successfully exercise the right asserted by it. The tests by which to decide this question are especially found in two sections of the statute already referred to. Section 138 provides: "Subject to the provisions of this article, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit. . . ." Section 139 then tells when goods are to be considered in transit, within the meaning of the prior section. It says that they are thus in transit—

"(a) From the time when they are delivered to a carrier by land or water, . . . until the buyer . . . takes delivery of them from such carrier . . . ;

"(b) If the goods are rejected by the buyer, and the carrier . . . continues in possession of them, even if the seller has refused to receive them back."

And, throwing some light on the interpretation of the clauses stating when goods are in transit, it likewise states when they are to be regarded as not in transit. The same section already quoted from enacts that they are not in transit, "if, after the arrival of the goods at the appointed destination, the carrier . . . acknowledges to the buyer . . . that he holds the goods on his behalf and continues in possession of them as bailee for the buyer. . . ."

The only debatable question under the tests thus prescribed is the one whether the goods had been delivered by the carrier to the vendee. It seems to us that —when right of stoppage in transitu ceases.

The facts determinative of that question have already been stated, and need not be repeated. Referring back to them, it may be conceded that if the vendee, after taking his bill of lading to the carrier and permitting it to be marked "Canceled by delivery," had stopped, there would have been a constructive delivery. Also, if he had allowed the matter to rest in that situation for a substantial time before doing anything to recall this act, it might be necessary to submit to the jury the question whether a delivery had not been so consummated that it could not thereafter be avoided. But he pursued neither of these courses. After the stamping of the bill of lading, he "thereupon," that is, immediately, examined the oats, and made what, if then permissible, was a clear and decisive refusal of acceptance of them from the buyer and of delivery from the carrier. It is only by separating these steps and regarding them as divisible and distinct transactions that a delivery can be made out. We do not think they ought to be thus separated, but that they were so closely connected in point of time and otherwise that they should be given the effect of one connected transaction. This being done, it is clear that there was no delivery.

We think that the subsequent history of the shipment confirms this view. It remained in the physical possession of the carrier for months. There was no suggestion of any agreement under which it was thus held by the latter as agent for bailee for the vendee. On the other hand, that which was done by the carrier, and, so far as appears, without objection or question by the parties, shows that the former was holding the oats under its original contract of shipment. As has been stated, it sold the oats for the purpose of

satisfying its lien for freight charges, and this it could not have done if by delivery it had surrendered its possession as carrier. *Bigelow v. Heaton*, 4 Denio, 496; *Pennsylvania Steel Co. v. Georgia R. & Bkg. Co.* 94 Ga. 636, 21 S. E. 577. While in our opinion the facts which we have discussed lead necessarily, and under simple principles, to the conclusion which we have adopted, general support for that conclusion may be found, if necessary, in the discussion of the subject of stoppage in transitu contained in *Brewer Lumber Co. v. Boston & A. R. Co.* 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; *Coleman v. New York, N. H. & H. R. Co.* 215 Mass. 45, ante, 1366, 102 N. E. 92; *Bolton v. Lancashire & Y. R. Co.* L. R. 1 C. P. 431, 35 L. J. C. P. N.

S. 137, 12 Jur. N. S. 317, 13 L. T. N. S. 764, 14 Week. Rep. 430; *Re McLaren*, L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518.

In accordance with these views the judgment should be reversed and judgment directed in favor of plaintiff against the defendant New York Central & Hudson River Railroad Company, for the sum of \$287.85, with any interest received thereon by said railroad company, together with further judgment against the defendant Dana as trustee of its disbursements incurred in this court and in the Appellate Division.

Judgment accordingly.

Chase, Hogan, and Crane, JJ., concur. Collin and Cuddeback, JJ., concur in result. McLaughlin, J., not sitting.

## ANNOTATION.

### When right of stoppage in transitu terminates.

#### I. General rule, 1374.

#### II. Delivery to vendee:

##### a. Actual delivery terminates:

1. Generally, 1382.
2. Reshipment by vendee, 1385.
3. Shipment intercepted, 1385.

##### b. Kind of delivery necessary:

1. Generally, 1386.
2. Constructive delivery sufficient:

(a) Rule stated, 1386.

(b) Application of rule:

(1) "Destination" governed by intention of parties, 1388.

(2) Carrier holding as such, 1389.

(3) Carrier holding as warehouseman, 1390.

(4) Vendee's agent or representative, 1391.

8. Doctrine that actual delivery is necessary, 1391.

##### c. Partial delivery, 1392.

#### I. General rule.

It may be stated as a general and almost uncontroverted rule of law that

#### III. Who may accept or take possession:

##### a. Agents:

1. In general, 1394.

2. General and forwarding agents 1394.

3. Carrier or representative as special agent of vendee, 1403.

4. Master of ship owned, chartered, or designated by vendee, 1405.

b. Customs officials, 1407.

c. Under attachment, garnishment, or execution, 1408.

d. Executors and administrators, 1410.

e. Trustees in bankruptcy and assignees in insolvency, 1411.

#### IV. Partial payment; taking commercial paper or security, 1412.

#### V. Sale or transfer by original vendee:

a. Bona fide transfer terminates, 1412.

b. Sufficiency of consideration, 1420.

c. Sale of part of consignment, 1422.

d. Assignment of duplicate bill of lading, 1422.

the right of stoppage in transitu continues while the goods are in the hands of the carrier and terminates

when the consignee or his bona fide transferee obtains lawful possession of the goods shipped. The following cases, which fall within the scope of the present annotation, support this rule:

**United States.** — *Schmidt v. The Pennsylvania* (1880) 4 Fed. 548, affirming on this point (1878) 7 W. N. C. 98; *Sheppard v. Newhall* (1898) 4 C. C. A. 352, 7 U. S. App. 544, 54 Fed. 306; *Re New York House Furnishing Goods Co.* (1909) 95 C. C. A. 140, 169 Fed. 612; *Re W. A. Paterson Co.* (1911) 34 L.R.A.(N.S.) 31, 108 C. C. A. 493, 186 Fed. 629; *Walter v. Ross* (1909) 2 Wash. C. C. 283, Fed. Cas. No. 17,122; *Ryberg v. Snell* (1809) 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Conyers v. Ennis* (1821) 2 Mason, 236, Fed. Cas. No. 3,149; *Barrett v. Goddard* (1822) 8 Mason, 107, Fed. Cas. No. 1046; *Burnham v. Winsor* (1843) Fed. Cas. No. 2,180; *Biggs v. Barry* (1855) 2 Curt. C. C. 259, Fed. Cas. No. 1,402; *Audenreid v. Randall* (1868) 3 Cliff. 99, Fed. Cas. No. 644; *Blum v. The Caddo* (1870) 1 Woods, 64, Fed. Cas. No. 1,573; *Parker v. Byrnes* (1871) 1 Low. Dec. 539, Fed. Cas. No. 10,728; *Re Foot* (1874) 11 Blatchf. 530, Fed. Cas. No. 4,907, 11 Nat. Bankr. Reg. 153; *Lesassier v. The Southwestern* (1874) 2 Woods, 35, Fed. Cas. No. 8,274; *Re Bearns* (1878) 18 Nat. Bankr. Reg. 500, Fed. Cas. No. 1,191; *St. Paul Roller-Mill Co. v. Great Western Despatch Co.* (1886) 27 Fed. 434; *The Natchez* (1887) 31 Fed. 615; *Re M. Burke & Co.* (1905) 140 Fed. 971; *Re Talbot & Poggi* (1911) 185 Fed. 986; *Re Dancy Hardware & Furniture Co.* (1912) 198 Fed. 386, affirmed without opinion in (1913) 119 C. C. A. 276, 201 Fed. 1023; *Willis v. Glenwood Cotton Mills* (1912) 200 Fed. 301; *Re White* (1913) 205 Fed. 393; *Re J. F. Growe Constr. Co.* (1919) 256 Fed. 907.

**Alabama.**—*Loeb v. Peters* (1879) 68 Ala. 243, 35 Am. Rep. 17; *Wolf v. Shepherd* (1893) 103 Ala. 241, 15 So. 519; *Bayonne Knife Co. v. Umbenhauer* (1894) 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. 175.

**Arkansas.**—*Mason v. Wilson* (1884) 43 Ark. 172; *Jacobs v. Bentley* (1908)

86 Ark. 186, 126 Am. St. Rep. 1086, 110 S. W. 594.

**California.** — *Markwald v. Their Creditors* (1857) 7 Cal. 213; *Blackman v. Pierce* (1863) 23 Cal. 508; *Jones v. Earl* (1869) 37 Cal. 630, 99 Am. Dec. 338; *Newhall v. Central P. R. Co.* (1876) 51 Cal. 845, 21 Am. Rep. 713; *Grange Co. v. Farmers' Union & Mill Co.* (1906) 8 Cal. App. 519, 86 Pac. 615.

**Colorado.**—*Weber v. Baessler* (1893) 3 Colo. App. 459, 34 Pac. 261; *First Nat. Bank v. Schmidt* (1895) 6 Colo. App. 216, 40 Pac. 479.

**Connecticut.** — *Woodruff v. Noyes* (1848) 15 Conn. 335; *Rogers v. Thomas* (1849) 20 Conn. 53; *Aguirre v. Parmelee* (1853) 22 Conn. 473.

**Dakota.** — *Powell v. McKechnie* (1884) 3 Dak. 319, 19 N. W. 410.

**Florida.**—*Smith v. Gail* (1902) 44 Fla. 803, 33 So. 527.

**Georgia.**—*Macon & W. R. Co. v. Meader* (1880) 65 Ga. 705; *Ocean S. S. Co. v. Ehrlich* (1891) 88 Ga. 502, 30 Am. St. Rep. 164, 14 S. E. 707; *Branan Bros. v. Atlanta & W. P. R. Co.* (1899) 108 Ga. 70, 75 Am. St. Rep. 26, 33 S. E. 836.

**Hawaii.**—*Green v. Janion* (1861) 2 Haw. 428.

**Illinois.**—*Lake Shore & M. S. R. Co. v. National Live Stock Bank* (1895) 59 Ill. App. 451, reversed on other grounds in (1899) 178 Ill. 506, 53 N. E. 326; *Delta Bag Co. v. Kearns* (1904) 112 Ill. App. 269; *Bauer v. Illinois C. R. Co.* (1912) 175 Ill. App. 346.

**Indiana.** — *Rogers v. Schneider* (1895) 13 Ind. App. 23, 41 N. E. 71.

**Iowa.**—*Cox v. Burns* (1855) 1 Iowa, 64; *O'Neil v. Garrett* (1858) 6 Iowa, 480; *Alsberg v. Latta* (1870) 30 Iowa, 442; *McFetridge v. Piper* (1875) 40 Iowa, 627; *Clapp Bros. & Co. v. Peck* (1880) 55 Iowa, 270, 7 N. W. 587; *Greve & Co. v. Dunham* (1882) 60 Iowa, 108, 14 N. W. 130; *Felix v. Brandstetter* (1902) — Iowa, —, 89 N. W. 971.

**Kansas.** — *Rucker v. Donovan* (1874) 13 Kan. 251, 19 Am. Rep. 84; *A. B. Symms & Co. v. Wm. Schotten & Co.* (1886) 35 Kan. 310, 10 Pac. 828.

**Kentucky.** — *Ford & Warren v. Sproule, A. & Co.* (1829) 2 A. K.

Marsh. 528, 12 Am. Dec. 439; *Hause v. Judson* (1836) 4 Dana, 7, 29 Am. Dec. 377; *Secomb v. Nutt* (1853) 14 B. Mon. 324; *Wood v. Yeatman* (1854) 15 B. Mon. 270; *Lane v. Robinson* (1857) 18 B. Mon. 623.

**Louisiana.**—*Hepp v. Glover* (1840) 15 La. 461, 35 Am. Dec. 206; *Blum v. Marks* (1869) 21 La. Ann. 268, 99 Am. Dec. 725; *Williams v. Dotterer* (1903) 111 La. 822, 35 So. 921.

**Maine.**—*Newhall v. Vargas* (1836) 13 Me. 93, 29 Am. Dec. 489; *Lee v. Kimball* (1858) 45 Me. 172; *Tufts v. Sylvester* (1887) 79 Me. 213, 1 Am. St. Rep. 303, 9 Atl. 357; *Johnson v. Eveleth* (1899) 93 Me. 306, 48 L.R.A. 50, 45 Atl. 35.

**Maryland.** — *O'Brien v. Norris* (1860) 16 Md. 122, 77 Am. Dec. 284; *Thompson v. Baltimore & O. R. Co.* (1868) 23 Md. 396; *McElroy v. Seery* (1884) 61 Md. 389, 48 Am. Rep. 110.

**Massachusetts.** — *Lane v. Jackson* (1809) 5 Mass. 157; *Stubbs v. Lund* (1811) 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs* (1812) 9 Mass. 65, 6 Am. Dec. 29; *Scholfield v. Bell* (1817) 14 Mass. 40; *Naylor v. Dennie* (1829) 8 Pick. 198, 19 Am. Dec. 319; *Rowley v. Bigelow* (1832) 12 Pick. 307, 23 Am. Dec. 607; *Stanton v. Eager* (1835) 16 Pick. 467; *Arnold v. Delano* (1849) 4 Cush. 33, 50 Am. Dec. 754; *Grout v. Hill* (1855) 4 Gray, 361; *Seymour v. Newton* (1870) 105 Mass. 272; *Mohr v. Boston & A. R. Co.* (1870) 106 Mass. 67; *Durgy Cement & Umber Co. v. O'Brien* (1877) 123 Mass. 12; *E. & G. Brooke Iron Co. v. O'Brien* (1883) 135 Mass. 442; *Brewer Lumber Co. v. Boston & A. R. Co.* (1901) 179 Mass. 228, 54 L.R.A. 485, 88 Am. St. Rep. 875, 60 N. E. 548; *Norfolk Hardwood Co. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 160, 88 N. E. 664; *COLEMAN v. NEW YORK, N. H. & H. R. Co.* (reported herewith) ante, 1866.

**Michigan.**—*White v. Mitchell* (1878) 38 Mich. 390; *Muskegon Booming Co. v. Underhill* (1880) 43 Mich. 629, 5 N. W. 1073; *Kingman & Co. v. Denison* (1891) 84 Mich. 608, 11 L.R.A. 347, 22 Am. St. Rep. 711, 48 N. W. 26.

**Minnesota.** — *Lewis v. Sharvey* (1894) 58 Minn. 464, 59 N. W. 1096;

*E. L. Welch Co. v. Lahart Elevator Co.* (1913) 122 Minn. 432, 142 N. W. 828.

**Mississippi.** — *Morris v. Shryock* (1874) 50 Miss. 590; *Langstaff v. Stix* (1886) 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97; *Dreyfus v. Mayer* (1891) 69 Miss. 282, 12 So. 267.

**Missouri.**—*Heinz v. Railroad Transfer Co.* (1884) 82 Mo. 233; *Schwabacher v. Kane* (1883) 13 Mo. App. 126; *Estey v. Truxel* (1887) 25 Mo. App. 238; *Klein v. Fischer* (1888) 30 Mo. App. 568; *Scott Bros. v. William B. Grimes Dry-Goods Co.* (1892) 48 Mo. App. 521; *O'Neal v. Day* (1893) 53 Mo. App. 139; *Shoninger v. Day* (1893) 53 Mo. App. 147, on subsequent appeal in (1895) 61 Mo. App. 366; *Dymock v. Missouri, K. & T. R. Co.* (1893) 54 Mo. App. 400, on subsequent appeal in (1896) 67 Mo. App. 97; *Evans Garden Cultivator Co. v. Missouri, K. & T. R. Co.* (1896) 64 Mo. App. 305; *Ætna Nat. Bank v. Union P. R. Co.* (1897) 69 Mo. App. 246; *Letts-Spencer Grocery Co. v. Missouri P. R. Co.* (1909) 138 Mo. App. 352, 122 S. W. 10; *Wheless v. Meyer-Schmid Grocer Co.* (1909) 140 Mo. App. 572, 120 S. W. 708; *F. H. Smith Co. v. Louisville & N. R. Co.* (1909) 145 Mo. App. 394, 122 S. W. 342.

**Montana.**—*Walsh v. Blakely* (1886) 6 Mont. 194, 9 Pac. 809.

**Nebraska.**—*Chicago, B. & Q. R. Co. v. Painter* (1884) 15 Neb. 394, 19 N. W. 488; *United States Wind Engine & Pump Co. v. Oliver* (1884) 16 Neb. 612, 21 N. W. 463; *Schuster v. Carson* (1890) 28 Neb. 612, 44 N. W. 734; *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* (1898) 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670.

**Nevada.**—*More v. Lott* (1878) 13 Nev. 376; *Fenkhausen v. Fellows* (1889) 20 Nev. 312, 4 L.R.A. 732, 21 Pac. 886.

**New Hampshire.**—*Atkins v. Colby* (1849) 20 N. H. 154; *Reynolds v. Boston & M. R. Co.* (1862) 43 N. H. 580; *Inslee v. Lane* (1876) 57 N. H. 454; *Hall v. Dimond* (1885) 63 N. H. 565, 3 Atl. 423.

**New Jersey.**—*Shepard & M. Lumber Co. v. Burroughs* (1898) 62 N. J. L. 469, 41 Atl. 695.

**New York.**—*Hollingsworth v. Napier* (1805) 3 Caines, 182, 2 Am. Dec.

208; *Lupin v. Marie* (1830) 2 Paige, 169, affirmed in (1830) 6 Wend. 77, 21 Am. Dec. 256; *Buckley v. Furniss* (1836) 15 Wend. 137, on subsequent appeal in (1837) 17 Wend. 504; *Covell v. Hitchcock* (1840) 23 Wend. 611; *Mettram v. Heyer* (1845) 1 Denio, 483, affirmed in (1846) 5 Denio, 629; *Harris v. Pratt* (1853) 17 N. Y. 249, affirming (1857) 6 Duer, 606; *Sturtevant v. Orser* (1862) 24 N. Y. 533, 82 Am. Dec. 321; *Cross v. O'Donnell* (1871) 44 N. Y. 661, 4 Am. Rep. 721; *Becker v. Hallgarten* (1881) 86 N. Y. 167; *NORTHERN GRAIN Co. v. WIFFLER* (reported herewith) ante, 1370; *Rosenthal v. Dessau* (1877) 11 Hun, 49; *Gass v. Astoria Veneer Mills* (1909) 134 App. Div. 184, 118 N. Y. Supp. 982; *Gass v. Southern P. Co.* (1912) 152 App. Div. 412, 137 N. Y. Supp. 261; *Ives v. Polak* (1857) 14 How. Pr. 411; *Stevens v. Wheeler* (1858) 27 Barb. 658; *Blossom v. Champion* (1858) 23 Barb. 217; *Hauterman v. Bock* (1859) 1 Daly, 386; *Holbrook v. Vose* (1860) 6 Bosw. 76; *Pequeno v. Taylor* (1862) 33 Barb. 375; *Fraschieris v. Henriques* (1868) 6 Abb. Pr. N. S. 261; *Clark v. Lynch* (1871) 4 Daly, 83.

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**Oregon.** — *Frame v. Oregon Liquor Co.* (1906) 48 Or. 272, 85 Pac. 1009, rehearing denied in (1906) 48 Or. 276, 86 Pac. 791.

**Pennsylvania.** — *Bolia v. Huffnagle* (1828) 1 Rawle, 9; *Bell v. Moss* (1840) 5 Whart. 189; *Donath v. Broomhead* 7 A.L.R.—87.

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**Tennessee.** — *Curry v. Roulstone* (1809) 2 Overt. 110; *Boyd v. Mosely* (1853) 2 Swan, 661; *Treadwell v. Aydlett* (1872) 9 Heisk. 383; *Bloomington v. Memphis & C. R. Co.* (1881) 6 Lea, 616; *Mississippi Mills v. Union & Planters Bank* (1882) 9 Lea, 314.

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**Wisconsin.** — *Hoover v. Tibbits* (1860) 13 Wis. 79; *Sherman v. Rugee* (1882) 55 Wis. 846, 18 N. W. 241; *Harding Paper Co. v. Allen* (1886) 65 Wis. 576, 27 N. W. 329; *Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 33



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Booker (1848) 2 Exch. 691, 154 Eng. Reprint, 668, 18 L. J. Exch. N. S. 9; M'Ewan v. Smith (1849) 2 H. L. Cas. 309, 9 Eng. Reprint, 1109, 13 Jur. 265; Bird v. Brown (1850) 4 Exch. 786, 154 Eng. Reprint, 1433, 14 Jur. 132, 19 L. J. Exch. N. S. 154, 23 Eng. Rul. Cas. 422; Turner v. Liverpool Docks (1851) 6 Exch. 543, 155 Eng. Reprint, 659, 20 L. J. Exch. N. S. 393, 4 Eng. Rul. Cas. 725; Ex parte Cross (1851) Fonbl. Eq. 215, as cited in 12 Mews, Eng. Cas. Law Dig. col. 620, and 25 Laws of England (Halsbury) p. 255; Gurney v. Behrend (1854) 3 El. & Bl. 622, 118 Eng. Reprint, 1275, 23 L. J. Q. B. N. S. 265, 18 Jur. 856, 2 Week. Rep. 425; Heinekey v. Earle (1857) 8 El. & Bl. 410, 120 Eng. Reprint, 153, 4 Jur. N. S. 848, 6 Week. Rep. 637, 28 L. J. Q. B. N. S. 79; Straker v. Ewing (1865) 34 Beav. 147, 55 Eng. Reprint, 590, 11 Jur. N. S. 127, 11 L. T. N. S. 588, 13 Week. Rep. 286; Smith v. Hudson (1865) 6 Best & S. 431, 122 Eng. Reprint, 1254, 34 L. J. Q. B. N. S. 145, 12 L. T. N. S. 377, 11 Jur. N. S. 622, 13 Week. Rep. 683; Cooper v. Bill (1865) 3 Hurlst. & C. 722, 159 Eng. Reprint, 715, 34 L. J. Exch. N. S. 161, 12 L. T. N. S. 466; Bolton v. Lancashire & Y. R. Co. (1866) L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; Schotsmans v. Lancashire & Y. R. Co. (1867) L. R. 2 Ch. 332, 36 L. J. Ch. N. S. 361, 16 L. T. N. S. 189, 15 Week. Rep. 537; Berndston v. Strang (1868) L. R. 3 Ch. 588, 37 L. J. Ch. N. S. 665, 19 L. T. N. S. 40, 16 Week. Rep. 1025; Coventry v. Gladstone (1868) L. R. 6 Eq. 44, 37 L. J. Ch. N. S. 492, 16 Week. Rep. 837; Fraser v. Witt (1868) L. R. 7 Eq. 64, 17 Week. Rep. 92, 19 L. T. N. S. 440; Rodger v. Comptoir d'Escompte de Paris (1869) L. R. 2 P. C. 398, 5 Moore, P. C. C. N. S. 538, 16 Eng. Reprint, 618, 38 L. J. P. C. N. S. 30, 21 L. T. N. S. 33, 17 Week. Rep. 468; Ex parte Gouda (1872) 20 Week. Rep. 981; Ex parte Catling (1873) 29 L. T. N. S. 431; Ex parte Gibbe (1875) L. R. 1 Ch. Div. 101, 24 Week. Rep. 298, 45 L. J. Bankr. N. S. 10, 33 L. T. N. S. 479; Pooley v. Great Eastern R. Co. (1876) 34 L. T. N. S. 537; Ex parte Watson (1877) L. R. 5 Ch. Div. 35, 25 Week.

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Cas. 202; Reddall v. Union Castle Mail S. S. Co. (1914) 112 L. T. N. S. 910.

Canada.—Barnes v. Lopez (1864) Newfoundl. Rep. 89; Burr v. Wilson (1855) 13 U. C. Q. B. 478; Lewis v. Mason (1875) 36 U. C. Q. B. 590; Ascher v. Grand Trunk R. Co. (1875) 36 U. C. Q. B. 609; Wiley v. Smith (1877) 1 Ont. App. Rep. 179, affirmed in (1877) 2 Can. S. C. 1; Wilds v. Smith (1877) 2 Ont. App. Rep. 8, reversing (1877) 41 U. C. Q. B. 136; Davis v. McWhirter (1877) 40 U. C. Q. B. 598; McLean v. Breithaupt (1884) 12 Ont. App. Rep. 383; Morgan Envelope Co. v. Boustead (1885) 7 Ont. Rep. 697; Brassert v. McEwen (1885) 10 Ont. Rep. 179; Anderson v. Fish (1888) 16 Ont. Rep. 476, affirmed on opinion below in (1890) 17 Ont. App. Rep. 28; Couture v. McKay (1889) 6 Manitoba L. R. 273; Mollison v. Lockhart (1891) 30 N. B. 398.

Ireland.—Orr v. Murdock (1851) 2 Ir. C. L. Rep. 9; Kemp v. Canavan (1864) 15 Ir. C. L. Rep. 216.

Scotland.—Mechan & Sons v. North Eastern R. Co. (1911) 48 Scot. L. R. 987. See also Reid v. Snowball Co. (1905) 7 F. (Scot. Ct. Sess.) 35, as set out in 3 Butterworths' Ten Years' Dig. col. 350.

In *Fraser v. Witt* (1868) L. R. 7 Eq. (Eng.) 64, Lord Romilly, M. R., said: "The doctrine of stoppage in transitu may be shortly expressed thus: It is the right which the seller of goods has, after they have been sold and despatched to the buyer, to stop them at any time before they have been delivered to the buyer, if the buyer has not paid for the goods, and has, in the meantime, become insolvent. The real and indeed the only question in all these cases is whether the transitus is over; in other words, whether the goods have been delivered to the buyer; if they have, then the right to stop is gone, and the only remedy of the seller is by action at law, or by proof against the estate of the buyer. . . . The doctrine of stoppage in transitu is that a vendor may stop the goods which he has sold to, and which have become the property of, the purchaser, at any time before they have got into

his possession, if he has become insolvent."

In *Kendall v. Marshall* (1888) L. R. 11 Q. B. Div. (Eng.) 356, Brett, L. J., explained the theory of stoppage in transitu and the extent of that right as follows: "The doctrine as to stoppage in transitu is not founded on any contract between the parties; it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop in transitu was originally proved in evidence as part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in equity. It is analogous to, but not the same as, the right of an unpaid vendor to retain the goods when the purchaser has become insolvent. If there has been a delivery of goods to the vendee and an appropriation of them to his own use, the right of stoppage does not exist; in a case of that kind, the property in and the possession of the goods have passed to the vendee; but where the goods are in the course of transit from the vendor to the vendee, although the property has passed to the vendee, and although he has the constructive possession of them, the right to stop prevails. Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a constructive possession exists in the vendee: nevertheless, whilst the goods are in the hands of the carrier, they are in the course of transit, and the right of stoppage may arise. There is another kind of constructive possession by the vendee; that is, when the goods have been delivered by the carrier, and have reached the hands of an agent of the vendee, to be held at his disposal. When the goods are in actual transit, hardly any difficulty occurs in determining the rights of the parties. But there may be a difficulty when the goods are in the hands of an agent, to be held by him at the disposal of the vendee: the goods may not have reached the end of the transit as originally contemplated, they may have come only to an intermediate stage. The question is not necessarily solved

by what was said before the contract was entered into; but what was said may be a material fact to be considered, because it may determine where the transit ended. I think that the definition of the transitus is well given in *Abbott on Merchants, Ship & Seamen*, pt. 3, chap. 9, 5th ed. p. 374, and pt. 4, chap. 10, 12th ed. p. 409. The principle is there stated in the following terms: 'Goods are deemed to be in transitu not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee.' It is clear that the author, in the latter part of this definition, is alluding to the second kind of constructive possession; if the wording of the latter clause may be enlarged, I should prefer it to stand thus: 'But also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly.'"

And in *Weber v. Baessler* (1893) 3 Colo. App. 459, 34 Pac. 261, the court, in discussing when the right of stoppage in transitu is terminated, among other things, said: "This right must be exercised while the goods are on their passage and before possession is taken by the vendee; and if they have ceased to be in transit, and have come into the hands of the vendee or of his agent for custody, the vendor's right of stoppage is defeated. The goods are regarded as in transit until they have passed out of the possession of every intermediate agent and have been actually delivered to the consignee; and until the transit has been terminated by such actual delivery, the right of the vendor to reclaim the goods is unimpaired."

In *Re Gurney* (1892) 7 Asp. Mar. L. Cas. (Eng.) 249, the court said: "The question in very nearly all cases of stoppage in transitu is, speaking generally, one of fact. The law, speaking generally, as applicable to cases of this kind, is that the right of the unpaid vendor is a right which continues in him, notwithstanding that he has parted with the property in the goods during their transit, until they reach the possession of the purchaser. The first thing to be ascertained is, What was the transit of these goods; and the next is, Whether that transit has been determined by the purchaser taking possession."

And as said by Sir H. M. Cairns, L.J., in *Schotsmans v. Lancashire & Y. R. Co.* (1867) L. R. 2 Ch. (Eng.) 332: "The essential feature of a stoppage in transitu, as has been remarked in many of the cases, is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them."

So in *Ex parte Rosevear China Clay Co.* (1879) L. R. 11 Ch. Div. (Eng.) 560, James, L. J., in the English court of appeal, said: "The authorities show that the vendor has a right to stop in transitu until the goods have actually got home into the hands of the purchaser, or of someone who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser, or of someone who can be treated as his servant or agent, and not in the hands of a mere intermediary. . . . When the vendor knows that he is delivering the goods to someone as carrier, who is receiving them in that character, he delivers them with the implied right which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier."

In *Orr v. Murdock* (1851) 2 Ir. C. L. Rep. 9, Pigot, C. B., stated the test or rule as follows: "Where anything remains to be done, either by the vendee to complete the contract, or by the

vendor to transfer the possession, the right of stoppage in transitu exists in the vendor."

And the rule is that the laches of the vendor in attempting to enforce his right of stoppage in transitu does not affect the right so long as the goods are still in transitu at the time the stop order is given. *Schwabacher v. Kane* (1883) 13 Me. App. 126; *Buckley v. Furniss* (1836) 15 Wend. (N. Y.) 137; *Morley v. Hay* (1828) 3 Mann. & R. (Eng.) 696, 7 L. J. K. B. 104. In *Buckley v. Furniss* (N. Y.) supra, the court said: "I am not aware that it has ever been held that the mere lapse of time was a circumstance of any importance in determining the right of the vendor to resume possession of the goods, provided the right be exercised before the transitus is at an end. As between the vendor and vendee, no reason is perceived why this consideration should be permitted to affect the question."

## II. Delivery to vendee.

### a. Actual delivery terminates.

#### 1. Generally.

It is universally conceded that consignors lose any right they may have had to stop a consignment of goods in transitu by an actual delivery thereof by the carrier to the consignee. The following cases are illustrative of those in which it has been held that actual delivery to the consignee terminates the vendor's right of stoppage in transitu:

United States. — *Sheppard v. Newhall* (1893) 4 C. C. A. 352, 7 U. S. App. 544, 54 Fed. 306; *Re W. A. Paterson Co.* (1911) 84 L.R.A.(N.S.) 31, 108 C. C. A. 493, 186 Fed. 629; *Conyers v. Ennis* (1821) 2 Mason, 236, Fed. Cas. No. 3,149; *Barrett v. Goddard* (1822) 3 Mason, 107, Fed. Cas. No. 1,046; *Audenried v. Randall* (1868) 3 Cliff 99, Fed. Cas. No. 644; *Re Bearns* (1878) 18 Nat. Bankr. Reg. 500, Fed. Cas. No. 1,191; *The Natchez* (1887) 31 Fed. 615; *Re Talbot* (1911) 185 Fed. 936; *Re Dancy Hardware & Furniture Co.* (1912) 198 Fed. 836, affirmed without opinion (1913) 119 C. C. A. 276, 201 Fed. 1023; *Re White* (1913) 205 Fed. 393.

**Arkansas.**—Mason v. Wilson (1884) 43 Ark. 172; Jacobs v. Bentley (1908) 86 Ark. 186, 126 Am. St. Rep. 1086, 110 S. W. 594.

**California.**—Grange Co. v. Farmers Union & Mill. Co. (1906) 3 Cal. App. 519, 86 Pac. 615.

**Florida.**—Smith v. Gail (1902) 44 Fla. 808, 38 So. 527.

**Iowa.**—O'Neil v. Garrett (1858) 6 Iowa, 480; McFetridge v. Piper (1875) 40 Iowa, 627; Felix v. Brandstetter (1902) — Iowa, —, 89 N. W. 971.

**Kentucky.** — Ford & Warren v. Sproule, A. & Co. (1820) 2 A. K. Marsh. 528, 12 Am. Dec. 439; Secomb v. Nutt (1853) 14 B. Mon. 324; Wood v. Yeatman (1854) 15 B. Mon. 270; Lane v. Robinson (1857) 18 B. Mon. 623.

**Louisiana.**—E. B. Williams & Co. v. Dotterer (1903) 111 La. 822, 35 So. 921.

**Maryland.** — McElroy v. Seery (1883) 61 Md. 389, 48 Am. Rep. 110.

**Massachusetts.**—French v. Star Union Transp. Co. (1883) 134 Mass. 288; E. & G. Brooke Iron Co. v. O'Brien (1883) 135 Mass. 442.

**Michigan.** — Muskegon Booming Co. v. Underhill (1880) 43 Mich. 629, 5 N. W. 1073.

**Minnesota.**—E. L. Welch Co. v. Lahart Elevator Co. (1913) 122 Minn. 432, 142 N. W. 828.

**Missouri.**—Wheless v. Meyer-Schmid Grocer Co. (1909) 140 Mo. App. 572, 120 S. W. 708.

**Montana.**—Walsh v. Blakely (1886) 6 Mont. 194, 9 Pac. 809.

**Nebraska.**—A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. (1898) 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670.

**New Hampshire.** — Hall v. Dimond (1885) 68 N. H. 565, 3 Atl. 423.

**New York.**—Harris v. Hart (1857) 6 Duer, 606, affirmed in (1858) 17 N. Y. 249; Sturtevant v. Orser (1862) 24 N. Y. 538, 82 Am. Dec. 321; Stevens v. Wheeler (1858) 27 Barb. 658; Becker v. Hallgarten (1881) 86 N. Y. 167; Blossom v. Champion (1858) 28 Barb. 217; Pequeno v. Taylor (1862) 38 Barb. 375.

**Pennsylvania.** — Bolin v. Huffnagle (1828) 1 Rawle, 9; Hays v. Mouille

(1850) 14 Pa. 48; Pottinger v. Heckscher (1855) 2 Grant, Cas. 309; Cabeen v. Campbell (1858) 30 Pa. 254.

**Texas.**—Chandler v. Fulton (1853) 10 Tex. 2, 60 Am. Dec. 188; Half v. Allyn (1883) 60 Tex. 278.

**England.** — Slubey v. Heyward (1795) 2 H. Bl. 504, 126 Eng. Reprint, 672, 3 Revised Rep. 386; Hammond v. Anderson (1803) 1 Bos. & P. N. R. 69, 127 Eng. Reprint, 384, 5 Esp. 139, 2 Campb. 243, 8 Revised Rep. 763; Scott v. Pettit (1803) 3 Bos. & P. 469, 127 Eng. Reprint, 255, 7 Revised Rep. 804; Coxe v. Harden (1803) 4 East, 211, 102 Eng. Reprint, 811, 1 Smith, 20, 7 Revised Rep. 570; Hurry v. Mangles (1808) 1 Campb. 452, 10 Revised Rep. 727; Stoveld v. Hughes (1811) 14 East, 308, 104 Eng. Reprint, 619, 12 Revised Rep. 523; Noble v. Adams (1816) Holt, N. P. 248, reaffirmed on this point in (1816) 7 Taunt. 59, 129 Eng. Reprint, 24, 2 Marsh. 366, 17 Revised Rep. 445; Ruck v. Hatfield (1822) 5 Barn. & Ald. 632, 106 Eng. Reprint, 1321, 24 Revised Rep. 507 (holding that where goods were to be delivered "free on board" a complete delivery under such a contract terminated transitus so as to prevent the vendor stopping the same); Crawshay v. Eades (1823) 1 Barn. & C. 181, 107 Eng. Reprint, 68, 2 Dowl. & R. 288, 1 L. J. K. B. 90, 25 Revised Rep. 348; Foster v. Frampton (1826) 6 Barn. & C. 107, 108 Eng. Reprint, 392, 9 Dowl. & R. 108, 2 Car. & P. 469, 5 L. J. K. B. 71, 30 Revised Rep. 255; Swanwick v. Sothorn (1839) 9 Ad. & El. 895, 112 Eng. Reprint, 1453, 1 Perry & D. 648; Jones v. Jones (1841) 8 Mees. & W. 431, 151 Eng. Reprint, 1107, 10 L. J. Exch. N. S. 481; Dodson v. Wentworth (1842) 4 Mann. & G. 1080, 134 Eng. Reprint, 448, 6 Jur. 1066, 5 Scott, N. R. 821, 12 L. J. C. P. N. S. 59; Meletopulo v. Ranking (1842) 6 Jur. 1095; Wentworth v. Outhwaite (1842) 10 Mees. & W. 436, 152 Eng. Reprint, 541, 12 L. J. Exch. N. S. 172; Heinekey v. Earle (1857) 8 El. & Bl. 410, 120 Eng. Reprint, 153, 4 Jur. N. S. 848, 6 Week. Rep. 687, 23 L. J. Q. B. N. S. 79; Cooper v. Bell (1865) 3 Hurlst. & C. 722, 159 Eng. Reprint, 715, 34 L. J. Exch. N. S. 161, 12 L. T. N. S. 466; Kendall v.

Marshall (1883) L. R. 11 Q. B. Div. 356, 31 Week. Rep. 597, 52 L. J. Q. B. N. S. 313, 48 L. T. N. S. 951 (per Cotton, L. J.).

Canada. — Brassert v. McEwen (1885) 10 Ont. Rep. 179; Couture v. McKay (1889) 6 Manitoba L. R. 273.

In *Conyers v. Ennis* (1821) 2 Mason, 236, Fed. Cas. No. 3,149, Story, Ch. J., in answering the contention that the right of a consignor to stop property in cases of insolvency ought not to be confined to stoppage in transitu, but in equity should extend to all cases where the property is not paid for and remains in the hands of the consignee, said: "It is admitted that the decisions in England have confined the right of stoppage to cases where the property is in its transit. But it is suggested that the point has not been solemnly adjudged in the United States, and that it is open. . . . Nothing is better settled, if an uninterrupted series of authorities can settle the law, than the doctrine that the vendor, in cases of insolvency, can stop the property only while it is in its transit. If it has once reached the consignee, there is an end of all right to reclaim it as a pledge for the payment of the purchase money. If the doctrine were to go the length now contended for, it is far from certain that it would promote public convenience or policy. Where could we stop? Could it be applied with safety to purchases made at any distance of time, if it should turn out, in the event, that the buyer was then insolvent? It is very true, as has been stated at the bar, that our law respecting the distribution of the estates of persons dying insolvent differs from that of England, where the assets are marshaled, and payment goes according to the dignity of the debt. Here, all debts are paid *pari passu*. This, however, affords no ground to change the general rights and duties of vendor or vendee, or to create relations between debtor and creditor hitherto unknown to the law. The cases arising under the Bankrupt Laws are not in principle unlike those which arise here under insolvencies. And the Bankrupt Laws furnish no instance of an attempt to

establish any doctrine like that now sought from the court. It is sufficient for me to stand upon the law, as it is now universally received. If there are public mischiefs growing out of its principles, let them be remedied by the legislature."

And it has been held that the application of the rule that actual delivery terminates the vendee's right of stoppage in transitu is not affected by the fact that the consignee, when he received the goods, made an undisclosed mental reservation to hold them for the vendor. *Smith v. Gail* (1902) 44 Fla. 863, 33 So. 527. However, in *Heinekey v. Earle* (1857) 8 El. & Bl. 410, 120 Eng. Reprint, 153, 4 Jur. N. S. 848, 6 Week. Rep. 687, 28 L. J. Q. B. N. S. 79, it was held that putting the goods into the consignee's possession, against his wishes and without his knowledge, did not terminate the right of stoppage in transitu, but that a subsequent consent to hold the same did constitute a delivery and acceptance sufficient to cut off the vendor's right of stoppage. And that the insolvent consignee not only should, but is bound to, reject purchased goods, see *Booker & Co. v. Milne* (1870) 9 Sc. Sess. Cas. 3d series, 314.

And a delivery terminating the right of stoppage in transit is not affected by the fact that the carrier subsequently takes possession of the shipment in an effort to reinstate its lien for shipment. *Re Dancy Hardware & Furniture Co.* (1912) 198 Fed. 336, affirmed without opinion in (1913) 119 C. C. A. 276, 201 Fed. 1023, holding that the attempt of a carrier to reinstate its lien was not an exercise of the right of stoppage in transitu which inured to the benefit of the seller.

Nor does it affect the case that the consignor elected to exercise his right of stoppage in transitu before actual delivery to the consignee or lawful demand therefor, provided such election was not communicated to the carrier in time to be communicated to the point of destination prior to such delivery or demand therefor. *Re White* (1913) 205 Fed. 393.

*B. Reshipment by vendee.*

Under the rule that actual delivery terminates the transitus, it is held that by a reshipment from the point to which the goods were originally consigned, under the orders of the consignee, the transitus is ended and the right of the consignor to stop the goods terminated. *Re W. A. Paterson Co.* (1911) 34 L.R.A. (N.S.) 31, 108 C. C. A. 493, 186 Fed. 629; *The Natchez* (1887) 31 Fed. 615; *E. & G. Brooke Iron Co. v. O'Brien* (1883) 135 Mass. 442; *Norfolk Hardwood Co. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 160, 88 N. E. 664; *Ætna Nat. Bank v. Union P. R. Co.* (1897) 69 Mo. App. 246; *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* (1898) 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; *Eaton v. Cook* (1859) 32 Vt. 58; *Mollison v. Lockhart* (1891) 30 N. B. 398.

But under this rule an order for a delivery of goods to a party other than the consignee does not constitute a reshipment from the point of original delivery, where the consignee and such third party are both within the original destination, and the goods are still being held by the carrier, as such, for the purpose of completing the original transportation. *Lewis v. Sharvey* (1894) 58 Minn. 464, 59 N. W. 1096. However, it has been held that, where the vendee directs the vendor to ship the goods to a third party in the vendee's name as consignor, there is a clear and unmistakable exercise of dominion and ownership on the part of the vendee which is recognized by the vendor's compliance with the request, so as to terminate his right of stoppage in transitu. *Treadwell v. Aydlott* (1872) 9 Heisk. (Tenn.) 383; *Eaton v. Cook* (1859) 32 Vt. 58.

*B. Shipment intercepted.*

According to some authorities the transitus ceases and the right of stoppage terminates when the vendee intercepts the shipment before it reaches its original destination, and lawfully and actually obtains possession thereof.

*Kentucky.*—*Secomb v. Nutt* (1853)

14 B. Mon. 324; *Wood v. Yeatman* (1854) 15 B. Mon. 270.

*Montana.*—*Walsh v. Blakely* (1886) 6 Mont. 194, 9 Pac. 809.

*New York.*—*Stevens v. Wheeler* (1858) 27 Barb. 658.

*Pennsylvania.*—*Cabeen v. Campbell* (1858) 30 Pa. 254.

*Texas.*—*Halff v. Allyn* (1883) 60 Tex. 278.

*England.*—*Mills v. Ball* (1801) 2 Bos. & P. 457, 126 Eng. Reprint, 1382, 5 Revised Rep. 653; *Jackson v. Nichol* (1839) 5 Bing. N. C. 508, 132 Eng. Reprint, 1195, 8 L. J. C. P. N. S. 294, 7 Scott, 577; *Jones v. Jones* (1841) 8 Mees. & W. 431, 151 Eng. Reprint, 1107, 10 L. J. Exch. N. S. 481; *Whitehead v. Anderson* (1842) 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; *Cooper v. Bell* (1865) 3 Hurlst. & C. 722, 159 Eng. Reprint, 715, 34 L. J. Exch. N. S. 161, 12 L. T. N. S. 466; *Reddall v. Union Castle Mail S. Co.* (1914) 112 L. T. N. S. 910, 84 L. J. K. B. N. S. 360, 20 Com. Cas. 86.

*Canada.*—*Couture v. McKay* (1839) 6 Manitoba L. R. 273.

See also *infra*, III. a, 2.

This is especially true where the consignee takes possession through an agent with the consent of the consignor. *Muskegon Booming Co. v. Underhill* (1880) 43 Mich. 629, 5 N. W. 1073.

So it has been held that the shipment need not reach the consignee's place of abode, it being sufficient to terminate transit and the right of the vendor to stop the goods that the consignee has gained possession or exercised some act of ownership, previous to their reaching such place of abode. *Wright v. Lawes* (1801) 4 Esp. (Eng.) 82.

Also in some instances controlling statutes have been enacted. For instance, by the express terms of the Sale of Goods Act (56 & 57 Vict. chap. 71, § 45, subd. 2), if the buyer or his agent obtains delivery of the goods before their arrival at the point of destination, the transit is at an end. See *Mechan & Son v. North Eastern R. Co.* (1911) 48 Scot. L. R. 987, which quotes and construes the act.



*b. Kind of delivery necessary.**1. Generally.*

As the above-stated general rule indicates, one of the great elements to be considered in answering the question under consideration is, What constitutes delivery? for, as that rule states, delivery to the vendee terminates the vendor's right of stoppage in transitu. Then, of course, arises the question what constitutes delivery. Upon this phase of the subject, the majority of the courts maintain that delivery, either actual or constructive, is sufficient to cut off the vendor's right of stoppage, but a few maintain that actual manual delivery and possession are necessary.

*2. Constructive delivery sufficient.**(a) Rule stated.*

The decided weight of authority is to the effect that the right of stoppage in transitu continues during the transitu, or, as otherwise expressed, until the goods are delivered to the buyer, or possession, actual or constructive, is taken by him at the point of destination; in other words, that constructive possession by the consignee is sufficient to terminate the consignor's right of stoppage in transitu. The following cases support this rule:

**United States.** — Sheppard v. Newhall (1893) 4 C. C. A. 352, 7 U. S. App. 544, 54 Fed. 306; *Re* New York House Furnishing Goods Co. (1909) 95 C. C. A. 140, 169 Fed. 612; *Ryberg v. Snell* (1809) 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Burnham v. Winsor* (1843) Fed. Cas. No. 2,180; *Biggs v. Barry* (1855) 2 Curt. C. C. 259, Fed. Cas. No. 1,402; *Audenried v. Randall* (1868) 8 Cliff. 99, Fed. Cas. No. 644; *Blum v. The Caddo* (1870) 1 Woods, 64, Fed. Cas. No. 1,573; *Parker v. Byrnes* (1871) 1 Low. Dec. 539, Fed. Cas. No. 10,728; *Re Foot* (1874) 11 Blatchf. 530, Fed. Cas. No. 4,907; *Re Bearns* (1878) 18 Nat. Bankr. Reg. 500, Fed. Cas. No. 1,191; *The E. H. Pray* (1885) 27 Fed. 474; *Re M. Burke & Co.* (1905) 140 Fed. 971; *Re Talbot* (1911) 185 Fed. 986; *Willis v. Glenwood Cotton Mills* (1912) 200 Fed. 801; *Re J. F. Grove Constr. Co.* (1919) 256 Fed. 907.

**Alabama.** — *Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17; *Wolf v. Shepherd* (1893) 103 Ala. 241, 15 So. 519; *Bayonne Knife Co. v. Umbenhauer* (1894) 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. 175.

**California.** — *Markwald v. Their Creditors* (1857) 7 Cal. 213; *Blackman v. Pierce* (1863) 23 Cal. 508; *Jones v. Earl* (1869) 37 Cal. 630, 99 Am. Dec. 338.

**Colorado.** — *Weber v. Baessler* (1893) 3 Colo. App. 459, 34 Pac. 261.

**Connecticut.** — *Woodruff v. Noyes* (1843) 15 Conn. 335; *Aguirre v. Parmelee* (1853) 22 Conn. 473.

**Dakota.** — *Powell v. McKechnie* (1884) 3 Dak. 319, 19 N. W. 410.

**Hawaii.** — *Green v. Janion* (1861) 2 Haw. 428.

**Illinois.** — *Lake Shore & M. S. R. Co. v. National Live Stock Bank* (1895) 59 Ill. App. 451, reversed in (1899) 178 Ill. 506, 53 N. E. 326.

**Indiana.** — *Rogers v. Schneider* (1895) 13 Ind. App. 23, 41 N. E. 71.

**Iowa.** — *Cox v. Burns* (1855) 1 Iowa, 64; *O'Neil v. Garrett* (1858) 6 Iowa, 480; *Alsberg v. Latta* (1870) 30 Iowa, 442; *McFetridge v. Piper* (1875) 40 Iowa, 627; *Clapp Bros. & Co. v. Peck* (1880) 55 Iowa, 270, 7 N. W. 270.

**Kansas.** — *Rucker v. Donovan* (1874) 13 Kan. 251, 19 Am. Rep. 84; *A. B. Symms & Co. v. Wm. Schotten & Co.* (1886) 35 Kan. 310, 10 Pac. 828.

**Kentucky.** — *Secomb v. Nutt* (1853) 14 B. Mon. 324; *Wood v. Yeatman* (1854) 15 B. Mon. 270; *Lane v. Robinson* (1857) 18 B. Mon. 623.

**Louisiana.** — *Hepp v. Glover* (1840) 15 La. 461, 35 Am. Dec. 206; *Blum v. Marks* (1869) 21 La. Ann. 268, 99 Am. Dec. 725.

**Massachusetts.** — *Rowley v. Bigelow* (1832) 12 Pick. 307, 23 Am. Dec. 607; *Stanton v. Eager* (1835) 16 Pick. 467; *Brewer Lumber Co. v. Boston & A. R. Co.* (1901) 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; *Norfolk Hardwood Co. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 160, 88 N. E. 664; *COLEMAN v. NEW YORK, N. H. & H. R. Co.* (reported herewith) ante, 1866.

**Minnesota.** — *Lewis v. Sharvey* (1894) 58 Minn. 464, 59 N. W. 1096.

**Mississippi.** — Langstaff v. Stix (1886) 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97.

**Nebraska.**—United States Wind Engine & Pump Co. v. Oliver (1884) 16 Neb. 612, 21 N. W. 468; Schuster v. Carson (1890) 28 Neb. 612, 44 N. W. 734.

**Nevada.** — More v. Lott (1878) 13 Nev. 376.

**New Hampshire.** — Atkins v. Colby (1849) 20 N. H. 154; Reynolds v. Boston & M. R. Co. (1862) 43 N. H. 580; Inslee v. Lane (1876) 57 N. H. 454; Hall v. Dimond (1885) 63 N. H. 565, 3 Atl. 423.

**New York.** — Covell v. Hitchcock (1840) 23 Wend. 611; Mottram v. Heyer (1845) 1 Denio, 483, affirmed (1846) 5 Denio, 629; Harris v. Pratt (1858) 17 N. Y. 249, affirming (1857) 6 Duer, 606; Gass v. Southern P. Co. (1912) 152 App. Div. 412, 137 N. Y. Supp. 261; Stevens v. Wheeler (1858) 27 Barb. 658; Holbrook v. Vose (1860) 6 Bosw. 76; Clark v. Lynch (1871) 4 Daly, 83.

**North Carolina.** — Farrell v. Richmond & D. R. Co. (1889) 102 N. C. 390, 3 L.R.A. 647, 11 Am. St. Rep. 760, 9 S. E. 302; Williams v. Hodges (1893) 113 N. C. 36, 18 S. E. 83.

**Pennsylvania.** — Bolin v. Huffnagle (1828) 1 Rawle, 9; Donath v. Broomhead (1847) 7 Pa. 301; Hays v. Mouille (1850) 14 Pa. 48; Cabeen v. Campbell (1858) 30 Pa. 254; Bender & Co. v. Bowman (1868) 2 Pearson, 517; Thompson v. Stewart (1870) 7 Phila. 187; Eastern Lumber Co. v. Gill (1891) 9 Pa. Co. Ct. 630.

**South Carolina.**—Frazer v. Hilliard (1847) 33 S. C. L. (2 Strobb.) 309.

**Tennessee.**—Boyd v. Mosely (1853) 2 Swan, 661; Treadwell v. Ayddlett (1872) 9 Heisk. 388.

**Texas.**—Chandler v. Fulton (1853) 10 Tex. 2, 60 Am. Dec. 188; Condict v. Rosenfield (1871) 36 Tex. 28; Halff v. Allyn (1883) 60 Tex. 278; Harris v. Tenney (1892) 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82; St. Louis, B. & M. R. Co. v. McDavitt Bros. (1914) — Tex. Civ. App. —, 165 S. W. 5.

**Vermont.**—Sawyer v. Joslin (1848) 20 Vt. 172, 49 Am. Rep. 768; Guilford

v. Smith (1858) 30 Vt. 49; Kitchen v. Spear (1858) 30 Vt. 545.

**Wisconsin.** — Hoover v. Tibbets (1860) 13 Wis. 80; Jeffris v. Fitchburg R. Co. (1896) 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424.

**England.** — Northey v. Field (1797) 2 Esp. 618; Mills v. Ball (1801) 2 Bos. & P. 457, 126 Eng. Reprint, 1382, 5 Revised Rep. 653; Foster v. Frampton (1826) 6 Barn. & C. 107, 108 Eng. Reprint, 392, 9 Dowl. & R. 108, 2 Car. & P. 469, 5 L. J. K. B. 71, 30 Revised Rep. 255; Allan v. Gripper (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 1 L. J. Exch. N. S. 71, 2 Tyrw. 217; Jackson v. Nichol (1839) 5 Bing. N. C. 508, 132 Eng. Reprint, 1195, 8 L. J. C. P. N. S. 294, 7 Scott, 577; Whitehead v. Anderson (1842) 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; Lackington v. Atherton (1844) 8 Jur. 407, 7 Mann. & G. 360, 185 Eng. Reprint, 151, 13 L. J. C. P. N. S. 140, 8 Scott, N. R. 38; VanCasteel v. Booker (1848) 2 Exch. 691, 154 Eng. Reprint, 668, 18 L. J. Exch. N. S. 9; Smith v. Hudson (1865) 6 Best & S. 431, 122 Eng. Reprint, 1254, 34 L. J. Q. B. N. S. 145, 12 L. T. N. S. 377, 11 Jur. N. S. 622, 13 Week. Rep. 683; Bolton v. Lancashire & Y. R. Co. (1866) L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; Schotsmans v. Lancashire & Y. R. Co. (1867) L. R. 2 Ch. 332, 36 L. J. Ch. N. S. 361, 16 L. T. N. S. 189, 15 Week. Rep. 538; Coventry v. Gladstone (1868) L. R. 6 Eq. 44, 37 L. J. Ch. N. S. 492, 16 Week. Rep. 887; Fraser v. Witt (1868) L. R. 7 Eq. 64, 17 Week. Rep. 92, 19 L. T. N. S. 440; Ex parte Gouda (1872) 20 Week. Rep. 981; Ex parte Catling (1873) 29 L. T. N. S. 431; Ex parte Gibbes (1875) L. R. 1 Ch. Div. 101, 24 Week. Rep. 298, 45 L. J. Bankr. N. S. 10, 33 L. T. N. S. 479; Ex parte Cooper (1879) L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518; Ex parte Rosevear China Clay Co. (1879) L. R. 11 Ch. Div. 560, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 780, 27 Week. Rep. 591; Kendall v. Marshall (1883) L. R. 11 Q. B. Div. 356, 31 Week. Rep. 597, 52 L. J. Q. B. N. S. 813, 48 L. T. N. S. 951; Bethell v. Clark

(1888) L. R. 20 Q. B. Div. 615, 57 L. J. Q. B. N. S. 302, 6 Asp. Mar. L. Cas. 346, 59 L. T. N. S. 808, 36 Week. Rep. 611, affirming (1887) L. R. 19 Q. B. Div. 553, 57 L. T. N. S. 627, 36 Week. Rep. 185.

Canada.—Burr v. Wilson (1855) 13 U. C. C. P. 478; Lewis v. Mason (1875) 36 U. C. Q. B. 590; Wiley v. Smith (1877) 1 Ont. App. Rep. 179, affirmed in (1877) 2 Can. S. C. 1; Wilds v. Smith (1877) 2 Ont. App. Rep. 8, reversing (1877) 41 U. C. Q. B. 136; McLean v. Breithaupt (1884) 12 Ont. App. Rep. 383; Anderson v. Fish (1888) 16 Ont. Rep. 476, affirmed on opinion below in (1890) 17 Ont. App. Rep. 28; Couture v. McKay (1889) 6 Manitoba L. R. 273; Mollison v. Lockhart (1891) 30 N. B. 398.

Ireland.—Orr v. Murdock (1851) 2 Ir. C. L. Rep. 9.

Scotland.—Mechan & Son v. North Eastern R. Co. (1911) 43 Scot. L. R. 987.

For a discussion of what is meant by the term "constructive delivery," as used in this rule, see Kendall v. Marshall (1883) L. R. 11 Q. B. Div. (Eng.) 356, 31 Week. Rep. 597, 52 L. J. Q. B. N. S. 313, 48 L. T. N. S. 951, as quoted *supra*, I.

(D) *Application of rule.*

(1) "*Destination*" governed by intention of parties.

Under the rule that actual or constructive delivery is sufficient to terminate the right of stoppage in transitu, the destination of the goods is that contemplated by the contract of sale, or understood between the consignor and the consignee at the time of the shipment, so that, generally speaking, the right of stoppage does not terminate before the goods reach that point.

United States.—Re M. Burke & Co. (1905) 140 Fed. 971; Biggs v. Barry (1855) 2 Curt. C. C. 259, Fed. Cas. No. 1,402.

Maine.—Johnson v. Eveleth (1899) 93 Me. 306, 48 L.R.A. 50, 45 Atl. 35.

Massachusetts.—Mohr v. Boston & A. R. Co. (1870) 106 Mass. 67.

Michigan.—White v. Mitchell (1878) 38 Mich. 390.

Minnesota. — Lewis v. Sharvey (1894) 58 Minn. 464, 59 N. W. 1096.

Missouri.—O'Neal v. Day (1893) 53 Mo. App. 139.

New York. — Covell v. Hitchcock (1840) 23 Wend. 611.

Texas. — Halff v. Allyn (1883) 60 Tex. 278.

Vermont.—Sawyer v. Joslin (1848) 20 Vt. 172, 49 Am. Rep. 768.

England. — Mills v. Ball (1801) 2 Bos. & P. 457, 126 Eng. Reprint, 1382, 5 Revised Rep. 653; Coates v. Railton (1827) 6 Barn. & C. 422, 108 Eng. Reprint, 507, 9 Dowl. & R. 593, 5 L. J. K. B. 209, 30 Revised Rep. 385; Morley v. Hay (1828) 7 L. J. K. B. 104, 3 Mann. & R. 696; Allan v. Gripper (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 1 L. J. Exch. N. S. 71, 2 Tyrw. 217; Straker v. Ewing (1865) 34 Beav. 147, 55 Eng. Reprint, 590, 11 Jur. N. S. 127, 11 L. T. N. S. 588, 13 Week. Rep. 286; Smith v. Hudson (1865) 6 Best. & S. 431, 122 Eng. Reprint, 1254, 34 L. J. Q. B. N. S. 145, 12 L. T. N. S. 377, 11 Jur. N. S. 622, 13 Week. Rep. 683; Fraser v. Witt (1868) L. R. 7 Eq. 64, 17 Week. Rep. 92, 19 L. T. N. S. 440; Rodger v. Comptoir D'Escompte de Paris (1869) L. R. 2 P. C. 398, 5 Moore P. C. C. N. S. 538, 16 Eng. Reprint, 618, 21 L. T. N. S. 33, 17 Week. Rep. 468, 38 L. J. P. C. N. S. 30; Ex parte Catling (1873) 29 L. T. N. S. 431; Ex parte Gibbes (1875) L. R. 1 Ch. Div. 101, 24 Week. Rep. 298, 45 L. J. Bankr. N. S. 10, 33 L. T. N. S. 479; Ex parte Watson (1877) L. R. 5 Ch. Div. 35, 25 Week. Rep. 489, 46 L. J. Bankr. N. S. 97, 36 L. T. N. S. 75.

Canada. — Mollison v. Lockhart (1891) 30 N. B. 398.

Scotland. — Reid v. Snowball Co. (1905) 7 F. (Scot. Ct. Sess.) 35, as set out in 3 Butterworths' Ten Years' Dig. col. 350; Mechan & Sons v. North Eastern R. Co. (1911) 43 Scot. L. R. 987.

In Re M. Burke & Co. (1905) 140 Fed. 971, it was held that where goods were shipped to a store at a given address, but such store was closed when they arrived, and the carting company retained them in its possession, the goods were still in transit so as to

enable the consignor to exercise his right of stoppage in transitu.

In *Re Arctic Stores* (1919) 258 Fed. 688, it was held that delivery on a specified railroad siding, as provided by the bill of lading, constituted a delivery and terminated the right of stoppage in transitu.

In *Biggs v. Barry* (1855) 2 Curt. C. C. 259, Fed. Cas. No. 1,402, it was held that delivery of goods to forwarding agents employed by the buyer, to hold subject to the further orders of the buyer, was in legal effect a delivery which terminated the vendor's right of stoppage in transitu.

In *White v. Mitchell* (1878) 38 Mich. 390, it was held that goods were still in transit, although they had been placed in the hands of a local carrier to be delivered to the consignee's store, the delivery man not being an agent of the consignee.

In *Covell v. Hitchcock* (1840) 23 Wend. (N. Y.) 611, it was held that the deposit of goods by the carrier in a public warehouse did not terminate the transitu, where such warehouse was merely an intermediate point between the place of sale and the destination of goods.

In *Sawyer v. Joslin* (1848) 20 Vt. 172, 49 Am. Dec. 768, it was held that a wharf  $\frac{1}{2}$  mile from the consignee's place of business was the point contemplated by the parties.

In *Mechan & Sons v. North Eastern R. Co.* (Scot.) supra, it was held that the point of delivery to a local cartman was not the point of delivery contemplated by the parties, the contract having called for delivery at the vendee's place of business.

*(2) Carrier holding as such.*

The mere arrival at or on the premises of the carrier at the point of destination does not terminate the transportation and the right of stoppage in transitu, for "transit" includes not only carriage of goods to destination, but delivery there according to the terms of the contract.

United States. — *Re J. F. Growe Constr. Co.* (1919) 256 Fed. 907.

Arkansas.—*Mason v. Wilson* (1884) 43 Ark. 172.

Indiana. — *Rogers v. Schneider* (1895) 13 Ind. App. 23, 41 N. E. 71.

Iowa.—*McFetridge v. Piper* (1875) 40 Iowa, 627; *Greve & Co. v. Dunham* (1882) 60 Iowa, 108, 14 N. W. 130.

Massachusetts. — *Naylor v. Dennis* (1829) 8 Pick. 198, 19 Am. Dec. 319; *Seymour v. Newton* (1870) 105 Mass. 272; *Durgy Cement & Umber Co. v. O'Brien* (1877) 123 Mass. 12.

Missouri.—*O'Neal v. Day* (1893) 53 Mo. App. 139.

England.—*Holst v. Pownall* (1794) 1 Esp. 240; *Heinekey v. Earle* (1857) 8 El. & Bl. 410, 120 Eng. Reprint, 153, 28 L. J. Q. B. N. S. 79, 4 Jur. N. S. 848, 6 Week. Rep. 687.

Canada. — *Mollison v. Lockhart* (1871) 30 N. B. 398.

And when goods arrive at the destination contemplated by the parties, an order for delivery at a particular warehouse or point within the original destination does not constitute a constructive possession sufficient to end the right of stoppage in transitu, at least, where the carrier is still holding the goods as such. *Lewis v. Sharvey* (1894) 58 Minn. 464, 59 N. W. 1096.

And the fact that a vendee has been accustomed to receive his freight at a certain depot or wharf does not constitute mere arrival there of a particular consignment of goods a delivery thereof, so as to terminate the vendor's right of stoppage in transitu. *Seymour v. Newton* (1870) 105 Mass. 272; *James v. Griffin* (1837) 2 Mees. & W. 623, 150 Eng. Reprint, 906, 6 L. J. Exch. N. S. 241. And this, even though the carrier promised the consignee or his assignee to deliver the goods as soon as it could get at them. *Coventry v. Gladstone* (1868) L. R. 6 Eq. (Eng.) 44, 37 L. J. Ch. N. S. 492, 16 Week. Rep. 837. However, in *Ex parte Gouda* (1872) 20 Week. Rep. (Eng.) 981, it was held that arrival at the general point of destination, together with notice by the carrier to the consignee that the goods had so arrived, constituted a constructive delivery sufficient to terminate the consignor's right of stoppage in transitu.

Nor does the mere fact that the goods shipped under a bill of lading making them deliverable to the con-

signee, or his order, terminate the right of stoppage in transitu upon their arrival at the point of destination, since such fact does not destroy the carrier's relation as such, or make it the agent of the consignee. *Brindley & Co. v. Cilgwyn Slate Co.* (1885) 55 L. J. Q. B. N. S. (Eng.) 67.

So, it has been held that the fact that the vendee had his bill of lading stamped "Canceled by delivery" did not terminate the vendor's right of stoppage in transitu, where the vendee immediately inspected the goods, refused to accept them, and had the indorsement canceled, and left the goods in the carrier's possession, the theory being that the acts of the vendee constituted one connected transaction, so that there was no delivery and acceptance. *NORTHERN GRAIN CO. v. WIFFLER* (reported herewith) ante, 1870.

In *Harding Paper Co. v. Allen* (1886) 65 Wis. 576, 27 N. W. 329, it was held that it was not conclusively shown that goods had been so delivered as to terminate the vendor's right of stoppage in transitu, by evidence tending to show that they had arrived at their destination, that the consignee had been notified by the carrier of their arrival, and had requested that they be taken away under penalty, for failure, that they be stored at the consignee's expense, to which request no attention was paid.

So, it has been held that a tender by the carrier and a refusal by the vendee to accept do not constitute a delivery sufficient to terminate the vendor's right of stoppage in transitu. *Kahnweiler v. Buck* (1870) 2 Pearson (Pa.) 69; *James v. Griffin* (1837) 2 Mees. & W. 623, 150 Eng. Reprint, 906, 6 L. J. Ch. N. S. 241.

And in *Massachusetts* it has been held that arrival at the point of destination, together with notice thereof to the consignee, payment of the freight charges by him up to a certain time, and his subsequent taking of samples, makes the question of constructive delivery and the dependent right of stoppage in transitu one of fact, and, upon all the evidence, for the jury, no definite acceptance or rejection being shown. *COLEMAN v. NEW*

*YORK, N. H. & H. R. Co.* (reported herewith) ante, 1366.

(3) *Carrier holding as warehouseman.*

The great weight of authority is to the effect that a consignment of goods, in the absence of special circumstances is in the possession of the carrier, and therefore still in transitu and subject to stoppage, as long as the goods are in its custody, either as such, or as a warehouseman.

*United States.*—*Re New York House Furnishing Goods Co.* (1909) 95 C. C. A. 140, 169 Fed. 612 (right of stoppage exercised while goods were in cars at point of destination): *Audenreid v. Randall* (1868) 3 Cliff. 99, Fed. Cas. No. 644; *Re Foot* (1874) 11 Blatchf. 530, 11 Nat. Bankr. Reg. 153, Fed. Cas. No. 4,907.

*Dakota.* — *Powell v. McKechnie* (1884) 3 Dak. 319, 19 N. W. 410.

*Iowa.*—*O'Neil v. Garrett* (1858) 6 Iowa, 480; *Alsberg v. Latta* (1870) 30 Iowa, 442; *McFetridge v. Piper* (1875) 40 Iowa, 627; *Clapp Bros. & Co. v. Peck* (1880) 55 Iowa, 270, 7 N. W. 587.

*Kansas.*—*A. B. Symms & Co. v. Wm. Schotten & Co.* (1886) 35 Kan. 310, 10 Pac. 828.

*Massachusetts.*—*Brewer Lumber Co. v. Boston & A. R. Co.* (1901) 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; *Norfolk Hardwood Co. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 160, 88 N. E. 664.

*Minnesota.* — *Lewis v. Sharvey* (1894) 58 Minn. 464, 59 N. W. 1096.

*Nebraska.* — *Schuster v. Carson* (1890) 28 Neb. 612, 44 N. W. 734.

*New Hampshire.*—*Reynolds v. Boston & M. R. Co.* (1862) 43 N. H. 580; *Inslee v. Lane* (1876) 57 N. H. 454.

*Ohio.* — *Calahan v. Babcock* (1871) 21 Ohio St. 281, 8 Am. Rep. 63; *Wheeling & L. E. R. Co. v. Koontz* (1899) 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471.

*Pennsylvania.* — *Bender & Co. v. Bowman* (1868) 2 Pearson, 517.

*Texas.*—*Half v. Allyn* (1883) 60 Tex. 278; *Harris v. Tenney* (1892) 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82; *Tillman v. Kansas City Distilling Co.* (1887) 3 Tex. App. Civ. Cas. (Willson) 349.

**Vermont.**—*Kitchen v. Spear* (1858) 30 Vt. 545.

**Wisconsin.**—*Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 33 L.R.A. 851, 57 Am. St. Rep. 919, 67 N. W. 424.

**England.** — *Tucker v. Humphrey* (1828) 4 Bing. 516, 130 Eng. Reprint, 866, 1 Moore & P. 878, note, 6 L. J. C. P. 92; *Bartram v. Farebrother* (1828) 4 Bing. 579, 180 Eng. Reprint, 891, 1 Moore & P. 515, 6 L. J. C. P. 125, 29 Revised Rep. 639; *Allan v. Gripper* (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 2 Tyrw. 217, 1 L. J. Exch. N. S. 71; *Edwards v. Brewer* (1837) 2 Mees. & W. 375, 150 Eng. Reprint, 802, Murph. & H. 132, 6 L. J. Exch. N. S. 185, 1 Jur. 432; *Whitehead v. Anderson* (1842) 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; *Ex parte Cooper* (1879) L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518.

**Canada.** — *McLean v. Breithaupt* (1884) 12 Ont. App. Rep. 383; *Morgan Envelope Co. v. Boustead* (1885) 7 Ont. Rep. 697; *Anderson v. Fish* (1888) 16 Ont. Rep. 476, affirmed on opinion below in (1890) 17 Ont. App. Rep. 28.

In *A. B. Symms & Co. v. Wm. Schotten & Co.* (1886) 35 Kan. 310, 10 Pac. 828, where the railroad company had removed the goods to its warehouse to await payment of freight charges and delivery to the vendee, the court answered the contention that, because the goods had reached the point to which they were shipped and had been placed in the carrier's warehouse, the transitus was at an end and the vendor's right of stoppage extinguished, as follows: "The general rule is that the vendor may resume possession of the goods at any time before they actually reach the possession of the vendee. This right continues in the vendor not only while the goods are being carried to the place of consignment, but may be exercised at any time until delivery to the vendee or his agent has been completed. The unloading of the goods and the placing of them in the warehouse of the railroad company does not necessarily terminate the transitus, nor put an end to the right of stoppage; so long as they remain in the hands of the car-

rier or middleman, as such, the right does not cease. There may be cases where the possession of the carrier or warehouseman, after the final destination is reached, will, owing to the agreement of the parties or the special circumstances of the case, be regarded as the possession of the vendee, and so put an end to the vendor's right of stoppage. But where goods are consigned and shipped in the ordinary way, and the railroad company which brings them to the point of delivery, in performance of its duty as carrier, unloads and places the goods in its warehouse, awaiting the payment of the freight charges before delivery to the vendee, the presumption will be that the goods are still in transit, and that the right of stoppage yet remains in the vendor."

(4) *Vendee's agent or representative.*

See *infra*, III., and the several subdivisions thereof.

3. *Doctrine that actual delivery is necessary.*

Some cases, apparently, take the view that actual delivery to and possession by the consignee are essential to a termination of the vendor's right of stoppage in transitu, and that constructive delivery, such as to a carrier, warehouseman, or other intermediary, is not sufficient.

**Illinois.**—*Delta Bag Co. v. Kearns* (1904) 112 Ill. App. 269; *Bauer v. Illinois C. R. Co.* (1912) 175 Ill. App. 346 (holding that the right exists while the goods are in the hands of the common carrier).

**Maine.**—*Newhall v. Vargas* (1836) 13 Me. 93, 29 Am. Dec. 489; *Johnson v. Eveleth* (1899) 93 Me. 306, 43 L.R.A. 50, 45 Atl. 35.

**Maryland.**—*Thompson v. Baltimore & O. R. Co.* (1868) 28 Md. 396.

**Michigan.**—*Kingman & Co. v. Denison* (1891) 84 Mich. 603, 11 L.R.A. 347, 22 Am. St. Rep. 711, 48 N. W. 26 (holding that delivery at the consignee's store was not sufficient where he was not present and did not affirmatively accept the goods).

**Missouri.** — *Estey v. Truxel* (1887) 25 Mo. App. 238; *Scott Bros. v. William*

B. Grimes Dry-Goods Co. (1892) 48 Mo. App. 521.

Ohio.—Calahan v. Babcock (1871) 21 Ohio St. 281, 8 Am. Rep. 63.

South Carolina.—Parker v. M'Iver (1792) 1 S. C. Eq. (Desauss.) 274, 1 Am. Dec. 656; Monaghan Mills v. Gilreath Mfg. Co. (1913) 96 S. C. 195, 80 S. E. 194 (holding that where goods were delivered by the vendor to a third party to be bleached on account of the buyer, the vendor could terminate the transit while the goods were in the hands of the intermediate party).

England.—Hunter v. Beale (1785) 3 T. R. 466, 100 Eng. Reprint, 680; Ellis v. Hunt (1789) 3 T. R. 464, 100 Eng. Reprint, 679, 1 Revised Rep. 743, 23 Eng. Rul. Cas. 416. The later English cases lay down a broader rule—see *supra*, II. b, 2.

In Scott Bros. v. William B. Grimes Dry-Goods Co. (Mo.) *supra*, the court said: "The essential ground of the right of lien is possession; that of stoppage in transitu is nondelivery to the vendee. The title of the vendor is never entirely divested until the goods have come into possession of the vendee; until then, he may retract the intended delivery and stop the goods in transitu. The goods must be delivered to the vendee, and be in his actual and absolute possession; they need not, however, come to his corporal touch; otherwise, they may be stopped in transitu. . . . The general rule is that the right of stoppage is gone when the goods fairly arrive at their destination, so as to give the vendee the actual and absolute possession of them. But this right is not lost by constructive delivery."

The reason for this rule of "actual" possession is, of course, much stronger where the bill of lading provides for actual possession at the point of destination. Stubbs v. Lund (1811) 7 Mass. 453, 5 Am. Dec. 63.

And in Georgia the statutes declare that the right of stoppage in transitu exists while the goods are in the hands of a carrier or middleman in transit, and continues until the vendee obtains actual possession of the goods, and it has been held that such provisions contemplate actual delivery and pos-

session, as distinguished from constructive possession, so that the vendor may stop a shipment at any time prior to actual delivery at destination. This statute, and the construction placed upon it by the courts, are illustrated by the following cases: Macon & W. R. Co. v. Meador (1880) 65 Ga. 705 (holding that a constructive delivery, such as that resulting from the carrier, at the direction of the vendee, storing the goods for sale and agreeing to apply the proceeds on an account for freight, did not prevent a stoppage in transitu); Ocean S. S. Co. v. Ehrlich (1891) 88 Ga. 502, 30 Am. St. Rep. 164, 14 S. E. 707; Branan Bros. v. Atlanta & W. P. R. Co. (1899) 106 Ga. 70, 75 Am. St. Rep. 26, 33 S. E. 836.

#### *c. Partial delivery.*

A considerable number of cases have passed upon the effect of a partial delivery of goods to the vendee to terminate the right of stoppage in transitu.

The majority of the decisions are to the effect that the fact that a part of the goods has rightfully come into the possession of the vendee at the point of destination does not constitute a constructive delivery, so as to terminate the vendor's right of stoppage in transitu as to the balance of the goods which is still undelivered. Johnson v. Eveleth (1899) 98 Me. 306, 48 L.R.A. 50, 45 Atl. 35; Buckley v. Furniss (1837) 17 Wend. (N. Y.) 504; Jeffris v. Fitchburg R. Co. (1896) 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; Ex parte Cross (1851) Fonbl. Eq. 215, as set out in 12 Mews, Eng. Case Law Dig. col. 620; Bolton v. Lancashire & Y. R. Co. (1866) L. R. 1 C. P. (Eng.) 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; Ex parte Cooper (1879) L. R. 11 Ch. Div. (Eng.) 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518; Ex parte Falk (1880) L. R. 14 Ch. Div. (Eng.) 446, 42 L. T. N. S. 780, 28 Week. Rep. 785, 4 Asp. Mar. L. Cas. 280, affirmed in Kemp v. Falk (1882) L. R. 7 App. Cas. 573, 31 Week. Rep. 125, 52 L. J. Ch. N. S. 167, 47 L. T. N. S. 454, 5 Asp. Mar. L. Cas. 1, 23 Eng. Rul.

Cas. 399. And see *Mohr v. Boston & A. R. Co.* (1870) 106 Mass. 67. At least, in the absence of a showing that it was the intention of the parties that such a partial delivery should operate as a delivery of the whole. *Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424; *Ex parte Cross* (1851) Fonbl. Eq. (Eng.) 215, as set out in 25 Laws of England (Halsbury) p. 255. In the *Jeffris Case* (Wis.) *supra*, it was said that this is upon the theory that it cannot be supposed that the carrier intended to abandon its lien for unpaid freight and charges. And, as is expressly enacted by the Sale of Goods Act (56 & 57 Vict. chap. 71, § 45, subd. 7), "where part delivery of the goods has been made to the buyer, or his agent in that belief, the remainder of the goods may be stopped in transitu unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods." In *Mechan & Son v. North Eastern R. Co.* (1911) 48 Scot. L. R. 987, it was said that this provision "raises a presumption against actual delivery of a part of a consignment of goods operating as constructive delivery of the whole, especially where, as in the present case, the goods are clearly divisible." In *Bolton v. Lancashire & Y. R. Co.* (1866) L. R. 1 C. P. (Eng.) 431, Willes, J., in discussing the effect of partial delivery on the right of stoppage in transitu, laid down the rule as follows: "The delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole."

But especially is this rule applicable where it actually does appear that the intention of both parties was to separate the part delivered from the residue. *Bunney v. Poyntz* (1833) 4 Barn. & Ad. 568, 110 Eng. Reprint, 569, 1 Nev. & M. 229, 2 L. J. K. B. N. S. 55; *Dixon v. Yates* (1835) 5 Barn. & Ad. 813, 110 Eng. Reprint, 806, 2 Nev. & M. 177, 2 L. J. K. B. N. S. 198, 23 Eng.

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Rul. Cas. 385; *Miles v. Gorton* (1834) 2 Cromp. & M. 504, 149 Eng. Reprint, 860, 4 Tyrw. 295, 3 L. J. Exch. N. S. 155; *Tanner v. Scovell* (1845) 14 Mees. & W. 28, 153 Eng. Reprint, 375, 14 L. J. Exch. N. S. 321.

And it has been held that, where the freight on a cargo has not been paid, a delivery of a part of the cargo cannot be a constructive delivery of the whole, because it must be assumed that the carrier would not have delivered the whole until he had received the whole of the freight, from which it follows that if it could not be said that the carrier had constructively delivered the whole, it would be impossible to say that the vendee had constructively accepted a delivery which was never made, and consequently that the vendor, upon the insolvency of the vendee, had a right to stop the undelivered part of the cargo. *Ex parte Cooper* (1879) L. R. 11 Ch. Div. (Eng.) 63, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518. A similar conclusion was reached in *Ex parte Falk* (1880) L. R. 14 Ch. Div. (Eng.) 446, 42 L. T. N. S. 780, 28 Week. Rep. 785, 4 Asp. Mar. L. Cas. 280.

However, it has been held without qualification that a delivery to the vendee or his general agent of only a part of the goods sold is a delivery of the whole, so as to bar the vendor's right of stoppage in transitu. *Stevens v. Wheeler* (1858) 27 Barb. (N. Y.) 658.

And it also has been held that transitu is ended by a complete delivery of a part of the goods sold under an entire contract, where no intention appears, either previous to or at the time of the delivery, to separate such part from the rest. *Slubey v. Heyward* (1795) 2 H. Bl. 504, 126 Eng. Reprint, 672, 3 Revised Rep. 386; *Hammond v. Anderson* (1803) 1 Bos. & P. N. R. 67, 127 Eng. Reprint, 384, 5 Esp. 139, 8 Revised Rep. 763; *Crawshay v. Eades* (1823) 1 Barn. & C. 181, 107 Eng. Reprint, 68, 2 Dowl. & R. 288, 1 L. J. K. B. N. S. 90, 25 Revised Rep. 348; *Jones v. Jones* (1841) 8 Mees. & W. 431, 151 Eng. Reprint, 1107, 10 L. J. Exch. N. S. 481. However, under special circumstances, the contrary has been held, where the delivery was of



a part only of an "entire" cargo. Thus, in *Crawshay v. Eades* (1823) 1 Barn. & C. 181, 107 Eng. Reprint, 68, where a carrier landed a part of a cargo on the consignee's wharf, but, upon discovering that he had stopped payment, reloaded the same and retained possession thereof, it was held that there had been no such delivery of any part of the cargo as would terminate the consignor's right of stoppage in transitu. This was upon the theory that during all the time the special property in the entire cargo remained in the cargo as security for its freight charges. Bayley, J., said: "In order to stop the consignor's right of stoppage in transitu, there ought to be such a delivery to the consignee as to divest the carrier's lien on the whole cargo. I am of opinion, therefore, that, the entire freight not having been tendered or paid, the delivery in this case was not complete, as to any part; that the special property remained in the carrier; and that the consignor was not deprived of his right of stoppage in transitu."

But the fact that the undelivered part of the goods sold under an entire contract are stopped in transit does not re-vest the part delivered in the vendor, at least where they had been shipped by a different route and means from those stopped. In other words, the fact that a part of the goods are still in transitu does not extend the vendor's right of stoppage in transitu to goods shipped by a different route, and which have arrived at their destination and been delivered to the vendee. *Wentworth v. Outhwaite* (1842) 10 Mees. & W. 436, 152 Eng. Reprint, 541, 12 L. J. Exch. N. S. 172.

### III. Who may accept or take possession.

#### a. Agents.

##### 1. In general.

While it has been said that to terminate the right of stoppage in transitu the goods must have come to "the corporal touch" of the vendees (*Hunter v. Beal* (1785) cited in 3 T. R. 466, 100 Eng. Reprint, 680), it is now generally conceded that the corporal touch of the consignee is not necessarily an essential to termination of

the transit, so as to prevent a stoppage by the consignor (*Klein v. Fischer* (1888) 30 Mo. App. 568; *Mottram v. Heyer* (1845) 1 Denio (N. Y.) 483, affirmed in (1846) 5 Denio, 629; *Williams v. Hodges* (1893) 113 N. C. 36, 18 S. E. 83; *Ellis v. Hunt* (1789) 3 T. R. 464, 100 Eng. Reprint, 679, 1 Revised Rep. 743, 23 Eng. Rul. Cas. 416; *Dixon v. Baldwin* (1804) 5 East, 175, 102 Eng. Reprint, 1036). In fact, in *Ellis v. Hunt* (1789) 3 T. R. 464, 100 Eng. Reprint, 679, 1 Revised Rep. 743, 23 Eng. Rul. Cas. 416, Lord Kenyon, Ch. J., said: "As to the necessity of the goods coming to the 'corporal touch' of the bankrupt, that is merely a figurative expression, and has never been literally adhered to." And *Dixon v. Baldwin* (1804) 5 East, 175, 102 Eng. Reprint, 1036, contains a similar statement. And again, in *Wright v. Lawes* (1801) 4 Esp. (Eng.) 82, Lord Kenyon said: "I once said that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much."

In fact, under the general rule that the constructive possession of the vendee is sufficient to terminate the vendor's right of stoppage in transitu, there seems to be no question that the vendee may accept delivery through an agent and take such a possession as will terminate the right of stoppage in transit.

#### 2. General and forwarding agents.

As has often been pointed out, there is a clear distinction between general and forwarding agents, but the practical and at the same time the difficult question is whether the agent in a particular case should, under the facts, be regarded as a general agent, or as a mere forwarding agent. For instance, *Denio, J.*, in *Harris v. Pratt* (1858) 17 N. Y. 249, in discussing a situation of the character under consideration, said: "The general rule in this class of cases is that, while the goods remain in the possession of persons concerned in their transportation to the place of destination named by the purchaser, they may, in the event of his failure, be reclaimed by the seller. It is not material whether the

person in whose possession they are when the seller interposes his claim be a carrier, a warehouse keeper, a wharfinger, packer, or other depository, or an agent for the purposes of forwarding, nor by which of the parties to the sale he was employed. He may be the agent of the purchaser, designated, paid, and employed by him, yet if the purpose of his employment is to expedite the property towards its destination, or to aid those engaged in forwarding it, the seller's right to stay the final delivery continues. But, however clearly the general principle may be stated, the circumstances of commercial dealings are so various that cases are apt to arise in which its application is a matter of extreme difficulty. When the seller attempts to claim the goods, the question is whether they have arrived at the end of their transit, and this usually depends upon the further question whether the party in whose hands they are found is acting in the character of an agent for transportation, or as the agent of the purchaser, holding them simply for his use, unconnected with the business of forwarding them. It sometimes happens that the seller delivers goods sold on credit immediately to an agent of the purchaser, or that, as in the present case, he sends them a part of the way to their final destination, and they are delivered to such agent of the buyer. When they have been so delivered according to the vendee's direction, either immediately upon the sale or after being carried a part of the distance, the question arises whether the seller retains a right to stop them on account of the failure of the purchaser. Under certain circumstances the depository in these cases is considered as the general agent of the purchaser, and the goods, when in his hands, are adjudged to be virtually in the possession of such purchaser, and not in transitu; while under a state of facts somewhat different, the person into whose custody they thus came is regarded as an agent for expediting them, and the right of stoppage continues until they come to the purchaser's hands at his place of business, or at some other place where he

has directed them to be sent. The question is within which of these classes the present case falls."

A considerable number of authorities have laid down the rule that the right of stoppage in transitu of goods sold is terminated by a final delivery thereof to the vendee's general agent, either at the general point of final destination or at an intermediate point, he not being a mere forwarding agent.

California.—*Grange Co. v. Farmers Union & Milling Co.* (1906) 3 Cal. App. 519, 86 Pac. 615.

Iowa.—*O'Neil v. Garrett* (1858) 6 Iowa, 480; *McFetridge v. Piper* (1875) 40 Iowa, 627.

Kentucky.—*Lane v. Robinson* (1857) 18 B. Mon. 623.

Missouri.—*Scott Bros. v. William B. Grimes Dry-Goods Co.* (1892) 48 Mo. App. 521.

Montana.—*Walsh v. Blakely* (1886) 6 Mont. 194, 9 Pac. 809.

Nevada.—*See More v. Lott* (1878) 13 Nev. 376.

New York. — *Covell v. Hitchcock* (1840) 23 Wend. 611; *Stevens v. Wheeler* (1858) 27 Barb. 658.

Pennsylvania. — *Hays v. Mouille* (1850) 14 Pa. 48; *Pottinger v. Hecksher* (1855) 2 Grant, Cas. 309; *Cabeen v. Campbell* (1858) 30 Pa. 254.

Texas.—*Chandler v. Fulton* (1853) 10 Tex. 2, 60 Am. Dec. 188; *Halff v. Allyn* (1883) 60 Tex. 278; *Harris v. Tenney* (1892) 85 Tex. 254, 84 Am. St. Rep. 796, 20 S. W. 82; *St. Louis, B. & M. R. Co. v. McDavitt Bros.* (1914) — Tex. Civ. App. —, 165 S. W. 5.

Vermont.—*Guilford v. Smith* (1858) 30 Vt. 49.

Wisconsin. — *Hoover v. Tibbits* (1860) 13 Wis. 79; *Harding Paper Co. v. Allen* (1886) 65 Wis. 576, 27 N. W. 329.

England.—*Wright v. Lawes* (1801) 4 Esp. 82; *Leeds v. Wright* (1803) 3 Bos. & P. 320, 127 Eng. Reprint, 176, 4 Esp. 243, 7 Revised Rep. 779; *Scott v. Pettit* (1803) 3 Bos. & P. 469, 127 Eng. Reprint, 255, 7 Revised Rep. 804; *Meletopulo v. Ranking* (1842) 6 Jur. 1095; *Bolton v. Lancashire & Y. R. Co.* (1866) L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; *Kendall*

*v. Marshall* (1883) L. R. 11 Q. B. Div. 356, 31 Week. Rep. 597, 52 L. J. Q. B. N. S. 313, 48 L. T. N. S. 951 (per Cotton, L. J.).

Canada.—*Couture v. McKay* (1889) 6 Manitoba L. R. 273.

The following cases illustrate various situations in which the agent has been held, under the noted facts, to have been a general agent within the meaning of the foregoing rule: In *Grange Co. v. Farmers' Union & Mill. Co.* (1906) 3 Cal. App. 519, 86 Pac. 615, under a statute providing that the transit of property is at an end when it comes into the possession of the consignee or into that of his agent, unless such agent is employed merely to forward the property to the consignee, it was held that delivery had been made to a general agent so as to cut off the vendor's right of stoppage in transitu, it appearing that plaintiff sold grain to a San Francisco firm, and shipped the same, pursuant to directions given by it, "care of" defendant, a general warehouseman at Stockton; that a draft on the consignee was dishonored on September 15, and the consignee became bankrupt on the 16th; that on the following day the consignor notified the carrier not to deliver the grain, but was informed that it had already done so; that the consignor then notified the defendant not to forward the grain to the consignee, as it held the receipts; and that, according to a customary and unvarying business method and usage between the consignee and the defendant, as well as so considered by plaintiff, such delivery was a complete and final one to the consignee. In *Lane v. Robinson* (1857) 18 B. Mon. (Ky.) 623, goods were delivered, although without express authority by the carrier, at the point of destination, to one who paid the freight and agreed to hold them as special agent for the vendee at that point. In *Walsh v. Blakely* (1886) 6 Mont. 194, 9 Pac. 809, the vendee's agent received the goods at an intermediate point, not as a warehouseman, carrier, or mere forwarding agent, but as a special agent or bailee for the vendee, and held the same subject to his further directions. In *Guilford v. Smith*

(1858) 30 Vt. 49, the vendee, residing in B., purchased flour in T., and ordered it shipped to his agent in O., who was in the habit of receiving flour and holding it subject to the orders of the vendee, and it was held that delivery of the flour to such agent was for the purpose of custody, so as to cut off the right of stoppage in transitu. In *Pottinger v. Hecksher* (1855) 2 Grant, Cas. (Pa.) 309, it was said that delivery of goods at an intermediate point to agents who so far represented the vendee as to have general and unlimited power, with respect to future control thereof, was a final delivery, and effectual to cut off the vendor's right of stoppage in transitu. And for decisions illustrating the converse of the above rule, see cases set out infra, this subdivision.

And the deposit of goods at the general point of destination with a warehouseman, subject to the order and control of the vendee, has been held to be such a delivery as effectually to cut off the vendor's right of stoppage in transitu. *Frazer v. Hilliard* (1847) 38 S. C. L. (2 Strobb.) 309; *Orr v. Murdock* (1851) 2 Ir. C. L. Rep. 9.

And this rule is not altered by the fact that the vendor is the warehouseman, provided he accepts warehouse rent from the vendee, such acceptance precluding a claim by him that he still retains possession as owner. *Hurry v. Mangles* (1808) 1 Campb. (Eng.) 452, 10 Revised Rep. 727.

On the other hand, the depositing of the goods at either an intermediate point or at the general point of destination, with an agent of the vendee, to be forwarded to their final destination, does not terminate the transitus so as to prevent a stoppage by the vendor.

California. — *Markwald v. Their Creditors* (1857) 7 Cal. 213; *Blackman v. Pierce* (1863) 23 Cal. 508; *Jones v. Earl* (1869) 37 Cal. 630, 99 Am. Dec. 358.

Colorado. — *Weber v. Baessler* (1898) 3 Colo. App. 459, 34 Pac. 261.

Connecticut. — *Aguirre v. Parmelee* (1853) 22 Conn. 478.

Illinois.—*Lake Shore & M. S. R. Co. v. National Live Stock Bank* (1895)

59 Ill. App. 451, reversed in (1899) 178 Ill. 506, 53 N. E. 326.

Iowa.—O'Neil v. Garrett (1858) 6 Iowa, 480.

Kentucky.—Lane v. Robinson (1857) 18 B. Mon. 623.

Louisiana.—Heff v. Glover (1840) 15 La. 461, 35 Am. Dec. 206.

Maine.—Johnson v. Eveleth (1899) 93 Me. 306, 48 L.R.A. 50, 45 Atl. 35.

Massachusetts.—Mohr v. Boston & A. R. Co. (1870) 106 Mass. 67.

Missouri.—Scott Bros. v. William B. Grimes Dry-Goods Co. (1892) 48 Mo. App. 521.

Nevada.—See More v. Lott (1878) 13 Nev. 376.

New York. — Covell v. Hitchcock (1840) 23 Wend. 611; Harris v. Pratt (1858) 17 N. Y. 249, affirming (1857) 6 Duer, 606; Holbrook v. Vose (1860) 6 Bosw. 76.

Ohio.—Jordan v. James (1831) 5 Ohio, 88.

Oregon.—Frame v. Oregon Liquor Co. (1906) 48 Or. 272, 85 Pac. 1009, rehearing denied in (1906) 48 Or. 276, 86 Pac. 791.

Pennsylvania.—Bolin v. Huffnagle (1828) 1 Rawle, 9; Hays v. Mouille (1850) 14 Pa. 48; Pottinger v. Heckscher (1855) 2 Grant, Cas. 309; Ca-been v. Campbell (1858) 30 Pa. 254.

Texas.—Chandler v. Fulton (1858) 10 Tex. 2, 60 Am. Dec. 188; Condict v. Rosenfield (1871) 36 Tex. 23; Half v. Allyn (1883) 60 Tex. 278; Harris v. Tenney (1892) 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82.

Vermont.—Guilford v. Smith (1858) 30 Vt. 49.

England.—Mills v. Ball (1801) 2 Bos. & P. 457, 126 Eng. Reprint, 1882, 5 Revised Rep. 653; Smith v. Goss (1808) 1 Campb. 282, 10 Revised Rep. 684; Coates v. Railton (1827) 6 Barn. & C. 422, 108 Eng. Reprint, 507, 9 Dowl. & R. 593, 5 L. J. K. B. 209, 30 Revised Rep. 385; Morley v. Hay (1828) 7 L. J. K. B. 104, 3 Mann. & R. 696; Nicholls v. Le Feuvre (1835) 2 Bing. N. C. 81, 132 Eng. Reprint, 32, 1 Hodges, 255, 2 Scott, 146, 7 Car. & P. 91, 4 L. J. C. P. N. S. 281; Jackson v. Nichol (1839) 5 Bing. N. C. 508, 132 Eng. Reprint, 1195, 8 L. J. C. P. N. S. 294, 7 Scott, 577; Ex parte Watson

(1877) L. R. 5 Ch. Div. 35, 25 Week. Rep. 489, 46 L. J. Bankr. N. S. 97, 36 L. T. N. S. 75; Ex parte Barrow (1877) L. R. 6 Ch. Div. 783, 25 Week. Rep. 466, 46 L. J. Bankr. N. S. 71, 36 L. T. N. S. 325; Bethell v. Clark (1888) L. R. 20 Q. B. Div. 615, 57 L. J. Q. B. N. S. 302, 6 Asp. Mar. L. Cas. 346, 59 L. T. N. S. 308, 36 Week. Rep. 611, affirming (1887) L. R. 19 Q. B. Div. 558, 57 L. T. N. S. 627, 36 Week. Rep. 185; Lyons v. Hoffnung (1890) L. R. 15 App. Cas. 391, 6 Asp. Mar. L. Cas. 551, 59 L. J. P. C. N. S. 79, 63 L. T. N. S. 293, 39 Week. Rep. 390; Re Gurney (1892) 7 Asp. Mar. L. Cas. 249, 67 L. T. N. S. 598, 9 Morrell, 294; Kemp v. Ismay, I. & Co. (1909) 100 L. T. N. S. 996, 14 Com. Cas. 202; Reddall v. Union Castle Mail S. S. Co. (1914) 112 L. T. N. S. 910.

Scotland.—Mechan & Son v. North Eastern R. Co. (1911) 48 Scot. L. Rep. 987.

Illustrations of facts and circumstances under which the agent to whom delivery was made has been regarded as a mere forwarding agent, instead of a general agent, are afforded by the cases which follow.

In Scott Bros. v. William B. Grimes Dry-Goods Co. (1892) 48 Mo. App. 521, cited supra, and quoted and discussed infra, the goods, at the time of the stoppage, were in the hands of a local transfer company at the destination point of the general carrier, under a previous general order of the vendee to receive any goods arriving for the latter, and for the mere purpose of being conveyed to the vendee's place of business.

In Weber v. Baessler (1893) 3 Colo. App. 459, 34 Pac. 261, T. & A., partners doing business in Denver, ordered goods of B., a manufacturer in Buffalo. The goods were shipped to the vendee and delivered to a local transfer company in Denver, which had general orders to receive and deliver any freight sent to the vendee. While in the hands of such transfer company the vendee refused to accept them, and they were delivered under an attachment obtained by a creditor of the vendee. Subsequently, the order of

stoppage was given to the transfer company.

In *Harris v. Tenney* (1892) 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82, the goods at the time of the stoppage had arrived at their rail destination, and were in the hands of local carriers for transportation to the vendee's place of business, they having been delivered by the carrier upon an order signed by the vendee, but which had been obtained by a creditor who had sued out an attachment.

In *Blackman v. Pierce* (1863) 23 Cal. 508, the vendee, living at T. C., ordered goods of B., of S. F., who shipped the same to T. C., care of P., at R. B., the point of transshipment from a steamer to wagons. P., who had orders from the vendee to forward the goods, placed them in his warehouse and advised the vendee of their arrival, and he advised that he would send his wagon for them. While so held in the warehouse at R. B., a creditor attached the goods, and subsequently the vendor gave notice of stoppage in transitu.

In *Frame v. Oregon Liquor Co.* (1906) 48 Or. 272, 85 Pac. 1009, rehearing denied in (1906) 48 Or. 276, 86 Pac. 791, a dealer at D., a town located back from the railroad, ordered goods which were consigned by the vendors to the vendee at D., by way of H., a point on the railroad. When the goods reached H. they were, pursuant to directions from the vendee, received by a local warehouseman and forwarding teamster, and stored in his warehouse to be transported to D. when ordered. The holding was that while so held the goods were in the hands of a mere forwarding agent, and, therefore, subject to stoppage in transitu.

In *Jones v. Earl* (1869) 37 Cal. 630, 99 Am. Dec. 338, the vendee, residing in V. C., ordered goods of B., in S. F., and the same were shipped care of E., at C., to be forwarded by him to the vendee at V. C. While the goods were at C., and in the custody of E.'s agent, the order to stop in transit was given.

In *Hepp v. Glover* (1840) 15 La. 461, 35 Am. Dec. 206, goods were purchased in New York, and were consigned care

of A. of New Orleans to be forwarded to the vendee at Jackson, Mississippi.

In *Markwald v. Their Creditors* (1857) 7 Cal. 213, M. C. & Co. of San Francisco purchased in Havana an invoice of cigars, directed the vendor to ship to P. & S. at New York, and to draw on the vendee's London agents, and directed P. & S., on receipt of the cigars, to reship them to San Francisco after paying the duties and charges. The goods were stopped while being carried from New York to San Francisco, and it was claimed on behalf of the vendee that he, through his New York agents, had taken possession of the shipment at New York by exercising well-defined acts of ownership over the cigars, such as entering them in the bonded warehouse, giving bond for the duties, withdrawing them from bond and reshipping them under new bills of lading, paying freight charges, etc.; but the court ruled that P. & S. of New York "were agents only for the purpose of expediting the carriage of the goods to their original destination, and performed only such acts as were necessary to this end." In connection with this decision it should be noted that it does not appear, except perhaps by inference from the case as reported, whether or not the vendors were aware that the destination of the goods was San Francisco, instead of New York, but both the court and the party seeking to defeat the right of stoppage in transitu seem to have regarded San Francisco as the "original destination."

In *Covell v. Hitchcock* (1840) 23 Wend. (N. Y.) 611, the goods in question were consigned to the vendee at W., and when the right of stoppage was attempted were in the hands of a public warehouseman at H., between which point and W. there was no public conveyance, so that the goods were awaiting conveyance by teams to be sent on by the vendee.

In *Hays v. Mouille* (1850) 14 Pa. 48, the goods, which were bought in P. and directed to the vendee at M., were stopped while in the hands of a collecting agent, they, according to business custom, having been collected

at one store by one of several vendors, to be shipped to the vendee.

In *Cabeen v. Campbell* (1858) 30 Pa. 254, the agents of the vendor took possession at an intermediate point with the understanding that they were to forward the goods without waiting for further orders or communicating with the vendee, and both the vendor and the vendee understood that such agents were mere agents for transportation to the place of original destination.

In *Half v. Allyn* (1883) 60 Tex. 278, the goods were sold at G. and shipped to the vendee at B. G., care of the railroad agent at C., the nearest railroad point to B. G., and were delivered by the freight agent to A., at C., who presented unindorsed bills of lading therefor, and while so held the right of stoppage in transitu was exercised. In this case it was held that the question whether the agent was a mere forwarding agent, as distinguished from one authorized to take possession and exercise general control over the goods, was for the jury.

In *Chandler v. Fulton* (1853) 10 Tex. 2, 60 Am. Dec. 188, the goods were received at an intermediate point to be forwarded, and not for safe custody or disposal.

In *O'Neil v. Garrett* (1858) 6 Iowa, 480, the carrier, after notice to stop the goods, and unknown to the consignee, delivered them to a warehouseman for storage, and not as agent of the consignee.

In *Aguirre v. Parmelee* (1853) 22 Conn. 473, T. & Co., of T., purchased through their New York purchasing agent, certain bales of wool of A., of New York. The wool was delivered to such agent, and in holding that such delivery did not terminate the vendor's right of stoppage in transitu, the court said: "The delivery was not to him as owner, nor as agent of the owner to dispose of them in any other way than to transmit them to the vendee's place of business. The finding is that he was the agent of the vendees, to make purchases of wool to be transmitted to T., and this seems to be the extent of his agency. He stood, therefore, rather in the position of a mere forwarding

agent than in that of an agent to receive the goods for the vendee's use."

In *Lake Shore & M. S. R. Co. v. National Live Stock Bank* (1895) 59 Ill. App. 451, reversed in (1899) 178 Ill. 506, 53 N. E. 326, the cattle in suit were purchased by and delivered to the vendee's brother in Chicago, for the express purpose of shipping them at once to the vendee in New York, and not for the purpose of holding them for disposal in any other way. The order of stoppage was given while the goods were in transit from Chicago to New York.

In *Johnson v. Eveleth* (1899) 93 Me. 306, 48 L.R.A. 50, 45 Atl. 35, logs were sold to be delivered "over the dam" at the outlet of a certain lake, to be driven by the K. Co. to the vendee's booms, and the right of stoppage was exercised while they were being so driven.

In *Mohr v. Boston & A. R. Co.* (1870) 106 Mass. 67, A. sold to B., in Boston, a number of barrels of whisky then in a bonded warehouse in Indiana, B. giving his acceptances for the price and the warehouseman giving his certificate for the whisky as the property of B. A. agreed that when so requested he would draw the whisky from the warehouse, pay the taxes, charges, and insurance, and draw on B. for the amount. The goods, while in the warehouse, were regarded as in the hands of an intermediate agent on their way to the vendee.

And probably as good an illustration as any of the extent to which courts will go in protecting the right of the vendor to stop goods in transitu is afforded by the New York case of *Harris v. Pratt* (1858) 78 N. Y. 249, affirming (1857) 6 Duer, 606. Here two partners, under different firm names, carried on businesses at New York and at Nottingham, England. The Nottingham firm bought goods in their firm name, expressly stating that they were for the New York house, and directing that they be sent to a Liverpool firm, which was a shipping agent, to await further orders for shipment. The invoice was to the Nottingham firm, and the vendors, on shipping the goods to the Liverpool

agent, wrote that they were sending the goods for the Nottingham firm, from whom "you will receive further instructions." On the same day the vendee sent shipping directions to the Liverpool firm. While the goods were on shipboard between Liverpool and New York, the vendors sought to exercise the right of stoppage in transitu, and it was held that the transit had not ended with the delivery to the Liverpool agents, the court holding to the theory that New York was the destination contemplated by both the vendors and the vendees, wherefore the Liverpool firm was merely a forwarding agent. In this connection, Denio, J., among other things, said: "We cannot consider the sending of the goods by the plaintiffs to the shipping agents at Liverpool as a full and final delivery of them to the purchasers. We regard what was done by the Halls of Nottingham, in giving directions to the shipping agents, to have been in aid of the general purpose of sending the goods to New York. The partner at Nottingham, though in law one of the purchasers, acted in regard to these goods as an agent of the house at New York in facilitating the transportation to that city. During the short time the goods remained in the hands of these agents, before the directions came from Nottingham, they could not be said to be 'awaiting new orders from the purchaser to put them again in motion, to communicate to them another substantive destination.' . . . New York was the destination contemplated from the beginning. It was the one named to the vendor, and there was no thought of diverting the goods from that point, at any time or by any person. They were awaiting a new impulse only in the sense in which that may be predicated of freight in transitu which is temporarily at rest while arrangements are making to send it forward on the journey on which it was originally embarked. We are of opinion, therefore, that the transitus was not determined at Liverpool." And Strong, J., in the same connection, said: "The employment of Edwards, Sandford, & Company, was as mere forwarding agents, in

their usual course of business. The goods purchased of the vendors for Hall Brothers were uniformly sent to those agents, and by them shipped for New York. There is nothing in the case which will warrant the idea of any special agency. I do not think any weight is due on this subject to the fact that the goods were sent to them with advice that they would receive from J. & J. Hall further instructions in regard to the goods. It is apparent from the evidence that the instructions referred to were those subsequently given as to the time of shipment and the vessel to be employed. That the goods were to be sent to New York was determined when the purchase was made, and for that purpose the direction was given that they should be forwarded to Edwards, Sandford, & Company. No change of that determination was made, or, so far as appears, intended or thought of. It appears that the vendors were to pay the expenses of sending the goods to Liverpool, from which place the vendees were to provide for their carriage; and hence the propriety of instruction from the vendees to Edwards, Sandford, & Company as to their shipment from that place. But the employment by the vendees of a carrier from Liverpool, and deferring instructions as to shipment from there until the goods should arrive, did not create a new transit from that point. If the destination of the goods, as understood between the vendors and vendees, was New York, the transit and right of stoppage continued to New York, entirely unaffected by the consideration that the vendors employed carriers for part of the route, and the vendees as to the residue. A transit may be single and entire, and yet carriers be employed for different stages of the route as they are needed, with directions as to the carriage to each carrier, and knowledge by him as to their ultimate destination limited to the distance he is to carry. The extent of the transit does not depend upon the direction or address of the goods, in a shipping bill or otherwise, or any information to the carrier, but only upon the purposes

of the buyers communicated to the sellers, unless some change of purpose occurs. When directions as to the carriage for part of the distance the goods are to be taken are delayed, and subsequently given, a new motion is not by the new instruction impressed upon the goods, as that language is used in some of the cases. The original motion continues, although the employment of new carriers and new instructions may be necessary from time to time in the course of the transit. A new motion takes place only when, after goods have reached their original destination, they are started to another destination. Those words express only a secondary transit. We must find such a transit before we can say a new motion has been given to the goods. Inquiry for a new motion is inquiry for a new transit. They are the same thing."

But, generally speaking, the receipt of the shipment, either at an intermediate point or at the destination specified in the contract by forwarding agents of the buyer, who are to hold the goods subject to the orders of the buyer, terminates the transit as regards the vendor, so that he cannot stop any further transit. *Biggs v. Barry* (1855) 2 Curt. C. C. 259, Fed. Cas. No. 1,402; *Bolin v. Huffnagle* (1828) 1 Rawle (Pa.) 9; *Pottinger v. Hecksher* (1855) 2 Grant, Cas. (Pa.) 309; *Guilford v. Smith* (1858) 30 Vt. 49; *Leeds v. Wright* (1803) 3 Bos. & P. 320, 127 Eng. Reprint, 176, 4 Esp. 243, 7 Revised Rep. 779; *Dixon v. Baldwin* (1804) 5 East, 175, 102 Eng. Reprint, 1036; *Rowe v. Pickford* (1817) 8 Taunt. 83, 129 Eng. Reprint, 313, 1 J. B. Moore, 526, 19 Revised Rep. 466; *Allan v. Gripper* (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 1 L. J. Exch. N. S. 71, 2 Tyrw. 217; *Jackson v. Nichol* (1839) 5 Bing. N. C. 508, 132 Eng. Reprint, 1195, 8 L. J. C. P. N. S. 294, 7 Scott, 577; *Dodson v. Wentworth* (1842) 4 Mann. & G. 1080, 134 Eng. Reprint, 443, 6 Jur. 1066, 5 Scott, N. R. 821, 12 L. J. C. P. N. S. 59; *Wentworth v. Outhwaite* (1842) 10 Mees. & W. 436, 152 Eng. Reprint, 541, 12 L. J. Exch. N. S. 172; *Valpy v. Gibson* (1847) 4 C. B. 837,

136 Eng. Reprint, 737, 11 Jur. 826, 16 L. J. C. P. N. S. 241; *Bolton v. Lancashire & Y. R. Co.* (1866) L. R. 1 C. P. (Eng.) 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; *Ex parte Gibbes* (1875) L. R. 1 Ch. Div. (Eng.) 101, 24 Week. Rep. 298, 45 L. J. Bankr. N. S. 10, 33 L. T. N. S. 479; *Kendall v. Marshall* (1883) L. R. 11 Q. B. Div. (Eng.) 356, 31 Week. Rep. 597, 51 L. J. Q. B. N. S. 313, 48 L. T. N. S. 951; *Ex parte Miles* (1885) L. R. 15 Q. B. Div. (Eng.) 39, 54 L. J. Q. B. N. S. 566; *Bethell v. Clark* (1888) L. R. 20 Q. B. Div. (Eng.) 615, 57 L. J. Q. B. N. S. 302, 6 Asp. Mar. L. Cas. 346, 59 L. T. N. S. 808, 36 Week. Rep. 611, affirming (1887) L. R. 19 Q. B. Div. 553, 57 L. T. N. S. 627, 36 Week. Rep. 185; *Re Gurney* (1892) 7 Asp. Mar. L. Cas. (Eng.) 249, 67 L. T. N. S. 598, 9 Morrell, 294; *Jobson v. Eppenheim* (1905) 21 Times L. R. (Eng.) 468; *Reddall v. Union Castle Mail S. S. Co.* (1914) 112 L. T. N. S. (Eng.) 910. And see *Mechan & Sons v. North Eastern R. Co.* (1911) 48 Scot. L. R. 987, which quotes the Sale of Goods Act (56 & 57 Vict. chap. 71, § 45, subsec. 3) to the effect that where the custodian at the general point of destination acknowledges that he holds the goods for the buyer, the transitus is at an end, "and it is immaterial that a further destination for the goods may have been indicated by the buyer."

In fact, in *Guilford v. Smith* (1858) 30 Vt. 49, it was said that the rule is well settled that, when goods are delivered at a place where they will remain until a fresh impulse is communicated to them by the vendee, the transitus is at an end and the right of stoppage terminated. And in *Dixon v. Baldwin* (1804) 5 East, 175, 102 Eng. Reprint, 1036, Lord Ellenborough, Ch. J., said that, as between the vendor and vendee, if the transit be once at an end, the delivery is complete and cannot commence de novo merely because the goods are again sent upon their travels toward a new and ulterior destination, and that goods have been so delivered when they have so far gotten to the end of their journey that they



wait for new orders from the purchaser to put them in motion again, and without which they would continue stationary.

In *Scott Bros. v. William B. Grimes Dry-Goods Co.* (1892) 48 Mo. App. 521, the court pointed out the distinction between the situation where the delivery is to a forwarding agent of the vendee, and that where the delivery is to a general agent, such as for safe custody or for disposal of the goods, in the following language: "Whether the right of stoppage continues or not depends upon whether the party to whom the actual possession of the goods is delivered by the carrier be the agent, so far representing the principal — the vendee — as to make the delivery to him a full, effective, and final delivery to the principal, as contradistinguished from a delivery merely to a person acting as a carrier or means of conveyance to or on account of the principal in a mere course of transit towards him. If the carrier or other person receiving the goods at their destination be the agent of the vendee beyond the duty and position of such person as a mere carrier, the possession of such agent would be effectual to bar the right of stoppage as the actual, manual possession of the vendee." However, the *Scott Case* seems to be qualified in *O'Neal v. Day* (1893) 53 Mo. App. 189, so as to limit the rule of a right to stoppage in transitu after delivery to an agent for delivery, to cases where the goods were billed to a store or other particular point, as distinguished from the general point of destination. In *O'Neal v. Day*, the carrier delivered to a local carrier having authority to receive and transport all of the vendee's freight to his place of business, and it was held that such a receiving of freight billed to the carrier's station was, *prima facie*, a termination of the transit. And the *O'Neal Case* was expressly followed in *Shoninger v. Day* (1893) 53 Mo. App. 147, which involved similar facts, and was again approved on subsequent appeal in (1895) 61 Mo. App. 366.

But similar language to that quoted in *Scott Bros. v. William B. Grimes*

*Dry-Goods Co. (Mo.) supra*, was again used in *Bolin v. Huffnagle* (1828) 1 Rawle (Pa.) 9.

And in *Mills v. Ball* (1801) 2 Bos. & P. 457, 126 Eng. Reprint, 1382, Lord Alvanley, Ch. J., in discussing the right of a vendor to stop goods in transit while they were in the hands of a wharfinger at an intermediate point, to be forwarded to the vendee, said: "The question is whether the goods in the hands of the wharfinger were in such a situation that the vendors could stop them. The cases cited for the plaintiffs have established that where there is a contract for the sale of goods, and a delivery has been made to a middleman, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. The only question is whether these goods are to be considered as having been in the hands of a middleman, or as having been taken in the possession of the person for whom they were ultimately intended? If, in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. . . . I am of opinion that the wharfinger in this case, not having been particularly employed by the vendee, is to be considered as a middleman."

And in *Bethell v. Clark* (1888) L. R. 20 Q. B. Div. (Eng.) 615, affirming (1887) L. R. 19 Q. B. Div. 553, 57 L. T. N. S. 627, 36 Week. Rep. 185, the master of the rolls said: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transit and may be stopped." This passage was quoted with approval

and the doctrine again applied in *Lyons v. Hoffnung* (1890) L. R. 15 App. Cas. (Eng.) 391, 6 Asp. Mar. L. Cas. 551, 59 L. J. P. C. N. S. 79, 63 L. T. N. S. 293, 39 Week. Rep. 390, which is cited *supra*, this subdivision. And again in the *Bethell Case*, Lord Esher, M. R., said: "Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract, or of the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit."

*8. Carrier or representative as a special agent of vendee.*

Where delivery is made by the carrier to a general warehouseman acting as agent for it, as, for instance, for the purpose of collecting freight and charges due upon the goods, they are regarded as in transit while so held, and the vendor's right of stoppage is not cut off because of lack of delivery, either actual or constructive, to the vendee. *Hoover v. Tibbits* (1860) 13 Wis. 79 (this case clearly points out the distinction between delivery to a general agent of the vendee and delivery to an agent of the carrier); *Ex parte Barrow* (1877) L. R. 6 Ch. Div. (Eng.) 783, 25 Week. Rep. 466, 46 L. J. Bankr. N. S. 71, 36 L. T. N. S. 325.

And if the vendor deposits the goods with the vendee's agent with the understanding that delivery was conditional upon payment of the purchase price, such agent becomes a trustee for the vendor, and delivery, neither to such agent, nor by him to the vendee without receiving the price, consti-

tutes such delivery as terminates the right of stoppage in transitu. *Loeschman v. Williams* (1815) 4 Campb. (Eng.) 181, 16 Revised Rep. 772.

But, of course, the carrier may hold as agent of the consignee under a new agreement with him pending a complete and actual delivery, in which case the right of stoppage in transitu terminates with the making of such new contract and the constructive delivery of the goods.

**Massachusetts.**—*Norfolk Hardware Co. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 160, 38 N. E. 664; *COLEMAN v. NEW YORK, N. H. & H. R. Co.* (reported herewith) ante, 1366.

**Mississippi.**—*Langstaff v. Stix* (1886) 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97.

**New Hampshire.**—*Hall v. Dimond* (1885) 63 N. H. 565, 3 Atl. 423.

**North Carolina.**—*Williams v. Hodges* (1893) 118 N. C. 36, 18 S. E. 83.

**Ohio.**—*Calahan v. Babcock* (1871) 21 Ohio St. 281, 8 Am. Rep. 63.

**Wisconsin.**—*Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424.

**England.**—*Whitehead v. Anderson* (1842) 9 Mees. & W. 518, 152 Eng. Reprint, 219, 11 L. J. Exch. N. S. 157; *Smith v. Hudson* (1865) 6 Best. & S. 431, 122 Eng. Reprint, 1254, 34 L. J. Q. B. N. S. 145, 12 L. T. N. S. 377, 11 Jur. N. S. 622, 13 Week. Rep. 683; *Bolton v. Lancashire & Y. R. Co.* (1866) L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. N. S. 137, 13 L. T. N. S. 764, 14 Week. Rep. 430; *Ex parte Catling* (1873) 29 L. T. N. S. 431; *Merchants Bkg. Co. v. Phoenix Bessemer Steel Co.* (1877) L. R. 5 Ch. Div. 205, 46 L. J. Ch. N. S. 418, 36 L. T. N. S. 395, 25 Week. Rep. 457; *Ex parte Cooper* (1879) L. R. 11 Ch. Div. 68, 48 L. J. Bankr. N. S. 49, 40 L. T. N. S. 105, 27 Week. Rep. 518. And see *Allan v. Gripper* (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 1 L. J. Exch. N. S. 71, 2 Tyrw. 217.

**Canada.**—*McLean v. Breithaupt* (1884) 12 Ont. App. Rep. 383 (per Burton, J. A.); *Mollison v. Lockhart* (1891) 30 N. B. 398.

In *Foster v. Frampton* (1826) 6 Barn. & C. 107, 108 Eng. Reprint, 392,

Bayley, J., in discussing the question of a carrier acting as warehouseman for a consignee, said: "Where a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpone the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end. Now here, the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples, and directed the carrier to keep the goods in his warehouse until he received further directions. From that time the carrier became the warehouseman of the bankrupt, and the goods were as much in the possession of the latter as if he had taken them into his own warehouse. . . . Now here the bankrupt, on the particular occasion, used the warehouse of the carrier as his own, and made it the repository of his goods. I, therefore, think that the transitus was at an end as soon as the bankrupt took the samples from the hogsheads, and desired that they should remain in the warehouse till further directions." And in *Bolton v. Lancashire & Y. R. Co.* (1866) L. R. 1 C. P. (Eng.) 431, Earle, Ch. J., said: "There is no doubt but that the carrier may and often does become a warehouseman for the consignee; but that must be by virtue of some contract or course of dealing between them that, when arrived at their destination, the character of carrier shall cease, and that of warehouseman supervene." So, in *Whitehead v. Anderson* (1842) 9 Mees. & W. 518, 152 Eng. Reprint, 219, Parke, J., in delivering the judgment of the court, said: "A case of constructive possession is where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination,

pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him."

And in such a case the termination of the right of stoppage in transitu has been held not to be affected by the fact that the carrier, as such, claims a lien on the goods. *Allan v. Gripper* (1832) 2 Crompt. & J. 218, 149 Eng. Reprint, 94, 1 L. J. Exch. N. S. 71, 2 Tyrw. 217.

And by the Sale of Goods Act (56 & 57 Vict. chap. 71, § 45, subd. 3) it is provided that, "if after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession as bailee or custodian for the buyer or his agent, the transit is at an end." This act is quoted and applied in *Mechan & Sons v. North Eastern R. Co.* (1911) 48 Scot. L. R. 987.

But it has been held that a mere business custom by which the vendee is allowed to leave the goods in the carrier's warehouse, to be removed at his convenience upon payment of charges, does not create a new relationship such as will terminate the vendor's right of stoppage in transitu. *Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 83 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424.

And in England it has been held that the right of the consignor, under the rule allowing stoppage in transitu at any time before delivery, cannot be affected by any usage of the carrier to retain goods as a lien for a general balance of account between it and the consignee. *Oppenheim v. Russell* (1802) 3 Bos. & P. 42, 127 Eng. Reprint, 24, 6 Revised Rep. 604. And see *Richardson v. Goss* (1802) 3 Bos. & P. 119, 127 Eng. Reprint, 65, 6 Revised Rep. 727. But see also *Rowe v. Pickford* (1817) 8 Taunt. 83, 129 Eng. Reprint, 313, 1 J. B. Moore, 526, 19 Revised Rep. 466; and *Foster v. Frampton* (1826) 6 Barn. & C. 107, 108 Eng. Reprint, 892, 9 Dowl. & R. 106, 2 Car. & P. 469, 5 L. J. K. B. 71, 30 Revised Rep. 255.

Where a vendor delivers goods to his agent to have work done upon them before being forwarded to the vendee, they are still in transit while so held, and may be stopped by the vendor upon the insolvency of the vendee. *Owenson v. Morse* (1796) 7 T. R. 64, 101 Eng. Reprint, 856.

*4. Master of ship owned, chartered, or designated by vendee.*

Under the rule requiring actual delivery, it has been held that where the goods are consigned to the vendee at a foreign port, the right of stoppage in transitu continues until delivery into the actual possession of the vendee at the port of delivery, and that the rule is not affected by the fact that the goods were carried in the vendee's ship. In other words, where goods are shipped to a foreign port in the vendee's ship and consigned to him, the vendor's right of stoppage in transitu does not terminate when the goods are delivered to the ship. *Newhall v. Vargas* (1836) 13 Me. 93, 29 Am. Dec. 489; *Stubbs v. Lund* (1811) 7 Mass. 453, 5 Am. Dec. 63; *Parker v. M'Iver* (1792) 1 S. C. Eq. (Desauss.) 274, 1 Am. Dec. 656.

And where the consignee has no control over the ship, but has merely contracted with the master to employ his ship in bringing goods for him, it has been held that delivery of goods on board does not terminate the consignor's right of stoppage in transitu any more than if delivered on board a general ship to be carried to the consignee. *Bohtlingk v. Inglis* (1803) 3 East, 381, 102 Eng. Reprint, 643, 7 Revised Rep. 490; *Berndtson v. Strang* (1868) L. R. 3 Ch. (Eng.) 538, 37 L. J. Ch. N. S. 665, 19 L. T. N. S. 40, 16 Week. Rep. 1025; *Ex parte Rosevear China Clay Co.* (1879) L. R. 11 Ch. Div. (Eng.) 560, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144. And this although no different or further destination than the ship was communicated to the vendor. *Ex parte Rosevear China Clay Co.* (Eng.) supra. In this case *Cotton, L. J.*, said that the verbal agreement which the purchaser entered into to charter the ship did not make the captain the agent or servant

of the purchaser, as he was only a carrier; and *Brett, L. J.*, argued that "it can make no difference whether the destination of the goods is communicated to [by] the purchaser at the time of the contract for sale, or whether the destination is to be named after the contract, but before the shipment."

Nor does the mere fact that the carrying ship was named by the buyer make any difference as to the consignor's right of stoppage in transitu. *Thompson v. Trail* (1826) 2 Car. & P. 334, 6 Barn. & C. 36, 108 Eng. Reprint, 366, 6 Dowl. & R. 31, 5 L. J. K. B. 34, 30 Revised Rep. 242; *Ex parte Watson* (1877) L. R. 5 Ch. Div. (Eng.) 35, 25 Week. Rep. 489, 46 L. J. Bankr. N. S. 97, 36 L. T. N. S. 75, 3 Asp. Mar. L. Cas. 396. But see *Wilmshurst v. Bowker* (1843) 12 L. J. Exch. N. S. 475, 7 Mann. & G. 882, 135 Eng. Reprint, 358, where goods were put on board a ship designated by the vendee to be carried for and at his risk, and the vendor sent an indorsed bill of lading and invoice to the vendee, in which it was held that the vendor's right of stoppage in transitu was terminated, it not appearing that payment was a condition precedent to transfer of title and possession.

However, the contrary has been held where the goods were consigned to the one owning, controlling, or designating the means of transportation,—as, for instance, a ship,—to be shipped to a foreign market rather than to be transported to the consignee, the right of stoppage in transitu terminating in such a case, on delivery to the ship. *Stubbs v. Lund* (1811) 7 Mass. 453, 5 Am. Dec. 63; *Rowley v. Bigelow* (1832) 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Fowler v. McTaggart*, as cited in *Inglis v. Usherwood* (1801) 1 East, 515, 102 Eng. Reprint, 198, 7 T. R. 442, 101 Eng. Reprint, 1066, 4 Revised Rep. 485. And see *Sturtevant v. Orser* (1862) 24 N. Y. 538, 82 Am. Dec. 321. In *Rowley v. Bigelow* (1832) 12 Pick. (Mass.) 307, *Shaw, Ch. J.*, said that it was very clear that delivery of goods on board a vessel appointed by the vendee to receive it, "not for the purpose of transportation to him, or to a place appointed by him to

be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence to a third person, was a termination of the transit, and the right of the vendor to stop in transitu was at an end."

And it has been held that where goods are shipped on the consignee's own vessel in a foreign port, to be transported and delivered to him, the transitus as between the vendor and vendee is terminated upon delivery to the ship's master, so as to prevent a subsequent stopping by the vendor. *Bolin v. Huffnagle* (1828) 1 Rawle (Pa.) 9, approved in *Hays v. Mouille* (1850) 14 Pa. 48; *Humberston v. Frodsham* (1844) DeG. Bankr. Cas. (Eng.) 262, 8 Jur. 675; *Van Casteel v. Booker* (1848) 2 Exch. 691, 154 Eng. Reprint, 668, 18 L. J. Exch. N. S. 9; *Straker v. Ewing* (1865) 34 Beav. 147, 55 Eng. Reprint, 590, 11 Jur. N. S. 127, 11 L. T. N. S. 588, 13 Week. Rep. 286; *Schotsmans v. Lancashire & Y. R. Co.* (1867) L. R. 2 Ch. (Eng.) 332, 36 L. J. Ch. N. S. 361, 16 L. T. N. S. 189, 15 Week. Rep. 537; *Re Bruno* (1887) 6 Asp. Mar. L. Cas. (Eng.) 138, 56 L. T. N. S. 577, 4 Morrell, 146. In *Bolin v. Huffnagle* (Pa.) supra, the court said: "The relation of the master is that of a special agent to his employer. He so far represents his principal as to make a delivery to him (in the absence of a special agreement to the contrary) a full, effectual, and final delivery to the principal himself. The master of the ship cannot, with any propriety, be considered a common carrier, or mere middleman, between the consignor and the consignee. . . . After the delivery of the goods at M. to the captain, B. & Company [the vendors] ceased to have any control over them. Every connection between the vendors and the agent was at an end, and the agent became alone responsible to his employers. Nor had the agent any demands against the vendors. Not so in the case of a common carrier or middleman, who, for certain purposes, is considered as the agent of both parties." At least, this is the rule unless the vendor reserves some control over the shipment. *Schotsmans v. Lancashire*

& Y. R. Co. (1867) L. R. 2 Ch. (Eng.) 332. In the latter case Lord Chelmsford, L. C., among other things, said that the essence of the doctrine of stoppage in transitu is that during the transitus the goods should be in the custody of some third person intermediate between the seller who has parted with and the buyer who has not acquired possession, and continued as follows: "If the goods are actually delivered to an agent of the vendee, employed by him to receive delivery, the vendor is divested of his right of stoppage in transitu. On the other hand, although there is no actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case, the goods were shipped on board the consignee's own ship, and delivered into the possession of his own servant, the master, who signed bills of lading making the goods deliverable to the consignees or assigns. There was, therefore, a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the vendor."

And it has been held that delivery to a ship chartered by the vendee, of goods for a voyage to a domestic port, constitutes a constructive delivery sufficient to terminate the vendor's right of stoppage in transitu. *Thompson v. Stewart* (1870) 7 Phila. (Pa.) 187.

However, where it does clearly appear that the vendors reserved dominion over the goods, delivery to the vendee's ship does not terminate the right of stoppage in transitu. Thus, in *Turner v. Liverpool Docks* (1851) 6 Exch. 543, 153 Eng. Reprint, 659, 20 L. J. Exch. N. S. 393, 14 Eng. Rul. Cas. 725, it was held that where a bill of lading in terms made the goods deliverable to the order of the vendors, they reserved such a title as prevented the goods passing to the vendees by delivery on board their ship, so that the right of stoppage in transitu continued during the voyage to the point of destination. So, in *Moakes v. Nicolson* (1865) 19 C. B. N. S. 290, 144 Eng. Reprint, 798, 34 L. J. C. P. N. S.

273, 12 L. T. N. S. 573, in holding that delivery of goods on board a ship chartered by the vendee had no effect whatever in passing the property so as to terminate the right of stoppage in transitu, Earle, Ch. J., said that if the intention was that the ship should be regarded as the warehouse of the vendor until the happening of a contemplated event (payment of the price), the putting of the goods on board the ship did not alter the position of the contracting parties. And in *Berndtson v. Strang* (1867) L. R. 4 Eq. (Eng.) 481, 87 L. J. Ch. N. S. 665, 19 L. T. N. S. 40, 16 Week. Rep. 1025, it was held that delivery by the vendor of goods on board a ship chartered by the vendee of such goods, under a bill of lading making the shipmaster a carrier, preserved the right of stoppage in transitu until the ship reached the point of destination. And in *Van Casteel v. Booker* (1848) 2 Exch. 691, 154 Eng. Reprint, 668, 11 L. J. Exch. N. S. 9, it was said that delivery to the purchaser's ship ends transit unless it appears that the consignor clearly intended to preserve his title to the goods until he did a further act, as by transferring the bill of lading. And in *Ruck v. Hatfield* (1822) 5 Barn. & Ald. 632, 106 Eng. Reprint, 1321, 24 Revised Rep. 507, it was held that where a delivery is made under a contract calling for delivery free on board, and the vendor's agent demands a receipt acknowledging shipment on account of the vendors, the transitus is not ended by the mere delivery of the goods, and the vendors still have a right to stop them, even though the ship's officer refused to sign the receipt as requested. And see *Ex parte Rosevear China Clay Co.* (1879) L. R. 11 Ch. Div. (Eng.) 560, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144, wherein the contract called for delivery "free on board" a ship chartered by the vendee, and in which it was held that such a delivery did not terminate the vendor's right of stoppage in transitu.

But even admitting the validity of the rule that a delivery of goods on board vendee's ship is, under ordinary circumstances, a delivery which ter-

minates the vendor's right of stoppage in transitu, a case may be taken out of the rule by a law of the vendor's country. Thus, in *Inglis v. Usherwood* (1801) 1 East, 515, 102 Eng. Reprint, 198, it was held that where delivery on board vendee's ship was made in Russia, and by a law of that country the owner may retake the same on board a ship upon the bankruptcy of the vendee, the vendor could stop the same in transit upon discovering the insolvency of his vendee.

#### *b. Customs officials.*

The taking of possession from the carrier by customs officials, under general orders, does not itself terminate the transitus, where the freight and duty remain unpaid and the entry has not been made, the custody of the carrier in such a case being regarded as continued by the customs officials. *Burnham v. Winsor* (1843) Fed. Cas. No. 2,180; *Parker v. Byrnes* (1871) 1 Low. Dec. 539, Fed. Cas. No. 10,728; *Re Bearns* (1878) 18 Nat. Bankr. Reg. 500, Fed. Cas. No. 1,191; *Re Talbot* (1911) 185 Fed. 985; *Hauterman v. Bock* (1859) 1 Daly (N. Y.) 366; *Fraschieris v. Henriques* (1868) 6 Abb. Pr. N. S. (N. Y.) 261; *Strahlheim v. Wallach* (1884) 12 Daly (N. Y.) 313; *Donath v. Broomhead* (1847) 7 Pa. 301; *Burr v. Wilson* (1856) 13 U. C. Q. B. 478; *Lewis v. Mason* (1875) 36 U. C. Q. B. 590; *Ascher v. Grand Trunk R. Co.* (1875) 36 U. C. Q. B. 609; *Morgan Envelope Co. v. Boustead* (1885) 7 Ont. Rep. 697. And in England the same conclusion has been reached where it merely appeared that the duties were unpaid. *Northey v. Field* (1797) 2 Esp. (Eng.) 613. Lord Kenyon said that until the duties were paid the goods were quasi in custodia legis.

But where the customs officials have entered the goods as belonging to the consignee and the freight has been paid, it has been held that the right of stoppage in transitu has terminated, although the goods are still held in bonded warehouses pending payment of duties. *Re Talbot* (1911) 185 Fed. 986; *Wiley v. Smith* (1877) 2 Can. S. C. 1, affirming (1877) 1 Ont. App. Rep.

179, and overruling *Graham v. Smith* (1876) 27 U. C. C. P. 1, and *Howell v. Alport* (1862) 12 U. C. C. P. 375, upon which the *Graham* decision was based; *Wilds v. Smith* (1877) 2 Ont. App. Rep. 8, reversing (1877) 41 U. S. Q. B. 136, and following *Wiley v. Smith* (1877) 2 Can. S. C. 1, affirming (1877) 1 Ont. App. Rep. 179. And that entry of goods at a customhouse, and the placing of the same in the public warehouse, terminate the right of stoppage in transitu, even though the duties have not been paid, see *Mottram v. Heyer* (1846) 5 Denio (N. Y.) 629, and *Cartwright v. Wilmerding* (1862) 24 N. Y. 521.

And in Ireland, in *Orr v. Murdock* (1851) 2 Ir. C. L. Rep. 9, the court applied the rule that transitus terminates when nothing remains to be done, either by the vendee to complete the contract, or by the vendor to transfer the possession, and held that lodgment of a delivery order with customs officials who held goods bought from the drawer of the order, by the one to whom delivery was ordered, terminated the transitus so as to prevent the vendor's stopping the consignment, since the order, especially as it was acted upon, made the officials the agents of the vendee instead of the vendor; and this even though there was no actual transfer on the excise books. It was also held in this case that payment of the duty by the vendee was not a condition precedent under the delivery order.

And where the consignee has the goods entered and bonded and warehoused in his own name, the seller has thereafter no right of stoppage. *Parker v. Byrnes* (1871) 1 Low. Dec. 539, Fed. Cas. No. 10,728; *Fraschieris v. Henriques* (1868) 6 Abb. Pr. N. S. (N. Y.) 261.

On the other hand, it has been held that, where the consignor has the goods entered and placed in bond in his own name, and, under treasury rulings, his order is necessary in order to enable the consignee to withdraw the same from bond, there has been no delivery such as would terminate the vendor's right of stoppage in transitu. *Re Bearns* (1878) 18 Nat. Bankr. Reg.

500, Fed. Cas. No. 1,191. And that the mere entry of goods by the vendee at the customhouse, without the payment of the duties, and when not placed in the public warehouse, does not terminate the transitus or the right to stop the same before the delivery to the vendee, see *Mottram v. Heyer* (1846) 5 Denio (N. Y.) 629; *Holbrook v. Vose* (1860) 6 Bosw. (N. Y.) 76, and *Fraschieris v. Henriques* (N. Y.) supra. And the same has been held where the consignee merely entered the goods before notice of arrival, at least, while they remained in the hands of the carrier as such. *Harris v. Pratt* (1858) 17 N. Y. 249, affirming (1857) 6 Duer, 606.

*c. Under attachment, garnishment, or execution.*

It is generally conceded that seizure of goods from an intermediate carrier or a warehouseman, on an attachment, garnishment, or other legal process by a general creditor of the consignee, before delivery, does not end transit so as to terminate the consignor's right of stoppage.

**United States.**—*Re J. F. Growe Constr. Co.* (1919) 256 Fed. 907.

**Alabama.**—*Bayonne Knife Co. v. Umbenhauer* (1894) 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. 175.

**Arkansas.**—*Mason v. Wilson* (1884) 43 Ark. 172.

**Connecticut.**—*Woodruff v. Noyes* (1843) 15 Conn. 385.

**Iowa.**—*Cox v. Burns* (1855) 1 Iowa, 64; *O'Neil v. Garrett* (1858) 6 Iowa, 480; *Greve v. Dunham* (1882) 60 Iowa, 108, 14 N. W. 130.

**Kansas.**—*Rucker v. Donovan* (1874) 13 Kan. 251, 19 Am. Rep. 84 (writ of execution).

**Kentucky.**—*Hause v. Judson* (1836) 4 Dana, 7, 29 Am. Dec. 377; *Wood v. Yeatman* (1854) 15 B. Mon. 270.

**Louisiana.**—*Hepp v. Glover* (1840) 15 La. 461, 35 Am. Dec. 206; *Blum v. Marks* (1869) 21 La. Ann. 268, 99 Am. Dec. 725.

**Maryland.**—*O'Brien v. Norris* (1860) 16 Md. 122, 77 Am. Dec. 234.

**Massachusetts.**—*Scholfeld v. Bell* (1817) 14 Mass. 40; *Naylor v. Dennie* (1829) 8 Pick. 198, 19 Am. Dec. 319; *Seymour v. Newton* (1870) 105 Mass.

272; Durgy Cement & Umber Co. v. O'Brien (1877) 123 Mass. 12.

**Michigan.** — White v. Mitchell (1878) 88 Mich. 890.

**Minnesota.** — Lewis v. Sharvey (1894) 58 Minn. 464, 59 N. W. 1096.

**Mississippi.** — Morris v. Shryock (1874) 50 Miss. 590; Langstaff v. Stix (1886) 64 Miss. 171, 60 Am. Rep. 49, 1 So. 97; Dreyfus v. Mayer (1891) 69 Miss. 282, 12 So. 267.

**Missouri.** — Schwabacher v. Kane (1888) 18 Mo. App. 126; Estey v. Truxel (1887) 25 Mo. App. 238; Letts-Spencer Grocery Co. v. Missouri P. R. Co. (1907) 188 Mo. App. 352, 122 S. W. 10.

**Nebraska.** — Chicago, B. & Q. R. Co. v. Painter (1884) 15 Neb. 394, 19 N. W. 488; Schuster v. Carson (1890) 28 Neb. 612, 44 N. W. 734.

**Nevada.** — More v. Lott (1878) 13 Nev. 376; Fenkhausen v. Fellows (1889) 20 Nev. 312, 4 L.R.A. 732, 21 Pac. 886.

**New Hampshire.** — Inslee v. Lane (1876) 57 N. H. 454.

**New York.** — Buckley v. Furniss (1836) 15 Wend. 137, on subsequent appeal in (1837) 17 Wend. 504; Holbrook v. Vose (1860) 6 Bosw. 76; Clark v. Lynch (1871) 4 Daly, 83.

**North Carolina.** — Farrell v. Richmond & D. R. Co. (1889) 102 N. C. 390, 3 L.R.A. 647, 11 Am. St. Rep. 760, 9 S. E. 302.

**Ohio.** — Benedict v. Schaettle (1861) 12 Ohio St. 515; Calahan v. Babcock (1871) 21 Ohio St. 281, 8 Am. Rep. 63.

**Oregon.** — Frame v. Oregon Liquor Co. (1906) 48 Or. 272, 85 Pac. 1009, rehearing denied in (1906) 48 Or. 276, 86 Pac. 791.

**Pennsylvania.** — Hays v. Mouille (1850) 14 Pa. 48; Schumacher v. Eby (1855) 24 Pa. 521; Pottinger v. Hecksher (1855) 2 Grant, Cas. 309; Cabean v. Campbell (1858) 30 Pa. 254; Baltimore & O. R. Co. v. Davis (1888) 9 Sadler, 147, 20 W. N. C. 514, 12 Atl. 335; Allen v. Mercier (1826) 1 Ashm. 103; Bender v. Bowman (1868) 2 Pearson, 517; Kahnweiler v. Buck (1870) 2 Pearson, 69; Eastern Lumber Co. v. Gill (1891) 9 Pa. Co. Ct. 630.

**Tennessee.** — Mississippi Mills v. Union & P. Bank (1882) 9 Lea, 314.

**Texas.** — Chandler v. Fulton (1858)

10 Tex. 2, 60 Am. Dec. 188; Harris v. Tenney (1892) 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82; Tillman v. Kansas City Distilling Co. (1887) 3 Tex. App. Civ. Cas. (Willson) 349.

**Vermont.** — Kitchen v. Spear (1858) 30 Vt. 545.

**Wisconsin.** — Sherman v. Rugee (1882) 55 Wis. 346, 13 N. W. 241.

**England.** — Smith v. Goss (1808) 1 Campb. 282, 10 Revised Rep. 684 (attachment); Bartram v. Farebrother (1828) 4 Bing. 579, 180 Eng. Reprint, 891, 1 Moore & P. 515, 6 L. J. C. P. 125, 29 Revised Rep. 639.

**Canada.** — McLean v. Breithaupt (1884) 12 Ont. App. Rep. 383.

In *Sherman v. Rugee* (1882) 55 Wis. 346, 13 N. W. 241, the court discussed the right of stoppage in transitu as affected by a seizure of goods on execution as follows: "If at that time [time of seizure by sheriff] the leather had not come to the possession of the purchasers, the right of the plaintiffs [vendors] to claim and take possession of it is clear. The fact that it had been seized by the sheriff by virtue of process against the goods of the purchasers does not destroy that right. Notwithstanding such seizure, the leather was still in transit when demanded of the sheriff. . . . It was argued that the taking of the leather by the sheriff from the railroad company, and removing it to the store of the purchasers, operated as a delivery to the purchaser and foreclosed the right of the plaintiffs to reclaim it. We find nothing in the testimony which supports this position. It is conclusively proved that the sheriff seized the property and held it under his processes, against the purchasers, and not as the agent of the purchasers. It is entirely immaterial that they delivered to him or allowed him to take the bill of the leather and the plaintiff's letter of advice inclosing it, or that he stored the goods in the building in which, before their failure, the purchasers carried on their business. The testimony fails entirely to show that there was ever a moment in which they had any dominion over or control of the property." In *Naylor v. Dennie* (1829) 8 Pick. (Mass.) 198, 19 Am.



Dec. 319, the court discussed the question of the right of stoppage in transitu as affected by an intervening attachment by a general creditor of the consignee as follows: "This right is founded upon an implied condition in the sale that, if the vendee should become actually insolvent between the shipment of the goods and the reception of them by the vendee, the vendor shall have the right to rescind the contract and reclaim the goods. To allow an attachment, before the transit is at an end, to have effect, will be to defeat a useful and necessary provision of the law merchant." And in *Buckley v. Furniss* (1836) 15 Wend. (N. Y.) 137, *Bronson, J.*, in discussing a similar question, said that an attaching creditor has no better right to the goods than the debtor consignee, and continued as follows: "He [the attaching creditor] might by legal process acquire a priority over other creditors, who were less diligent, and thus secure his debt; but he could not divest a right already existing in the plaintiff [the consignor]. The process does not proceed on the ground of defeating a prior right in a third person, but on the ground of acquiring such interest in the property attached as the debtor had himself. If the levy of an execution, or the service of an attachment against the vendee, were allowed to defeat the claim of the vendor, the right of stoppage in transitu would be of little value; for in this state judgments and attachments not infrequently furnish the first public evidence of the insolvency of a trader."

And the same has been held to be the rule where the attachment is levied at an intermediate point while the goods are in the hands of an agent of the vendee to be forwarded. *Blackman v. Pierce* (1863) 23 Cal. 508; *Weber v. Baessler* (1893) 3 Colo. App. 459, 34 Pac. 261; *Atkins v. Colby* (1849) 20 N. H. 154.

But in a few instances the courts have seemingly regarded a seizure upon execution as upon a different footing than an attachment or garnishment, and have held that goods while in transit may be seized on execution so as to terminate the vendor's

right of stoppage in transitu. The following cases are to this effect: *Couture v. McKay* (1889) 6 Manitoba L. R. 273; *McLean v. Breithaupt* (1884) 12 Ont. App. Rep. 383. And see *Smith v. Goss* (1808) 1 Campb. (Eng.) 282, 10 Revised Rep. 684.

And it has been held that where the vendor of goods himself attaches them as the property of the vendee while they are in transit, such attachment destroys the right of the vendor to subsequently stop them in transit. *Woodruff v. Noyes* (1843) 15 Conn. 335; *Fox v. Willis* (1883) 60 Tex. 373. At least, unless the vendor, in the belief that he still has a right of stoppage in transitu, promptly dismisses the writ and seeks to stop the transit. *Fox v. Willis* (Tex.) supra.

And it has been broadly stated, and seemingly in square conflict with the general rule above stated, that an attachment levied on goods after their delivery to the carrier for transportation to the vendee, but before the right of stoppage in transitu was exercised, terminated the right of stoppage. *Boyd v. Mosely* (1853) 2 Swan (Tenn.) 661. This was upon the theory that the one in whose favor the attachment was made was a bona fide holder; but it seems that this reasoning is fallacious, and in fact is declared to be obiter in the subsequent Tennessee case of *Mississippi Mills v. Union & P. Bank* (1882) 9 Lea (Tenn.) 314, in which, as shown supra, the general rule is adhered to.

And it has been held that after the goods have reached the point of destination they may be taken on attachment or execution sued out by creditors of the vendee, so as to work a delivery and terminate the right of stoppage in transitu. *French v. Star Union Transp. Co.* (1883) 134 Mass. 288; *Wentworth v. Outhwaite* (1842) 10 Mees. & W. 486, 152 Eng. Reprint, 541, 12 L. J. Exch. N. S. 172.

#### *d. Executors and administrators.*

When the vendee dies, his administrator or executor, who succeeds to his rights, may take possession of goods which have arrived at the point of destination, thereby terminating the tran-

sit and putting an end to the vendor's right of stoppage. *Jacobs v. Bentley* (1908) 86 Ark. 186, 126 Am. St. Rep. 1086, 110 S. W. 594.

*e. Trustees in bankruptcy and assignees in insolvency.*

Where goods have reached the point of destination, it has been held that either an assignee in insolvency or a receiver in bankruptcy of the consignee may take the goods from the carrier, so as to terminate the shipper's right of stoppage in transitu. *Re Arctic Stores* (1919) 258 Fed. 688; *McElroy v. Seery* (1884) 61 Md. 389, 48 Am. Rep. 110; *Ellis v. Hunt* (1789) 3 T. R. 464, 100 Eng. Reprint, 679, 1 Revised Rep. 743, 28 Eng. Rul. Cas. 416 (assignee in bankruptcy put mark on goods after arrival, and previous to the consignor's attempted stoppage in transitu); *Scott v. Pettit* (1803) 3 Bos. & P. 469, 127 Eng. Reprint, 255, 7 Revised Rep. 804; *Bird v. Brown* (1850) 4 Exch. 786, 154 Eng. Reprint, 1488, 19 L. J. Exch. N. S. 154, 14 Jur. 132, 23 Eng. Rul. Cas. 422; *Davis v. McWhirter* (1877) 40 U. C. Q. B. 598. In *Bird v. Brown* (1850) 4 Exch. 786, 154 Eng. Reprint, 1433, *supra*, the court said: "There could be no valid stoppage in transitu, after the formal demand of the goods by Bird on the 11th of May, and the subsequent delivery of them to the defendants. The goods had then arrived at Liverpool, and were ready to be delivered to the parties entitled. Bird, on behalf of the assignees, demanded the goods, and tendered the amount due for the freight. Assuming that there had been no previous stoppage in transitu, the masters of the several ships were thereupon bound to deliver up the goods to Bird, as representing *Carne & Telo*, and they could not, by their wrongful detainer of them and delivering them over to other parties, prolong the transitu, and so extend the period during which stoppage might be made. The transitu was at an end when the goods had reached the port of destination, and when the consignees, having demanded the goods and tendered the amount of the freight, would have taken them into

their possession but for a wrongful delivery of them to other parties."

On the other hand, it has been held that a messenger in insolvency of a vendee cannot, at least as against the refusal of the vendee himself to accept a shipment from a carrier, terminate the vendor's right of stoppage in transitu by accepting the goods, it being said that "a bankruptcy messenger acts in a passive capacity, is intrusted with no discretionary powers, acts under mandate of court, or does certain things particularly described by the law which creates the office, is mostly a defender or keeper of property, a custodian until an assignee comes,—and he can neither add to nor take from the bankrupt's estate." *Tufts v. Sylvester* (1837) 79 Me. 213, 1 Am. St. Rep. 303, 9 Atl. 357.

And it has been held that the carrier's agent has a right to refuse to turn over the goods pending instructions from the company, so that a mere demand on the part of the assignee does not work a constructive delivery sufficient to cut off the vendor's right of stoppage in transitu. *Anderson v. Fish* (1838) 16 Ont. Rep. 476, affirmed on opinion below in (1890) in 17 Ont. App. Rep. 28.

And, of course, the mere fact that the consignee has made an assignment in bankruptcy before the goods arrive at the point of destination does not terminate the vendor's right of stoppage in transitu. *Kinloch v. Craig* (1790) 4 Bro. P. C. 47, 2 Eng. Reprint, 32, 3 T. R. 119, 788, 100 Eng. Reprint, 487, 863, 1 Revised Rep. 664.

And in England, in a very early case, it was held that as between the assignee for creditors of the consignee and the consignor, and as against the carrier, the consignor may stop the goods at any time before they actually come into the hands of the assignee. *D'Aquila v. Lambert* (1761) 2 Eden, 75, 28 Eng. Reprint, 824, 1 Ambl. 399, 27 Eng. Reprint, 266. And see *Winks v. Hassall* (1829) 9 Barn. & C. 372, 109 Eng. Reprint, 138, 7 L. J. K. B. 265.

In fact, in what appears to be the earliest reported English case, it was held that if the consignor can "by

any means" prevent the goods coming into the hands of the consignee or his assignees in bankruptcy, it was lawful to do so. *Wiseman v. Vandeputt* (1690) 2 Vern. 203, 23 Eng. Reprint, 732.

*IV. Partial payment; taking commercial paper or security.*

The receipt of part payment for the goods shipped does not terminate the consignor's right of stoppage in transitu. *Burnham v. Winsor* (1843) Fed. Cas. No. 2,180; *Newhall v. Vargas* (1836) 13 Me. 93, 29 Am. Dec. 489; *Jordan v. James* (1831) 5 Ohio, 88; *Hodgson v. Loy* (1797) 7 T. R. 440, 100 Eng. Reprint, 1065, 4 Revised Rep. 483; *Feise v. Wray* (1802) 3 East, 93, 102 Eng. Reprint, 532, 6 Revised Rep. 551; *Barnes v. Lopez* (1864) Newfoundl. Rep. 89. And this, even though a draft for the balance has been presented and accepted after arrival of the goods. *Burnham v. Winsor* (Fed.) *supra*.

Nor does receipt by the consignor of the consignee's acceptance for a part of the goods terminate the right of stoppage in transitu. *Edwards v. Brewer* (1837) 2 Mees. & W. 375, 150 Eng. Reprint, 802, *Murph. & H.* 132, 6 L. J. Exch. N. S. 135, 1 Jur. 432. And the bill need not be tendered back. *Ibid*.

Likewise, it has been held that the right of stoppage in transitu is not lost by the taking by the vendor of the vendee's draft for the price, and the acceptance thereof by the latter, the same not constituting an absolute payment as between the vendor and the vendee. *Ainis v. Ayres* (1891) 62 Hun, 376, 16 N. Y. Supp. 905; *Kinloch v. Craig* (1790) 4 Bro. P. C. 47, 2 Eng. Reprint, 32, 3 T. R. 119, 783, 100 Eng. Reprint, 487, 858, 1 Revised Rep. 664; *Jenkyns v. Usborne* (1844) 7 Mann. & G. 678, 135 Eng. Reprint, 273, 8 Scott, N. R. 505, 13 L. J. C. P. N. S. 196; *Barnes v. Lopez* (1864) Newfoundl. Rep. 89. In fact, it has been broadly stated that the vendor's right of stoppage in transitu is not abridged or in any way affected by the fact that he has received the vendee's bill of exchange, or other negotiable securities for the whole price, even though they have

been negotiated and are still outstanding. *Diem v. Koblitz* (1892) 49 Ohio St. 41, 34 Am. St. Rep. 531, 29 N. E. 1124; *Bell v. Moss* (1840) 5 Whart. (Pa.) 189; *Feise v. Wray* (1802) 3 East, 93, 102 Eng. Reprint, 532, 6 Revised Rep. 551; *Wood v. Jones* (1825) 7 Dowl. & R. (Eng.) 126.

And in Pennsylvania it has been held that the giving of a bank check does not constitute a payment sufficient to suspend the right of stoppage in transitu, unless it was so agreed and the deposit was actually placed to the drawee's account. *Bell v. Moss* (1840) 5 Whart. (Pa.) 189.

And it has been held that the fact that the vendor has accepted the vendee's note for the price does not terminate the right of stoppage in transitu (*Brewer Lumber Co. v. Boston & A. R. Co.* (1901) 179 Mass. 228, 54 L.R.A. 435, 88 Am. St. Rep. 375, 60 N. E. 548; *Donath v. Broomhead* (1847) 7 Pa. 301; *Hays v. Mouille* (1850) 14 Pa. 48), even though the vendor has also receipted the bill for the goods, provided he can produce and tender the note (*Brewer Lumber Co. v. Boston & A. R. Co.* (Mass.) *supra*). And in such a case it is immaterial that the note has, in the meantime, been in the hands of a third person for collection, or after discount. *Ibid*. And in Pennsylvania it has been held that the note need not be tendered back before stopping the goods in transitu. *Hays v. Mouille* (Pa.) *supra*.

However, it has also been held that the taking of the vendee's promissory note for the price, and discounting it and having it outstanding, constitute a payment sufficient to prevent the retaining of the goods by the vendor. *Bunney v. Poyntz* (1833) 4 Barn. & Ad. 568, 110 Eng. Reprint, 806, 1 Nev. & M. 229, 2 L. J. K. B. N. S. 55.

It has been held that the consignor is not precluded from stopping goods in transitu by the fact that he holds collateral security for the price. *Bell v. Moss* (1839) 5 Whart. (Pa.) 189.

*V. Sale or transfer by original vendee.*

*a. Bona fide transfer terminates.*

It is well settled that a shipper of goods has no right of stoppage in

transitu after a bona fide sale thereof, by an assignment or indorsement of the bill of lading, by the vendee to a third party, for a valuable consideration, even though the sale was made before actual arrival of the goods at point of destination.

**United States.**—*Conrad v. Atlantic Ins. Co.* (1828) 1 Pet. 386, 7 L. ed. 189; *Schmidt v. The Pennsylvania* (1880) 4 Fed. 548, affirming on this point (1878) 7 W. N. C. 98; *Sheppard v. Newhall* (1893) 4 C. C. A. 352, 7 U. S. App. 544, 54 Fed. 306; *Walter v. Ross* (1808) 2 Wash. C. C. 283, Fed. Cas. No. 17,122; *Ryberg v. Snell* (1809) 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Audenreid v. Randall* (1868) 3 Cliff. 99, Fed. Cas. No. 644; *Castonala v. Missouri P. R. Co.* (1885) 24 Fed. 267; *St. Paul Roller Mill Co. v. Great Western Despatch Co.* (1886) 27 Fed. 434.

**Alabama.**—*Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17.

**California.**—*Jones v. Earl* (1869) 37 Cal. 630, 99 Am. Dec. 338. And see *Newhall v. Central P. R. Co.* (1876) 51 Cal. 345, 21 Am. Rep. 713, as quoted *infra* this subdivision.

**Colorado.** — *First Nat. Bank v. Schmidt* (1895) 6 Colo. App. 216, 40 Pac. 479.

**Kentucky.**—*Ford v. Sproule, A. & Co.* (1820) 2 A. K. Marsh. 528, 12 Am. Dec. 439; *Secomb v. Nutt* (1853) 14 B. Mon. 324.

**Maine.**—*Lee v. Kimball* (1858) 45 Me. 172.

**Maryland.** — See *National Bank v. Baltimore & O. R. Co.* (1904) 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

**Massachusetts.** — *Stanton v. Eager* (1835) 16 Pick. 467.

**Mississippi.**—See *Morris v. Shryock* (1874) 50 Miss. 590.

**Missouri.**—*Klein v. Fischer* (1888) 30 Mo. App. 568; *Dymock v. Missouri, K. & T. R. Co.* (1893) 54 Mo. App. 400; *Ætna Nat. Bank v. Union P. R. Co.* (1897) 69 Mo. App. 246.

**New Jersey.**—*Shepard & M. Lumber Co. v. Burroughs* (1898) 62 N. J. L. 469, 41 Atl. 695.

**New York.**—*Dows v. Perrin* (1857) 16 N. Y. 325; *Dows v. Greene* (1862) 24 N. Y. 638, affirming (1860) 32 Barb. 490; *Becker v. Hallgarten* (1881) 86

N. Y. 167; *Rosenthal v. Dessau* (1877) 11 Hun, 49; *Gass v. Astoria Veneer Mills* (1909) 134 App. Div. 184, 118 N. Y. Supp. 982; *Gass v. Southern P. Co.* (1912) 152 App. Div. 412, 137 N. Y. Supp. 261; *Stevens v. Wheeler* (1858) 27 Barb. 658; *Holbrook v. Vose* (1860) 6 Bosw. 76.

**Ohio.**—*Wheeling & L. E. R. Co. v. Koontz* (1897) 15 Ohio C. C. 288, 9 Ohio C. D. 102, affirmed in (1899) 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471.

**Pennsylvania.** — *Schumacher v. Eby* (1855) 24 Pa. 521.

**Tennessee.** — *Curry v. Roulstone* (1809) 2 Overt. 110; *Boyd v. Mosely* (1853) 2 Swan, 661; *Bloomingdale v. Memphis & C. R. Co.* (1881) 6 Lea, 616.

**Texas.**—*Chandler v. Fulton* (1853) 10 Tex. 2, 60 Am. Dec. 188; *Missouri P. R. Co. v. Heidenheimer* (1891) 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608.

**England.** — *Lickbarrow v. Mason* (1787) 2 T. R. 63, 100 Eng. Reprint, 35, reversed in the exchequer chamber in (1790) 1 H. Bl. 357, 126 Eng. Reprint, 209, which was reversed, and a venire de novo awarded by the House of Lords in (1793) 4 Bro. P. C. 57, 2 Eng. Reprint, 39 (upon a second trial by the court of King's bench, reported in (1794) 5 T. R. 683, 101 Eng. Reprint, 380, it was held without discussion that the court adhered to its former opinion, and a writ of error to review this judgment was later abandoned); *Salomons v. Nissen* (1788) 2 T. R. 674, 100 Eng. Reprint, 363, 1 Revised Rep. 592; *Coxe v. Harden* (1803) 4 East, 211, 102 Eng. Reprint; 811, 1 Smith, 20, 7 Revised Rep. 570; *Newsom v. Thornton* (1805) 6 East, 17, 102 Eng. Reprint, 1189, 2 Smith, 207, 8 Revised Rep. 378; *Cuming v. Brown* (1808) 9 East, 506, 103 Eng. Reprint, 666, 1 Campb. 104, 9 Revised Rep. 603; *Re Westzinthus* (1833) 5 Barn. & Ad. 817, 110 Eng. Reprint, 992, 2 Nev. & M. 644, 3 L. J. K. B. N. S. 56, 4 Eng. Rul. Cas. 845; *Spalding v. Ruding* (1843) 6 Beav. 376, 49 Eng. Reprint, 871, 12 L. J. Ch. N. S. 503, affirmed in (1846) 15 L. J. Ch. N. S. 374; *Jenkyns v. Usborne* (1844) 7 Mann. & G. 678, 135 Eng. Reprint, 273, 8 Scott, N. R. 505,

13 L. J. C. P. N. S. 196; *Gurney v. Behrend* (1854) 3 El. & Bl. 622, 118 Eng. Reprint, 1275, 23 L. J. Q. B. N. S. 265, 18 Jur. 856, 2 Week. Rep. 425; *Rodger v. Comptoir d'Escompte de Paris* (1869) L. R. 2 C. P. 393, 5 Moore, P. C. C. N. S. 538, 16 Eng. Reprint, 618, 21 L. T. N. S. 33, 17 Week. Rep. 468, 38 L. J. P. C. N. S. 30; *Leask v. Scott* (1877) L. R. 2 Q. B. Div. 376, 46 L. J. Q. B. N. S. 576, 36 L. T. N. S. 784, 25 Week. Rep. 654, 3 Asp. Mar. L. Cas. 469, 4 Eng. Rul. Cas. 790; *Ex parte Golding, D. & Co.* (1880) L. R. 13 Ch. Div. 628, 42 L. T. N. S. 270, 48 Week. Rep. 481 (per Cotton, L.J.). However, in England, it has been held in a few cases that a consignor may stop goods in transitu notwithstanding the consignee has assigned the bill of lading to a third person for a valuable consideration and without notice. *Snee v. Prescott* (1743) 1 Atk. 245, 26 Eng. Reprint, 157; *Fearon v. Bowers* (1753) 1 H. Bl. 364, note, 126 Eng. Reprint, 214, note; *Burghall v. Howard* (1759) 1 H. Bl. 365, note, 126 Eng. Reprint, 215, note; *Mason v. Lickbarrow* (1790) 1 H. Bl. 357, 126 Eng. Reprint, 209, reversing (1787) 2 T. R. 63, 100 Eng. Reprint, 85, and reversed and a venire de novo awarded by the House of Lords in (1793) 4 Bro. P. C. 57, 2 Eng. Reprint, 39 (upon a second trial by the court of King's bench in 1794 (5 T. R. 683, 101 Eng. Reprint, 380) it was held without discussion that the court adhered to its former opinion; a writ of error to review this judgment was later abandoned); *Gurney v. Behrend* (1854) 3 El. & Bl. 622, 118 Eng. Reprint, 1275, 23 L. J. Q. B. N. S. 265, 18 Jur. 856, 2 Week. Rep. 425. And see *Craven v. Ryder* (1816) 6 Taunt. 433, 128 Eng. Reprint, 1103, 2 Marsh. 127, Holt, N. P. 100, 16 Revised Rep. 644. But at least some of these cases merely lay down a qualification to the general rule. For instance, in *Gurney v. Behrend* (Eng.) supra, it was held that, for the purpose of showing that the right of stoppage in transitu was gone, it was not enough that a transferee of an indorsed bill of lading had become a bona fide holder for a valuable consideration, but that it was also essential to show that the indorser had a

right to transfer it. As thus qualified, Lord Campbell, Ch. J., stated the rule as follows: "The bona fide transferee for value of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop in transitu, as against the purchaser."

**Canada.** — *Mollison v. Lockhart* (1891) 30 N. B. 398.

**Ireland.**—*Kemp v. Canavan* (1864) 15 Ir. C. L. Rep. 216.

In *Audenreid v. Randall* (1868) 3 Cliff. (U. S.) 99, Fed. Cas. No. 644, Clifford, C. J., discussed this question as follows: "When the goods are sold at sea, the indorsement and delivery of the bill of lading to the buyer, and the acceptance of the same by him under the contract, are the proper substitutes for an actual delivery and acceptance of the goods, and have the effect to vest a perfect title in the buyer, discharged of all right of stoppage in transitu on the part of the seller and indorser of the bill of lading. . . . The right of stoppage in transitu was conceded to the seller, in order to prevent the injustice which would take place if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized and appropriated in satisfaction of his other liabilities, to the prejudice of the rights of his unpaid vendor. The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. Such a right attaches to goods sold on credit, where nothing is agreed on as to the time of delivery. In that state of the case, the vendee is immediately entitled to the possession, and the property and the right of possession vest at once in him; but his right of possession is not absolute, because it is liable to be defeated, if he becomes insolvent before he obtains the absolute control of the goods. . . . Nothing can be more certain than the rule that, as between the consignor and the consignee on the one side, and third parties on

the other, the indorsement and delivery of the bill of lading by the consignee of goods at sea, and the acceptance of the same by the buyer under a contract, made in good faith, defeats the right of stoppage in transitu by the consignor. The settled rule is that in such cases, where there has been a sale by the consignee which would give a title to the vendee, as against the consignor, independently of the indorsement of the bill of lading, the effect of the indorsement would be to take away that right, even in cases where it would otherwise exist. . . .

The bona fide transferee, for value, of a bill of lading indorsed by the consignee of the shipper, takes an absolute title to the goods, free from the equitable right of the unpaid vendor to stop the goods in transitu, as against the purchaser. The obvious reason of the rule is that by reason of such a transfer of the bill of lading the transitu is regarded as ended, and the right of stoppage, therefore, is gone."

And for a better reason the right of stoppage in transitu is terminated by a bona fide sale by the consignee after arrival at the point of destination and actual delivery by the carrier to the transferee. *Klein v. Fischer* (1888) 30 Mo. App. 568; *United States Wind Engine & Pump Co. v. Oliver* (1884) 16 Neb. 612, 21 N. W. 468; *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* (1898) 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; *Hollingsworth v. Napier* (1805) 3 Caines (N. Y.) 182, 2 Am. Dec. 268; *Blossom v. Champion* (1858) 28 Barb. (N. Y.) 217; *Schneider v. Leibes Bros.* (1887) 3 Tex. App. Civ. Cas. (Willson) 350; *Stoveld v. Hughes* (1811) 14 East, 308, 104 Eng. Reprint, 619, 12 Revised Rep. 523. This is especially true where the original consignee consents to the transfer. *Stoveld v. Hughes* (1811) 14 East, 308, 104 Eng. Reprint, 619, 12 Revised Rep. 523.

And the right of stoppage in transitu is terminated by a bona fide sale for value to a third person while the goods are in the hands of a warehouseman pending final delivery, at least where such warehouseman acknowledges that he holds the goods as

agent for the purchaser from the original vendee (*Hawes v. Watson* (1824) 2 Barn. & C. 540, 107 Eng. Reprint, 484, 4 Dowl. & R. 22, 2 L. J. K. B. 83, 26 Revised Rep. 448), as, for instance, by the acceptance of warehouse rent from the subpurchaser, following a transfer of the goods on the books to such person (*Harman v. Anderson* (1809) 2 Campb. (Eng.) 243, 11 Revised Rep. 706). And the same is true where the goods are held by the warehouseman subject to the order of the original vendee, and an order of delivery is given to a bona fide subpurchaser. *Frazer v. Hilliard* (1847) 38 S. C. L. (2 Strobh.) 809. Especially, where the warehouseman acknowledges the rights of the subpurchaser. *Pooley v. Great Eastern R. Co.* (1876) 34 L. T. N. S. (Eng.) 537.

Likewise the right of stoppage in transitu is terminated where goods are reshipped from the point of destination by the carrier, to a new destination, under orders from a bona fide subpurchaser from the original vendee. *Mollison v. Lockhart* (1891) 30 N. E. 898.

And the rule that a sale to a bona fide purchaser terminates the right of stoppage in transitu has been held to apply, even though the notice to stop in transit was given before the goods reached their destination. *Schmidt v. The Pennsylvania* (1879) 7 W. N. C. (Pa.) 98, affirmed on this point in (1880) 4 Fed. 548; *Walter v. Ross* (1808) 2 Wash. C. C. 283, Fed. Cas. No. 17,122; *Ryberg v. Snell* (1809) 2 Wash. C. C. 403, Fed. Cas. No. 12,190; *Missouri P. R. Co. v. Heidenheimer* (1891) 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608.

So, it has been held that the rule that the vendor's right of stoppage in transitu is terminated by a sale to a bona fide purchaser, made while the goods are in transit, applies even though such sale was made after the notice to stop was given, provided, of course, that the sale was to a bona fide purchaser. *Newhall v. Central P. R. Co.* (1876) 51 Cal. 345, 21 Am. Rep. 713. And see *Ætna Nat. Bank v. Union P. R. Co.* (1897) 69 Mo. App. 246. In the *Newhall Case* (Cal.) su-

pra, the court discussed this question as follows: "If the bill of lading is assigned, and the legal title passes to a bona fide purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a bona fide holder for value of the legal title. . . . The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, 'without notice of such circumstances as render the bill of lading not fairly and honestly assignable,' has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee. . . . These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made before the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made after the carrier is notified by the vendor. . . . The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound at his peril to ascertain whether possibly the vendor may not have notified a carrier—it may be on some remote portion of the route—that the goods are stopped in transitu. If a person taking an assignment of a bill of lading is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor and of every carrier through whose hands the goods are to come whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class

of commercial transactions will be practically abrogated."

The rule of some jurisdictions that an actual delivery and possession are essential to terminate the right of stoppage in transitu generally is qualified by the provision that a bona fide assignee of a bill of lading will be protected against the seller's right of stoppage in transitu. An illustration of a qualifying provision of this character is found in *Ocean S. S. Co. v. Ehrlich* (1891) 88 Ga. 502, 30 Am. St. Rep. 164, 14 S. E. 707, wherein it was held that the fact that the consignee had sold the goods to a bona fide purchaser for value, who had paid the purchase money, did not terminate the shipper's right of stoppage in transitu in the absence of either actual possession in the vendee or his assignee, or an actual assignment of the bill of lading. So, in *Branan Bros. v. Atlanta & W. P. R. Co.* (1899) 108 Ga. 70, 75 Am. St. Rep. 26, 33 S. E. 836, it was held that in the absence of actual delivery, the title of a bona fide purchaser from the consignee could only be made good against the right of stoppage in transitu by an assignment of the bill of lading. And a similar conclusion was reached in *Delta Bag Co. v. Kearns* (1904) 112 Ill. App. 269. And see also *Pattison v. Culton* (1870) 33 Ind. 240, 5 Am. Rep. 199. It has also been held that the rule that the right of stoppage in transitu is terminated by indorsement of the bill of lading to a bona fide purchaser for value is not affected by the first section of the Bills of Lading Act (18 & 19 Vict. chap. 111), which provides that every indorsee of a bill of lading shall be subject to the same liabilities as to the goods as if the contract had been made with him, and, therefore, does not extend the right of stoppage in transitu so that it can be invoked against a bona fide indorsee for value. *Kemp v. Canavan* (1864) 15 Ir. C. L. Rep. 216. This was upon the theory that a different construction would violate not only the spirit of the Bills of Lading Act, but would be in contravention of § 2, which provided that nothing therein should prejudice or "affect" any right of stoppage in transitu.

In all cases, in order to have the effect of defeating the right of stoppage in transitu, the sale or assignment must be to a bona fide purchaser for value, since, if the sale is fraudulent, or without consideration, or made for the express purpose of defeating the right of stoppage, it will not have that effect. *Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17; *Stanton v. Eager* (1835) 16 Pick. (Mass.) 467; *Rosenthal v. Dessau* (1877) 11 Hun (N. Y.) 49; *Gass v. Astoria Veneer Mills* (1909) 134 App. Div. 184, 118 N. Y. Supp. 982; *Gass v. Southern P. Co.* (1902) 152 App. Div. 412, 137 N. Y. Supp. 261; *Holbrook v. Vose* (1860) 6 Besw. (N. Y.) 76; *Wheeling & L. E. R. Co. v. Koontz* (1899) 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471, affirming (1897) 15 Ohio C. C. 288, 9 Ohio C. D. 102; *Chandler v. Fulton* (1858) 10 Tex. 2, 60 Am. Dec. 188; *Poole v. Houston & T. C. R. Co.* (1882) 58 Tex. 134, on subsequent appeal in (1885) 63 Tex. 246; *Salomons v. Nissen* (1788) 2 T. R. 674, 100 Eng. Reprint, 863; *Coxe v. Harden* (1803) 4 East, 211, 102 Eng. Reprint, 811, 1 Smith, 20, 7 Revised Rep. 570; *Newsom v. Thornton* (1805) 6 East. 17, 102 Eng. Reprint, 1189, 2 Smith, 207, 8 Revised Rep. 378; *Cuming v. Brown* (1808) 9 East, 506, 103 Eng. Reprint, 666, 1 Campb. 104, 9 Revised Rep. 603; *Ex parte Golding, D. & Co.* (1880) L. R. 13 Ch. Div. (Eng.) 28, 42 L. T. N. S. 270, 48 Week. Rep. 481, 4 Eng. Rul. Cas. 851. And it has been held that by the use of the words "Not negotiable," stamped on a bill of lading, a transferee thereof is given notice of the possible rights of the consignor or at least is put on inquiry in this respect, so that the taking of the same without inquiry does not terminate the consignor's right of stoppage in transitu. *Gass v. Astoria Veneer Mills* (1909) 134 App. Div. 184, 118 N. Y. Supp. 982; *Gass v. Southern P. Co.* (1912) 152 App. Div. 412, 137 N. Y. Supp. 261. But an indorsee of a bill of lading may be a bona fide holder, although he knows that the consignor has not received money payment for the goods, but had taken the consignee's acceptances, so that after

such an assignment, the consignor cannot stop the goods in transit. *Cuming v. Brown* (1808) 9 East, 506, 103 Eng. Reprint, 666. In this case Lord Ellenborough, Ch. J., in delivering the opinion of the court, said: "The question is whether the indorsement of the bill of lading in this case passed the property of the goods, the plaintiff having notice that the goods had not been paid for in money. It must be taken to have been found that the indorsement was bona fide, for valuable consideration, and without notice of any circumstance which ought in fairness to have prevented the plaintiff's taking it; unless, indeed, notice that the goods had not been paid for in money be such circumstance. But to render this circumstance one which ought in fairness to have prevented the assignee of the bill of lading from taking it, it should have appeared that the consignor, by the terms of his dealing with the consignee, had bargained for or expected that the payment should precede the assignment of the bill of lading. But if we look at the actual facts of the case as between the consignor and the consignee, by the memorandum at the foot of the invoice transmitted before the bill of lading, (and which arrived on the 3d of January, 1806), the price of the goods was 'payable in bill on London at three months from 20th December;' and at the time of the assignment Maine, the consignee, had done all that such bargain required, by having accepted a bill on London at three months from the 20th of December, which was not due at the time of the indorsement of the bill of lading on the 23d of February. If, therefore, the plaintiff had known all the circumstances of the case as they stood between consignor and consignee, he would have known nothing which should have made it unfair in the consignee to assign, or in himself to accept, the assignment of the bill of lading. If he had assisted in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, it would have been otherwise, and he would, in



that case, have stood in the same situation with the consignee. If, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid, in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop in transitu, and would, therefore, have been unavailable to the party taking an assignment of the bill of lading under such circumstances, and for such purpose; but here, any knowledge or suspicion of the kind on the part of the plaintiff is negatived expressly by the plaintiff's answer read on the part of the defendant. And if a bill of lading should be held by us not assignable under these circumstances, the consequence would be that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing,—a position which would tend to overturn the general practice and course of dealing of the commercial world on this subject, and which is warranted, as we conceive, by no decided case upon the subject."

And, of course, a mere agreement by a consignee before receipt of the goods or the evidence of the right thereto, to transfer the same to a third person, does not deprive the consignor of the right of stoppage in transitu. *Clapp Bros. v. Sohmer* (1880) 55 Iowa, 273, 7 N. W. 639; *Holbrook v. Vose* (1860) 6 Bosw. (N. Y.) 76; *Moakes v. Nicolson* (1865) 19 C. B. N. S. 290, 144 Eng. Reprint, 798, 34 L. J. C. P. N. S. 273, 12 L. T. N. S. 573. Especially where the assignment is for the benefit of creditors, and the assignee takes with full knowledge of the insolvency of the consignee. *Stanton v. Eager* (1835) 16 Pick. (Mass.) 467.

It will be observed that the rule, as stated *supra*, V. a, as to the effect of

a sale during transit by the vendee to a third person to terminate the right of stoppage in transitu, includes the condition that the sale is by the assignment or indorsement of the bill of lading, and there is express and affirmative authority for this condition. Thus, it has been held that the rule of constructive delivery by assignment to a bona fide purchaser is limited to bills of lading which possess something of the character of negotiable paper, and that no other instrument of transfer or mercantile document possesses the power of terminating the right of stoppage in transitu until perfected by actual possession. *Ives v. Polak* (1857) 14 How. Pr. (N. Y.) 411 (holding that an order authorizing the transferee to withdraw goods from a bonded warehouse was not a constructive delivery); *Jenkyns v. Usborne* (1844) 7 Mann. & G. 678, 135 Eng. Reprint, 273, 8 Scott, N. R. 506, 13 L. J. C. P. N. S. 196 (holding that a mere delivery order is insufficient); *M'Ewan v. Smith* (1849) 2 H. L. Cas. 309, 9 Eng. Reprint, 1109, 13 Jur. 265 (holding that a delivery order on a warehouse was insufficient). Likewise it has been held that a mere order by the consignee upon the carrier for delivery to a third person upon payment of freight and charges, left with the carrier, only operates to give such person the rights of the consignee, and cannot of itself prevent a stoppage in transitu, especially where there is nothing to show that the carrier ever assumed to act as agent of such third person, or that it ever recognized any right on his part to have the delivery of the goods, or that it ever agreed to deliver them to him upon any terms whatever. *Jeffris v. Fitchburg R. Co.* (1896) 93 Wis. 250, 33 L.R.A. 351, 57 Am. St. Rep. 919, 67 N. W. 424. And in *Withers v. Lyss* (1815) 4 Campb. (Eng.) 237, Holt, N. P. 18, 16 Revised Rep. 781, it was held that the giving to a warehouseman by an original vendee, of an order to weigh and deliver certain goods to a subpurchaser, did not itself terminate the original vendor's right of stoppage in transitu, but that such right continued, at least, until the goods were actually weighed

so that the price could be determined. And according to *Abbott on Shipping*, 7th Am. ed. 539, it was held, in 1805, in the English case of *Nix v. Olive*, that the transmission of a bill drawn to order or assigns unindorsed was insufficient to divest the right of the consignor to stop the goods in transit. It is also stated that Lord Ellenborough, in reaching this conclusion, expressly said that he was of the opinion that there was a difference between the indorsement of the bill of lading and the sending it unindorsed in a letter containing equivalent orders. In *Jenkyns v. Osborne* (1844) 7 Mann. & G. 678, 135 Eng. Reprint, 273, Tindal, Ch. J., discussed this question as follows: "The actual holder of an indorsed bill of lading may undoubtedly, by indorsement, convey a greater right than he himself has. It is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not; but the exception is founded on the nature of the instrument in question, which, being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself. In the present case, Thomas was not in possession of the bill of lading; he had only an order on the captain to deliver the goods on arrival; and when, under the circumstances stated in the case, that order was handed over to the defendant, it appears to us that, although an interest in the contract passed to the defendant, the interest in the goods did not pass as it would have done if the transfer had been by assignment of the bill of lading, but that such interest in the goods was still liable to be defeated by the insolvency of Thomas and a proper exercise of the right of stoppage in transitu."

But where the goods are in a warehouse, and according to custom an order thereon is necessary to complete delivery, it has been held that the mere giving by the original vendee of an invoice and receipt of payment for the goods, without a delivery order, does not constitute a delivery such as will cut off the original vendor's right of stoppage in transitu. *Dixon v. Yates* (1833) 5 Barn. & Ad. 313, 110 Eng. Reprint, 806, 2 Nev. & M. 177, 2 L. J. K. B. N. S. 198, 23 Eng. Rul. Cas. 385. And the order, to be effective to transfer title and terminate the original vendor's right of stoppage in transitu, must be such a one as the warehouseman is accustomed to act upon. *Lackington v. Atherton* (1844) 8 Jur. 407, 7 Mann. & G. 360, 135 Eng. Reprint, 151, 13 L. J. C. P. N. S. 140, 8 Scott, N. R. 38. For instance, where goods have been held up at an intermediate point and placed in a warehouse, the giving of authority by the consignee to the warehouseman to sell the same has been held to be conditional only, at least, in the absence of an actual sale pursuant to such authority, so that it does not cut off the consignor's right of stoppage in transitu. *Re Foot* (1874) 11 Blatchf. 530, Fed. Cas. No. 4,907.

So, it has been held that while the right of stoppage in transitu is adverse to the rights of the consignee, it need not necessarily be exercised adversely, and that the consignor's right of stoppage is not defeated by his obtaining from the consignee a writing in which he revokes the order for the goods, declines to receive the same, and requests the intermediary holder thereof to return them to the consignor, or, in other words, by a relinquishment of the consignment by the consignee to the consignor. *Naylor v. Dennie* (1829) 8 Pick. (Mass.) 198, 19 Am. Dec. 319; *Re O'Sullivan* (1892) 67 L. T. N. S. (Eng.) 464, which reversed (1892) 66 L. T. N. S. 619, 61 L. J. Q. B. N. S. 228.

And where goods are shipped without being ordered, and upon account, and at the risk of the shipper, as distinguished from a sale to the consignee, it has been held that a factor

cannot, while the goods are still in transit, and without the possession of the bill of lading, make a sale thereof which will terminate the shipper's right of stoppage in transitu. *Walter v. Ross* (1808) 2 Wash. C. C. 283, Fed. Cas. No. 17,122.

*b. Sufficiency of consideration.*

It has been expressly held that the original vendor's right of stoppage in transitu is not terminated by his vendee selling to a subpurchaser, where the purchase money has not been paid, since in such a case the exercise of such right by the vendor does not interfere with any rights of the subpurchaser for which a valuable consideration has been paid. *Ex parte Golding, D. & Co.* (1880) L. R. 13 Ch. Div. 628, 42 L. T. N. S. 270, 48 Week. Rep. 481, 4 Eng. Rul. Cas. 851; *Ex parte Falk* (1880) L. R. 14 Ch. Div. (Eng.) 446, 42 L. T. N. S. 780, 28 Week. Rep. 785, 4 Asp. Mar. L. Cas. 280, affirmed in (1882) L. R. 7 App. Cas. 573, 31 Week. Rep. 125, 52 L. J. Ch. N. S. 167, 47 L. T. N. S. 454, 5 Asp. Mar. L. Cas. 1, 23 Eng. Rul. Cas. 399. At least, the vendor is entitled to intercept, to the extent of his own unpaid purchase money, so much of the subpurchaser's purchase money as is unpaid by him. *Ex parte Falk* (1880) L. R. 14 Ch. Div. (Eng.) 446. But on this point see the opinion of Lord Selborne; L. C., on appeal in L. R. 7 App. Cas. 573, wherein he said: "It is not consistent with my idea of the right of stoppage in transitu that it should apply to anything except to the goods which are in transitu."

And a number of authorities are to the effect that, for the purposes of the rule that a valid sale terminates the consignor's right of stoppage in transitu, the consideration may be an antecedent debt so that no right of stoppage in transitu exists after a bona fide transfer to a third person, even though the valuable consideration was an existing indebtedness. *St. Paul Roller Mill Co. v. Great Western Despatch Co.* (1886) 27 Fed. 434; *Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17; *First Nat. Bank v. Schmidt* (1895) 6 Colo. App. 216, 40 Pac. 479; *Lee v.*

*Kimball* (1858) 45 Me. 172; *Shepard & M. Lumber Co. v. Burroughs* (1898) 62 N. J. L. 469, 41 Atl. 695; *Leask v. Scott* (1877) L. R. 2 Q. B. Div. 376, 46 L. J. Q. B. N. S. 576, 36 L. T. N. S. 784, 3 Asp. Mar. L. Cas. 469, 4 Eng. Rul. Cas. 790; *Clementson v. Grand Trunk R. Co.* (1877) 42 U. C. Q. B. 263. In *Leask v. Scott* (1877) L. R. 2 Q. B. Div. 376, 4 Eng. Rul. Cas. 790, the English court of appeal, speaking through Bramwell, L. J., refuted the contentions "that the right of stoppage in transitu is available and effectual against everyone, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration has been got by means of the bill of lading; that if the consideration were past, it was not such a consideration, and the title gained by it was not such a title, as would defeat the equitable right of stoppage in transitu," and "that such right was only defeated where there was a transfer for present consideration," and said: "Practically such a consideration as is now under consideration has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him, to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff, or not, was, no doubt, such an understanding that, if the plaintiff had taken proceedings against *Geen & Company* the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out-and-out, and been paid part of his debt with the price, the consideration would have sufficed, if the transaction was not colorable. If the plaintiff had said: 'I cannot take this bill of lading safely, as the consideration would be past; do it with the broker next door, and give me his check,' that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration." Of course,

under this rule, the assignment must be bona fide. *Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17; *Wheeling & L. E. R. Co. v. Koontz* (1899) 61 Ohio St. 551, 76 Am. St. Rep. 435, 56 N. E. 471, affirming (1897) 15 Ohio C. C. 288, 9 Ohio C. D. 102 (holding that a sale to the carrier to cover freight and other pre-existing debts did not constitute the carrier a bona fide purchaser).

However, in England, it has been expressly held that the mere release of an antecedent debt is not a sufficiently valuable consideration for the indorsement of a bill of lading, to terminate the unpaid vendor's right of stoppage in transitu. *Rodger v. Comptoir D'Escompte de Paris* (1869) L. R. 2 P. C. 393, 5 Moore P. C. C. N. S. 538, 16 Eng. Reprint, 618, 21 L. T. N. S. 33, 17 Week. Rep. 468, 38 L. J. P. C. N. S. 30. This case was expressly criticized in *Leask v. Scott* (Eng.) supra, which is set out and quoted supra, this subdivision.

And in the states it has also been held that a transfer of a bill of lading as a mere collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage in transitu. *Lesassier v. The Southwestern* (1874) 2 Woods, 35, Fed. Cas. No. 8,274; *Dymock v. Missouri, K. & T. R. Co.* (1893) 54 Mo. App. 400, as explained on subsequent appeal in (1896) 67 Mo. App. 97. And see *Loeb v. Peters* (1879) 63 Ala. 243, 35 Am. Rep. 17, and *Lee v. Kimball* (1858) 45 Me. 172. In *Farrell v. Richmond & D. R. Co.* (1889) 102 N. C. 390, 3 L.R.A. 647, 11 Am. St. Rep. 760, 9 S. E. 302, where a consignee of a safe, while in the carrier's warehouse, said that he placed it in the agent's hands as security for past freight charges, it was held that the transaction did not amount to such a delivery of the safe as would defeat the vendor's right of stoppage in transitu, even if it be conceded that the carrier's agent accepted the offer. This was upon the theory that the carrier already had a lien on the safe for the freight on it, and that there was no

new consideration for the vendee's offer. And it has been held, generally, that the rule applies only to indorsements for the purpose of sale, and consequently that an indorsement by way of pledge does not work a termination of the vendor's right of stoppage in transitu. *Newsom v. Thornton* (1805) 6 East, 17, 102 Eng. Reprint, 1189, 2 Smith, 207, 8 Revised Rep. 378. However in *Re Westzinthus* (1833) 5 Barn. & Ad. 817, 110 Eng. Reprint, 992, 2 Nev. & M. 644, 3 L. J. K. B. N. S. 56, 4 Eng. Rul. Cas. 845; *Spalding v. Ruding* (1843) 6 Beav. 376, 49 Eng. Reprint, 871, 12 L. J. Ch. N. S. 503, affirmed in (1846) 15 L. J. Ch. N. S. 374; *Coventry v. Gladstone* (1868) L. R. 6 Eq. (Eng.) 44, 37 L. J. Ch. N. S. 492, 16 Week. Rep. 837; and *Kemp v. Falk* (1832) L. R. 7 App. Cas. 573, 31 Week. Rep. 125, 52 L. J. Ch. N. S. 167, 47 L. T. N. S. 454, 5 Asp. Mar. L. Cas. 1, 23 Eng. Rul. Cas. 399, affirming (1880) L. R. 14 Ch. Div. 446, 42 L. T. N. S. 780, 28 Week. Rep. 785, 4 Asp. Mar. L. Cas. 280, it was held that a transfer by a consignee for a valuable consideration and for a limited purpose, such as security, does not destroy the original vendor's right of stoppage in transitu, but that such stoppage is, however, subject to the transferee's lien for the amount secured.

So, in Texas, it has been broadly held that where the transfer of the bill of lading is by way of mortgage or pledge, the right to stop the goods is not absolutely defeated as in the case of a bona fide sale by the consignee, since if the mortgage or pledge has been made bona fide, the vendor may still resume his interest, subject to the rights of the mortgagee, and will have a right to the residue which may remain after satisfying the mortgagee's claim. *Chandler v. Fulton* (1853) 10 Tex. 2, 60 Am. Dec. 188. It follows, and it has been held, that the seller cannot exercise the right until he has discharged the debt secured by the transfer. *Missouri P. R. Co. v. Heid-enheimer* (1891) 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608.

On the other hand, in Missouri, a bona fide assignment of a bill of lading as collateral security, "and not in pay-

ment of an antecedent indebtedness," has been held to create a title which is paramount to the unpaid vendor's right of stoppage in transitu. *Dymock v. Missouri, K. & T. R. Co.* (1893) 54 Mo. App. 400, as explained on subsequent appeal in (1896) 67 Mo. App. 97.

It has been held that no delivery creating a change of property sufficient to terminate the vendor's right of stoppage in transitu is made by an assignment of the bill of lading to a third person, to enable him to receive and hold the goods for the shipper. *Scholfield v. Bell* (1817) 14 Mass. 40; *Grout v. Hill* (1855) 4 Gray (Mass.) 361.

*c. Sale of part of consignment.*

In *Secomb v. Nutt* (1853) 14 B. Mon. (Ky.) 324, it was held that a lawful sale of a part of the shipment did not terminate the right of stoppage in transitu as to the balance thereof still in the possession of the carrier as such.

*d. Assignment of duplicate bill of lading.*

Where duplicate or triplicate bills of lading have been issued, one hold-

ing is that those bills marked "original," and those marked "duplicate," are of equal legal effect, so that the indorsement of the duplicate bill to a bona fide holder passes the title and terminates the original vendor's right of stoppage in transitu. *Missouri P. R. Co. v. Heidenheimer* (1891) 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608.

But the better rule seems to be that, where the attempted sale is merely by assignment of the duplicate bill of lading, the third person purchases at his peril, and is subject to the right of the consignor to stop the shipment in transit. In other words, the duplicate bill of lading does not represent the goods, and a purchaser who takes the same has notice that there is an original which, if paid, renders the duplicate of no value, so that he does not acquire a legal title which would defeat the right of the consignor, holding the original bill, to stop the goods in transit. This rule was adopted in *Castanola v. Missouri P. R. Co.* (1885) 24 Fed. 267. The *Castanola Case*, however, was expressly disapproved in *Missouri P. R. Co. v. Heidenheimer* (Tex.) supra. G. J. C.

ROOKS CREEK EVANGELICAL LUTHERAN CHURCH, Appt.,  
v.  
FIRST LUTHERAN CHURCH OF PONTIAC.

*Illinois Supreme Court—October 27, 1919.*

(290 Ill. 183, 124 N. E. 793.)

**Deed — distinction between covenant and condition.**

1. The chief distinction between a condition subsequent and a covenant in a deed pertains to the remedy in case of breach, which in the former subjects the estate to forfeiture and in the latter is merely a ground for recovery of damages.

[See note on this question beginning on page 1429.]

**— condition — connection with synod.**

2. A provision in a resolution authorizing conveyance of property by one church to another, that the deed is to be on condition that the grantee be and remain connected with a specified synod, does not make connection with that synod a condition precedent

to the vesting of title, where to the knowledge of the grantor it was being organized as an independent church and there was a desire by the grantor to convey its property at once to the grantee in order that there would not be two churches of the same denomination in the city.

— construction of condition — rule.

3. Courts prefer conditions subsequent to conditions precedent, and when the words are of doubtful meaning the courts prefer to construe the condition as subsequent, so as to give a present estate liable to be divested rather than to defer the vesting.

[See 8 R. C. L. 1098.]

— effect of words “on condition.”

4. While the words “on condition” in a deed are appropriate words to create a condition, yet they may be construed in view of the context as creating a covenant rather than a condition.

[See 8 R. C. L. 1101.]

— construction as covenant.

5. Courts will incline to construe language in a deed whenever it is possible to do so, into a covenant rather than a condition.

[See 7 R. C. L. 1086; 8 R. C. L. 1101.]

— effect of intention of parties.

6. The intention of the parties as ascertained from the instrument, with respect to whether it creates a covenant or a condition, will be enforced

when it can be done consistently with the rules of law.

[See 8 R. C. L. 1101.]

— connection with synod as condition.

7. The words, “on condition that said church be and remain connected with a specified synod,” in a deed by one church to another, is a condition subsequent, and not merely an incident to the consideration, although the purpose is to prevent two churches of the same denomination in the city, and the conveyance is subject to a mortgage.

— intention that condition shall be covenant.

8. The parties cannot, in the absence of imposition, fraud, or mistake, insist that they meant a provision in a deed to be a covenant when it is in fact a condition and nothing else.

[See 7 R. C. L. 1087.]

— necessity of words of forfeiture.

9. Words of re-entry or forfeiture are not necessary or indispensable to create a condition in a deed.

[See 8 R. C. L. 1119.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Livingston County (Patton, J.) in favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Tuesburg, Wilson, & Armstrong, for appellant:

If the condition be subsequent it must have been complied with in a reasonable time to escape a forfeiture.

Nowak v. Dombrowski, 267 Ill. 103, 107 N. E. 807; 2 Devlin, Real Estate 3d ed. § 972.

Where the clause goes to the whole of the consideration, it is a condition.

Barnes v. Southfield Beach R. Co. 202 N. Y. 301, 95 N. E. 691.

Where a condition precedent goes only to part of the consideration and a breach of it can be compensated in damages, it ceases to be a condition, and the remedy for a breach of it must be an action for damages.

Palmer v. Meriden Britannia Co. 188 Ill. 508, 59 N. E. 247; Rubens v. Hill, 213 Ill. 525, 72 N. E. 1127; Chicago Legal News Co. v. Browne, 103 Ill. 317; Nelson v. Oren, 41 Ill. 18; Chitty, Pl. 12th Am. ed. 823.

The estate is upon condition where the grantor has reserved no other effectual remedy for the enforcement of

performance on the part of the grantee.

Richter v. Richter, 111 Ind. 456, 12 N. E. 698.

Where it appears from the deed that the grantor intended the property to be used in a specific way, and no other, and there are apt words of condition used, it will be construed as a conveyance on condition.

Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 28 Atl. 479.

There need be no expressed clause of forfeiture or right of re-entry for condition broken to create a condition where apt words of condition are used.

Downen v. Rayburn, 214 Ill. 347, 73 N. E. 364, 3 Ann. Cas. 36; Glocke v. Glocke, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 28 Atl. 479; 13 Cyc. 690.

Even the word “condition” is not necessary to the creation of an estate upon condition if it plainly appears

that the intent of the parties was to create an estate of that description.

*Richter v. Richter*, *supra*.

While conditions are not favored, and in the construction of deeds courts will incline to interpret the language as a covenant, rather than as a condition, the intention of the parties to the instrument, when clearly ascertained, must control.

*Sherman v. Jefferson*, 274 Ill. 294, 113 N. E. 624; *Kew v. Trainor*, 150 Ill. 150, 37 N. E. 223; *Wakefield v. Van Tassel*, 202 Ill. 41, 65 L.R.A. 511, 95 Am. St. Rep. 207, 66 N. E. 830.

Where compensation can be made in money, courts of equity will relieve against forfeitures, and compel the party to accept a reasonable compensation in money.

*Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511.

The consequence of the nonfulfilment of a condition is a forfeiture of the estate.

*Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4.

The clause is a condition precedent.

*Shuman v. Heldman*, 63 S. C. 474, 41 S. E. 510.

Words of re-entry are not essential to create a condition.

*Scovill v. McMahon*, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; *Hunt v. Beeson*, 18 Ind. 380; *Sharon Iron Co. v. Erie*, 41 Pa. 341; *Congregational Soc. v. Stark*, 34 Vt. 243; *Sperry v. Pond*, 5 Ohio, 388, 24 Am. Dec. 296; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500; *Tallman v. Snow*, 35 Me. 342; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; *Bear v. Whisler*, 7 Watts, 144; *Brown v. Chicago & N. W. R. Co.* — Iowa, —, 82 N. W. 1003; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 42, 18 Am. Rep. 142; *Cavanagh v. Iowa Beer Co.* 136 Iowa, 236, 113 N. W. 856; *United States v. Oregon & C. R. Co.* 186 Fed. 861; *Hale v. Finch*, 104 U. S. 261, 26 L. ed. 732; *Wilson v. Wilson*, 86 Ind. 472; *Gray v. Blanchard*, 8 Pick. 284; *Hayden v. Stoughton*, 5 Pick. 528; *Langley v. Chapin*, 134 Mass. 82; *Hornner v. Chicago, M. & St. P. R. Co.* 38 Wis. 165.

Taking a deed "subject to an outstanding mortgage" creates no personal liability on the grantee to pay off the encumbrance unless he has specially agreed to do so, or the amount of the mortgage has been deducted from the purchase price.

*Comstock v. Hitt*, 37 Ill. 542; *Rapp*

*v. Stoner*, 104 Ill. 618; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209; *Siegel v. Borland*, 191 Ill. 107, 60 N. E. 863; *Ray v. Lobdell*, 213 Ill. 389, 72 N. E. 1076.

The chief distinction between a condition subsequent and a covenant pertains to the remedy in event of a breach, which, in the former, subjects the estate to a forfeiture, and in the latter is merely ground for the recovery of damages.

*Brown v. Chicago & N. W. R. Co.* — Iowa, —, 82 N. W. 1003; *Cavanagh v. Iowa Beer Co.* 136 Iowa, 236, 113 N. W. 856.

The instrument will not be construed as a covenant, where there is no remedy for its breach.

*Wilson v. Wilson*, 86 Ind. 472; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Bear v. Whisler*, 7 Watts, 144; *United States v. Oregon & C. R. Co.* 186 Fed. 861.

*Messrs. Adsit & Thompson*, for appellee:

The clause, "on condition that said church be and remain connected," etc., must be construed as a single condition.

6 Am. & Eng. Enc. Law, 2d ed. 505.

If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be done as well after as before the vesting of the estate, or if such is evidently the intention of the parties, the condition is subsequent.

*Tiedeman*, Real Prop. 2d ed. p. 24, § 273; *Nowak v. Dombrowski*, 267 Ill. 103, 107 N. E. 807; *Phillips v. Gannon*, 246 Ill. 98, 92 N. E. 616; *Finlay v. King*, 3 Pet. 346, 7 L. ed. 701; 18 Cyc. 691.

Courts prefer to construe conditions as subsequent rather than precedent.

*Phillips v. Gannon*, 246 Ill. 98, 92 N. E. 616; *Tiedeman*, Real Prop. § 273; *Nowak v. Dombrowski*, 267 Ill. 103, 107 N. E. 807.

The clause in question is not a condition, but a covenant.

*Nowak v. Dombrowski*, *supra*; *Dru-ecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647; *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Victoria Hospital Asso. v. All Persons*, 169 Cal. 455, 147 Pac. 124; *Bald v. Nuernberger*, 267 Ill. 616, 108 N. E. 724; *Board of Education v. First Baptist Church*, 63 Ill. 204; *Boone v. Clark*, 129 Ill. 466,

5 L.R.A. 276, 21 N. E. 850; King v. Lee, 282 Ill. 530, 118 N. E. 724; O'Neil v. Caples, 257 Ill. 528, 101 N. E. 50; Ayer v. Emery, 14 Allen, 67.

Where the conveyance is not purely voluntary, and there is other consideration than the clause of condition or covenant, it will not be held to be a condition subsequent.

Rawson v. School Dist. 7 Allen, 125, 83 Am. Dec. 670.

But where the clause of condition or covenant goes to the whole consideration it may be treated as a condition subsequent.

Barnes v. Southfield Beach Co. 202 N. Y. 301, 95 N. E. 691.

Although there be no express assumption of the payment of mortgage indebtedness, if the purchase be made expressly subject to the encumbrance and the amount of the mortgage indebtedness forms a part of the consideration, the grantee will be held to have assumed the mortgage indebtedness.

Brousseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

The clause cannot be construed as a condition merely because there may be no adequate remedy for its breach.

Rawson v. School Dist. supra; Brady v. Gregory, 49 Ind. App. 355, 97 N. E. 452.

Carter, J., delivered the opinion of the court:

This was an action in ejectment brought in the circuit court of Livingston county by appellant against appellee to recover certain real estate in Pontiac. After a hearing before the court and jury the court instructed the jury to find for appellee and the verdict was so returned. The cause was then appealed to this court.

On March 6, 1907, appellant conveyed by warranty deed to appellee, both being religious corporations duly organized under the laws of this state, lot 5 in block 61 in the original town of Pontiac. That deed reads as follows:

This indenture witnesseth, that the grantor, the Rooks Creek Evangelical Lutheran Church of Rooks Creek township, Livingston county, Illinois, by Lewis B. Shay, Andrew F. Johnson, and John Carlson, its trustees, of the county of Living-

ston and state of Illinois, for and in consideration of the sum of one dollar, and in order to carry into effect a resolution adopted by the members of said church at a meeting held as hereinafter set forth, convey and warrant to the First Lutheran Church of Pontiac, whose trustees are James M. Mitchell, Julius Johnson, Peter Peterson, P. J. Sjoborg, and Ole Erickson, to them and their successors in office, county of Livingston and state of Illinois, the following described real estate, to wit: Lot five (5) in block sixty-one (61) in the original town (now city) of Pontiac, in Livingston county, Illinois.

Resolution hereinabove referred to:

"Whereas Rooks Creek Evangelical Lutheran Church at Rooks Creek township, Livingston county, Illinois, did in the year 1894-1895 purchase a church building and lot for the purpose of establishing a station for worship in the city of Pontiac for members of said congregation and others; and whereas, said church building was duly dedicated for worship by the officials of the Hauges Lutheran synod (of which said Rooks Creek Church was and still is a member) according to the teachings and rules of said synod, and said worship and other mission work has been continually kept up by the members of said church; and whereas, the pastor, O. O. Riswold, now in the service of said church, has solicited subscriptions for the organization of an independent church in the city of Pontiac, consisting of the original members of said Rooks Creek Evangelical Lutheran Church and others now living in and near the city of Pontiac, and said members desire to maintain their connection with said synod; and whereas, it appears proper for the permanent establishment of said independent church to connect with some Lutheran synod, and for the purpose of avoiding strife and contention in the said city of Pontiac, where there apparently is no room for more than



one Lutheran church to succeed, it seems to us reasonable and proper, and in accordance with the Christian practices, where peace is predominating and local success desired, that the new church, composed as above set forth, should unite with the synod already established in said city, and, if possible, to divide pastoral service with said Rooks Creek Church:

"Therefore be it resolved, the board of trustees for Rooks Creek Evangelical Lutheran Church be and are hereby authorized to convey and transfer to the said church in Pontiac lot 5, block 61, in the original town (now city) of Pontiac, together with the church building thereon, subject to the indebtedness thereon due to A. Erickson, Th. Ryerson, and R. Aarvig, on condition that said church be and remain connected with the Hauges Lutheran synod.

"Adopted by the Rooks Creek Evangelical Lutheran congregation at their regularly appointed annual meeting, held at the First Lutheran Church of Pontiac, Ill., Feb. 7, 1907.

"O. O. Riswold, Chairman; O. S. Ryerson, Temporary Secretary."

Dated this sixth (6) day of March, A. D. 1907.

Lewis B. Shay, [Seal.]  
Andrew F. Johnson, [Seal.]  
John Carlson. [Seal.]

Trustees of the Rooks Creek Evangelical Lutheran Church.

The deed was delivered to appellee March 8, 1907, and duly recorded on June 17, 1907. The appellee corporation, after the delivery of the deed, entered into the possession of said lands and premises and still remains in possession. It was not then, and never has since become, connected with the Hauges Lutheran synod. In May, 1911, the appellee corporation regularly adopted, at a regular session of the corporation, a revised constitution, which provided, among other things, that they recognized the necessity of maintaining some connection with a Lutheran body in order to

secure the services of regularly trained and ordained pastors in good standing, but that, as the membership of the church was then made up of various nationalities and people coming from different Lutheran synods, it was deemed expedient for the present until action shall have been taken as hereinafter provided, to remain as an independent organization synodically, "provided, however, that this section shall not be construed as a repudiation of one certain clause set forth in a deed conveying the church property on the corner of Oak and Water streets to the First Lutheran Church of Pontiac, namely, that the church 'be and remain connected with the Hauges Lutheran synod.'" It appears from the record that the appellee church never joined the Hauges synod, but that in January, 1918, it joined the Evangelical Lutheran synod of Northern Illinois. We do not deem that the transactions since the execution of this deed are necessarily controlling, but have stated them, so that all the circumstances in connection with the transaction may be in mind in construing this deed.

It is contended by counsel for appellant that the deed conveyed the land first upon a condition precedent that the appellee church should become connected with the Hauges synod; and, second, on a condition subsequent that it should remain connected with said synod. Counsel for the appellee argue that the language of the deed, if construed as a condition, must be construed as a single condition, and that is, that the grantee church should have a continuing connection with said Hauges synod; that, as these two provisions or conditions in the deed are connected by the conjunction "and," both clauses must be construed together as one condition (6 Am. & Eng. Enc. Law, 2d ed. 505), and that by this same authority, if the language does create a double condition, neither condition is required to be performed before the vesting of the title.

We do not think the clause in the deed should be construed as a condition precedent. It is disclosed by the wording of the deed that at the time it was executed the Rooks Creek congregation was aware that its pastor was organizing an independent Lutheran church in Pontiac; that it was not the intention of the Pontiac church to then be connected with the Hauges synod or any other synod; that it was evidently the desire of the Rooks Creek congregation to transfer its property at once to the new congregation in order that there would not be two Lutheran churches in said city. The resolution on which the deed was executed provided for immediate conveyance, and the deed was duly executed shortly after the passage of the resolution. We do not think

Deed—  
condition—  
connection  
with synod.

it can be fairly argued that the deed either expressly or impliedly provided that the grantee church should first join said synod before the title passed. The grantee church was placed in possession of the property in question, and remained in undisturbed possession, without objection on the part of the grantor church, for nearly twelve years. There is nothing in the language of the deed, or in the resolution under which the deed was executed, which made it necessary that the connection with the synod should be made before the title vested in the grantee. This connection with the synod could be made contemporaneously with or subsequent to the vesting of the title, equally as well as prior thereto. Courts prefer conditions subsequent to conditions precedent, and when

—construction  
of condition—  
rule.

the words are of doubtful meaning the courts prefer to construe the conditions as subsequent, so as to give a present estate liable to be divested rather than to defer the vesting. Phillips v. Gannon, 246 Ill. 98, 92 N. E. 616, and authorities cited; Nowak v. Dombrowski, 267 Ill. 103, 107 N. E. 807. "If the act or condition required do

not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent." Tiedeman, Real Prop., 3d ed. § 202. Under the rules laid down by these authorities, as applied to the facts in this case, it must be held that the wording of the deed in question, if held to be a condition, creates a condition subsequent, the performance of which did not necessarily precede the vesting of the title.

The deciding and crucial question in this case, however, is whether the deed in question is so worded as to create a condition subsequent or a mere covenant. It must be conceded that the words "on condition," in a deed, are apt words

to create a condi- —effect of words  
tion; yet such "on condition."

words have often been construed, in view of the context, as creating a covenant rather than a condition. 2 Devlin, Real Estate, 3d ed. § 971; Nowak v. Dombrowski, supra. One of the most important considerations in determining whether a clause is a condition subsequent or something else is the presence or absence of a clause providing for re-entry by the grantor or his heirs or for forfeiture of the estate for a breach. Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072. Such a clause, while not indispensable, is always important as evidence of an intention to impose a condition subsequent, and will make certain that which, in its absence, is left open to construction. Druecker v. McLaughlin, 235 Ill. 367, 85 N. E. 647. It is difficult to say with any degree of precision when language importing a condition will be construed as a covenant. "The general rule un-

doubtedly is that courts will incline to construe language, wherever it is possible to do so,

—construction as covenant.

into a covenant rather than a condition. Still, if it is the clear intention of the parties to create an estate upon condition subsequent the court must give effect to the intention of the parties." 2 Devlin, Deeds, 970d; 7 R. C. L. 1086. It has been held that a covenant or condition may be created by the same words. The chief distinction between a condition subsequent and a covenant pertains to the remedy in the event of a breach, which in the former subjects the estate to a forfeiture and in the latter is merely a ground for recovery of damages. Whether a clause shall be construed to be a condition subsequent or of covenant must depend upon the contract or circumstances and the intention of the party creating the estate. 12 C. J. 411. According to the weight of authority, a clause only operates as a condition when it is apparent, from the whole scope of the instrument, that it was intended so to operate, or, in other words, there is no technical rule, but the courts are bound in each case to ascertain the intent and give the instrument effect accordingly. The intention of the parties as ascertained from the instrument itself will be enforced when this can be done consistently with the rules of law. Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L.R.A. 380, and authorities cited in note; Victoria Hospital Asso. v. All Persons, 169 Cal. 455, 147 Pac. 124. A covenant is an agreement duly made between the parties to do or not to do a particular act. Bald v. Nuernberger, 267 Ill. 616, 108 N. E. 724, and authorities cited.

—distinction between covenant and condition.

It is argued by counsel for appellee that the clause, "on condition that said church be and remain connected," etc., is not the whole consideration, but only part of it, and

—effect of intention of parties.

that the conveyance in question was not voluntary; that the consideration therefor was the establishment of a single Lutheran church in Pontiac and the payment of the mortgage debt of \$1,600, and the promise of the Pontiac church (appellee herein) to be connected with the Hauges synod; that this promise to be connected with the Hauges synod being only a part of the consideration, therefore the failure to perform it could not defeat the whole title and right of the Pontiac church to the premises; that such promise should be construed as a covenant and not as a condition; that it has been held where a clause claimed to be a condition was only part of the consideration that it was merely a covenant or promise, and not a condition (Victoria Hospital Asso. v. All Persons, supra); that it has also been held that where a conveyance is not purely voluntary, and there is consideration other than the clause of condition or covenant, such condition will not be held to be a condition subsequent (Rawson v. School Dist. 7 Allen, 125, 83 Am. Dec. 670).

It is further insisted by counsel for appellee that the amount of the mortgage mentioned in the deed was a part of the purchase money, and under the form of the deed it must be held that the grantee assumed the payment of this mortgage debt; that no precise and formal words are necessary to impose upon a grantee an engagement to pay off a mortgage, but the inquiry is as to the intention of the parties. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901, and cases cited. It is argued just as earnestly by counsel for appellant that the grantee in this deed did not assume and agree to pay the encumbrance; that the property was primarily liable for the mortgage, and that under the reasoning of this court in Ray v. Lobdell, 213 Ill. 389, 72 N. E. 1076, it must be held that the grantee only took the equity of redemption in encumbered property, and therefore was not personally liable to pay

said indebtedness; that therefore it cannot properly be held that the mortgage indebtedness was a part of the consideration. It is also argued by counsel for appellee that the absence of any remedy under the covenant will not, by itself, make into a condition language which is not so framed as to warrant in law such interpretation; that the provision with reference to the connection with the Hauges synod was a mere incident of the consideration, and not its principal feature.

We cannot hold that the connection with the Hauges synod was a mere incident to the consideration. Considering the words of the resolution in connection with the rest of the deed, we are of the opinion that the grantors intended the connection with the Hauges synod to be one of the principal considerations

—connection  
with synod as  
condition.

upon which the title was conveyed. The words used were

apt words, creating a condition subsequent, and where the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act, and ascribes to it, a definite significance, and the parties cannot be

—intention  
that condition  
shall be  
covenant.

heard to say, where there is no imposition, no fraud, no

mistake, that although they delib-

erately made a condition, and nothing but a condition, they yet meant that it should be enforced as a covenant. *Blanchard v. Detroit, L. & M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142. See also *United States v. Oregon & C. R. Co. (C. C.)* 186 Fed. 861. The action on the covenant would not give appellant an adequate remedy. There were apt words of consideration. There is here largely an absence of other consideration and also an absence of other remedy. In discussing a somewhat similar question it has been said: "If the vendee had altogether failed in the performance of his agreement as to the vendor, would it have been an adequate remedy to the vendor to give him an action of covenant? It is manifest it would not." *Bear v. Whisler*, 7 Watts, 144.

In the light of all the facts in the case, the same may be said here. The facts and circumstances as disclosed by the record, including the recognition by the grantee in its action thereafter, all unite in tending to show that a condition rather than a covenant was intended by the words of this deed. The only thing that could make such position stronger would be words of re-entry or forfeiture in the deed, and these, as the authorities show, are not necessary or indispensable in order to create a condition.

—necessity of  
words of  
forfeiture.

The judgment will therefore be reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Petition for rehearing denied, December 5, 1919.

## ANNOTATION.

### Distinction between condition and covenant in grant of land for church purposes.

The rule that the question whether a provision in a deed constitutes a covenant or a condition depends on the intention of the parties, as gathered from the entire instrument, and

that in case of doubt a covenant is favored rather than a condition, has been applied in the following cases in deeds of land for church purposes, which have been construed as creating

covenants rather than conditions subsequent: *Board of Education v. First Baptist Church* (1872) 63 Ill. 204; *Bald v. Nuernberger* (1915) 267 Ill. 616, 108 N. E. 724; *St. Stephen's Protestant Episcopal Church v. Church of Transfiguration* (1909) 130 App. Div. 166, 114 N. Y. Supp. 628; *St. Peter's Church v. Bragaw* (1907) 144 N. C. 126, 10 L.R.A.(N.S.) 633, 56 S. E. 688; *Ashland v. Greiner* (1898) 58 Ohio St. 67, 50 N. E. 99.

A covenant, and not a condition subsequent, it was held in *St. Stephen's Protestant Episcopal Church v. Church of Transfiguration* (1909) 130 App. Div. 166, 114 N. Y. Supp. 628, was created by a provision in a deed made for a substantial money consideration, that the grantee, for himself, his heirs, and assigns, "doth covenant and agree" with the grantor, that the grantee should not at any time thereafter occupy or use the premises, or permit the same to be occupied or used, for any purpose other than church purposes only; and that "the said covenant" should run with the land.

It was held in *Bald v. Nuernberger* (1915) 267 Ill. 616, 108 N. E. 724, that a covenant, and not a condition subsequent, was created by a deed to a church, which provided that "the above-subscribed land being deeded in trust that said premises shall be used, kept, maintained, and disposed of as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church." The court said: "There is nothing in the form of the language in the deed in question to indicate that it was intended that the conveyance was upon a condition subsequent. No word or terms show a condition of any kind, and no words of equivalent meaning are found in the deed. There is no re-entry clause. These are the usual indications of an intent to create a condition subsequent. . . . Under the authorities we think the provision in the deed in question must be considered a covenant, and not a condition subsequent." The consideration for the deed does not appear.

A provision in a deed of lots to a religious society that the property

should not be used as a cemetery was held in *St. Peter's Church v. Bragaw* (1907) 144 N. C. 126, 10 L.R.A.(N.S.) 633, 56 S. E. 688, not a condition subsequent, breach of which would work a forfeiture, but a covenant the observance of which would be enforced by equity.

It was held in *Ashland v. Greiner* (1898) 58 Ohio St. 67, 50 N. E. 99, that a covenant, and not a condition subsequent, was created by a deed made for a stated financial consideration, which contained a provision that "it is expressly to be understood that the said grantees nor their successors in office, shall not at any time use or occupy the aforesaid premises for any other purpose or purposes than whereon to erect or build religious meeting houses or parsonages, and for cemetery or burying ground." The court said that when value is paid for the estate, a stipulation that it is to be used only for particular purposes is construed as a covenant running with the land, in the nature of a trust, for the uses and purposes expressed in the deed; and that in such cases a breach of the covenant restricting the uses and purposes to which the estate is to be devoted does not have the legal effect of forfeiting the estate and of reinvesting the title in the grantor, his heirs, or assigns; but that to have such legal effect there must be words of forfeiture or re-entry in the deed.

Also in *Board of Education v. First Baptist Church* (1872) 63 Ill. 204, it was held that a covenant rather than a condition subsequent was created by a deed providing that the property should be used for church purposes only, but that when it ceased to be so used the grantee should pay to the grantor a certain sum and have an absolute title thereto. The court referred to the well-established rule that courts will always incline to interpret the language of deeds as a covenant rather than a condition, and stated in effect that the plain intent of the grantor in this instance was that if the property was not used for church purposes the consideration for the deed, which was otherwise only nominal, should be the sum stated.

In *Hays v. St. Paul M. E. Church* (1902) 196 Ill. 683, 63 N. E. 1040, it was not denied that a provision in a deed to a church that "this conveyance is made strictly subject to the condition that no building or structure shall be built or erected" beyond the limits therein specified, created a valid, personal obligation to the grantor, the proposition that a condition subsequent was created thus being negatived at least by implication.

A condition subsequent, it was held in *Mills v. Davison* (1896) 54 N. J. Eq. 659, 85 L.R.A. 113, 55 Am. St. Rep. 594, 35 Atl. 1072, was not created by a conveyance, for a nominal consideration, of a lot to a religious society, with an habendum "to have and to hold unto the said party of the second part and their successors forever, with this express condition and limitation," namely, that neither the grantor nor his successors should sell, mortgage, or in any way convey the land, and that no building should be erected thereon except for the purpose of public worship. It was said that the conveyance created a trust which the grantee was bound to perform, enforceable, not by forfeiture of the title, but by those methods by which a court of equity compels the performance of such trusts; and that the word "condition" is a term of flexible meaning, and in leases is often construed as a covenant.

In holding that a declaration of trust, and not a condition subsequent or a covenant, was created by a deed to a religious society "to have and to hold all and singular the above-mentioned and described premises . . . unto the said party of the second part . . . on condition" that the church erected on the premises should be called by a certain name, that no instrumental music should be used in the worship of the church, etc., the court in *MacKenzie v. Presbytery of Jersey City* (1905) 67 N. J. Eq. 652, 5 L.R.A. (N.S.) 227, 61 Atl. 1027, said: "Words seemingly appropriate to a condition only may introduce a covenant, a condition, or declaration of trust; and the whole of the clause submitted to investigation must, in form

and scope, be considered, in order to determine within which class it should fall. . . . All of the words used in the clause in question being considered, and the absence of words of determination or reverter being noted, the intent of the parties, to be exercised as permitted by the principles of law, will be best subserved by holding the clause to be a declaration of trust. Examining the deeds in the light of the authorities, we find no words whereby either party binds itself to the other for the doing or not doing of a particular thing, or for the existence or nonexistence of a particular state of facts, and for breach whereof the party bound should be answerable in damages. Hence we have no difficulty in concluding that the words are not words of covenant."

As an illustration of a line of cases which the annotation does not cover, dealing with the creation of trusts as distinguished from conditions subsequent in deeds to a religious society, see *Taylor v. Campbell* (1912) 50 Ind. App. 515, 98 N. E. 657, citing numerous other cases of a similar nature.

But a condition subsequent, and not a mere covenant personal to the grantee, it was held in *Upington v. Corrigan* (1896) 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 859, was created by deed, for a nominal consideration, providing in the habendum clause "to have and to hold . . . unto the said party of the second part, his heirs and assigns, . . . upon the conditions following, to wit, that said party of the second part shall consecrate, or cause to be consecrated, the said property for the purpose of erecting a church building, and shall, within a reasonable time, erect, or cause to be erected, such building."

And as construing a provision in a deed to a church "on condition that said church be and remain connected" with a certain Lutheran synod, as a condition subsequent, and not as a covenant, see the reported case (*ROOKS CREEK EVANGELICAL LUTHERAN CHURCH v. FIRST LUTHERAN CHURCH*, ante, 1422).

In a number of other cases the question arose as to whether a deed for

church purposes was made on a condition subsequent, and the court, without discussing the distinction between conditions and covenants, held that the provision in question was not a condition subsequent. Some of these cases are of value on the subject under annotation for the reason that provisions were involved of a nature similar to those in the cases previously set out. A few of these decisions are, therefore, referred to, without intending to treat this line of cases exhaustively.

The use of the words, "upon and subject to the condition," in a deed of land, for a nominal consideration, to a religious society, was held not to create a condition subsequent, in *Episcopal City Mission v. Appleton* (1875) 117 Mass. 326, where the deed was of land on which a chapel stood, and was made "upon and subject to the condition" that the land should be held for religious worship, but it was also provided that no building should be erected on a certain portion of the land until the adjoining landowner should cease to keep open a contiguous strip of land, or the premises should "cease to be a chapel." The court said that although the words "upon condition" in a conveyance of real estate were apt words to create a condition, yet they were not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, was otherwise, and that it was of the opinion that such an intention appeared on the face of this deed.

And it was said in *Farnham v. Thompson* (1885) 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9, that while certain words have acquired a technical signification as creating a condition, as the words, "provided," "on condition," or "so as," when followed by words imposing an obligation, these, though apt and proper for the purpose, do not necessarily create a condition, since the instrument in which they were used may contain other qualifying words showing that they were not used in their technical sense, and that a condition was not intended. And it was held in this

case that a condition subsequent was not created by a deed, made without money consideration, to a church, of land "for the purpose of erecting a church thereon."

So, the words, "in trust nevertheless, and upon condition always," in a deed, it was stated in *Sohier v. Trinity Church* (1871) 109 Mass. 1, do not always create a condition; and it was held that these words in the habendum clause of a deed that the property should be held for specific church use did not make a condition subsequent where the deed was given by a church trustee, who held title for the church, to the vestry and wardens and their successors.

Attention is called also to *Stanley v. Colt* (1866) 5 Wall. (U. S.) 119, 18 L. ed. 502, in which, in holding that a trust, and not a conditional estate, was created by a devise to a religious society, the court said: "It is true that the word 'proviso' is an appropriate one to constitute a common-law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust."

It was held in *Packard v. Ames* (1860) 16 Gray (Mass.) 327, that an estate on condition was not created by a grant to persons who, the deed recited, had associated together for the purpose of erecting on the land a meetinghouse for public worship, with habendum that the grantees should hold the estate for the purpose of erecting and maintaining thereon a house for public worship.

In *Downen v. Rayburn* (1905) 214 Ill. 342, 73 N. E. 364, 3 Ann. Cas. 36, it was held that a condition subsequent was not created by a deed to church trustees of "a certain tract or parcel of land to be used as a church location," but that the grantee acquired an unrestricted title.

And it was held in *Cushman v. Church of Good Shepherd* (1892) 14

Pa. Co. Ct. 26, that a condition subsequent was not created by a provision in a deed to a church, that the land should never be used as a place of sepulture, and that no other building should be put on the same except the church and Sunday-school buildings.

Also in *First Presby. Church v. Bailey* (1916) — Del. Ch. —, 97 Atl. 583, it was held that a condition subsequent was not created by a deed to church trustees, the consideration being a stated sum of money, and that the land might remain and inure under the said trustees and their successors forever for a meetinghouse, burying ground, and such other good and pious uses as to the trustees and elders of the church might seem most fitting and convenient. The court regarded these recitals merely as expressing the purpose of the conveyance and the rule as well settled that such recitals do not import a condition.

A conveyance of land to a church "to have and to hold the said lot of ground for mission-school purposes" was held in *Rankin Regular Baptist Church v. Edwards* (1902) 204 Pa. 216, 53 Atl. 770, not to create an estate on condition.

An estate on condition, it was held in *Brown v. Caldwell* (1883) 23 W. Va. 187, 48 Am. Rep. 876, was not created by a conveyance, made in consideration of a stated sum of money and of the trusts therein expressed, viz., that the grantee should at all times permit all the white religious societies of Christians to use the land as a common burying ground, and for no other purpose, unless for the erection of a house for public Christian worship.

Although not strictly within the scope of the annotation, the provision being in a will, attention is called to the case of *Adams v. First Baptist Church* (1907) 148 Mich. 140, 11 L.R.A.(N.S.) 509, 111 N. W. 757, 12 Ann. Cas. 224, holding that a devise of real estate to a religious corporation, "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else," did not create a condition subsequent so as to cause a forfeiture if the property was devoted to other uses.

But in *Scott v. Stipe* (1859) 12 Ind. 74, a grant to the use of the trustees of a church and their successors, in consideration of Christianity and a desire that the church might have a suitable place of worship, was held to be on a condition subsequent and to be forfeited by the sale and secular use of the property.

And it was held in *Southwick v. New York Christian Missionary Soc.* (1912) 151 App. Div. 116, 135 N. Y. Supp. 392, that a condition subsequent was created by a provision in a deed to church trustees that "the above-described land being designed for church purposes, it is understood and agreed that the seats therein shall be forever free for the use of any and all persons to occupy in the capacity of worship. But if the seats of the church to be erected thereon or any other church thereon shall be rented or sold then the said above-described premises shall revert to said party of the first part or her heirs." The decision was affirmed in (1914) 211 N. Y. 515, 105 N. E. 204, and rehearing denied in (1914) 212 N. Y. 564, 106 N. E. 1043. R. E. H.

JOHN G. SCOUTON

v.

STONY BROOK LUMBER COMPANY, Appt.

*Pennsylvania Supreme Court — April 22, 1918.*

(261 Pa. 241, 104 Atl. 548.)

**Corporation — agency — repudiation — retention of benefits.**

1. A corporation cannot retain money which it secures by loan on a



note executed by its president and secretary without authority, and repudiate the agency by which it was secured.

[See note on this question beginning on page 1446.]

— power — borrowing money.

2. A corporation may lawfully borrow money to pay its indebtedness.

[See 7 R. C. L. 593.]

— failure to pass money through hands of treasurer.

3. The liability of a corporation to

repay money lent it to pay its indebtedness is not affected by the fact that the money did not pass through the hands of its treasurer and the transaction was not referred to on the corporate minutes.

[See 7 R. C. L. 594.]

**APPEAL** by defendant from a judgment of the Court of Common Pleas for Sullivan County (Terry, P. J.) in favor of plaintiff in an action brought to recover an amount alleged to have been loaned to defendant for corporate purposes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Clarence D. Coughlin and G. J. Clark, for appellant:

The corporation had a legal entity and existence outside of the stockholders. It had rights independent of them, which rights could only be divested in a proper and legal manner.

*Bidwell v. Pittsburgh, O. & E. L. Pass. R. Co.* 114 Pa. 535, 6 Atl. 729; *Goetz's Estate*, 236 Pa. 630, 85 Atl. 65; *Com. v. Monongahela Bridge Co.* 216 Pa. 108, 64 Atl. 909, 8 Ann. Cas. 1073; *Rhawn v. Edge Hill Furnace Co.* 201 Pa. 637, 51 Atl. 360.

Directors may propose, offer, debate, argue, etc., but only action by the majority of the directors has any effect on corporate rights.

*Allegheny County Workhouse v. Moore*, 95 Pa. 408; *Dorsey v. Abrams*, 85 Pa. 299, 27 Am. Rep. 657; *Sword v. Reformed Congregation Keneseth Israel*, 29 Pa. Super. Ct. 626; *Workingman's Loan & Bldg. Asso. v. Heaton*, 288 Pa. 177, 92 Atl. 78; *Tift v. Quaker City Nat. Bank*, 141 Pa. 550, 21 Atl. 660.

Outside of estoppel and ratification a corporation is bound only by corporate action, and such action may be by general authority conferred by by-laws or resolutions, or special authority by resolution or motion of the board of directors properly convened.

*Cook, Corp.* 7th ed. ¶ 713a.

Where a resolution is actually passed by a corporation and through inadvertence or mistake is not recorded in the minutes, the fact of its passage may be proved by testimony of those present.

*Boalsburg Water Co. v. State College Water Co.* 240 Pa. 198, 87 Atl. 609.

The note in suit comes without sanc-

tion of by-laws or other corporate authority, and therefore was improperly received as evidence of corporate liability.

5 *Wigmore*, Ev. 2d ed. ¶ 2521; *Henderson Mercantile Co. v. First Nat. Bank*, 100 Tex. 344, 99 S. W. 850; *Monongahela Nat. Bank v. Harmony Land Co.* 226 Pa. 440, 75 Atl. 687, 18 Ann. Cas. 727; *McAllister v. Pittsburgh Water Heater Co.* 65 Pa. Super. Ct. 522; *Gould v. W. J. Gould & Co.* 134 Mich. 515, 104 Am. St. Rep. 624, 96 N. W. 576, 2 Ann. Cas. 519; 21 Am. & Eng. Enc. Law, 859; *Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888; *Pittsburg & S. R. Co. v. Allegheny County*, 79 Pa. 210; *Curry v. Claysville Cemetery Asso.* 5 Pa. Super. Ct. 289; *Allegheny County Workhouse v. Moore*, 95 Pa. 408; *Millward-Cliff Cracker Co's Estate*, 161 Pa. 157, 28 Atl. 1072; *Worthington v. Schuylkill Electric R. Co.* 195 Pa. 211, 45 Atl. 927; *Louchheim v. Somerset Bldg. & L. Asso.* 25 Pa. Super. Ct. 325; *Pollock v. Standard Steel Car Co.* 230 Pa. 136, 79 Atl. 400.

Even if on such evidence the jury were permitted to find as a fact that Scouton's \$5,000 paid that amount of Blackman's \$6,500 indebtedness, that does not create a right of action in favor of one who pays the debt without showing corporate request or corporate authority. No benefit accrued to the defendant corporation by such payment; the benefit was to Carter in closing his deal.

*Worthington v. Schuylkill Electric R. Co.* 195 Pa. 211, 45 Atl. 927; *Monongahela Nat. Bank v. Harmony Land Co.* 226 Pa. 440, 75 Atl. 687, 18 Ann. Cas. 727; *Van Haagen Soap Co's Estate*

(261 Pa. 241, 104 Atl. 548.)

(Third Nat. Bank's Appeal) 141 Pa. 214, 12 L.R.A. 223, 21 Atl. 598, 773; 2 Morawetz, Priv. Corp. ¶ 716; Taylor, Priv. Corp. (N. Y.) ¶ 312; 15 Am. & Eng. Enc. Law, 1101; Anderson v. Hamilton Twp. 25 Pa. 75; Thompson v. Griggs, 31 Pa. Super. Ct. 608.

As a director, the burden is upon plaintiff to show good faith.

Thomp. Corp. ¶ 4068; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; Commonwealth Title Ins. & T. Co. v. Seltzer, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77; Porter v. Healy, 244 Pa. 427, 91 Atl. 428; Hechelman v. Geyer, 248 Pa. 490, 94 Atl. 188, Ann. Cas. 1917A, 236.

Mr. E. J. Mullen, for appellee:

Defendant is liable for money loaned to it at a meeting of its board of directors when it receives it with full knowledge that it is loaned for corporate purposes and permits it to be applied to the payment of corporation debts, although no entry of such loan is made in the minutes of the board, and the money does not pass through the hands of its treasurer.

Hartzell v. Ebbvale Min. Co. 239 Pa. 602, 86 Atl. 1093; First Nat. Bank v. American Bangor Slate Co. 229 Pa. 27, 77 Atl. 1100; Millward-Cliff Cracker Co's Estate, 161 Pa. 157, 28 Atl. 1072; Wayne Title & T. Co. v. Schuykill Electric R. Co. 191 Pa. 90, 43 Atl. 135; Presbyterian Bd. v. Gilbee, 212 Pa. 310, 61 Atl. 925; Pennsylvania Natural Gas Co. v. Cook, 123 Pa. 170, 16 Atl. 762; MacGeorge v. Chemical Mfg. Co. 141 Pa. 575, 21 Atl. 671; Pannebaker v. Tuscarora Valley R. Co. 219 Pa. 60, 67 Atl. 923; Kendall v. Klapperthal Co. 202 Pa. 596, 52 Atl. 92; Dougherty v. Hunter, 54 Pa. 380; Manhattan Hardware Co. v. Phalen, 128 Pa. 110, 18 Atl. 428; Inter-state Mut. F. Ins. Co. v. O. D. Brownback & Co. 1 Pa. Super. Ct. 183.

Defendant is bound to reimburse plaintiff for the amount of the loan.

Wojciechowski v. Johnkowski, 16 Pa. Super. Ct. 444.

Walling, J., delivered the opinion of the court:

This is an action of assumpsit for money loaned. The defendant company was incorporated in 1910, with an authorized capital stock of \$200,000, divided into shares of \$100 each. It owned a tract of 2,200 acres of timberland in Sullivan county, where it was engaged in the

manufacture and sale of lumber. Prior to August, 1915, 1,500 shares of its capital stock had been issued, of which 1,100 shares were owned or controlled by John Hughes Blackman, and the remaining 400 shares by C. F. Carter. The latter manufactured the lumber for the corporation, and the former looked after its business affairs. In the spring of 1915 Carter secured from Blackman an option for the purchase of his stock. Blackman was president of the corporation, and insisted that, in connection with the sale of his stock, all the company's direct and collateral liabilities, amounting to about \$41,000, must be paid. The agreed price for his stock was, in round numbers, \$50,000, making the amount necessary to consummate the transaction \$91,000. Carter employed plaintiff, who was an attorney, to assist him in securing this money, which was obtained largely by loans from banks and individuals. The option as drawn expired July 15th of that year, but was extended. The parties in interest met at a bank in Pittston on July 31st, also on August 2d, and again on August 4th, when the matter was finally consummated, and Carter became the owner of practically all the stock of the corporation. At the same time the company was reorganized, and the number of directors increased from three to five, which included Carter, his two sons, plaintiff, and H. W. Ruggles. A share of stock was transferred to each of the two latter to qualify them to act as such. Mr. Carter became president, his son, Bruce A. Carter, secretary, and Mr. Ruggles, treasurer.

Some of the notes given by Carter to raise the money were indorsed by plaintiff, who also furnished \$5,000 of his own, which amount, with the balance of the \$91,000, was turned over to Blackman at the meeting on August 4th. So far as appears, Mr. Blackman paid all the debts and liabilities of the old company and retained the balance as the price of his stock. The only question involved in this suit is whether the \$5,000

was a loan to Carter or to the corporation; plaintiff says to the corporation. The \$41,000 indebtedness included \$6,500 owing to Blackman for salary. On the day last mentioned there was a meeting of the new board of directors, at which four were present; and the evidence for plaintiff tends to show that it was then agreed and understood that his \$5,000 was a loan to the corporation and to be used in payment of Blackman's salary. In corroboration of this a three-months' note for that amount, drawn payable to plaintiff and executed by the new president and secretary in the corporate name, was put in evidence. The note was not signed by the treasurer as the by-laws provide; but plaintiff's evidence is to the effect that the treasurer was present, consented to the transaction, and said he would sign the note, if necessary. This is denied by the treasurer, who testifies, in effect, that it was a loan to Carter, and not to the company, and that the question of treating it as a loan from plaintiff to the company was broached at the meeting on August 2d, when he (the treasurer) refused to so consider it, or to sign the note, and that later, after a private conversation between Carter and plaintiff, they stated that other arrangements had been made as to the \$5,000, and further that he had no knowledge of said note until long afterwards, and never consented thereto.

As we understand the facts none of the funds turned over to Blackman passed through the hands of the treasurer. The minutes of the corporate meeting held that day contain no reference to this loan. Ruggles seems to have been interested in this suit as the holder of a large block of the company's stock as collateral for a loan to Carter, who died in November, 1915, apparently insolvent. The note was admitted in evidence in support of plaintiff's contention. As the court below says, there was a sharp conflict in the evidence. Each side was supported to

some extent by more than one witness, and the case became largely one of fact; as such it was submitted to the jury with adequate instructions. The verdict was in favor of the plaintiff, and the lower court, after careful consideration, directed judgment to be entered thereon, from which defendant appealed.

We find no error in the record. Some of the funds turned over to Blackman were for his stock, and the balance for corporate indebtedness. The jury found this \$5,000 was a part of the latter; that being so, the corporation received the benefit of the loan. Conceding that the president and secretary were not

authorized to execute the note, yet the company got the money, which it cannot retain and

Corporation—  
agency—re-  
pudiation—  
retention of  
benefits.

repudiate the agency by which it was secured. Upon this question we adopt the following from the opinion of the court below: "If plaintiff's money was loaned and used for such purpose, it is of no consequence that the election of officers was irregular, or that one of them was absent at the time of such loan, or that the treasurer did not execute the note. Such irregularities give way to the principle that a party cannot avail himself of the benefit of his agent's act and repudiate his authority; in the application of which it is held that a corporation which has received the benefit of a note irregularly issued cannot escape liability thereon by showing it was not executed by the proper officers. *Hartzell v. Ebbvale Min. Co.* 239 Pa. 602, 86 Atl. 1093; *Pannebaker v. Tuscarora Valley R. Co.* 219 Pa. 60, 67 Atl. 923; *Presbyterian Bd. v. Gilbee*, 212 Pa. 310, 61 Atl. 925; *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. 170, 16 Atl. 762; *MacGeorge v. Chemical Mfg. Co.* 141 Pa. 575, 21 Atl. 671. And a director of a company, suing, is not denied the application of such rule. *Kendall v. Klapperthal Co.* 202 Pa. 596, 52 Atl. 92."

The defendant's obligation arises from the receipt of the money by it, and the note, although defectively executed, is evidence as tending to establish the loan.

—power—bor-  
rowing money.

See *Wojciechowski v. Johnkowiak*, 16 Pa. Super. Ct. 444. A corporation may lawfully borrow money to pay its indebtedness, and when used for that purpose the obligation to repay is undoubted. The fact that the loan in question did not pass through the hands of the treasurer is not controlling, nor is the absence of any reference thereto in the corporate minutes.

—failure to pass  
money through  
hands of  
treasurer.

The assignments of error are

overruled, and the judgment is affirmed.

#### NOTE.

The proposition of the first head-note of the reported case (*SCOUTON v. STONY BROOK LUMBER Co.* ante, 1483) is a specific application of the general principle promulgated in the annotation beginning at page 1446, post, to the effect that where an officer, without authority, enters into a contract for a corporation, and the corporation receives and retains the benefits of the contract after acquiring knowledge of the circumstances attending its execution, it thereby ratifies the contract and makes it good by adoption.

ED. SCHUSTER & COMPANY, Respt.,

v.

KURYER PUBLISHING COMPANY, Appt.

*Wisconsin Supreme Court — April 4, 1917.*

(165 Wis. 327, 162 N. W. 173.)

**Corporation — contract approved by manager — binding effect.**

1. A publisher which continues performance of an advertising contract after notice of its terms comes to the attention of its business manager, who has authority to make such contract, is bound by its terms.

[See note on this question beginning on page 1446.]

**Appeal — findings sustained by evidence — effect.**

2. A finding of the trial court, sustained by the evidence, cannot be disturbed on appeal on the ground that it is against the clear preponderance of the evidence.

[See 2 R. C. L. 203.]

**Injunction — against breach of contract.**

3. Injunction lies to prevent a news-

paper publisher which has contracted to furnish advertising space at a certain rate for a specified time from refusing to continue the performance of its contract unless the advertiser will pay in advance an increased rate for space before the termination of the agreement.

[See 14 R. C. L. 381.]

**APPEAL** by defendant from a judgment of the Circuit Court for Milwaukee County (Gregory, J.) in favor of plaintiff in an action brought to restrain defendant from breaching the terms of an advertising contract. *Affirmed.*

**Statement by Siebecker, J.:**

This action is brought in equity to restrain the defendant from breaching the terms of an advertising contract.

The plaintiff is a corporation duly organized and existing under the laws of the state of Wisconsin, and operates three department stores. The defendant is also a corporation

existing by virtue of the laws of the state, and publishes a newspaper in the city of Milwaukee. On or about the 18th of February, 1913, the merchandise manager of the plaintiff and the advertising manager of the defendant contracted as follows:

"We hereby agree to contract with Ed. Schuster & Co. to sell you fifteen thousand (15,000) inches or more of space in the *Kuryer Polski*, to cover three (3) years, beginning with March 1, 1913, and ending February 28, 1916, at the rate of 18c. per inch, bills to be payable before the 15th of each month following. It is also understood that 5,001 inches, or more, are to be used each year.

"The right is hereby granted to Ed. Schuster & Co. to renew this contract for another two years, under like conditions and at the same rate."

The contract was executed for three years by the parties. On December 27, 1915, the plaintiff elected to renew the contract under the option contained therein, and notified the defendant of such election by mail. It appears that the defendant corporation had a rule that all contracts for advertising for a period of more than one year must be submitted to the business manager of the corporation. At the time of making this contract plaintiff had no knowledge of such a rule of defendant. The contract, however, came to the notice of the business manager of the defendant corporation some time after August 1, 1914, and the defendant continued to furnish advertising to the plaintiff thereafter in accordance with the terms of the agreement and in no way disavowed the contract. After March 1, 1916, the defendant refused to accept and publish the advertisements tendered it by the plaintiff, except upon the condition that the plaintiff would in advance of publication agree to pay a higher rate of advertising than the rate set forth in the original contract.

The circuit court adjudged that the defendant corporation be per-

manently enjoined and restrained during the continuance of the two years' extension of the contract after March 1, 1916, from refusing to receive and publish the advertising tendered by the plaintiff in compliance with the terms and conditions of such contract. It was also adjudged by the court that the plaintiff recover from the defendant nominal damages and its costs and disbursements of the action. From such judgment this appeal is taken.

Messrs. Cochems & Wolfe, for appellant:

The alleged contract is not one specifically enforceable in equity under the proofs in the present case.

26 Am. & Eng. Enc. Law, 2d ed. 17; 6 Pom. Eq. Jur. § 744; *Wilson v. Mineral Point*, 39 Wis. 160; *Eau Claire Water Co. v. Eau Claire*, 127 Wis. 154, 106 N. W. 679; *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L.R.A.(N.S.) 119, 131 N. W. 412.

A jury would be warranted in finding that plaintiff's advertising agent knew that defendant's agent had no authority to enter into this long-term contract.

31 Cyc. 1335; *Ames v. D. J. Murray Mfg. Co.* 114 Wis. 85, 89 N. W. 836.

Plaintiff, at the time of the inception of this action, must have known that he was not entitled to equitable relief, and that he was only entitled to legal relief, and for that reason the court should have refused to retain jurisdiction of the subject-matter.

*McLennan v. Church*, 163 Wis. 411, 158 N. W. 73.

Mr. William Kaunheimer, for respondent:

Dalkowski was employed by the defendant as advertising manager for the *Daily Kuryer Polski*.

*Wheeler & W. Mfg. Co. v. Lawson*, 57 Wis. 400, 15 N. W. 398; *Saunders v. United States Marble Co.* 25 Wash. 475, 65 Pac. 782.

The word "advertising" as applied to him, as manager, is a word of limitation, and would confine his authority within the field of advertising.

*Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Curtis Land & Loan Co. v. Interior Land Co.* 137 Wis. 341, 129 Am. St. Rep. 1068, 118 N. W. 853; *Strait v. Northwestern Steel & Iron Works*, 148 Wis. 254, 134 N. W. 387;

Garrick Theatre Co. v. Gimbel Bros. 158 Wis. 649, 149 N. W. 385.

The service which the defendant in this instance undertook to render to plaintiff was of such a unique character as to place it within the rule of that class of cases of which a court of equity will take cognizance to enjoin a breach.

Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; Humphreys Mfg. Co. v. David Williams Co. 70 Misc. 354, 128 N. Y. Supp. 680; Chain Belt Co. v. Von Spreckelsen, 117 Wis. 106, 94 N. W. 78.

Siebecker, J., delivered the opinion of the court:

There is no dispute concerning the terms of the contract as originally agreed upon between the plaintiff's merchandise manager and defendant's advertising manager on February 18, 1913. The court's finding that the "contract came to the notice of said Michael Kruszka, business manager of said defendant, some time after August 1, 1914, and that after it came to his notice the said defendant continued to receive advertising from the said plaintiff

in accordance with terms of the contract and did not disavow the same," is sustained by the evidence and hence cannot be disturbed on appeal as against the clear preponderance of the evidence. In the light of these facts it must be held that the contract became and is a binding obligation on the defendant in its entirety, and plaintiff

had the right to elect, as it did, to extend the contract for two years from March 1, 1916. The evidence shows that defendant refused to receive and publish plaintiff's advertisements in its paper, as required by the contract, after March 1, 1916, unless plaintiff agreed in advance to pay a higher rate for this space in defendant's paper, which it had sold to the plaintiff under the contract. It is manifest that, had plaintiff complied with defendant's demands in the respect mentioned, plaintiff

Appeal—Findings sustained by evidence—effect.  
Corporation—contract approved by manager—binding effect.

would thereby have waived its right to recover compensation for the breach of the contract and the right to have the contract specifically enforced. Under such circumstances it was the plaintiff's right to stand upon the terms of the agreement and seek the redress the law affords for defendant's refusal to perform the obligations the contract imposes. The plaintiff asserts that the threatened breach of the contract would cause it irreparable damage, and therefore invoked equitable interposition to prevent defendant from carrying out such threatened breach of the agreement.

The court found, as the evidence establishes, that the damages resulting from such a breach of the agreement, under the peculiar and special nature of the contract, are impossible of ascertainment, and hence a legal measure thereof cannot be arrived at to compensate plaintiff in an action at law. Under the facts and circumstances shown by the record it is obvious that if plaintiff is deprived of advertising its business in defendant's paper, as specified in the contract, the loss thereby occasioned cannot possibly be ascertained within any legal rules, and would result in irreparable injury. This state of the case furnishes ample basis for invoking equitable jurisdiction to restrain defendant from committing the threatened breach of the contract. Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955, 3 Mor. Min. Rep. 291; Rolfe v. Burnham, 110 Mich. 660, 68 N. W. 980; Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 48 L.R.A. 568, 56 N. E. 822; Humphreys Mfg. Co. v. David Williams Co. 70 Misc. 354, 128 N. Y. Supp. 680.

Injunction—against breach of contract.

The judgment appealed from is affirmed.

Eschweiler, J., took no part.

#### NOTE.

The legal proposition stated in the

first headnote of the reported case (*Ed. SCHUSTER & Co. v. KURYER PUB. Co. ante*, 1437) is in accordance with the great weight of authority, as is shown in the annotation beginning at page 1446, post, on "Ratification

by corporation of unauthorized contract entered into by officer by acceptance and retention of benefits." The reported case is cited in subdivisions II. and III. of that annotation, where analogous cases will be found.

R. L. WEATHERSBY, Intervener, Plff. in Err.,  
v.

TEXAS & OHIO LUMBER COMPANY.

*Texas Supreme Court — December 15, 1915.*

(107 Tex. 474, 180 S. W. 735.)

**Estoppel — of corporation to question authority of officer — retention of benefit.**

1. A corporation which accepts and retains title to land secured for it by its promoters under a contract signed by its president is estopped to question the authority of such persons to agree to render certain considerations for the surrender by a third person of an option on the land.

[See note on this question beginning on page 1446.]

**Contract — consideration — delivery of deed.**

2. The delivery of a deed which has been contracted for to a corporation organized to take the property is sufficient consideration for the corporation's confirmation of a contract made by its promoters to save the grantor harmless from certain indorsements which he had made for another corporation.

[See 7 R. C. L. 81, 82.]

**Notice — compliance with contract.**

3. A corporation which after organization complies with all the terms of

a contract by which promoters secured for it title to lands, except one in dispute, will be held to have had notice of the terms of the contract so that acceptance of benefits will charge it with the burden.

**— of officer — imputation to corporation.**

4. Knowledge of the contents of a contract under which a corporation secured title to real estate, gained by its president when, acting for it, he executed the instrument, will be imputed to the corporation.

[See 7 R. C. L. 653.]

**ERROR** to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court for Jasper County in favor of defendant, in an action brought to recover the amount of two judgments which plaintiff had been compelled to pay off and satisfy, and for the foreclosure of his lien upon certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Crook, Lord, & Lawhon, for plaintiff in error:

Defendant could not accept the benefits of contracts made by its promoters without assuming the burdens.

*McDonough v. First Nat. Bank*, 34 Tex. 309; *Texas Western R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Ennis Cot-*

*ton-Oil Co. v. Burks*, — Tex. Civ. App. —, 39 S. W. 966; *Weatherford, M. W. & N. W. R. Co. v. Granger*, — Tex. Civ. App. —, 22 S. W. 70; 2 Cook, Corp. pp. 1462-1514.

A. P. Laughlin, as president and managing officer of the corporation, was authorized to make contracts in

its name for the purpose of acquiring timberlands, and the defendant would be bound by such contracts.

2 Cook, Corp. pp. 1511, 1512.

Mr. W. W. Blake for defendant in error.

Messrs. J. L. Peeler and Thelburt Martin in support of a motion for rehearing by defendant in error.

Yantis, J., delivered the opinion of the court:

R. L. Weathersby owned 80,000 shares of stock in the Jasper County Lumber Company, which was in the hands of a receiver. He was an indorser on two notes which it owed to W. W. Willson, in the aggregate sum of \$3,503.96. He filed a plea of intervention in a receivership suit which was pending against the Texas & Ohio Lumber Company, in which he asked for judgment in his favor against the said Texas & Ohio Lumber Company for the said sum, alleging that said company purchased from him an option which he owned, to purchase from George N. Smalley 3,743 acres of timberland in Jasper county, and that as a part consideration for the purchase of his said option said Texas & Ohio Lumber Company agreed and contracted to protect him against the payment of said notes; and that when he caused the owner of said land, George N. Smalley, to deed it to the Texas & Ohio Lumber Company, it took said land charged with a lien in his favor to secure said protection; that he had been sued by said Willson on said notes, and a judgment had been rendered against him for the said amount, and that he had paid and discharged said judgment. In his plea of intervention he asked for judgment in his favor against the Texas & Ohio Lumber Company in said amount, with interest thereon, and for a foreclosure of said lien on the said 3,743 acres of land.

The receiver answered said plea of intervention by denying any contractual relationship between the Texas & Ohio Lumber Company and Weathersby. He alleged that the 3,743 acres of land were purchased

by Applegate, and the deed was taken in his name as trustee for the Texas & Ohio Lumber Company; that a cash payment was made by the promoters of the Texas & Ohio Lumber Company; that the contract to hold the intervener Weathersby harmless by reason of his having to pay off the said notes was signed without the authority of the board of directors of the Texas & Ohio Lumber Company, and without any knowledge on their part of the conditions of such contract.

The district court rendered judgment against Weathersby. He appealed to the honorable court of civil appeals for the first district, where the judgment of the trial court was affirmed. A writ of error was granted by this court upon the view that the Texas & Ohio Lumber Company was bound by the contract of its promoters to protect Weathersby against liability on said notes. We will now consider this question, which is the only one presented for decision.

The undisputed evidence shows that in April, 1906, A. P. Laughlin, and several other parties, acting together, had in contemplation and were arranging for the organization of a lumber company corporation which, when organized, would purchase timberlands to be used in the operation of the business of said corporation. The corporation was organized and chartered in June, 1906, and said Laughlin was elected its president, and H. D. Applegate was elected its vice president. Prior to the actual organization of the corporation, among the lands Laughlin contemplated buying for the prospective corporation were 3,743 acres of timberland in Jasper county, which were owned by one George N. Smalley. Laughlin engaged one H. D. Applegate, afterwards vice president of the Texas & Ohio Lumber Company, as a promoter for the prospective company, and directed him to contract for the purchase of this tract of land for such company. However, he could not purchase the



land direct from Smalley, as he ascertained, for the reason that Weathersby held a legal contract with said Smalley, which gave said Weathersby an option to purchase said land, and said option had not expired. So that Applegate and Laughlin ascertained that they could only secure said land by purchasing said option from Weathersby, or by contracting with him to waive said option in their favor. Accordingly, on April 25, 1906, said Applegate, the promoter of the prospective corporation, made a written contract with said Weathersby, through the latter's agent, John H. Kirby, by the terms of which Weathersby agreed to release his option on the land in their favor, and that Smalley should convey the land direct to said Applegate as trustee for his said associates and the prospective corporation. In this contract the consideration moving to Weathersby was the purchase from him by Applegate and his associates of 80,000 shares of the capital stock of the Jasper County Lumber Company, which said Weathersby owned, at its par value of \$8,000, which was to be paid in cash; and, further, that said Weathersby would be protected by said Applegate and said prospective corporation against loss as an indorser or guarantor upon any of the promissory notes, accounts, or obligations of the Jasper County Lumber Company, which was in the hands of a receiver. In obedience to said contract, said Weathersby did procure said George N. Smalley to convey by deed said land to said Applegate, which deed was executed, but not delivered, on June 8, 1906, but was delivered after the execution of the contract of September 18, 1906, which was of the following nature: It was executed by the Texas & Ohio Lumber Company, by A. P. Laughlin, president. It was also signed by H. D. Applegate and A. P. Laughlin, individually. By its terms it confirmed said contract of April 25, 1906, which was made by said Applegate and said Kirby, as agent for Weathersby. Said new

contract of September 18 recited that the one of April 25 had been made, and named the consideration which was to be received by Weathersby as stated above, and recited that through said contract of April 25 Weathersby had promised to deliver a deed to said land to the Texas & Ohio Lumber Company, and that said lumber company was now desirous of having said deed from Smalley, the owner of said land, delivered to it, and it then, in said September contract, agreed to pay to Weathersby all the considerations recited in said April contract, including the protection of Weathersby against paying the said notes, said September contract reciting a lien on said land to secure Weathersby against liability on said notes.

This contract of the Texas & Ohio Lumber Company, of September 18, was made long subsequent to the organization of the corporation, whose charter was secured in June, 1906, and when said contract was made Laughlin and Applegate were its duly elected and acting president and vice president, respectively.

The deed to the Smalley land at the date of the execution of the said September contract had not been delivered to Applegate by Weathersby or his agent Kirby, who had refused to deliver it until such time as the Texas & Ohio Lumber Company itself would become responsible to Weathersby for the considerations mentioned. After the execution of this September contract, Kirby delivered the deed to Applegate, and thereafter Applegate conveyed the land to the Texas & Ohio Lumber Company.

There is no merit in the contention made by the Texas & Ohio Lumber Company, defendant in error, or its receiver, that there was no consideration for the September contract. The consideration was plainly expressed therein. It stated, in substance, that in order to secure the deed to the said land the Texas & Ohio Lumber Company agreed to pay to Weathersby, the plaintiff in

error, the considerations mentioned and promised in the April contract, expressly agreeing to protect him against liability on the notes referred to, which were the foundation of the judgment secured against Weathersby, on account of which the latter sues herein. When the deed was delivered to Applegate the \$8,000 cash consideration was paid to Weathersby, and only that portion of the consideration mentioned in said contracts which provided protection to Weathersby against the payment of said notes was left outstanding, and this was assumed to be cared for by the Texas & Ohio Lumber Company. This was ample consideration to support the contract; and as soon as it was agreed by the Texas & Ohio Lumber Company to pay said considerations, Kirby, the agent for Weathersby, delivered the deed to Applegate, the promoter, who then conveyed the land to the Texas & Ohio Lumber Company, in accordance with the general understanding, when each of said contracts was executed.

It is contended, however, that the Texas & Ohio Lumber Company was not bound on said contract of September 18, because it is denied that Laughlin, its president, had authority from the board of directors to execute it. It is true the evidence shows that Laughlin had not been authorized by the board of directors to make this contract, and we will consider the question whether the Texas & Ohio Lumber Company is bound by its provisions from that viewpoint. That is, that Laughlin, when he executed said contract, exceeded his authority as president of the corporation. We will assume, also, that he did not act within the apparent scope of his authority, because there is evidence in the record that when he signed said September contract as president of the Texas & Ohio Lumber Company, he stated to the interested parties that the board of directors had not authorized him to make the contract. But there still remains the fact that the Texas & Ohio Lumber Company

took and retained the land under his contract and the April contract, made for its benefit by its promoters, and that it is still holding and claiming said land which was acquired through the provisions of said contract, without offering in this suit to surrender said land. We do not think there can be any sound reason for sustaining the position thus occupied by it, which, in effect, would mean that it could receive the benefits of these contracts made by its promoters for it, and at the same time refuse the burdens imposed upon it by the contract. The title to this land it acquired through the provisions of said contracts, and it is by the force of the provisions contained in said contract that it still holds and claims the land. Under such circumstances equity would not allow it to refuse to pay the consideration promised by its promoters in

Contract—  
consideration—  
delivery of deed.

said contract, for in good conscience it should not be permitted to keep the lands and at the same time refuse to pay for them. When the Texas & Ohio Lumber Company asserts title to said lands, it affirms the validity of said contract through whose provisions they secured said title. It cannot affirm the contract in part and repudiate it in part. It cannot accept its benefits and reject the burdens; and having affirmed the portion of the contract favorable to it, which it did in accepting and holding the lands, equity estops it from denying any portion of the contract, and especially that portion which provides for the consideration to be paid to Weathersby for securing the title thereto.

Estoppel—  
of corporation  
to question  
authority of  
officer—reten-  
tion of benefit.

The question involved is not a new one. It has been directly passed upon by this court in the case of Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 40 Am. St. Rep. 837, 24 S. W. 795. Judge Gaines, then associate justice, gave careful and exhaustive consid-

eration to the identical question involved here. In that case he said: "It is also generally held that contracts by promoters, made on behalf of the corporation within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified, but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense. *McArthur v. Times Printing Co.* 48 Minn. 319, 31 Am. St. Rep. 653, 51 N. W. 216; *Spiller v. Paris Skating Rink Co.* L. R. 7 Ch. Div. 368, 26 Week. Rep. 456. With the exception of the law courts of England, the rule is also very generally recognized that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accepts its benefits, it must take it with its burdens, and if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. . . . Where the promoters of a railway company have agreed with a landed proprietor, through whose estates the road is projected to run, to take the requisite quantity of his land at a stipulated price, and after the corporation is formed it takes the land, it is certainly equitable that the company should be made to pay the agreed compensation; and the doctrine is recognized in many English equity cases. . . . Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be held estopped to deny its validity. Again, when the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with

the nonexistence of such contract might be deemed conclusive evidence of such adoption."

In the case of *Texas Western R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98, Judge Gaines again gave consideration to this question, and the following excerpt from his said opinion is directly decisive thereof. He says: "But it is further insisted that the resolution, as a contract to issue bonds secured by a mortgage, was void, because it was never authorized or ratified by a two-thirds vote of the stock of the corporation, as required by our statute. Rev. Stat. art. 4220. There is some conflict among the authorities upon the question of the validity of the contract of a corporation, when made in excess of its powers. When the contract is executed and the corporation has received the benefit, the weight of authority seems to be that the corporation should be held estopped to deny its authority to make it. *Jones v. New York Guaranty & Indemnity Co.* 101 U. S. 622, 25 L. ed. 1030; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Perkins v. Portland, S. & P. R. Co.* 47 Me. 573, 74 Am. Dec. 507; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160, 2 Mor. Min. Rep. 421; *Bank of State v. Hammond*, 30 S. C. L. (1 Rich.) 281; *City F. Ins. Co. v. Carrugi*, 41 Ga. 660; *Southern L. Ins. & T. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Littlewort v. Davis*, 50 Miss. 403; *Underwood v. Newport Lyceum*, 5 B. Mon. 129, 41 Am. Dec. 260; *Hays v. Galion Gaslight & Coal Co.* 29 Ohio St. 330; *State Bd. of Agri. v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Darst v. Gale*, 83 Ill. 136; *Thompson v. Lam-*

bert, 44 Iowa, 239; Foulke v. San Diego & G. S. P. R. Co. 51 Cal. 365. The rule is correctly stated in a recent work on estoppel: 'When a contract has in good faith been fully performed and nothing remains to be done by . . . the party seeking relief, and all the shareholders have acquiesced in its performance, the plea of ultra vires or mere want of power is not available by the corporation in an action brought against it for not performing its portion of the contract.' 2 Herman, Estoppel & Res Judicata, § 1179, and the numerous cases there cited. There are some decisions which hold that a contract by a corporation ultra vires is wholly void and cannot be enforced, either by or against it. But if the contract be within the general scope of the corporate authority, and the prohibition be merely against the mode of its execution, it is valid as against the corporation which has received its benefits, in favor of a party who has fully complied with the obligations on his part. In the case before us the railroad company had power to make a mortgage, but the statute provides it must be authorized by a vote in meeting of two thirds in value of the stockholders. This provision is evidently for the protection of the latter. It seems from the evidence in this case that the defendant corporation was organized for the purpose of extending and operating the railroad acquired, or then about to be acquired by Gentry. It is fully shown that it made the purchase, promised the bonds and mortgage as a part of the consideration for the property, and had operated the road for about three years when this suit was brought. It does not appear that it ever had any other assets save the property so acquired and a short extension of the line. Under these circumstances, the corporation must be held estopped to deny the want of assent of its shareholders. The promise to make a mortgage under these circumstances is deemed, in equity, equivalent to a mortgage, as

between the original parties to the transaction."

It is contended that the Texas & Ohio Lumber Company had no notice of the terms of the contracts of April 25 and September 18, and that for this reason said company would not be bound by the provisions of said contracts, or estopped from holding the land without paying all of the consideration to Weathersby provided in said contracts. But we think the undisputed evidence shows that the Texas & Ohio Lumber Company did have such notice, both actual and constructive. After its incorporation it complied with every provision in the contracts except the one which exacted of it to hold Weathersby harmless on these two notes. It paid the cash consideration of \$8,000 for the stock which Weathersby owned in the Jasper County Lumber Company. This was one of the provisions in the contract. It paid the note of Heiseg & Norvell, which was one of the provisions mentioned in the contract. It accepted the deed from Weathersby, which was one of the provisions in the contract. It is inconceivable that the company would have voluntarily paid out such large sums of money to comply with some of the provisions of the contract, without ascertaining all of the provisions of the contract, for certainly it would not have undertaken to comply with any of the provisions in the contract without intending to comply with all its provisions, for it knew that it could not secure the benefit to itself which it desired, namely, the deed, unless it complied with the entire contract. It knew that to comply with some of the provisions would not entitle it to the deed. In addition to this the undisputed evidence shows that Laughlin, the president of the Texas & Ohio Lumber Company, had actual knowledge of all of the provisions of the contract of April 25, and of the contract of September 18, because he directed Applegate to make the former, and

Notice—  
compliance  
with contract.

had in person made and executed the latter, and must have been familiar with its contents. In each instance, he acquired notice and information of all of the provisions in said contract while engaged in furthering the business of the Texas & Ohio Lumber Company: in the first instance, before the company was organized, and in the latter instance, several months after it was chartered, and while he was its acting president. Having acquired such notice and information while

attending to business for the benefit of the Texas & Ohio Lumber Company, the notice he had as its president was imputed to the said company. If he had acquired this notice while acting for himself in his own private business affairs, it would not be imputed to the Texas & Ohio Lumber Company, but since he acquired the notice while transacting business

for the lumber company, such notice was, in law, imputed to the company. *Teagarden v. R. B. Godley Lumber Co.* 105 Tex. 616, 154 S. W. 973.

We conclude that the judgment of the Court of Civil Appeals, and of the District Court, should be reversed, and judgment should be here rendered in favor of plaintiff in error *R. L. Weathersby*, in the sum of \$3,503.96, with interest thereon at the rate of 8 per cent per annum from and after the 17th day of May, 1907, together with all costs incurred by him in the District Court, as well as in the Court of Civil Appeals, and in this court, and that he have a foreclosure of his said lien upon said 3,743 acres of land in Jasper county, Texas, covering the full amount of said indebtedness; and it is accordingly so ordered.

Petition for rehearing denied.

## ANNOTATION.

**Ratification by corporation of unauthorized contract entered into by officer, by acceptance and retention of benefits.**

- I. Introductory, 1446.
- II. General rule, 1447.
- III. Application of rule:
  - a. Contract of employment of servant, 1453.
  - b. Contract of employment of agent, broker, or attorney, 1456.
  - c. Contract to purchase or sell personalty in general, 1459.
  - d. Contract to purchase or sell realty or chattel real, 1463.
  - e. Contract to lease or rent premises, 1466.
  - f. Contract to rent, transfer, or assign personal property, 1469.
  - g. Contract to construct, repair, or maintain corporate property, 1469.
  - h. Issue, indorsement, or acceptance of commercial paper, 1472.

### I. Introductory.

For the purposes of this note the term "officers" has been held to include the formally titled heads of a company, as the president, vice pres-

- III.—continued.
  - i. Issue of mortgage or trust deed, 1477.
  - j. Issue or receipt of bond, debenture or certificate of deposit, 1479.
  - k. Pledge of securities, 1480.
  - l. Loan made or money borrowed, 1480.
  - m. Contract of guaranty, 1482.
  - n. Agreement to extend time of payment or stay execution, 1482.
  - o. Agreement of compromise or settlement, 1484.
  - p. Miscellaneous contracts, 1484.
- IV. Limitation of rule:
  - a. Retention of benefits without knowledge of contract, 1488.
  - b. Contract against public policy or in contravention of statute, 1494.

ident, secretary, and treasurer, and also directors, managers, superintendents, attorneys, and members of executive and managing committees. No attempt has been made to include

herein cases where contracts were made by agents not officers of a corporation, or cases wherein the courts have held corporate contracts to have been ratified by acquiescence alone, without a receipt and retention of the benefits.

## II. General rule.

It is well established that where an officer, without authority so to do, enters into a contract for a corporation, and the corporation receives and retains the benefits of the contract after acquiring knowledge of the circumstances attending its execution, it thereby ratifies the contract and makes it good by adoption.

**United States.**—*Bank of Columbia v. Patterson* (1813) 7 Cranch, 299, 3 L. ed. 351; *New England Car-Spring Co. v. Union Indiana Rubber Co.* (1857) 4 Blatchf. 1, Fed. Cas. No. 10,153; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Leroy & C. Valley Air-Line R. Co. v. Sidell* (1895) 13 C. C. A. 308, 26 U. S. App. 656, 66 Fed. 27; *Prentiss Tool & Supply Co. v. Godchaux* (1895) 13 C. C. A. 420, 30 U. S. App. 68, 66 Fed. 234; *Jacksonville, M. P. R. & Nav. Co. v. Hooper* (1896) 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *McDougall v. Hazelton Tripod-Boiler Co.* (1898) 31 C. C. A. 487, 60 U. S. App. 209, 88 Fed. 217; *First Nat. Bank v. G. V. B. Min. Co.* (1898) 89 Fed. 439, modified in (1899) 36 C. C. A. 633, 95 Fed. 23; *Plymer v. Hartford & N. Y. Transp. Co.* (1900) 103 Fed. 674, affirmed in (1903) 57 C. C. A. 238, 120 Fed. 624; *Domenico v. Alaska Packers' Asso.* (1901) 112 Fed. 554; *Washington Irrig. Co. v. Krutz* (1902) 56 C. C. A. 1, 119 Fed. 279; *Owyhee Land & Irrig. Co. v. Tautphas* (1903) 57 C. C. A. 557, 121 Fed. 343; *Egbert v. Sun Co.* (1903) 126 Fed. 568; *Kessler & Co. v. Ensley Co.* (1905) 141 Fed. 130, affirmed in (1906) 79 C. C. A. 534, 148 Fed. 1019; *Fourth Nat. Bank v. Camden Lumber Co.* (1905) 142 Fed. 257; *Love v. Export Storage Co.* (1906) 74 C. C. A. 155, 143 Fed. 1; *Bauersmith v. Extreme Gold Min. & Mill. Co.* (1906) 146 Fed. 95; *Sprague Canning Machinery Co. v. Fuller*

(1908) 86 C. C. A. 46, 158 Fed. 588, reversing (1907) 155 Fed. 372; *Dickinson v. Matheson Motor Car Co.* (1908) 161 Fed. 874; *Pennsylvania Taximeter Cab Co. v. Cressey* (1911) 112 C. C. A. 81, 191 Fed. 337; *Coney Island Co. v. McIntyre-Paxton Co.* (1912) 119 C. C. A. 197, 200 Fed. 901; *Pacific State Bank v. Coats* (1913) 123 C. C. A. 634, 205 Fed. 618, Ann. Cas. 1913E, 846; *Shafer v. Spruks* (1913) 140 C. C. A. 504, 225 Fed. 480; *Fudickar v. Glenn* (1917) 151 C. C. A. 50, 237 Fed. 808; *Re Eastman Oil Co.* (1916) 238 Fed. 416; *Shook v. Levi* (1918) 153 C. C. A. 157, 240 Fed. 121, affirming (1916) 234 Fed. 118; *Mutual Oil Co. v. Hills* (1918) 160 C. C. A. 335, 248 Fed. 257; *Reeves v. New York Engineering & Supply Co.* (1918) 161 C. C. A. 439, 249 Fed. 513; *Bostwick v. Mutual L. Ins. Co.* (1918) 163 C. C. A. 286, 251 Fed. 36; *Re National Piano Co.* (1918) 252 Fed. 950. See also *Jones v. New York Guaranty & Indemnity Co.* (1879) 101 U. S. 622, 25 L. ed. 1030; *Fitzgerald & M. Constr. Co. v. Fitzgerald* (1890) 187 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; *Bensiek v. Thomas* (1895) 13 C. C. A. 457, 27 U. S. App. 765, 66 Fed. 104.

**Alabama.**—*Mobile & M. R. Co. v. Gilmer* (1888) 85 Ala. 422, 5 So. 138; *Mobile & K. C. R. Co. v. Owen* (1899) 121 Ala. 505, 25 So. 612; *Southern Bitulithic Co. v. Hughston* (1912) 177 Ala. 559, 58 So. 450. See also *Alabama Fidelity & C. Co. v. Jefferson County Sav. Bank* (1917) 198-Ala. 557, 73 So. 918.

**Arkansas.**—*J. K. Siphon Ventilator Co. v. Hutton* (1915) 116 Ark. 545, 175 S. W. 30. See also *Arkansas Amusement Asso. v. Higgins* (1910) 96 Ark. 493, 132 S. W. 635.

**California.**—*Pixley v. Western P. R. Co.* (1867) 33 Cal. 183, 91 Am. Dec. 623; *Foulke v. San Diego & G. S. P. R. Co.* (1876) 51 Cal. 365; *Illinois Trust & Sav. Bank v. Pacific R. Co.* (1897) 117 Cal. 332, 49 Pac. 197; *Phillips v. Sanger Lumber Co.* (1900) 130 Cal. 431, 62 Pac. 749; *Brown v. Crown Gold Mill. Co.* (1907) 150 Cal. 376, 89 Pac. 86; *Pacific Vinegar & Pickle Works v. Smith* (1907) 152 Cal. 507, 93 Pac. 85; *Black v. Harrison Home Co.* (1909)

155 Cal. 121, 99 Pac. 494; *E. Aigeltinger v. Burke* (1917) 176 Cal. 621, 169 Pac. 373; *Colpe v. Jubilee Min. Co.* (1906) 2 Cal. App. 393, 84 Pac. 324; *Jones v. Evans* (1907) 6 Cal. App. 88, 91 Pac. 532; *Hutchison v. Evans* (1907) 6 Cal. App. xiii, 92 Pac. 1135; *West v. Will C. Prather & Co.* (1907) 7 Cal. App. 81, 93 Pac. 892; *Tilden v. Goldy Mach. Co.* (1908) 9 Cal. App. 9, 98 Pac. 39; *Dickinson v. Zubiato Min. Co.* (1909) 11 Cal. App. 656, 106 Pac. 123; *Newhall v. Joseph Levy Bag Co.* (1912) 19 Cal. App. 9, 124 Pac. 875; *Hudson v. Seeley Specialties Co.* (1912) 19 Cal. App. 213, 124 Pac. 1051; *L. Scatena & Co. v. Van Loben Sels* (1912) 19 Cal. App. 423, 126 Pac. 187; *Blanck v. Commonwealth Amusement Corp.* (1912) 19 Cal. App. 720, 127 Pac. 805; *Goodwin v. Central Broadway Bldg. Co.* (1913) 21 Cal. App. 376, 131 Pac. 896; *Doerr v. Fandango Lumber Co.* (1916) 31 Cal. App. 318, 160 Pac. 406; *Palo Alto Mut. Bldg. & L. Asso. v. First Nat. Bank* (1917) 33 Cal. App. 214, 164 Pac. 1124; *Armour & Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 773, 173 Pac. 404; *Cudahy Packing Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 818, 173 Pac. 406. See also *San Francisco Gas Co. v. San Francisco* (1858) 9 Cal. 453; *Argenti v. San Francisco* (1860) 16 Cal. 255; *Thomasson v. Grace M. E. Church* (1896) 113 Cal. 558, 45 Pac. 838.

**Colorado.** — *Drescher v. Fulham* (1898) 11 Colo. App. 62, 52 Pac. 685; *Extension Gold Min. & Mill. Co. v. Skinner* (1901) 28 Colo. 237, 64 Pac. 198; *Bingel v. Brown* (1908) 43 Colo. 281, 96 Pac. 449; *Rizzuto v. R. W. English Lumber Co.* (1908) 44 Colo. 413, 98 Pac. 728. See also *Mulford v. Torrey Exploration Co.* (1909) 45 Colo. 81, 100 Pac. 596.

**Connecticut.** — *Perry v. Simpson Waterproof Mfg. Co.* (1871) 37 Conn. 520; *Tryon v. White & C. Co.* (1892) 62 Conn. 161, 20 L.R.A. 291, 25 Atl. 712.

**Florida.** — *Atlanta & St. A. B. R. Co. v. Thomas* (1910) 60 Fla. 412, 53 So. 510.

**Georgia.** — *Bank of Garfield v. Clark* (1912) 138 Ga. 798, 76 S. E. 95; *Ocilla*

*Southern R. Co. v. Morton* (1913) 13 Ga. App. 504, 79 S. E. 480.

**Idaho.** — *Valley Lumber Co. v. McGilvery* (1909) 16 Idaho, 338, 101 Pac. 94; *Pettengill v. Blackman* (1917) 30 Idaho, 241, 164 Pac. 358.

**Illinois.** — *Darst v. Gale* (1876) 83 Ill. 136; *Wetherbee v. Fitch* (1886) 117 Ill. 67, 7 N. E. 513; *West Side Auction House Co. v. Connecticut Mut. L. Ins. Co.* (1898) 76 Ill. App. 635; *Lake Street Elev. R. Co. v. Carmichael* (1899) 82 Ill. App. 344, affirmed in (1900) 184 Ill. 348, 56 N. E. 372; *Hartford Deposit Co. v. Calkins* (1903) 109 Ill. App. 579; *McCormick v. Unity Co.* (1908) 142 Ill. App. 159, affirmed in (1909) 239 Ill. 306, 87 N. E. 924; *Love v. Metropolitan Church Asso.* (1913) 184 Ill. App. 102; *Lord & Thomas v. Sanitary Drinking Cup Co.* (1915) 191 Ill. App. 150; *Flodin v. W. H. Lutes Co.* (1915) 191 Ill. App. 195; *Garmire v. McDonough & Co.* (1916) 197 Ill. App. 527; *Sargent v. McDonough & Co.* (1916) 197 Ill. App. 523.

**Indiana.** — *White Water Valley Canal Co. v. Hawkins* (1858) 4 Ind. 474; *Brown v. First Nat. Bank* (1894) 137 Ind. 655, 24 L.R.A. 206, 37 N. E. 158; *Marion Trust Co. v. Crescent Loan & Invest. Co.* (1901) 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688; *Bossert v. Geis* (1914) 57 Ind. App. 384, 107 N. E. 95.

**Iowa.** — *Tracy v. Guthrie County Agri. Soc.* (1877) 47 Iowa, 27; *Humphrey v. Patrons' Mercantile Asso.* (1879) 50 Iowa, 607; *Merchants Union Barb Wire Co. v. Rice* (1886) 70 Iowa, 14, 29 N. W. 784; *Thompson v. Des Moines Driving Park* (1900) 112 Iowa, 628, 84 N. W. 678; *Groeltz v. Armstrong Real Estate Co.* (1902) 115 Iowa, 602, 89 N. W. 21; *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (1904) 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; *Fidelity Ins. Co. v. German Sav. Bank* (1905) 127 Iowa, 591, 103 N. W. 958; *Porter v. Farmers & M. Sav. Bank* (1909) 143 Iowa, 629, 120 N. W. 633; *Bertholf v. Fisk* (1918) 182 Iowa, 1308, 166 N. W. 713. See also *Ney v. Eastern Iowa Teleph. Co.* (1919) — Iowa, —, 171 N. W. 26, reversing (1913) 162 Iowa, 525, 144 N. W. 383.

**Kansas.**—Marbourg v. Lloyd (1879) 21 Kan. 545; Topeka Capital Co. v. March (1900) 10 Kan. App. 40, 61 Pac. 876. See also Getty v. C. R. Barnes Mill. Co. (1888) 40 Kan. 281, 19 Pac. 617.

**Kentucky.**—Frankfort & S. Turnp. Co. v. Churchill (1828) 6 T. B. Mon. 428, 17 Am. Dec. 159; Underwood v. Newport Lyceum (1844) 5 B. Mon. 129, 41 Am. Dec. 260; Pittsburgh, C. & St. L. R. Co. v. Woolley (1876) 12 Bush, 451; Maxville, W. & L. Turnp. Road Co. v. Barnes (1892) 14 Ky. L. Rep. 431; Herring v. Dix River & L. Turnp. Road Co. (1901) 23 Ky. L. Rep. 642, 63 S. W. 576; Paducah Wharfboat Co. v. Mechanics Trust & Sav. Bank (1915) 164 Ky. 729, 176 S. W. 190. See also Imeson v. Newport Bridge Co. (1884) 5 Ky. L. Rep. 685; Elk Valley Coal Co. v. Thompson (1912) 150 Ky. 614, 150 S. W. 817.

**Louisiana.**—Bezou v. Pike (1871) 23 La. Ann. 788; Poche v. New Orleans Home Invest. Co. (1900) 52 La. Ann. 1287, 27 So. 797; Perchman v. Mt. Eagle Constr. Co. (1911) 128 La. 894, 55 So. 567; J. D. Pace & Co. v. Alexandria Electric R. Co. (1916) 138 La. 879, 70 So. 867.

**Maine.**—Patten v. Moses (1861) 49 Me. 255.

**Maryland.**—Elysville Mfg. Co. v. Okisko Co. (1849) 1 Md. Ch. 392; Edelhoff v. Horner-Miller Straw Goods Mfg. Co. (1898) 86 Md. 595, 39 Atl. 314.

**Massachusetts.**—Episcopal Church Charitable Asso. v. Episcopal Church (1823) 1 Pick. 372; Burrill v. Nahant Bank (1840) 2 Met. 163, 35 Am. Dec. 395; Westcott v. Atlantic Silk Co. (1841) 3 Met. 282; Dedham Inst. for Sav. v. Slack (1850) 6 Cush. 408; Brown v. Winnisimmet Co. (1865) 11 Allen, 326; Simmons v. Shaw (1899) 172 Mass. 516, 52 N. E. 1087; Bishop v. Burke (1910) 207 Mass. 133, 93 N. E. 254; Fallon v. Clifton Mfg. Co. (1911) 207 Mass. 491, 93 N. E. 800.

**Michigan.**—Clement, B. & Co. v. Michigan Clothing Co. (1896) 110 Mich. 458, 68 N. W. 224; Michigan C. R. Co. v. Chicago, K. & S. R. Co. (1903) 132 Mich. 324, 93 N. W. 882; Ruttle v. What Cheer Coal Min. Co. (1908) 153

Mich. 300, 117 N. W. 168; Meeuwse v. Clough & W. Co. (1919) — Mich. —, 175 N. W. 408.

**Mississippi.**—Planters Bank v. Sharp (1844) 4 Smedes & M. 75, 43 Am. Dec. 470; Watts Mercantile Co. v. Buchanan (1908) 92 Miss. 540, 46 So. 66; Belzoni Oil Co. v. Yazoo & M. Valley R. Co. (1908) 94 Miss. 58, 47 So. 468.

**Missouri.**—Tyrell v. Cairo & St. L. R. Co. (1879) 7 Mo. App. 294; Brown v. Wright (1887) 25 Mo. App. 54; Mayer v. Old (1894) 57 Mo. App. 639; First Nat. Bank v. Badger Lumber Co. (1894) 60 Mo. App. 255; Parsons v. Guarantee Invest. Co. (1895) 64 Mo. App. 32; Ferguson v. Venice Transp. Co. (1899) 79 Mo. App. 352; Kansas City Star Pub. Co. v. Standard Warehouse Co. (1907) 123 Mo. App. 13, 99 S. W. 765; Danglade & R. Min. Co. v. Mexico-Joplin Land Co. (1916) — Mo. App. —, 190 S. W. 35; Rowland v. Progressive Invest. Co. (1918) — Mo. App. —, 202 S. W. 257; Magnolia Compress & Warehouse Co. v. St. Louis Cash Register Co. (1919) — Mo. App. —, 210 S. W. 125. See also Vogel v. St. Louis Museum, Opera & Fine Art Gallery (1879) 8 Mo. App. 587; Win-scott v. Guarantee Invest. Co. (1895) 63 Mo. App. 367; Ham & H. Lead & Zinc Invest. Co. v. Catherine Lead Co. (1913) 251 Mo. 721, 158 S. W. 369.

**Nebraska.**—Rich v. State Nat. Bank (1878) 7 Neb. 201, 29 Am. Rep. 382; Alexander v. Culbertson Irrig. & Water Power Co. (1901) 61 Neb. 333, 85 N. W. 233; Fremont Carriage Mfg. Co. v. Thomsen (1902) 65 Neb. 370, 91 N. W. 376. See also Omaha Consol. Vinegar Co. v. Burns (1896) 49 Neb. 229, 68 N. W. 492.

**Nevada.**—Yellow Jacket Silver Min. Co. v. Stevenson (1869) 5 Nev. 224, 3 Mor. Min. Rep. 545; Henningsen v. Tonapoh & G. R. Co. (1910) 33 Nev. 208, 111 Pac. 36, Ann. Cas. 1913D, 1008, rehearing denied in (1910) 33 Nev. 266, 119 Pac. 774, Ann. Cas. 1918D, 1021. See also Edwards v. Carson Water Co. (1893) 21 Nev. 469, 34 Pac. 381.

**New Hampshire.**—Despatch Line of Packets v. Bellamy Mfg. Co. (1841) 12 N. H. 205, 37 Am. Dec. 203; Peter-



borough R. Co. v. Nashua & L. R. Co. (1879) 59 N. H. 385.

**New Jersey.**—*Leggett v. New Jersey Mfg. & Bkg. Co.* (1832) 1 N. J. Eq. 541, 23 Am. Dec. 728; *Blake v. Domestic Mfg. Co.* (1897) 64 N. J. Eq. 480, 38 Atl. 241; *Pomeroy v. New York Smelting & Ref. Co.* (1901) — N. J. Eq. —, 48 Atl. 395; *Clement v. Young-McShea Amusement Co.* (1905) 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82, reversing (1905) 69 N. J. Eq. 347, 60 Atl. 419; *Trenton Street R. Co. v. Lawlor* (1908) 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Bennett v. Milville Improv. Co.* (1902) 67 N. J. L. 320, 51 Atl. 706; *Beach v. Palisade Realty & Amusement Co.* (1914) 86 N. J. L. 238, 90 Atl. 1118.

**New Mexico.**—*Western Homestead & Irrig. Co. v. First Nat. Bank* (1897) 9 N. M. 1, 47 Pac. 721.

**New York.**—*Moss v. Rossie Lead Min. Co.* (1843) 5 Hill, 137; *Fister v. LaRue* (1853) 15 Barb. 323; *Farmers' & Citizens Bank v. Sherman* (1860) 6 Bosw. 181, affirmed in (1865) 33 N. Y. 69; *Emmet v. Reed* (1853) 8 N. Y. 312; *Hooker v. Eagle Bank* (1864) 30 N. Y. 83, 86 Am. Dec. 351; *Scott v. Middletown, U. & W. G. R. Co.* (1881) 86 N. Y. 200; *Jourdan v. Long Island R. Co.* (1889) 115 N. Y. 380, 22 N. E. 153; *Halstead v. Dodge* (1884) 1 How. Pr. N. S. 170; *Electrical Supply Co. v. Jersey City Electric Light Co.* (1886) 4 N. Y. S. R. 516; *Morrell v. Long Island R. Co.* (1888) 1 N. Y. Supp. 65; *Schurr v. New York & B. Suburban Invest. Co.* (1891) 41 N. Y. S. R. 90, 16 N. Y. Supp. 210; *Smith v. Martin Anti-Fire Car Heater Co.* (1892) 45 N. Y. S. R. 26, 19 N. Y. Supp. 285; *Sheridan Electric Light Co. v. Chatham Nat. Bank* (1889) 52 Hun, 575, 5 N. Y. Supp. 529; *Milbank v. De Riesthal* (1894) 82 Hun, 537, 31 N. Y. Supp. 522; *Camacho v. Hamilton Bank Note & Engraving Co.* (1896) 2 App. Div. 369, 37 N. Y. Supp. 725, appeal dismissed without opinion in (1899) 158 N. Y. 663, 52 N. E. 1123; *Davies v. Harvey Steel Co.* (1896) 6 App. Div. 166, 39 N. Y. Supp. 791; *Balet v. New York & N. J. Bridge Co.* (1899) 40 App. Div. 245, 58 N. Y. Supp. 19; *White v. Sheppard* (1899) 41 App. Div.

113, 58 N. Y. Supp. 563; *Caldwell v. Mutual Reserve Fund Life Asso.* (1900) 53 App. Div. 245, 65 N. Y. Supp. 826; *Curtis v. Natalie Anthracite Coal Co.* (1903) 89 App. Div. 61, 85 N. Y. Supp. 413, affirmed in (1905) 181 N. Y. 543, 73 N. E. 1122; *Pescia v. Societa Co-operative* (1904) 91 App. Div. 506, 86 N. Y. Supp. 952; *Giebler Mfg. Co. v. Kranenberg* (1905) 102 App. Div. 471, 92 N. Y. Supp. 843; *Davidson v. Cannabis Mfg. Co.* (1906) 113 App. Div. 664, 99 N. Y. Supp. 1018, appeal dismissed for want of jurisdiction in (1907) 187 N. Y. 576, 80 N. E. 1108; *Lyon v. West Side Transfer Co.* (1909) 132 App. Div. 777, 117 N. Y. Supp. 648; *Higginbotham v. International Trust Co.* (1910) 141 App. Div. 535, 126 N. Y. Supp. 366; *Lord v. United States Transp. Co.* (1911) 143 App. Div. 437, 128 N. Y. Supp. 451; *Dill & C. Co. v. Morison* (1913) 159 App. Div. 583, 144 N. Y. Supp. 894; *Hubbard v. Syenite-Trap Rock Co.* (1917) 178 App. Div. 531, 165 N. Y. Supp. 486; *William Wicke Co. v. Kaldenberg Mfg. Co.* (1897) 21 Misc. 79, 46 N. Y. Supp. 937; *Anderson v. Conner* (1904) 43 Misc. 384, 87 N. Y. Supp. 449; *Bigelow Co. v. Automatic Gas Producer Co.* (1907) 56 Misc. 389, 107 N. Y. Supp. 894; *Cawthra v. Stewart* (1908) 59 Misc. 38, 109 N. Y. Supp. 770; *Fischer v. Motor Boat Club* (1908) 61 Misc. 66, 113 N. Y. Supp. 56; *Stanley v. Franco-American Ferment Co.* (1916) 97 Misc. 401, 161 N. Y. Supp. 365. See also *Bank of Vergennes v. Warren* (1842) 7 Hill, 91; *French v. O'Brien* (1876) 52 How. Pr. 394; *Simis v. Davidson* (1887) 22 Jones & S. 235; *Hamilton Coal Co. v. Bernhard* (1891) 61 Hun, 624, 40 N. Y. S. R. 875, 16 N. Y. Supp. 55; *Hayden v. Wheeler & T. Co.* (1893) 66 Hun, 629, 49 N. Y. S. R. 240, 20 N. Y. Supp. 902; *Hitchings v. St. Louis, N. O. & O. C. & Transp. Co.* (1893) 68 Hun, 33, 22 N. Y. Supp. 719; *Seeber v. People's Bldg. L. & Sav. Asso.* (1899) 36 App. Div. 312, 55 N. Y. Supp. 364, affirmed in (1900) 54 App. Div. 626, 66 N. Y. Supp. 1144, which is affirmed in (1901) 165 N. Y. 670, 59 N. E. 1130; *Braxmar v. Stanton* (1905) 110 App. Div. 167, 96 N. Y. Supp. 1096; *Brooklyn Heights R. Co.*

*v. Brooklyn City R. Co.* (1912) 151 App. Div. 465, 135 N. Y. Supp. 990.

**North Carolina.**—*Duke v. Markham* (1890) 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; *Chatham v. Mecklenburg Realty Co.* (1917) 174 N. C. 671, 94 S. E. 447; *Phillips v. Interstate Land Co.* (1918) 176 N. C. 514, 97 S. E. 417.

**Ohio.**—See also *Cincinnati v. Cameron* (1878) 33 Ohio St. 336.

**Oklahoma.**—*Rainbow Oil & Gas Co. v. Barton* (1918) — Okla. —, 173 Pac. 1135.

**Oregon.**—*Currie v. Bowman* (1894) 25 Or. 364, 35 Pac. 848; *Finnegan v. Pacific Vinegar Co.* (1894) 26 Or. 152, 37 Pac. 457; *West v. Washington & C. River R. Co.* (1907) 49 Or. 436, 90 Pac. 666; *Wehrung v. Portland Country Club & Live Stock Asso.* (1912) 61 Or. 48, 120 Pac. 747; *Rowley v. Hager* (1912) 63 Or. 246, 127 Pac. 36; *Roe v. Hellig Theater Co.* (1919) — Or. —, 185 Pac. 909.

**Pennsylvania.**—*Hughes v. First Nat. Bank* (1885) 110 Pa. 423, 1 Atl. 417; *Goldbeck v. Kensington Nat. Bank* (1891) 48 Phila. Leg. Int. 76, affirmed in (1892) 147 Pa. 267, 23 Atl. 565; *Zearfoss v. Farmers & M. Institute* (1893) 154 Pa. 449, 26 Atl. 211; *Wayne Title & T. Co. v. Schuylkill Electric R. Co.* (1899) 191 Pa. 90, 43 Atl. 135; *Mohrfeld v. Second German S. E. Bldg. Asso.* (1900) 194 Pa. 488, 45 Atl. 335; *Pannebaker v. Tuscarora Valley R. Co.* (1907) 219 Pa. 60, 67 Atl. 923; *McKibbin v. Hulton Dyeing & Finishing Co.* (1910) 227 Pa. 153, 75 Atl. 1038; *First Nat. Bank v. American Bangor Slate Co.* (1910) 229 Pa. 27, 77 Atl. 1100; *DeForest v. Northwest Townsite Co.* (1912) 236 Pa. 125, 84 Atl. 674; *SCOUTON v. STONY BROOK LUMBER Co.* (reported herewith) ante, 1433; *McBride v. Western Pennsylvania Paper Co.* (1919) 263 Pa. 345, 106 Atl. 720. See also *Martin v. Interstate Lumber Co.* (1918) 260 Pa. 218, 103 Atl. 613.

**Rhode Island.**—*Adam v. New England Invest. Co.* (1911) 33 R. I. 193, 80 Atl. 426.

**South Carolina.**—*Hubbard v. Camperdown Mills* (1887) 26 S. C. 581, 2 S. E. 576; *Moyer v. East Shore Ter-*

*minal Co.* (1894) 41 S. C. 300, 25 L.R.A. 48, 44 Am. St. Rep. 709, 19 S. E. 651.

**South Dakota.**—*Dedrick v. Ormsby Land & Mortg. Co.* (1899) 12 S. D. 59, 80 N. W. 153; *Hunt v. Northwestern Mortg. Trust Co.* (1902) 16 S. D. 241, 92 N. W. 23; *American Nat. Bank v. Wheeler-Adams Auto Co.* (1913) 31 S. D. 524, 141 N. W. 396. See also *Ege v. Centerville Teleph. Co.* (1914) 33 S. D. 648, 147 N. W. 70.

**Texas.**—*Clark v. Elmendorf* (1904) — Tex. Civ. App. —, 78 S. W. 538; *Peach River Lumber Co. v. Ayers* (1906) 41 Tex. Civ. App. 334, 91 S. W. 387; *Hurlbut v. Gainor* (1907) 45 Tex. Civ. App. 588, 103 S. W. 409; *Texas & G. R. Co. v. Whiteside* (1909) 55 Tex. Civ. App. 593, 119 S. W. 126; *Kansas City, M. & O. R. Co. v. Sweetwater* (1911) 62 Tex. Civ. App. 242, 131 S. W. 251, reversed in (1911) 104 Tex. 329, 137 S. W. 1117; *Knox Mill. Co. v. Warren* (1911) — Tex. Civ. App. —, 141 S. W. 1007; *Kincheloe Irrigating Co. v. Hahn Bros.* (1912) 105 Tex. 231, 146 S. W. 1187, affirming (1910) — Tex. Civ. App. —, 132 S. W. 78; *Canadian Long Distance Teleph. Co. v. Seiber* (1913) — Tex. Civ. App. —, 159 S. W. 897; *Southern Kansas R. Co. v. Logue* (1911) — Tex. Civ. App. —, 139 S. W. 11, affirmed in (1914) 106 Tex. 445, 167 S. W. 805; *Bankers' Trust Co. v. Cooper* (1915) — Tex. Civ. App. —, 179 S. W. 541; *WEATHERSBY v. TEXAS & O. LUMBER Co.* (reported herewith) ante, 1440; *Morgan v. Washburn Lumber Co.* (1915) — Tex. Civ. App. —, 180 S. W. 911.

**Utah.**—*Murray v. Beal* (1901) 23 Utah, 548, 65 Pac. 726; *Brooks v. Geo. Q. Cannon Asso.* (1919) — Utah, —, 178 Pac. 589.

**Vermont.**—*Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* (1891) 63 Vt. 581; 25 Am. St. Rep. 783, 22 Atl. 575; *Lyndon Sav. Bank v. International Co.* (1905) 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50.

**Virginia.**—*Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.* (1919) — Va. —, 99 S. E. 716.

**Washington.**—*Dexter Horton & Co. v. Long* (1891) 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271; *Kirwin v. Washington Match Co.* (1905) 37

Wash. 285, 79 Pac. 928; *McKinley v. Mineral Hill Consol. Min. Co.* (1907) 46 Wash. 162, 89 Pac. 495; *Shertzer v. Hillman Invest. Co.* (1909) 52 Wash. 492, 100 Pac. 892; *Sesnon v. Lindeberg* (1911) 66 Wash. 1, 118 Pac. 900; *Ulrich v. Pateros Water Ditch Co.* (1912) 67 Wash. 328, 121 Pac. 818; *King v. West Coast Grocery Co.* (1913) 72 Wash. 132, 129 Pac. 1081. See also *Elwell v. Puget Sound & C. R. Co.* (1893) 7 Wash. 487, 35 Pac. 376.

**West Virginia.**—*Third Nat. Bank v. Laboring Man's Mercantile & Mfg. Co.* (1904) 56 W. Va. 446, 49 S. E. 544; *Williams v. S. M. Smith Ins. Agency* (1915) 75 W. Va. 494, 84 S. E. 235, Ann. Cas. 1917A, 813, later appeal (1916) 79 W. Va. 16, 90 S. E. 393.

**Wisconsin.**—*Kneeland v. Gilman* (1869) 24 Wis. 39; *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 543, 47 N. W. 729; *Moody & M. Co. v. Methodist Episcopal Church* (1898) 99 Wis. 49, 74 N. W. 572; *Bullen v. Milwaukee Trading Co.* (1901) 109 Wis. 41, 85 N. W. 115; *Heinze v. South Green Bay Land & Dock Co.* (1901) 109 Wis. 99, 85 N. W. 145; *St. Claire v. Rutledge* (1902) 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Petersen v. Elholm* (1906) 130 Wis. 1, 109 N. W. 76, rehearing denied in (1906) 130 Wis. 9, 109 N. W. 1034; *ED. SCHUSTER & Co. v. KURYER PUB. Co.* (reported herewith) ante, 1437.

**Wyoming.**—*Frank v. Hicks* (1894) 4 Wyo. 502, 35 Pac. 475, 1025.

**England.**—*Smith v. Hull Glass Co.* (1852) 11 C. B. 897, 138 Eng. Reprint, 729, 7 Eng. Ry. & C. Cas. 287, 21 L. J. C. P. N. S. 106, 16 Jur. 595; *Re Magdalena Steam Nav. Co.* (1860) Johns. V. C. 690, 70 Eng. Reprint, 597, 29 L. J. Ch. N. S. 667, 6 Jur. N. S. 975, 8 Week. Rep. 329; *Troup's Case* (1860) 29 Beav. 353, 54 Eng. Reprint, 664; *Hoare's Case* (1861) 30 Beav. 225, 54 Eng. Reprint, 874; *Wilson v. West Hartlepool Harbour & R. Co.* (1864) 34 Beav. 187, 55 Eng. Reprint, 606, affirmed in (1865) 2 De G. J. & S. 475, 46 Eng. Reprint, 459, 34 L. J. Ch. N. S. 241, 11 Jur. N. S. 124, 11 L. T. N. S. 692, 13 Week. Rep. 351; *Totterdell v. Fareham Blue Brick & Tile Co.* (1866) 35 L. J. C. P. N. S. 278, L. R.

1 C. P. 674, 12 Jur. N. S. 901, 14 Week. Rep. 919.

**Canada.**—*Thompson v. Brantford Electric & Operating Co.* (1898) 25 Ont. App. Rep. 340; *Hedican v. Crow's Nest Pass Lumber Co.* (1914) 19 B. C. 416, 17 D. L. R. 164, 6 West. Week. Rep. 969, 28 West. L. R. 37. See also *Wood v. Ontario & Q. R. Co.* (1874) 24 U. C. C. P. 334; *Bridgewater Cheese Factory Co. v. Murphy* (1894) 26 Ont. Rep. 327, 23 Ont. App. Rep. 66, 26 Can. S. C. 443; *Foster v. British Columbia F. Ins. Co.* (1917) — *Manitoba*, —, 3 West. Week. Rep. 598, 37 D. L. R. 404.

Thus, in a comparatively early case, *Fister v. La Rue* (1853) 15 Barb. (N. Y.) 323, concerning the unauthorized execution of a contract of employment by a trustee of an incorporated school district, it was said: "It is well settled, at least in this country, that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

So, too, in a recent case, in holding that a corporation ratified the unauthorized contract of its officer by knowingly receiving and retaining the benefits thereof, the court said: "It is repugnant to every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent's act, and at the same time repudiate his authority. A corporation may not avail itself even of ultra vires as a defense, where a contract has been entered into and executed in good faith by the other party, and the corporation has received the benefit of the performance." *McBride v. Western Pennsylvania Paper Co.* (1919) 263 Pa. 345, 106 Atl. 720.

*III. Application of rule.**a. Contract of employment of servant.*

Where the president of a corporation enters into a contract of employment with a servant, and the latter performs services pursuant to the contract, which are received by the company with full knowledge of the contract, the corporation may not deny the authority of its officer in order to evade the liability incurred under the agreement, having accepted and retained the advantages derived from the contract. *Egbert v. Sun Co.* (1903) 126 Fed. 568; *Mobile & K. C. R. Co. v. Owen* (1898) 121 Ala. 505, 25 So. 612; *Perry v. Simpson Waterproof Mfg. Co.* (1871) 37 Conn. 520; *Bennett v. Millville Improv. Co.* (1902) 67 N. J. L. 320, 51 Atl. 706; *Schurr v. New York & B. Suburban Invest. Co.* (1891) 41 N. Y. S. R. 90, 16 N. Y. Supp. 210; *Rainbow Oil & Gas Co. v. Barton* (1918) — Okla. —, 173 Pac. 1135; *De Forest v. Northwest Townsite Co.* (1912) 236 Pa. 125, 84 Atl. 674.

In *Mutual Oil Co. v. Hills* (1918) 160 C. C. A. 335, 248 Fed. 257, it appeared that the plaintiff was employed as a manager of the defendant corporation pursuant to a contract of employment made by the latter's president, by which the plaintiff was to receive, in addition to his salary, a number of shares of the corporation. Pursuant to this contract, and with full knowledge of its existence and character on the part of the corporate officers and shareholders, the plaintiff entered on and performed his managerial duties. In this action to compel the issuance of the stock provided for in the contract, the court held that the corporation, having accepted the plaintiff's services with knowledge of the contract under which he was employed, had incurred a liability which it could not evade by disclaiming the president's authority to act.

Where the manager of a corporation appointed and employed a superintendent at a monthly salary, despite the fact that the charter of the corporation provided that a superintendent could only be appointed by an election of the board of directors, and the corporation through its directors,

knowing of such employment, received the benefits thereof, the court held that the act of the manager was ratified, quoting from *Gribble v. Columbus Brewing Co.* (1893) 100 Cal. 71, 34 Pac. 529, as follows: "That which . . . a principal may authorize an agent to perform, he may ratify when performed by the latter without authority, and the same rule applies to a corporation; where, with full knowledge of all the facts involved, a principal reaps the fruits of an unauthorized contract of his agent, and for some time yields acquiescence to its provision, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals." *Colpe v. Jubilee Min. Co.* (1905) 2 Cal. App. 393, 84 Pac. 324.

So, in *Brown v. Crown Gold Min. Co.* (1907) 150 Cal. 376, 89 Pac. 86, it was held that where the board of directors of a corporation, knowing of the unauthorized act of its manager *de facto* in hiring the plaintiff, nevertheless failed to disaffirm the contract of employment and allowed the plaintiff to perform services beneficial to the corporation, it must be deemed that the manager's contract of hiring was ratified.

In *Domenico v. Alaska Packers' Asso.* (1901) 112 Fed. 554, an action brought by several employees of the defendant corporation, it appeared that they were employed by the defendant's general superintendent and rendered such services as their employment required. The company, although denying the authority of its officer to make the contracts of employment, retained the benefit of the claimants' services. It was held that the corporation, by receiving the benefits of the contracts, was estopped from disputing the authority of its superintendent to act for it in making the contracts.

In *Fallon v. Clifton Mfg. Co.* (1911) 207 Mass. 491, 93 N. E. 800, it was held that a corporation was liable for services rendered by the plaintiff pursuant

to a contract of employment executed by the corporation's treasurer, under which the plaintiff performed the services required, the benefits of which were received and retained by the company with knowledge of the terms of the contract made by its officer.

Where it appeared that a school-teacher was employed under a contract executed by one of the trustees of an incorporated school district, and rendered the required services with the knowledge of the other officers, the court held that the contract was thereby ratified, saying: "It is well settled, at least in this country, that where a person is employed for a corporation by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract." *Fister v. La Rue* (1853) 15 Barb. (N. Y.) 323.

And in *Finnegan v. Pacific Vinegar Co.* (1894) 26 Or. 152, 37 Pac. 457, a corporation was held liable under an unauthorized contract of employment where the plaintiff entered upon and performed his duties under the contract with the knowledge of the corporation, the court saying: "The defendant having suffered the plaintiff to work for it under a contract made with its vice president, for the period of eight months, without protest or objection, and without in any way signifying its dissent, the jury was justified in finding that it had ratified the act of its agent, and therefore could not be heard to impeach the validity of the contract on the pretense that it was made without authority. If it desired to disavow the contract, it was its duty to have been active in doing so as soon as the fact came to its knowledge."

In *Wehrung v. Portland Country Club & Live Stock Asso.* (1912) 61 Or. 48, 120 Pac. 747, it appeared that the plaintiff rendered services as a general manager of the defendant corporation, pursuant to a contract of employment executed on the part of the corporation by its vice president and secretary, and it further appeared that the corporation received and retained the benefits of the plaintiff's services under, and with knowledge of, the contract. The court held that the agreement made by the corporation's officers was thereby ratified, saying: "In an action upon a contract, executed by one assuming to act in behalf of the corporation, where plaintiff has rendered services in accordance with the agreement, and with the knowledge of the officers of the corporation, without notice that the contract is not recognized by it as valid, such corporation will be held to have ratified the contract, and will be liable for the services rendered according to the agreement."

In *Moyer v. East Shore Terminal R. Co.* (1894) 41 S. C. 300, 25 L.R.A. 48, 44 Am. St. Rep. 709, 19 S. E. 651, wherein it appeared that the defendant's general manager employed the plaintiff by contract executed by him, without authority, and the plaintiff performed services thereunder for a considerable period of time with apparent knowledge on the part of the corporation of the agreement made by its officer-agent, the court held that it could not now, allege the invalidity of the contract because of the want of authority of its agent to execute the same, for it had accepted and retained the benefits of the transaction, with knowledge of its terms and purport.

And in *Totterdell v. Fareham Blue Brick & Tile Co.* (1866) 35 L. J. C. P. N. S. (Eng.) 278, L. R. 1 C. P. 674, 12 Jur. N. S. 901, 14 Week. Rep. 919, wherein it appeared that two of the directors of the defendant stock company employed the plaintiff as a foreman in the company's plant, and that, pursuant to the contract, the plaintiff performed the services required, which were received by the corporation to its benefit, the court held that he could

recover the value of his services, as the company was bound under the contract made by its directors, having accepted and retained the value thereof.

Also in *Arkansas Amusement Asso. v. Higgins* (1910) 96 Ark. 493, 132 S. W. 635, the court held that a corporation was liable for services rendered by an employee hired by its president and general manager, it being shown that the corporation received the benefits and enjoyed the fruits of the enterprise conducted for it by its officer-agent.

In *Brooks v. Geo. Q. Cannon Asso.* (1919) — Utah, —, 178 Pac. 589, the court held that a charge to the jury in the following words was proper: "That if you find from the evidence that any officer of defendant, purporting or pretending to act for defendant, did employ plaintiff, and defendant did receive and accept the benefit of plaintiff's services, although you may find that plaintiff was not employed in a formal way by the defendant corporation, or by anyone having authority from the defendant corporation to employ her in said matter, still said defendant is liable to plaintiff for the reasonable value of the services so rendered by her and accepted by the defendant." However, it appeared that the corporation received no benefits from any contract entered into with the plaintiff.

In *Bank of Columbia v. Patterson* (1818) 7 Cranch (U. S.) 299, 3 L. ed. 351, wherein it appeared that a duly appointed committee of the defendant corporation contracted, without express authority, with the plaintiff, to perform certain services for the corporation, and pursuant to and with knowledge of such a contract the defendant accepted the benefits of the plaintiff's services, the court held that by so doing the corporation ratified and adopted the contract of its committee, and therefore the defendant was bound and liable to the plaintiff for the payment of the value of the latter's services.

In *Heinze v. South Green Bay Land & Dock Co.* (1901) 109 Wis. 99, 85 N. W. 145, wherein it appeared that the plaintiff rendered services as a civil

engineer to the defendant corporation pursuant to, and with knowledge on its part of, a contract retaining the plaintiff, and executed by a party who was elected president of the corporation by its de facto board of directors, the court held that the defendant, having knowledge of the transaction and receiving its benefits, adopted the same and could not question the authority of its officer to bind it.

So, in *Balet v. New York & N. J. Bridge Co.* (1899) 40 App. Div. 245, 58 N. Y. Supp. 19, wherein it appeared that the plaintiff, a civil engineer, at the instance and request of the defendant corporation's officers, performed services for the company in the nature of drawing plans, and having cuts made thereof, of a bridge proposed to be constructed by the defendant corporation, and wrote a descriptive article of the same, all of which were used in a newspaper article for the purpose of influencing public opinion in favor of the defendant, the court held that, having received and accepted the benefit of the plaintiff's performance of an unauthorized contract, it must be deemed that the corporation ratified the same and was liable thereon.

In *Davies v. Harvey Steel Co.* (1896) 6 App. Div. 166, 39 N. Y. Supp. 791, wherein it appeared that the plaintiff performed work, labor, and services for the defendant corporation at the instance of its president, and pursuant to a contract executed by him, and it further appeared that the corporation, knowing of the transaction, accepted and received the benefits thereof, the court held that the corporation was liable under the agreement, having ratified the same by accepting and retaining the fruits derived therefrom, stating the general rule as follows: "The general rule is that an agreement by an officer or agent of a corporation, who assumes to act in its behalf, can be enforced against the corporation where it has received the benefit of the agreement."

And in *Hooker v. Eagle Bank* (1864) 30 N. Y. 83, 86 Am. Dec. 351, it appeared that the president and two directors of the defendant corporation

contracted with the plaintiff for his services as an architect in the construction of a building for the defendant. It further appeared that after the plaintiff had partly performed, and the corporation, with knowledge of the contract made by its officers, had accepted and retained the benefits of the performance, it canceled the contract. In this action to recover the value of the services, the court held that the corporation was liable on an implied assumpsit; having accepted and retained the benefits of the unauthorized contract, it thereby ratified the same.

In *Ruttle v. What Cheer Coal Min. Co.* (1908) 153 Mich. 300, 117 N. W. 168, it appeared that, with knowledge of the defendant corporation, the plaintiff rendered services to it pursuant to a contract made by a principal stockholder, who was also the president and treasurer of the company, and that the corporation received the benefits of the services performed. It was held that the corporation was as much bound as though it had itself formally contracted for the services, having ratified the contract by receiving and retaining the benefits flowing therefrom.

In *Underwood v. Newport Lyceum* (1844) 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260, the court held that a corporation was liable on an assumpsit to a person for rendering services and performing work for the corporation at the instance of a contract made by the company's officers, where it appeared that the corporation accepted and retained the benefits of the contract.

In *Wood v. Ontario & Q. R. Co.* (1874) 24 U. C. C. P. 334, the court found the evidence insufficient to show a receipt of the benefits of the plaintiff's services, pursuant to a contract executed by a director of the defendant corporation to retain the plaintiff, but said: "The acceptance or enjoyment by the company [if shown] is evidence of its having contracted for the thing done, and agreeing to pay for it."

In *Thomasson v. Grace M. E. Church* (1896) 113 Cal. 558, 45 Pac. 838, the

court held that work performed under an unauthorized contract was "wholly worthless," and therefore there was no acceptance of benefits so as to create a ratification.

*b. Contract of employment of agent, broker, or attorney.*

Where it appeared that the general manager of a corporation contracted with the plaintiff, a broker, to procure a purchaser for certain stock of the corporation, and, the broker having succeeded in selling the stock, the corporation received the proceeds of the sale with knowledge of the alleged unauthorized contract of its officer, the court held that the broker could recover his commissions, saying: "When a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the contract of its agent." *J. D. Pace & Co. v. Alexandria Electric R. Co.* (1916) 138 La. 879, 70 So. 867.

In *Bauersmith v. Extreme Gold Min. & Mill. Co.* (1906) 146 Fed. 95, it appeared that the secretary of the defendant corporation contracted, without authority, with the plaintiff, a stockbroker, for the sale of the company's stock, and the plaintiff, having procured a buyer, sold the stock and delivered the proceeds of the sale to the corporation, which accepted and retained the moneys so received. In this action brought by the broker to obtain his commissions under the unauthorized contract, the court held that the corporation authorized and ratified the contract of its secretary by accepting the benefits and profits derived from the plaintiff's performance, and having done so, it was estopped from asserting the lack of authority of its officer-agent in order to throw off the obligation.

In *Meeuwse v. Clough & W. Co.* (1919) — Mich. —, 175 N. W. 408, it was held that a corporation which had purchased the plant and business of another corporation, having accepted the benefits of a contract subsequently made in the name of the latter corporation for the payment of commis-

sions on orders, by filling the orders in part, could not escape liability for commissions on the part of the orders that were canceled, upon the ground that it did not know the terms of the contract, since it was its legal duty to discover all the terms of the commission contract the benefits of which it accepted.

In *Plymer v. Hartford & N. Y. Transp. Co.* (1900) 103 Fed. 674, affirmed in (1903) 57 C. C. A. 288, 120 Fed. 624, it was held that the act of a general manager of a corporation in retaining the services of a broker to effect the sale of a steamship was ratified by the acceptance by the corporation of the purchase price of the boat, obtained from a sale effected by the broker.

So, where it appeared that the president of a corporation, without authority, retained the services of a broker to sell certain property of the corporation, and the latter, knowing of the contract, accepted a purchaser procured by the broker, and completed a sale of the property through him, it was held that the broker could recover his commissions, as the corporation in effect ratified the contract made by its officer without authority, by knowingly accepting and retaining the benefits thereof. *Rowland v. Progressive Invest. Co.* (1918) — Mo. App. —, 202 S. W. 257.

And in *Lyon v. West Side Transfer Co.* (1909) 132 App. Div. 777, 117 N. Y. Supp. 648, the court held that where it appeared that a corporation knowingly received the benefits of a sale of property procured through the services of a broker, who was employed without authority by its officers, the burden was upon the corporation to prove that it did not thereby ratify the unauthorized contract of employment.

In *Pescia v. Societa Co-operativa* (1904) 91 App. Div. 506, 86 N. Y. Supp. 982, it appeared that certain officers of the defendant corporation, having purchased a building through a real estate broker, made a contract with the latter without authority, by which it was agreed that the corporation should pay the broker commissions for his services in finding tenants for

the property, in consideration that he relinquish and pay to the corporation a part of his commission received from the sale under which the company was the vendee. And, it further appearing that the corporation knowingly received and retained the consideration stipulated in the unauthorized contract, the court held that it thereby ratified the same, and having received the plaintiff's money it could not deny the authority of its officers to retain him under the contract.

And in *Peach River Lumber Co. v. Ayers* (1906) 41 Tex. Civ App. 334, 91 S. W. 387, wherein it appeared that the vice president, secretary, and treasurer were authorized by the by-laws of the defendant corporation to contract for the services of a broker in making sales of corporate property, and the secretary and treasurer of the corporation, acting without the vice president contrary to the requirement, employed the plaintiff as broker, and subsequently the vice president, on behalf of the corporation, accepted the benefits of the plaintiff's services, the court held that his action in so doing ratified the contract executed by the other two officers, and validated the same ab initio.

In *Pixley v. Western P. R. Co.* (1867) 33 Cal. 183, 91 Am. Dec. 623, the court held that where an attorney, retained by the president of a corporation, performed the services required under the contract, it would be deemed that the corporation ratified the same and was liable for the value of the services rendered.

But in *Foulke v. San Diego & G. S. P. R. Co.* (1876) 51 Cal. 365, the court explained the foregoing ruling, saying: "There are indeed dicta in the opinions delivered in *Pixley v. Western P. R. Co.* to the apparent effect that, where all has been done by the other contracting party which the contract requires of him, the corporation should be held to have ratified the express contract, and a recovery be had according to the terms of such contract. But these were not called for by the circumstances of that case, which was an action on the quantum meruit. The true rule to be deduced



from the opinions in *Pixley v. Western P. R. Co.* is, the provision of the statute must be limited to contracts wholly executory. It cannot refer to those liabilities which the law itself implies from benefits received and actually enjoyed, where the services have been performed on the one side and received and enjoyed on the other. In the last class of cases, however, the action must be brought upon the implied promise, and the recovery must be limited to the value of the actual benefit received."

In *Goodwin v. Central Broadway Bldg. Co.* (1913) 21 Cal. App. 376, 181 Pac. 896, wherein it appeared that the president of the defendant corporation, without authority, employed an attorney, and the corporation with knowledge of the contract accepted the services rendered thereunder, the court held that the contract of employment was ratified by the acceptance and retention of the benefits derived therefrom, saying: "Where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals."

Where it appeared that an officer of a corporation contracted for the services of an attorney, and the corporation received the benefit of his services, the court held that the acceptance of the advantages of the contract precluded the corporation from asserting want of authority on the part of its officer to incur a liability for the same. *Bankers' Trust Co. v. Cooper* (1915) — Tex. Civ. App. —, 179 S. W. 541.

So in *Pittsburgh, C. & St. L. R. Co. v. Woolley* (1876) 12 Bush (Ky.) 451, the court held that a contract made by a director, retaining the services of an attorney, could not be avoided on the ground of want of authority of the agent-officer to contract, where it appeared that the corporation knowing-

ly received the benefits of the agreement by accepting the attorney's services.

See also *Ney v. Eastern Iowa Teleph. Co.* (1919) — Iowa, —, 171 N. W. 26, reversing (1913) 162 Iowa, 525, 144 N. W. 383, wherein the court held that evidence of the fact that the defendant corporation accepted the services of the plaintiff as an attorney, retained in pursuance of an alleged unlawful contract with the company's president, should have been submitted to the jury as a question of fact whether or not the corporation ratified the contract.

In *Lord & Thomas v. Sanitary Drinking Cup Co.* (1915) 191 Ill. App. 150, the court held that express authority on the part of a secretary-treasurer of the defendant corporation, to contract for the rendering of services as an advertising agent by the plaintiff, was not necessary, where it was shown that the defendant, knowing of the contract, received and retained the benefits thereof, for by so doing it ratified the contract of its officer, making it valid *ab initio*.

Where it appeared that the president of the defendant corporation entered into a contract, without authority, to pay commissions to the plaintiff for his services in inducing patronage for the defendant, and it appeared further that the corporation, knowing of the unauthorized contract, nevertheless received and retained the benefits incident to the plaintiff's performance, the court held that the facts constituted a ratification of the unauthorized contract, saying: "Upon this appearing, even assuming that the president of the defendant was not authorized to make the contract with plaintiff, yet the corporation, in availing itself of plaintiff's services thereunder, has adopted and ratified the same, and should pay for the services according to the agreement." *Smith v. Martin Anti-Fire Car Heater Co.* (1892) 45 N. Y. S. R. 26, 19 N. Y. Supp. 285.

In *Bertholf v. Fisk* (1918) 182 Iowa, 1308, 166 N. W. 713, wherein it appeared that the manager of the defendant corporation hired the plaintiff as an automobile salesman, and the cor-

poration, knowing of the contract of employment, accepted the benefit of a consideration paid by the plaintiff, for the agency, the court held that the retention of the benefits of the contract ratified the same, and the defendant was liable to the plaintiff under the agreement.

Where it appeared that an officer of a defendant corporation contracted, without authority, with the plaintiff, an insurance adjuster, for the services of the latter in adjusting claims against the corporation, and pursuant to this contract the plaintiff rendered his services in the matter and successfully adjusted certain claims for the corporation, which received and retained the benefits and fruits of the plaintiff's services, with knowledge of the character and extent of the unauthorized contract, the court held that the defendant ratified the unauthorized contract of its officer by receiving, with knowledge, the benefits derived from the contractual performance on the part of the plaintiff, saying: "Corporations engaged in as large a business as that of defendant cannot have all corporate action through directors, or the ordinary executive officers. They will not be permitted to take advantage of benefits accruing from the acts of officers, necessarily invested with large discretion and acting within the scope of their authority, and repudiate the obligations incurred in their acquisition, by denying the authority of the officers. Mere denial of authority will not be conclusive; and one undertaking to enforce his claims against the corporation may establish by circumstances an authority which exists in fact, though it may never have been conferred by any single affirmative act. Acquiescence and confirmation may also be established by circumstances." *Bostwick v. Mutual L. Ins. Co.* (1918) 168 C. C. A. 286, 251 Fed. 36.

In *Rich v. State Nat. Bank* (1878) 7 Neb. 201, 29 Am. Rep. 382, wherein it appeared that the president of a banking corporation contracted with the plaintiff, and the corporation, with knowledge of the transaction, received and retained the benefits of the con-

tract in the nature of plaintiff's services as a director and the continued business of plaintiff's firm, the court held that the retention of the benefits of the contract constituted a ratification thereof, and created an estoppel, so that the defendant could not avail itself of its officer's lack of authority to contract.

See also *Foster v. British Columbia F. Ins. Co.* (1917) 3 West. Week. Rep. (Manitoba) 598, 37 D. L. R. 404, wherein, among other things, the court held that the question of an officer's authority to bind his corporation to an agreement to pay the plaintiff for his services in effecting a reinsurance transaction for it, was immaterial, in view of the fact that the company subsequently ratified the contract by accepting the benefits of the plaintiff's services.

*c. Contract to purchase or sell personality in general.*

In *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.* (1919) — Va. —, 99 S. E. 716, it appeared that the manager of a theatrical corporation contracted with plaintiff for the purchase of furniture and theater equipment for the defendant corporation's theater building, then being remodeled and equipped. In this action to recover the contract price of the materials supplied under the agreement, the corporation contended that its manager had no authority to bind it. The court held that, having accepted the benefit of the contract made for it with knowledge of its terms, the defendant ratified the act of its officer-agent, and must assume the burdens incident to the same.

In *Shook v. Levi* (1918) 153 C. C. A. 157, 240 Fed. 121, affirming (1916; D. C.) 234 Fed. 118, it appeared that the defendant's president contracted for the purchase of a number of horses, which were received by the corporation pursuant to and with knowledge of the officer's transaction. The court held that the retention of the benefits of the contract amounted to a ratification of the acts of the president, and that the defendant was precluded from denying the authority of its officers so to act.

In *Sprague Canning Machinery Co. v. Fuller* (1908) 86 C. C. A. 46, 158 Fed. 588, reversing (1907) 155 Fed. 372, the court held that a corporation could not disclaim the authority of its officers to incur a debt for the purchase of machinery, and at the same time claim title to and use the property involved, for the retention of the benefits of the contract, with knowledge of its terms, amounted to a ratification of the corporate officer's unauthorized acts.

And in *Reeves v. New York Engineering & S. Co.* (1918) 161 C. C. A. 439, 249 Fed. 513, it was held that the installation of a machine bought by the president of the defendant corporation, and a part payment of the purchase price, amounted to a ratification of the officer's act in making the purchase.

Where it appeared that the bid of a corporation to furnish certain manufactured articles was received on the condition agreed on with one of its officers that the corporation would receive as part payment an account owing by the president of the corporation to the purchaser, and subsequently, the contract being performed and the corporation having received part payment on the same with knowledge of the conditional agreement with its officer, the court held that by accepting the benefits of the contract the corporation ratified the acts of the officer in executing it, saying, on rehearing: "The corporation cannot accept and ratify the contracts in so far as they are beneficial to it, and repudiate them in so far as they imposed any liability on its part. It accepted . . . money on the strength of these contracts, and cannot, while retaining the same, be heard to say that its officers had no authority to make the contracts under which it was received." *Valley Lumber Co. v. McGilvery* (1909) 16 Idaho, 338, 101 Pac. 94.

In *Electrical Supply Co. v. Jersey City Electric Light Co.* (1886) 4 N. Y. S. R. 516, wherein it appeared that the plaintiff supplied to the defendant corporation materials to be used in the construction of a building for it,

and the materials were supplied on the credit of the corporation, at the instance of a director, who acted without authority, and who was also the contractor for the construction of the building, the court held that, it being shown that the corporation received and retained the materials with full knowledge of the alleged unauthorized contract, it must be held liable, as it thereby ratified the agreement entered into by its officer.

In *Westcott v. Atlantic Silk Co.* (1841) 3 Met. (Mass.) 282, wherein it appeared that a corporation received and retained certain machinery purchased in pursuance of a contract entered into by one acting as the president of the corporation, it was held that the acceptance and retention of the benefits of the officer's contract constituted a ratification thereof.

In *Newhall v. Joseph Levy Bag Co.* (1912) 19 Cal. App. 9, 124 Pac. 875, it appeared that the defendant's secretary entered into a contract for the sale of certain articles manufactured by the defendant, and pursuant thereto, and with knowledge of the terms of the contract, the corporation manufactured and delivered the articles and received payment therefor, which benefit it retained. The court held that by so doing the corporation ratified the alleged unauthorized act of its secretary, and was estopped from asserting the invalidity of the contract because of lack of authority on the part of its officer-agent to contract.

So, in *Henningsen v. Tonopah & G. R. Co.* (1910) 38 Nev. 208, 111 Pac. 36, Ann. Cas. 1913D, 1008, rehearing denied in (1911) 38 Nev. 266, 119 Pac. 774, Ann. Cas. 1913D, 1021, wherein it appeared that the general superintendent of the defendant corporation contracted with the plaintiff for the sale of certain personal property of the corporation, and the latter, with knowledge of the agreement, accepted and retained the benefits derived from the consummated sale, the court held that the facts stated authorized a presumption that the corporation ratified the contract.

In *Scott v. Middletown, U. & W. C. R. Co.* (1881) 86 N. Y. 200, it appeared

that, pursuant to an unauthorized contract made by the defendant corporation's president with the plaintiff, the latter furnished and supplied materials which were accepted and used by the corporation, which had full knowledge of the contract. The court held that the acceptance of the benefits of the contract and their appropriation to the corporate uses, made by the company with knowledge, actual or implied, of the transaction from which these benefits emanated, amounted to a ratification and adoption of the act of the officer.

In *Zearfoss v. Farmers' & M. Institute* (1893) 154 Pa. 449, 26 Atl. 211, the court held that a corporation was liable for lumber and materials supplied and received by it pursuant to a contract executed by a de facto director, where it appeared that, although the officer contracted without authority, the corporation knowingly accepted the benefits of the contract, and was bound thereby.

Where it appeared that the general manager of a corporation contracted for the purchase of a claim held by the plaintiff against a third person, and the corporation, pursuant to the contract, accepted the claim and retained the benefits derived from a collection thereof, the court held that the corporation thereby ratified the contract made by its officer, saying: "It cannot keep the proceeds of the contract, and at the same time repudiate it." *Clement, B. & Co. v. Michigan Clothing Co.* (1896) 110 Mich. 458, 68 N. W. 224.

In *Smith v. Hull Glass Co.* (1852) 11 C. B. 897, 138 Eng. Reprint, 729, 7 Eng. Ry. & C. Cas. 287, 21 L. J. C. P. N. S. 106, 16 Jur. 595, wherein it appeared that the manager of a corporation contracted for the purchase of certain materials to be used by it in the business, and the same were delivered to and received by the corporation pursuant to the agreement, and with knowledge thereof, the court held that the receipt and use of the benefits of the contract on the part of the corporation, through its directors, constituted an adoption and ratification of the same.

In *L. Scatena & Co. v. VanLoben Sels* (1912) 19 Cal. App. 423, 126 Pac. 187, wherein it appeared that a corporation's president-manager had contracted for the sale by the corporation of certain produce of a third party, and that in consideration thereof the corporation would pay a rebate on its commissions, the court held that the payment of the rebate and the acceptance of commissions earned under the contract, by the corporation, with knowledge of the contract, constituted a ratification, and estopped the corporation from asserting lack of authority on the part of its officer to contract.

In *Re National Piano Co.* (1918) 252 Fed. 950, it appeared that the president of the defendant corporation agreed, in writing, to repurchase from the plaintiff several hundred shares of its preferred stock, deliveries being made in the course of the ensuing three years, and that the stock was accepted and paid for by the company with knowledge of the contract, and pursuant thereto. The court held that ratification of the contract was implied by the retention of the stock delivered under the agreement.

So, in *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (1904) 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742, wherein it appeared that, pursuant to a contract executed by its president whereby the defendant corporation agreed to repurchase stock subscribed to by the plaintiffs, the corporation knowingly received the benefits of the sale of the stock under the agreement, the court held that it was estopped from asserting want of authority of its officer to make the contract, saying: "The corporation cannot accept and ratify the contracts in so far as they were beneficial to it, and repudiate them in so far as they imposed any liability on its part. It accepted plaintiff's money on the strength of these contracts, and cannot, while retaining the same, be heard to say that its officers had no authority to make the contracts under which it was received."

In *Frankfort & S. Turnp. Co. v.*

Churchill (1828) 6 T. B. Mon. (Ky.) 428, 17 Am. Dec. 159, the court held that a corporation could not avoid a contract for the sale of stock entered into by two of its directors, where it appeared that the corporation, knowing of the agreement, received and retained the benefits thereof, saying: "The doctrine contended for by the corporation cannot be admitted. It cannot be privileged, by virtue of its invisible, intangible, and immaterial existence, to practise frauds by its agents, claim the benefit of the agreement and promise to itself, and yet deny the mutual and correlative promise and consideration held out by its visible agents. It is too late, after they, the company of individuals composing the corporate body, have received the money, with full notice of the condition, to say they are not bound by the condition. Such a privilege would indeed be transcendent, and would verify the complaint of long standing, and reiterated by wisdom and experience in many preceding generations, that it is difficult to obtain common justice in a dispute with a corporation."

And where it appeared that a corporation's president contracted for the purchase of certain stock by the corporation, and the contract was subsequently performed, with the knowledge of the directors of the transaction, and the corporation, as a result, received certain valuable benefits, which it retained, the court held that it could not question the authority of its president so to contract, for, by accepting and retaining the benefits of the contract with knowledge of its terms, the same was impliedly ratified. *Hudson v. Seeley Specialties Co.* (1912) 19 Cal. App. 213, 124 Pac. 1051.

In *Elysville Mfg. Co. v. Okisko Co.* (1849) 1 Md. Ch. 394, wherein it was contended that the action of the president of the defendant corporation in subscribing to the stock of another company was void, because he acted without authority, it appeared that, knowing of the transaction, the corporation received and retained the stock subscribed for, and also voted on

the same. The court held that the retention of the benefits of the contract gave rise to a presumption of the authority of the defendant's president to execute the same, and therefore amounted to a ratification of the transaction.

In *Fremont Carriage Mfg. Co. v. Thomsen* (1902) 65 Neb. 370, 91 N. W. 376, wherein it appeared that the president of the defendant corporation contracted for the sale of certain of its stock, and pursuant thereto the plaintiff purchased the stock, and the corporation, with knowledge of the transaction, accepted and retained the proceeds thereof, the court held that it thereby ratified the contract of its officer, for it could not repudiate the transaction on the claim of lack of authority on his part to make the contract, and at the same time retain the benefits derived therefrom.

Where an officer of a corporation entered into a contract for the sale of capital stock of the company, without apparent authority so to do, and the corporation, with knowledge of the transaction, subsequently received and retained the purchase price of the stock sold, the court held that the company thereby ratified the act of its officer, and was estopped from asserting his lack of authority to contract. *J. K. Siphon Ventilator Co. v. Hutton* (1915) 116 Ark. 545, 175 S. W. 30.

In *Western Homestead & Irrig. Co. v. First Nat. Bank* (1897) 9 N. M. 1, 47 Pac. 721, it appeared that the general manager of a corporation entered into a contract with a third person by which the corporation agreed to buy certain stocks, and to employ the party. With the knowledge of its officers and directors, the corporation received and retained the stock sold, but failed to pay the purchase price, whereupon the action was brought by a judgment creditor of the third person, to enforce garnishment against the corporation. The court held that the corporation was liable despite the lack of authority of its officer to make the contract for it, having knowingly accepted the benefits of the transaction and thereby ratified and acquiesced in the same, saying: "It

would be contrary to sound principles of law, and a travesty on justice, to hold that an officer of a corporation may enter into a contract in good faith with an individual for the transfer to it of valuable property, hold and keep it, and then decline to pay for it, because, forsooth, the officer so entering into the agreement did not have special authority to make and sign the contract conferred on him by the provisions of its secret by-laws."

In *Cawthra v. Stewart* (1908) 59 Misc. 38, 109 N. Y. Supp. 770, it appeared that the president of the defendant corporation, who was also a director and the sole owner thereof, induced the plaintiff, by fraudulent representations, to subscribe to the stock of the corporation, and the money paid by the plaintiff as the purchase price of the stock so subscribed for was accepted and retained by the corporation. The court held that the defense of lack of authority of its president to make the contract, and therefore lack of authority to make the false representations, was unavailing to the defendant corporation, for it had accepted and retained the money with knowledge of the facts, and therefore ratified the officer's acts as well as his representations.

Where under a contract executed by the secretary of a corporation with a purchaser of stock, the corporation had the benefit, with knowledge of the transaction, of the purchase price of the stock for a long period, the court held that it could not claim a lack of authority on the part of the secretary to enter into the contract, for the retention of the benefits and advantages accruing to the corporation thereunder created a ratification of the officer's contract. *White Water Valley Canal Co. v. Hawkins* (1858) 4 Ind. 474.

And in *Higginbotham v. International Trust Co.* (1910) 141 App. Div. 535, 126 N. Y. Supp. 366, the defendant corporation was held liable on a contract for the subscription of its stock, executed by its president with the plaintiff, wherein it appeared, among other things, that the defendant had received and retained, to its

benefit, the subscription price paid by the plaintiff for the stock, pursuant to and with knowledge on the part of the corporation of the contract.

In *Adam v. New England Invest. Co.* (1911) 33 R. L. 193, 80 Atl. 426, wherein it appeared that the president and general manager of the defendant corporation contracted with the plaintiff to purchase certain stock owned by her, and it further appeared that the stock so purchased was accepted and retained by the corporation with knowledge of the transaction, the court held that, the facts showing that the corporation received and retained the benefits of the contract, it must be held to have ratified the same.

See also *Hamilton Coal Co. v. Bernhard* (1891) 61 Hun, 624, 40 N. Y. S. R. 875, 16 N. Y. Supp. 55, wherein it was held error to refuse to admit in evidence a contract executed by the plaintiff-corporation's secretary, whereby the corporation agreed to sell coal at a certain price to the defendant, it appearing that the corporation, with knowledge of the contract, had received and retained certain benefits in the nature of the purchase price of coal delivered, the court holding that the jury might reasonably have found that the contract was ratified, although unauthorized in its inception.

See also *Braxmar v. Stanton* (1905) 110 App. Div. 167, 96 N. Y. Supp. 1096, wherein there is dictum to the effect that a corporation could ratify the act of its superintendent in contracting for the purchase of certain material on its account, and a receipt of the material and its use by the corporation would be such a ratification.

*d. Contract to purchase or sell realty or chattel real.*

In *WEATHERSEY v. TEXAS & O. LUMBER Co.* (reported herewith) ante, 1440, it appeared that the president of the defendant corporation executed a contract, without authority, by which, among other things, the corporation was to obtain a deed from the plaintiff of certain timberland, on which the latter had an option to purchase. Pursuant to this contract, and with knowledge of its terms, the corporation received the benefits thereof in

the nature of the timberlands mentioned, but failed on its part to perform the consideration therefor, claiming, in this action to enforce the same, that the president had no authority to execute the contract. The court holds that by accepting and retaining the benefits of the contract the defendant corporation thereby affirmed the validity of and ratified the same.

In *Canadian Long Distance Teleph. Co. v. Seiber* (1913) — *Tex. Civ. App.* —, 159 S. W. 897, wherein it appeared that the president of the defendant corporation contracted for the purchase of certain telephone property and issued a note of the corporation to bind the payment for the same, the court held that, conceding the officer acted without authority, very slight evidence was required to show a ratification of his acts by the corporation, where it appeared that the latter received and retained substantial benefits derived from the transaction, saying, in part, as follows: "Where the unauthorized act is beneficial to the corporation, and the directors have individual knowledge of it, slight evidence will be sufficient to establish ratification by acquiescence or failure to repudiate, and this upon the theory that a party who accepts benefits will be deemed to have done so with a knowledge of the conditions and circumstances surrounding the transaction out of which the act creating the benefit arose, and must take the burdens with the benefits."

In *Washington Irrig. Co. v. Krutz* (1902) 56 C. C. A. 1, 119 Fed. 279, it appeared that the officers of the defendant corporation, without authority, contracted with the plaintiff for the purchase of certain water rights, and the company, with full knowledge of the unauthorized contract, accepted and retained the benefits appurtenant to the same. The court held that by accepting the fruits of the transaction the corporation ratified the acts of its officers, saying: "The corporation could not accept the conveyance of the land upon which the consideration of the contract was based, and then deny

the authority of its president to enter into the contract."

In *Mobile & M. R. Co. v. Gilmer* (1888) 85 Ala. 422, 5 So. 138, wherein it appeared that the president of a corporation, in a transaction for the purchase of land, executed certain covenants running with the land to the grantor, and pursuant to, and with knowledge of, the transaction, the defendant corporation received and used the lands conveyed by the deed, the court held that this amounted to a ratification, saying: "The acceptance of the deed with the benefits of the contract, and possession under it by the railroad, was a full ratification of the act of its agent, and estopped that corporation from denying the fact of the agent's lawful appointment, as well as his authority to act in the premises."

So, in *McBride v. Western Pennsylvania Paper Co.* (1919) 263 Pa. 345, 106 Atl. 720, it appeared that the vice president of the defendant corporation agreed with the plaintiff that the corporation would bid in certain real estate owned by the plaintiff, which was to be sold by the sheriff pursuant to an execution, and that subsequently, upon a resale of the property, the plaintiff and the corporation would divide the proceeds. Accordingly, the corporation, with knowledge of the agreement, bought the property and sold the same at a large profit. In this action brought by the plaintiff to recover under the contract with the defendant's officer, the corporation defended on the ground of the officer's lack of authority to execute such an agreement. The court held that the defendant accepted the benefit of the transaction, and thereby ratified or adopted the acts of its representative, and consequently was estopped from setting up a defense that the contract was entered into without authority.

Where the manager of a railway corporation, acting without authority, contracted for the sale of premises belonging to the corporation, and the latter, knowing of the agreement, evacuated the premises and the vendee moved thereon, and it further appeared that the corporation performed certain works for the vendee as re-

quired by the contract, it was held that by so doing the corporation ratified the contract made by its manager. *Wilson v. West Hartlepool Harbour & R. Co.* (1864) 34 Beav. 187, 55 Eng. Reprint, 606, affirmed in (1865) 2 De G. J. & S. 475, 46 Eng. Reprint, 459, 34 L. J. Ch. N. S. 241, 11 Jur. N. S. 124, 11 L. T. N. S. 692, 13 Week. Rep. 361.

In *Perchmann v. Mt. Eagle Constr. Co.* (1911) 128 La. 894, 55 So. 567, wherein it appeared that the directors of a corporation sold a lease held by the company on a sand pit, and the corporation, knowing of the sale, accepted the proceeds thereof, the court held that the acceptance and retention of the fruits of the sale constituted a ratification of the directors' act, regardless of their initial authority to make the contract.

In *Davidson v. Cannabis Mfg. Co.* (1906) 113 App. Div. 664, 99 N. Y. Supp. 1018, appeal dismissed for want of jurisdiction in (1907) 187 N. Y. 576, 80 N. E. 1108, the court granted a decree of specific performance of a contract entered into by the principal officers of the defendant corporation with the plaintiff, whereby the former agreed to sell, and the latter to purchase, certain real estate, and wherein it appeared that the corporation knowingly received and retained a part payment from the plaintiff pursuant to the contract, the court holding that it would be inequitable, under the circumstances, to allow the corporation to repudiate the contract on the ground that the officers who executed the same acted without authority.

In *Shertzer v. Hillman Invest. Co.* (1909) 52 Wash. 492, 100 Pac. 982, it appeared that the president of the defendant corporation, who was also a majority stockholder, made representations that a certain portion of a suburban building plan was to be created and used as a public park, and to this effect large posters, plats, and advertisements were circulated and posted in and about the company's offices. It further appeared that the plaintiff, among others, induced by these representations, bought of the

corporation a plot of ground for the purpose of erecting thereon a dwelling house, and the corporation, knowing of the representations of its officer and agents, accepted the benefits of the sale induced and procured thereby. This action being brought to restrain the use of the land so represented as a public park for building purposes, the court held that the company was bound by the representations made by its officer, for, having accepted and retained the benefit of sales procured thereby, it ratified the same, and could not now be heard to assert his want of authority to make them.

So too in *White v. Sheppard* (1899) 41 App. Div. 113, 58 N. Y. Supp. 563, wherein it appeared that the president of a corporation, being authorized to sell an apartment house owned by the corporation, sold the same, but by the terms of the deed exceeded his authority in so doing, and it further appeared that the corporation received and retained the moneys paid by the grantee as the purchase price, with knowledge of the officer's acts, the court held that the corporation was estopped from impugning the transaction, as it ratified and confirmed the excess of authority of its president by its acceptance and retention of the money.

In *Rowley v. Hager* (1912) 63 Or. 246, 127 Pac. 36, wherein it appeared that the president and a salesman of the defendant corporation entered into a contract to sell a certain lot of real estate owned by the corporation, and the latter, with full knowledge of the agreement, received the purchase price thereof, the court held that, regardless of the authority of the corporate representatives to make the contract, the corporation ratified it by accepting and retaining the benefits derived therefrom with full knowledge of the transaction.

In *Kessler v. Ensley Co.* (1905) 141 Fed. 130, affirmed in (1906) 79 C. C. A. 534, 148 Fed. 1019, wherein it appeared that the property of a corporation was conveyed to trustees for the purpose of a sale by them of so much of the property as was needed to pay off the debts of the corporation, and it further appeared that the trustees



sold a part of the property, and the proceeds of the sale were accepted by the corporation and applied to extinguish the corporate debts, and the property remaining in the trustees was reconveyed to the corporation, the court held that the acceptance of the benefits of their acts, on the part of the corporation, was a ratification of the same, and validated all the proceedings and transactions made under the trust.

In *Goldbeck v. Kensington Nat. Bank* (1891) 48 Phila. Leg. Int. (Pa.) 76, affirmed in (1892) 147 Pa. 267, 23 Atl. 565, wherein it appeared that the president of the plaintiff bank contracted with the defendant, whereby the bank agreed to bid in property owned by the latter at a sale in execution in order to diminish the loss, and it further appeared that the bank, having bid in the property, subsequently sold the same and received and retained the profits of the sale, the court held that it could not then question the authority of its officer to make the contract with the defendant, for by accepting and retaining the fruits of the transaction it ratified the same.

And in *Poche v. New Orleans Home Invest. Co.* (1900) 52 La. Ann. 1287, 27 So. 797, it was held that where a corporation received the benefits of notes held by it, pursuant to a sale of the corporate property made by its president in excess of authority, it thereby ratified the sale as made, and was estopped to seek avoidance of the contract on the ground of lack of authority of its officer so to act.

*c. Contract to lease or rent premises.*

In *Fudickar v. Glenn* (1917) 151 C. C. A. 50, 237 Fed. 808, it appeared that the defendant's president renewed the lease of premises in which the corporation conducted its business, and the latter continued in occupancy pursuant to, and with full knowledge of, the renewal made by its officer. The court held that, assuming the act of the defendant's officer-agent was unauthorized, the corporation was bound by the contract, having, by implication, ratified the same by a retention of the benefits incidental thereto.

In *Atlanta & St. A. B. R. Co. v.*

*Thomas* (1910) 60 Fla. 412, 53 So. 510, wherein it appeared that an attorney of the defendant corporation contracted with the plaintiffs for the use of land owned by them for a right of way, and that in consideration thereof the company would build and maintain a railroad depot "to subserve the interests" of the plaintiff, and pursuant to this contract, and with knowledge of its terms, the defendant accepted the benefits thereunder, and went into possession of the right of way, the court held that the corporation, having accepted the benefits of a contract and entered on possession, could not raise the question of the authority of its officer who executed the contract in its name.

In *Peterborough R. Co. v. Nashua & L. R. Co.* (1879) 59 N. H. 385, wherein it appeared that the officers of the defendant railroad company entered into a contract with the plaintiff whereby the latter leased to the defendant corporation its railroad for a term of years, and with knowledge of the transaction the defendant entered upon and remained in possession of the railroad, using the same for the corporate purposes, the court held that by accepting the lease of the plaintiffs, and deriving all the advantages contemplated by the agreement, the defendant was estopped to deny the authority of its officers in making and executing the contract.

Where it appeared that the president of a corporation leased premises owned by himself for the benefit of the corporation, which, with knowledge of the transaction, maintained thereon a toll house for a period of fifteen years, accepting and retaining the benefits derived therefrom, the court held that, although the transaction was unauthorized, the corporation nevertheless ratified the same by retaining the benefits incident thereto. *Herring v. Dix River & L. Turnp. Road Co.* (1901) 23 Ky. L. Rep. 642, 63 S. W. 576.

But in *Clement v. Young-McShea Amusement Co.* (1905) 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82, reversing (1905) 69 N. J. Eq. 347, 60 Atl. 419, it appeared that a manager of the defendant corporation executed,

without written authority, a lease of premises owned by the corporation for a term exceeding three years, and subsequently the rental of the premises was received by him and credited to the account of the corporation. The court held, on the question of estoppel and ratification, that the authority to execute the contract was required to be in writing by the Statute of Frauds (2 Gen. Stat. p. 1602), and that, therefore, the doctrine of ratification by the retention of benefits could not apply, as the officer's authority was not in writing, saying: "It would be unreasonable to hold that an agent whose agency must, under a legislative rule of public policy like the Statute of Frauds, be created by writing, might be dealt with as if such writing existed without any effort to ascertain its existence. Equally unreasonable would it be to hold that an agent appearing to have merely unwritten authority to make leases, which under such a rule cannot, either at law or in equity, bind his principal for more than three years, may yet make a contract incidental, or ancillary to a lease, which in equity will bind the principal for a longer period, in the discretion of the agent. These considerations prevent us from adjudging that the complainants had a right to assume that Young had the authority necessary to maintain their contract against the company. . . . The claims of estoppel and ratification [therefore] are both barred by a single fact—that the company had no notice, either actual or constructive, that the complainants possessed, or believed they possessed, a lease for a longer term than Young's unwritten authority entitled him to give, or that its own rights, consistent with the proper exercise of his authority, were in any wise infringed." In so holding the court reversed the finding of the court below (69 N. J. Eq. 347), wherein it was said: "Having permitted the complainants to enter under an agreement made with its agent, and accepted payment of the rent agreed upon, it would be inequitable to now allow the defendants to shield themselves behind an informality in

the execution of a lease both parties have acted under, and compel the complainants to suffer the loss of their investment . . . incurred in fitting up the property for the uses contemplated by the lease, or the agreement for a lease."

In *Jacksonville, M. & P. R. & Nav. Co. v. Hooper* (1896) 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379, it was held that where the president of a corporation, without express authority, entered into a lease of the plaintiff's premises for the use of the defendant, and the latter, with full knowledge of the terms of the lease, entered into possession and retained the benefits derived from the occupancy of the premises, the corporation thereby ratified the unauthorized act of its officer.

In *West Side Auction House Co. v. Connecticut Mut. L. Ins. Co.* (1898) 76 Ill. App. 635, it was held that a corporation ratified a lease signed by the secretary, where it entered on and retained possession of the premises pursuant thereto.

Where it appeared that the president of a corporation, acting without authority, leased premises for the use of the corporation, and the latter, knowing of the transaction, accepted and retained the use of the premises, the court held that the corporation thereby ratified the lease, executed without authority by its officer-agent. *Alexander v. Culbertson Irrig. & Water Power Co.* (1901) 61 Neb. 383, 85 N. W. 288.

So too, in *William Wicke Co. v. Kaldenberg Mfg. Co.* (1897) 21 Misc. 79, 46 N. Y. Supp. 937, it appeared that the manager of the defendant corporation rented premises for its use, but without authority, and subsequently, and with notice of the agreement, the corporation entered upon the premises so hired, and retained and used the same for storage purposes. The court held that the corporation ratified the contract made by its manager, by accepting and retaining its benefits with knowledge thereof, and that it was now estopped to deny liability for rent of the premises by asserting lack of

authority of its officer to make the contract.

In *Fischer v. Motor Boat Club* (1908) 61 Misc. 66, 113 N. Y. Supp. 56, wherein it appeared that a secretary of a membership corporation rented premises without authority, but with the knowledge of the corporation, for its benefit, and the corporation subsequently entered upon and made use of the premises, the court held that such action, the acceptance, with knowledge, and retention of the benefits of the secretary's act, constituted a ratification on the part of the corporation of the unauthorized contract.

Where it appeared that the general manager of the defendant corporation entered into a contract, without authority, with the plaintiff, whereby the latter agreed to rent, and the corporation to lease, certain lots belonging to the latter, and it further appeared that the plaintiff paid part of the consideration, which was accepted and retained by the corporation with knowledge of the transaction, the court held that the receipt and retention of the benefits of the contract by the corporation gave rise to the legal conclusion that it thereby ratified the contract executed, without authority, by its officer. *West v. Washington & C. River R. Co.* (1907) 49 Or. 436, 90 Pac. 666.

So, in *Kincheloe Irrigating Co. v. Hahn Bros.* (1912) 105 Tex. 231, 146 S. W. 1187, affirming (1910) — Tex. Civ. App. —, 132 S. W. 78, the court held that it was immaterial as a defense that the defendant corporation's general manager lacked authority to contract for a lease of the corporate lands, where it appeared that the corporation entered upon the execution of the contract, and received and retained benefits thereunder.

And in *King v. West Coast Grocery Co.* (1913) 72 Wash. 132, 129 Pac. 1081, it was held that the question of authority of an officer of a corporation to execute a lease of its property was immaterial, where it appeared that the corporation knowingly received the rental of the premises, for, conceding that the officer acted without authority, the subsequent receipt

and retention by the corporation of the fruits of the transaction constituted a ratification of the same, and an estoppel to question its validity.

Where it appeared that a corporation accepted and retained the rents and profits derived from the leasing of property by its president, without authority, and it appeared further that the company had knowledge of the contract of leasing executed by its officer, the court held that the retention of the benefits constituted a ratification by the corporation of the unauthorized lease, saying: "Ratification may be inferred from the fact that the owner of real property, held under an unauthorized lease, with knowledge of the infirmity of the lease, recognizes the lessee as his tenant, and accepts and receives from the tenant the benefits of the lease." *Anderson v. Conner* (1904) 43 Misc. 384, 87 N. Y. Supp. 449.

In *Jourdan v. Long Island R. Co.* (1889) 115 N. Y. 380, 26 N. Y. S. R. 138, 22 N. E. 153, it appeared that the president and secretary of defendant, a railroad corporation, executed an agreement with another railroad corporation, by which each mutually agreed to allow the other the use of its tracks and depots. It further appeared that the defendant corporation, although alleging herein lack of authority of its officers to make the contract, had received and retained the profits and advantages derived from the performance of the transaction. The court held that the defendant could not escape liability for a breach of the contract, because its officers were unauthorized to execute the same, for by accepting and retaining the benefits of the transaction the corporation ratified it, saying, in part, that "if they intended to disavow it, it was their duty to be active in so doing."

See also *Hayden v. Wheeler & T. Co.* (1892) 66 Hun, 629, 49 N. Y. S. R. 240, 20 N. Y. Supp. 902, wherein it appeared that the secretary and treasurer of the defendant corporation executed, without authority, a lease of property for the corporate use, and the company, with knowledge on its

part, entered on the premises and paid rent therefor. The court held that it was proper to submit the facts to the jury on the question whether the corporation had ratified the unauthorized contract made by its officer.

*f. Contract to rent, transfer, or assign personal property.*

In *Ferguson v. Venice Transp. Co.* (1899) 79 Mo. App. 352, it appeared that the president of a corporation, acting without authority, transferred and assigned an asset of the corporation, and the latter, knowing of the transaction, nevertheless received and retained the benefits thereof. The court held that the corporation could not question the validity of the assignment on the ground of lack of authority of its president to make the same, for by accepting the benefits of the transaction the corporation acquiesced in its making.

In *Dill & C. Co. v. Morison* (1913) 159 App. Div. 583, 144 N. Y. Supp. 894, it was held that an unauthorized assignment of corporate property by its officers was valid and binding, where it appeared that the corporation received and retained the benefits of the assignment, with knowledge of the same, and thereby ratified the acts of its officer-agents.

Where it appeared that the treasurer of the defendant corporation, without authority, chartered a steamboat belonging to the company, to the use of a third person, and the corporation, knowing of the transaction, accepted and retained the sum paid therefor, the court held that the contract of the officer was thereby ratified. *Brown v. Winnisimmet Co.* (1865) 11 Allen (Mass.) 326.

In *Thompson v. Brantford Electric & Operating Co.* (1898) 25 Ont. App. Rep. 340, wherein it appeared that the president of the defendant corporation, who was also the general manager, acting without the express assent of the board of directors, rented on behalf of the corporation a machine to be used in its business, and the corporation, knowing of the contract of renting, accepted and used the machine, the court held that, having received and retained the benefits of the

contract, the corporation had ratified and was liable under the same, regardless of whether its officer-agent had authority to make the contract.

*g. Contract to construct, repair, or maintain corporate property.*

In *Owyhee Land & Irrig. Co. v. Tautphas* (1903) 57 C. C. A. 557, 121 Fed. 343, wherein it appeared that the president of the defendant corporation contracted for the construction by the plaintiff of a canal, and the latter fully performed the work required, and the benefit of his performance, with the knowledge of the shareholders of all the circumstances, was received and retained by the corporation, it was held that the defendant was estopped from questioning the authority of its officers to make the contract, as the defect was cured by the retention of the benefits derived from the unauthorized act.

In *Southern Bitulithic Co. v. Hughton* (1912) 177 Ala. 559, 58 So. 450, an action by a subcontractor against the defendant corporation for the performance of certain construction work pursuant to a contract made by the president of the corporation, wherein it appeared that the defendant had received and retained benefits arising from the performance of the contract, with full knowledge of its terms and character, the court held that the retention of the benefits of the contract amounted to a ratification by the defendant, and that it was estopped from denying the authority of its officer to enter into the contract.

And in *Blanck v. Commonwealth Amusement Corp.* (1912) 19 Cal. App. 720, 127 Pac. 805, wherein it appeared that the directors of the defendant corporation entered into several contracts for the building of a theater to be conducted by the corporation, and for the supply of materials therefor, and with knowledge of the transactions the corporation accepted and retained the work done and the materials furnished, the court held that the company thereby ratified the contracts made by its officers, and in an action to foreclose mechanic's liens for the materials and services rendered, the defendant was estopped

from avoiding the contracts on the ground of lack of authority of its directors so to contract.

Where a corporation's president entered into a contract with a construction company for work, labor, and material to be furnished in the erection of a building in which the corporation was interested, and the latter, knowing of the act of its officer, accepted the full benefits of the performance of the contract, the court held that it thereby ratified the contract of its officer, and was estopped from questioning his authority, saying: "One cannot knowingly accept the benefits of a contract made in its behalf, or in which it is interested, and refuse to be bound by its terms and conditions." *E. Aigeltinger v. Burke* (1917) 176 Cal. 621, 169 Pac. 373.

So in *Bingel v. Brown* (1908) 43 Colo. 281, 96 Pac. 449, wherein it appeared that a director of the defendant corporation contracted, without authority, for the construction by the plaintiff of an irrigating ditch for the use of the corporation, and pursuant to the contract the plaintiff performed the work required, and the same was accepted by the defendant with knowledge of the contract made by its directors, the court held that the acceptance and retention of the benefits of the unauthorized transaction ratified the same, and validated the act of its director ab initio.

In *Tryon v. White & C. Co.* (1892) 62 Conn. 161, 20 L.R.A. 291, 25 Atl. 712, wherein it appeared that the plaintiff, a subcontractor, performed certain extra work in the construction of a building for the defendant corporation on the promise of a director of the latter that he would be paid therefor, and the corporation, knowing of the transaction, accepted the benefits of the work done by the plaintiff, the court held that the corporation ratified the contract of its director, and was bound thereby, saying: "It must be true that the acceptance of the benefits of the transaction imposes an obligation to assume its burdens."

Where the president of a corporation contracted, without authority, but

with the knowledge of his company, for the building of a railroad for the corporate use, and, bonds having been issued for the construction of the road, the company received and applied the proceeds of their sale, the court held that the unauthorized act of the officer was impliedly ratified by the retention of the benefits of the contract, saying: "When the president of a corporation does, in its behalf and within the scope of its charter, an official act which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act; and when an official act is performed by the general agent of a corporation, in its behalf and for a purpose authorized by its charter, and within the scope of his ordinary powers, and the corporation knowingly receives the benefit of the act without objection, it may be presumed to have authorized or ratified the contract of its agent." *Leroy & C. Valley Air-Line R. Co. v. Sidell* (1895) 13 C. C. A. 308, 26 U. S. App. 656, 66 Fed. 27.

In *Maxville, W. & L. Turnp. Road Co. v. Barnes* (1892) 14 Ky. L. Rep. 431, wherein it appeared that a contract to construct certain works for the defendant corporation was made by its officers with the plaintiff who performed the work required, which was accepted by the corporation with knowledge of the contract under which it was performed, the court held that the contract was ratified by the acceptance and retention of its benefits, and therefore it was binding on the corporation.

In *Michigan C. R. Co. v. Chicago, K. & S. R. Co.* (1903) 132 Mich. 324, 93 N. W. 882, wherein it appeared that, without authority, the president of a corporation entered into a contract with the plaintiff railroad company, by which the latter was to rebuild a sidetrack to the corporation's plant for the use of the latter, and the corporation, knowing of the agreement, accepted and retained the benefits of the plaintiff's performance, it was held that the retention of the advantages of the unauthorized contract gave rise

to an implied ratification thereof, estopping the corporation from questioning the authority of the contracting officer.

So, in *Belzoni Oil Co. v. Yazoo & M. Valley R. Co.* (1908) 94 Miss. 58, 47 So. 468, wherein it appeared that the president of a corporation, by written agreement, contracted with a railroad company for the construction and use by it of a spur-track line to connect with the former's plant, the court held that, the railroad company having performed the agreement and the corporation having received the benefits derived therefrom, the corporation could not assert that it did not authorize the making of the contract.

In *Morrell v. Long Island R. Co.* (1888) 1 N. Y. Supp. 65, it appeared that the superintendent of the defendant railroad company agreed with the plaintiff to fill in a certain part of the defendant's right of way, contiguous to plaintiff's land, the latter to supply the necessary sand and gravel, and it further appeared that the plaintiff did supply the needed filling, but the corporation removed and used the same on another part of its lines. The court held that by taking the benefit of the contract it ratified the same, and was estopped from setting up the lack of authority of its officer-agent to enter into the contract, and thereby bind it.

So, in *Pannebaker v. Tuscarora Valley R. Co.* (1907) 219 Pa. 60, 67 Atl. 923, it appeared that the president of the defendant railroad company agreed with the plaintiff to construct a siding from the company's lines to the plaintiff's property, in consideration that the latter erect and maintain a sawmill for the purpose of cutting up lumber to be shipped over the defendant's road; and it further appeared that this contract was entered into and executed by both parties, to their mutual benefit. The court held that the railroad company could not assert the lack of authority of its officer to bind it by the contract, for, having accepted and retained the benefits derived therefrom, it ratified the same.

Where it appeared that the president of a corporation contracted for

the construction of a bridge, and after the same was completed it was received and used by the corporation with full knowledge of the terms of the contract, the court held that the act of the officer was thereby ratified, saying: "When a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the contract of its agent." *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 38 L. ed. 157, 9 Sup. Ct. Rep. 770.

In *Brown v. Wright* (1887) 25 Mo. App. 54, wherein it appeared that services and material were furnished the defendant corporation pursuant to a contract to erect a hotel for it, executed by the corporate president, and, knowing of the terms and character of the contract, the corporation received and retained the services rendered, and the materials furnished pursuant thereto, the court held that the corporation was liable under the contract, having accepted its benefits, and would not be heard to assert that its officer contracted without authority.

In *Moody & M. Co. v. Methodist Episcopal Church* (1898) 99 Wis. 49, 74 N. W. 572, wherein it appeared that the pastor of the defendant, a religious corporation, contracted without express authority for the repair and remodeling of the church owned by the corporation, and it further appeared that the latter, knowing through its trustees of the work being done on the church, allowed the same to progress, the court held that it effectually ratified the contract made by the pastor, having accepted and retained the benefits incident to its performance.

In *Hartford Deposit Co. v. Calkins* (1903) 109 Ill. App. 579, it appeared that the secretary-attorney of a corporation entered into a contract with the owner of property adjoining a building being constructed for the defendant corporation, whereby the defendant would be allowed to make certain changes in the wall of plaintiff's building to enable the construction of

its own building to be completed, and in consideration thereof the defendant would hold the plaintiff harmless from all damages incurred. The corporation, subject to this agreement and with knowledge of its terms, completed the construction of its building accordingly. The court held that, having accepted the benefits of the contract made by its officer, the corporation impliedly ratified his action, and could not contend lack of authority on the part of the officer to bind the corporation.

See also *Omaha Consol. Vinegar Co. v. Burns* (1896) 49 Neb. 229, 68 N. W. 492, wherein the court said, relative to an alleged unauthorized contract entered into by the president of the defendant corporation with the plaintiff: "The defendant went on the premises of the company with the necessary machinery and implements to perform his part of the contract, began it, and continued it almost without ceasing, night and day, during three months or more, and in the work was directed and consulted with by the different officers of the company, and by and for the company was notified, in the manner provided for in the contract, to stop the work which he was doing under it, and moreover the company is here in this suit claiming relief under and by virtue of the terms and provisions of the agreement. There is sufficient here to constitute the contract binding on the company, whether it was so in its inception or not, which we do not here decide."

*h. Issue, indorsement, or acceptance of commercial paper.*

In an action on certain promissory notes indorsed, without authority, by the treasurer of a corporation, wherein it appeared that the company, with knowledge of its officer's acts, had received the proceeds of the transactions, the court held that it thereby acquiesced in and ratified the contracts of its officer, and could not question his authority to bind it by the transactions. *First Nat. Bank v. American Bangor Slate Co.* (1910) 229 Pa. 27, 77 Atl. 1100.

In *SCOUTON v. STONY BROOK LUMBER Co.* (reported herewith) ante,

1433, wherein it appeared that the defendant corporation received the proceeds of a note issued by its president, and in this action asserted as a defense that he was not authorized to execute the same, the court held that the corporation received and retained the benefits of the transaction, with knowledge of the same, and could not, therefore, repudiate the agency by which it was secured, saying: "A party cannot avail himself of the benefit of his agent's act and repudiate his authority; in the application of which it is held that a corporation which has received the benefit of a note irregularly issued cannot escape liability thereon by showing it was not executed by the proper officers."

In *Wayne Title & T. Co. v. Schuylkill Electric R. Co.* (1899) 191 Pa. 90, 43 Atl. 135, wherein it appeared that the treasurer of the defendant corporation issued a check which was indorsed by the president, who deposited in the bank a sum of money to meet the same, and the corporation knowingly received the benefit of the transaction, the court held that, conceding the acts of the officers were unauthorized, nevertheless the acceptance and retention of the benefits of their acts amounted to a ratification on the part of the corporation.

In *Re Eastman Oil Co.* (1916) 238 Fed. 416, it appeared that the president of the defendant corporation borrowed money from himself for the use of the company, and issued the latter's promissory notes payable to him as evidences of the debt; and that the stockholders and directors of the corporation, knowing of the transactions, received and applied the moneys so obtained to the corporate use. It was held that although no authority existed to justify the acts of the officer, yet the retention and use of the benefits procured from the transactions amounted to a ratification of the unauthorized acts, and the corporation was therefore estopped from claiming want of authority on the part of its officer-agent so to act.

In *Pacific State Bank v. Coats* (1913) 123 C. C. A. 634, 205 Fed. 613, Ann. Cas. 1913E, 846, wherein it ap-

peared that the president and secretary of the defendant corporation issued a note for the purpose of obtaining a loan, and the corporation, with knowledge of the transaction, received the proceeds thereof and used the same for corporate purposes, it was held that the acceptance of the benefits of the contract ratified the same, the court saying: "Where money is received and used for the benefit of a corporation by its executive officers, who are also its trustees, the corporation ratifies the contract under which the money was paid, and it is estopped to deny the authority of its agents to make the same."

Where a corporation retained the benefits derived from the execution of a promissory note by its president, with knowledge of the unauthorized act, the court held that it thereby ratified the transaction. *Phillips v. Sanger Lumber Co.* (1900) 130 Cal. 431, 62 Pac. 749.

In *Jones v. Evans* (1907) 6 Cal. App. 88, 91 Pac. 532; *Hutchison v. Evans* (1907) 6 Cal. App. XIII., 92 Pac. 1135, wherein it appeared that the vice president of an alleged corporation indorsed certain promissory notes which were discounted for the benefit of the corporation, which, with the knowledge of the unauthorized transaction of its officer, accepted and retained the benefits so received, the court held that by so doing the defendant ratified the act of its vice president, and could not assert want of authority to contract on the part of the officer to evade liability incurred thereby.

In *Commercial Secur. Co. v. Modesto Drug Co.* (1919) — Cal. App. —, 184 Pac. 964, where the president and manager of a corporation executed notes in connection with an advertising contract, without complying with the by-laws, which required the approval of the board of directors, but the person who, together with the president, owned practically all the stock, made no objection and recognized the contract after he had purchased the president's stock, it was held that even if there was not a technical ratification within the meaning of the code, the corporation was

at least estopped, by accepting the benefits of the contract, to deny its binding force.

In *Ocilla Southern R. Co. v. Morton* (1913) 13 Ga. App. 504, 79 S. E. 480, it appeared that a corporation knowingly received the benefits of a draft executed by one signing as its president. The court held that the corporation thereby ratified the contract of its officer, and could not assert its lack of authority to issue the draft.

So where it appeared that a corporation, knowing of the unauthorized issuance of certain notes by its president, received the benefit of the proceeds thereof, the court held that it ratified the acts of its officer by accepting the fruits of his unauthorized contract, and it could not question his authority so to contract. *Flodin v. W. H. Lutes Co.* (1915) 191 Ill. App. 195.

In *Marion Trust Co. v. Crescent Loan & Invest. Co.* (1901) 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688, wherein it appeared that the officers of the defendant corporation, acting without authority, gave notes of the corporation for the purpose of borrowing money, and the company, with full knowledge of the unauthorized contract, accepted and retained the benefits of the contract, the court held that by so doing it ratified the acts of its officers, and gave to the transactions the validity of contracts entered into pursuant to a vote of the board of directors.

It was held in *Tilden v. Goldy Mach. Co.* (1908) 9 Cal. App. 9, 98 Pac. 39, that a corporation, having received the benefits of a non-negotiable note indorsed, and therefore guaranteed, by its duly appointed executive committee, ratified the act of the committee, and was estopped from questioning its authority.

In *Marbourg v. Lloyd* (1879) 21 Kan. 545, the court held that the authority of a treasurer of a corporation to indorse and sell a note, the proceeds of which were accepted and retained by the corporation, could not be questioned, saying: "If there was any want of proof of his authority to make the transfer in the first instance, the subsequent acts of the cor-



poration ratified all he did. The note was indorsed and discounted for the benefit of the corporation, and the proceeds thereof were used in the business of the company. We must assume that all of this was done with full knowledge of the action of the treasurer."

So, in *First Nat. Bank v. G. V. B. Min. Co.* (1898) 89 Fed. 439, modified in (1899) 36 C. C. A. 633, 95 Fed. 23, the court held that a corporation was estopped from denying the authority of its president, and thereby evading its contractual obligations, where it appeared that the officer issued notes of the corporation for the purpose of borrowing money for the corporate use, and the company, with knowledge of the transaction, accepted and used the moneys so obtained.

In *Topeka Capital Co. v. March* (1900) 10 Kan. App. 40, 61 Pac. 876, wherein it appeared that the manager of the defendant corporation issued without authority, but with the knowledge of the corporate officers, a promissory note, the proceeds of which were accepted and retained by the defendant, it was held that the corporation, having received the benefits of the contract made by its manager, could not deny his authority so to act, but by the retention of the fruits of the transaction it ratified and validated the same, and could not escape liability incurred by the contract.

In *Paducah Wharfboat Co. v. Mechanics Trust & Sav. Bank* (1915) 164 Ky. 729, 176 S. W. 190, it appeared that the plaintiff loaned money to the secretary of the defendant corporation on notes executed by that officer, and the money borrowed was deposited to the credit of the corporation, which thereby received the benefit of the alleged unauthorized act of its secretary. The court held that the corporation, having retained the money borrowed from the plaintiff, thereby ratified the execution of the notes by its officer, and was estopped from claiming his want of authority to act in order to evade payment to the plaintiff.

Where, in *Patten v. Moses* (1861) 49 Me. 255, it appeared that one acting as the president of a corporation in-

dorsed a promissory note, the proceeds of which the corporation received and retained, knowing of the transaction, the court held that the acceptance of the benefits bound the corporation, which could not evade liability by asserting lack of its officer's authority to make the contract.

In *Planters Bank v. Sharp* (1844) 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470, wherein it appeared that a note was discounted by an insufficient number of directors of a bank, but the bank, with knowledge of the transaction, accepted and retained the benefits of the discount, the court held that the contract was thereby ratified, and became binding on all the parties.

In *Watts Mercantile Co. v. Buchanan* (1908) 92 Miss. 540, 46 So. 66, it appeared that the general manager of the defendant corporation issued certain promissory notes to secure the purchase price of stock bought and retained by the corporation with full knowledge of the transaction. The court held that the facts clearly constituted a ratification of the officer's contract, the corporation having knowingly received and retained the benefits of the transaction.

Where it appeared that the trustees of a Masonic lodge issued a promissory note, the proceeds of which were received knowingly by the corporation, the court held that, having received and retained the consideration of the contract, the lodge thereby ratified it. Note: It does not appear in the present case whether or not the lodge was incorporated, but, as stated by the court, it is not material to the holding. *Mayer v. Old* (1894) 57 Mo. App. 639.

In *Moss v. Rossie Lead Min. Co.* (1843) 5 Hill (N. Y.) 137, it was held that the defendant corporation ratified the act of its president and secretary in issuing the notes of the corporation without authority, by accepting and retaining the consideration for the notes.

So, in *First Nat. Bank v. Badger Lumber Co.* (1895) 60 Mo. App. 255, it appeared that the manager of the defendant corporation issued to the plaintiff a corporate note and sent the

proceeds thereof to the defendant, to be applied on an account owing by him. Subsequently, finding out the terms and the nature of the transaction, the corporation still retained and applied the proceeds thereof to its own use. The court held that, by accepting and retaining the benefits of the contract, the corporation had ratified it, and could not escape liability by alleging want of authority on the part of its officers to act.

It was held in *Magnolia Compress & Warehouse Co. v. St. Louis Cash Register Co.* (1919) — Mo. App. —, 210 S. W. 125, that a corporation receiving and retaining the benefits of a note issued by its general manager could not deny his authority to issue the same, having full knowledge of the alleged unauthorized transaction.

In *Parsons v. Guarantee Invest. Co.* (1895) 64 Mo. App. 32, wherein it appeared that the defendant corporation received and retained, knowingly, the benefits of a note issued without authority by its president, the court held that it could not deny his authority to make the note, as his contract was ratified by the acceptance and retention of the benefits thereof, with knowledge of the unauthorized transaction.

Where, with the knowledge of the corporation's directors, its president and secretary had indorsed a multitude of commercial paper, the benefits of which were received by the corporation, the court held that not only must actual authority so to act on the part of the officers be implied, but also, the corporation having received and retained the fruits of the transactions, the contracts of indorsement, even though unauthorized, were ratified, and the corporation, therefore, must be held liable. *Blake v. Domestic Mfg. Co.* (1897) 64 N. J. Eq. 480, 38 Atl. 241.

In *McKinley v. Mineral Hill Consol. Min. Co.* (1907) 46 Wash. 162, 89 Pac. 495, wherein it appeared that the president and general manager of a corporation, with the knowledge of the other officers and directors, executed a promissory note signed in behalf of the company as maker, and in con-

sideration of money loaned to the corporation, and services rendered in its behalf, the court held that, having received the consideration of the contract with knowledge of the source from which it came, the corporation ratified the act of its officer-agent, and would not be heard to claim his want of authority so to contract, in order to evade liability thereunder.

Where it appeared that a corporation received and accepted payments on a note accepted pursuant to a contract made without authority by its principal officer, the court held that it thereby ratified his act, it having been shown that the corporation received the benefits of the contract with knowledge of its character and terms. *Emmet v. Reed* (1853) 8 N. Y. 312.

In *Sheridan Electric-Light Co. v. Chatham Nat. Bank* (1889) 52 Hun, 575, 5 N. Y. Supp. 529, it appeared that a trustee, given a power of attorney by a corporation, indorsed for discount certain negotiable paper, and that, with knowledge of the transaction, the corporation received and retained the proceeds of the discount. The corporation claiming that the trustee acted without authority, the court held that the retention of the benefits flowing from the executed contract constituted a ratification of the same, saying: "The company, through the indorsements, received this sum of \$10,000, and it was afterwards appropriated to its use and benefit; and it could not receive and dispose of this fund, knowing generally, as the trustees and the executive committee did, that it was obtained in this manner, and afterwards disaffirm the transactions through which the money was secured."

In *Hubbard v. Syenite-Trap Rock Co.* (1917) 178 App. Div. 531, 165 N. Y. Supp. 486, it was held error to refuse the admission, as evidence, of proof that a corporation had knowingly received the benefits of an unauthorized note issued by its treasurer, the court saying: "If this fact had been proven, under well-settled authority the corporation could not assert the lack of authority in the treasurer to sign the note."

Where it appeared that the president of a corporation issued without authority, and in a manner contrary to the corporate by-laws, negotiable notes, and proceeds thereof were received and retained by the company with knowledge of their source, the court held that the notes were valid, and that the president's authority to execute the same could not be attacked by the corporation, it having received and retained the fruits of the unauthorized transaction. *Bigelow Co. v. Automatic Gas Producer Co.* (1907) 56 Misc. 389, 107 N. Y. Supp. 894.

In *Milbank v. De Riesthal* (1894) 82 Hun, 537, 31 N. Y. Supp. 522, it was held that a corporation was liable on notes issued by its president, although the secretary did not join therein as required by the by-laws, where it appeared that the corporation received and retained the benefits of the notes so executed, with knowledge of the defect in the officer's act.

Where it appeared that the president and secretary of a corporation issued its promissory note under seal, and the corporation subsequently received the proceeds of the same with knowledge of its execution, the court held that it became bound thereby regardless of the lack of authority of its officers to enter into the transaction. *Bullen v. Milwaukee Trading Co.* (1901) 109 Wis. 41, 85 N. W. 115.

And in *Phillips v. Interstate Land Co.* (1918) 176 N. C. 514, 97 S. E. 417, wherein it appeared that the president of the defendant corporation, acting without authority, issued a promissory note for the payment of the purchase price of a new automobile to be used in the defendant's business, and the latter, with knowledge of the transaction, accepted and used the automobile for which the note had been given, the court held that it thereby ratified the contract of its officer, saying: "The defendant needed the new automobile in its business, and retained it. The law will not allow defendant to repudiate the act of its president, and at the same time retain the property for which the note was given."

So, it was held in *Knox City Mill Co. v. Warren* (1911) — Tex. Civ. App.

—, 141 S. W. 1007, that the acceptance and retention of the benefits of notes by a corporation, issued by its general manager, estopped it from evading liability on the ground that he had no authority to enter into the transactions and bind the company, as, under the circumstances, his authority so to act must be implied.

Where it appeared that a treasurer of a corporation received a draft of \$1,000, with the knowledge of the company, as a part payment for the assignment of patent rights owned by the corporation, and applied the sum so received to the corporate purposes, the court held that the acceptance and retention of the money so received ratified the acts of the treasurer. *New England Car-Spring Co. v. Union India Rubber Co.* (1857) 4 Blatchf. 1, Fed. Cas. No. 10,153.

In *Sesnon v. Lindeberg* (1911) 66 Wash. 1, 118 Pac. 900, wherein it appeared that the secretary of a corporation executed its note to secure the purchase price of stock bought and retained by the corporation with knowledge of the transaction, the court held that the retention by the company of the stock so purchased constituted a ratification of the secretary's act.

So, in *Williams v. S. M. Smith Ins. Agency* (1916) 79 W. Va. 16, 90 S. E. 393, former appeal (1915) 75 W. Va. 494, 84 S. E. 235, Ann. Cas. 1917A, 813, it was held that, if the acts of an officer of a corporation in issuing its notes were done without authority, nevertheless the corporation was bound thereby, where it appeared that it received and retained the proceeds of the notes with knowledge of their execution.

In *Third Nat. Bank v. Laboring-man's Mercantile & Mfg. Co.* (1904) 56 W. Va. 446, 49 S. E. 544, wherein it appeared that the defendant corporation retained the proceeds of a note after receiving knowledge that the same were obtained from the execution by its president, without authority, of a promissory note discounted by the plaintiff bank, the court held that it thereby ratified and adopted as its own the act of its officer and agent,

saying: "The directors of the defendant company had, or should have had, notice of the execution of the note in controversy, and of its disposition to the bank by Murphy [its president], by reason of the present action, brought upon that note. But the company, having then received the benefit of the transaction, repudiated it, and did not, when sued, nor since that time, return to the plaintiff the money thus received and used by it. The failure of the defendant to return the money so received, when its receipt had become known to its directors, was and is a confirmation of the transaction."

See also *Hitchings v. St. Louis, N. O. & O. C. Transp. Co.* (1893) 68 Hun, 33, 22 N. Y. Supp. 719, wherein the court held that where the president of a corporation, without authority, discounted a note, and that the corporation received the benefit thereof, a subsequent transfer of the note by the officer to a third party was valid and binding.

In *Martin v. Inter-State Lumber Co.* (1918) 260 Pa. 218, 103 Atl. 613, the court stated, as one of the circumstances under which a corporation may be held liable on notes executed by its officers without authority, the receipt by the corporation of the benefit of the proceeds of the notes. In the instant case, however, there was no ratification by the retention of benefits, no benefits having come to the corporation by reason of the transaction.

And see *Ege v. Centerville Teleph. Co.* (1914) 33 S. D. 648, 147 N. W. 70, wherein it is said: "But if the board had acted without authority in making the purchase of the telephone plant, and executing and delivering the company's note in part payment therefor, the retention and use of the telephone property for so long a period of time would amount to a ratification of the contract, and the plaintiff was entitled to judgment."

So, in *Bridgewater Cheese Factory Co. v. Murphy* (1894) 26 Can. S. C. 443, 26 Ont. Rep. 327, 23 Ont. App. Rep. 66, the court held that a corporation must affirm or disaffirm a note

executed in its behalf, without authority, by its president, where it appeared that the proceeds thereof were credited to the company, stating that the corporation could not retain the benefits of the transaction and at the same time disaffirm the same on the ground that its officer had no authority to bind it.

#### *i. Issue of mortgage or trust deed.*

In *Love v. Metropolitan Church Asso.* (1913) 184 Ill. App. 102, wherein it appeared that the president and secretary of the defendant corporation mortgaged certain real estate owned by the company, and that the proceeds of the mortgage were accepted by the corporation, with knowledge of the transaction, and used to secure certain notes given for the purchase price of the real estate, the court held that the act of the officers of the corporation was ratified by the retention and use of the benefits derived therefrom.

So, in *Doerr v. Fandango Lumber Co.* (1916) 31 Cal. App. 318, 160 Pac. 406, the court held that a corporation ratified the unauthorized act of its president in executing a mortgage as security for a loan to the corporation, where it appeared that the company, knowing of the transaction of its officer, received the money so loaned to it and applied the same to the corporate uses, saying: "The defendant . . . company, having received, retained, and used for the purposes of its business the money, to secure the repayment of which the mortgage was given, is, and upon a familiar equitable principle should be, estopped from denying the validity of the obligation."

In *Shafer v. Spruks* (1913) 140 C. C. A. 504, 225 Fed. 480, wherein it appeared that corporate officers issued bonds and mortgages, with the knowledge of the directors and shareholders, for the purpose of securing loans of money for the use of the corporation, and the moneys so secured were received and retained by the corporation, the court held that the retention of the benefits of the transactions constituted a ratification of the officers' acts, and the company was estopped from

denying their authority, saying that it could not "enjoy the fruit of the acts, and disavow that to which the fruit owes its existence."

In *Frank v. Hicks* (1894) 4 Wyo. 502, 35 Pac. 475, 1025, wherein it appeared that certain officers of a corporation executed a trust deed to secure the payment of bonds issued by the corporation, and the latter enjoyed the benefits and proceeds of this transaction with knowledge of its terms and nature, the court held that it thereby ratified the act of its officers and could not question their authority in order to evade liability under the deed.

In *Clark v. Elmendorf* (1904) — Tex. Civ. App. —, 78 S. W. 538, wherein it appeared that the president of a corporation executed, without authority, a deed of trust to secure the payment of certain promissory notes, and the corporation knowingly received and used the moneys for which the deed was executed, the court held that its action in so doing satisfied the officer's unauthorized contract.

In *Bank of Garfield v. Clark* (1912) 138 Ga. 798, 76 S. E. 95, it was held that where it appeared that officers of a corporation, without authority, procured money upon the transfer of a title to land to secure the loan, and the corporation received the money so procured, knowing of the transaction, it could not retain the benefits of the contract and avoid liability thereunder by setting up the invalidity of the transfer of title on the ground of lack of authority of its officer-agents so to act, as the retention of the benefits of the contract ratified the acts of the contracting officers.

So, in *Murray v. Beal* (1901) 23 Utah, 548, 65 Pac. 726, wherein it appeared that the directors of a corporation informally executed a trust deed as security for the loan of a sum of money, and the corporation, with knowledge of the transaction, accepted and used the money so obtained for corporate purposes, the court held that its action in so doing constituted a ratification of the transaction.

Where it appeared that the officers of a corporation, acting without ex-

press authority, executed a chattel mortgage on the corporate property, and, knowing of the transaction, the corporation received and retained the benefits of the mortgage, the court held that having received the full benefits of the transaction the corporation will be presumed to have authorized or ratified the acts of its officers. *Edelhoff v. Horner-Miller Straw Goods Mfg. Co.* (1898) 86 Md. 595, 39 Atl. 314.

So, in *Currie v. Bowman* (1894) 25 Or. 364, 35 Pac. 848, wherein it appeared that the president of a corporation executed, without authority, certain chattel mortgages on corporate property to secure moneys borrowed and used by the corporation, the court held that the use and retention of the benefits of the transaction by the corporation, after acquiring knowledge of its character and terms, effected a ratification of the unauthorized contract of its officer.

In *American Nat. Bank v. Wheeler-Adams Auto Co.* (1913) 31 S. D. 524, 141 N. W. 396, wherein it appeared that the president and secretary of the defendant corporation, who apparently exercised sole management of the corporate business, executed chattel mortgages covering certain property of the corporation, and the latter knowingly received and retained the proceeds of the transaction, the court held that the corporation could not deny the validity of the transactions, having accepted and retained the proceeds thereof.

In *Dexter Horton & Co. v. Long* (1891) 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271, wherein it appeared that the president and secretary of a corporation, acting without formal authority, executed a mortgage on the corporate property to secure an advance of money to it, and it further appeared that the money was received and used by the corporation with full knowledge of its source, the court held that by accepting and retaining the benefits of the transaction the corporation indorsed the same, and thereby gave to the mortgage the same validity as though it had been authorized im-

primis by a formal act of the board of trustees.

In *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 543, 47 N. W. 729, wherein it appeared that certain officers of the defendant corporation executed a mortgage on the corporate property and delivered the same to the plaintiff to secure a sum of money borrowed in behalf of the corporation, and it further appeared that with knowledge of this transaction the corporation received and used the money so obtained, the court held that it could not question the authority of its officers to enter into the transaction, having accepted and retained the benefits of the same.

See also *Simis v. Davidson* (1887) 22 Jones & S. (N. Y.) 235, wherein it was held to be error to refuse to admit in evidence a mortgage executed by the president of the defendant corporation, where it appeared that the money obtained was used for the corporate purposes, the court holding that under the facts the jury might have found that the officer had implied authority so to contract.

*j. Issue or receipt of bond, debenture, or certificate of deposit.*

In *McCormick v. Unity Co.* (1908) 142 Ill. App. 159, affirmed in (1909) 239 Ill. 306, 87 N. E. 924, it was held that a corporation ratified the acts of its officers in issuing certain bonds, the proceeds of which were accepted and retained by the corporation with knowledge of the transactions, and therefore the company was estopped from asserting that the issuing of the bonds was unauthorized.

So, in *Tyrell v. Cairo & St. L. R. Co.* (1879) 7 Mo. App. 294, the court held that the stockholders of a corporation ratified the contracts of the directors of the company by receiving, with knowledge, the benefits of certain bonds issued by the directors, saying: "As other principals are held liable for the acts, even for the frauds, of their agents, done in the course of the principal's business, it is not easy to see why stockholders who stand by, as did the stockholders here, refusing to hold a meeting, and availing themselves of the benefits of the directors'

actions, should be allowed to repudiate the corresponding burden. Ample time was given to the stockholders here concerned to meet and disown the action of the agents whom they had selected to carry on their business, and their ratification is not less effectual than if a meeting had been held and a formal vote taken. Upon them was imposed the legal obligation to act, and they refused to do so."

And in *Pomeroy v. New York Smelting & Ref. Co.* (1901) — N. J. Eq. —, 48 Atl. 395, wherein it appeared that the officers of a corporation, having been authorized to execute certain mortgages, incidentally issued bonds to secure the same, the court held that not only was the power to issue the bonds incidental to the execution of the mortgages, and therefore authorized, but also, conceding that the officers acted without authority, it must be held that the corporation ratified their acts by receiving knowingly the benefits incident thereto, saying: "The company received the consideration for the bonds (either money or property transferred), retained and used it, and paid interest on the bonds for over four years. The company having the power to execute the bonds, and its proper officers having actually executed and delivered them, the omission of a formal resolution authorizing their execution, if there was such omission, is, under the circumstances, no defense to the bond."

In *Re Magdalena Steam Nav. Co.* (1860) Johns. V. C. 690, 70 Eng. Reprint, 597, 29 L. J. Ch. N. S. 667, 6 Jur. (N. S.) 975, 8 Week. Rep. 329, wherein it appeared that directors of a corporation, acting without the requisite authority, issued debentures of the corporation to secure an advance of money, and the money so secured was received and used by the corporation, with knowledge of the directors' acts, the court held that the receipt and retention of the benefits of the transaction constituted a ratification of the directors' contract.

In *Fidelity Ins. Co. v. German Sav. Bank* (1905) 127 Iowa, 591, 103 N. W. 958, it appeared that the president and secretary of a corporation accepted,

without authority, certain bank stock and certificates of deposit as payment of a debt owing to the corporation, and the latter, knowing of the transaction, its nature and terms, accepted the stock and certificates and treated them as part of its assets. The court held that the corporation ratified the unauthorized acts of its officers by receiving and retaining the benefits of the transaction.

*k. Pledge of securities.*

In *Love v. Export Storage Co.* (1906) 74 C. C. A. 155, 143 Fed. 1, wherein it appeared that the defendant's president placed property of the corporation in a warehouse, and pledged the warehouse receipt as security for the discount of notes placed with the plaintiff, and the moneys so received were used by the company for the corporate purposes with full knowledge on the part of the shareholders of the transaction, the court held that the retention of the benefits implied a ratification of the president's transactions, and the corporation could not thereafter evade liability on the notes by disclaiming the authority of its officer-agent to act.

Where it appeared that an officer of a corporation pledged certain bonds for the purpose of securing a loan, and that the money so received was retained by the corporation with full knowledge of the transaction, the court held that by receiving and retaining the benefits of the pledge the corporation ratified the act of its officer. *Prentiss Tool & Supply Co. v. Godchaux* (1895) 13 C. C. A. 420, 30 U. S. App. 68, 66 Fed. 234.

In *Illinois Trust & Sav. Bank v. Pacific R. Co.* (1897) 117 Cal. 332, 49 Pac. 197, the court held that where a corporation received money obtained from the pledge of bonds by its president, who was authorized only to issue bonds, the corporation ratified the unauthorized transaction by the acceptance of the benefits, and that the officer must be presumed to have had the power to hypothecate the bonds as well as issue them.

In *Darst v. Gale* (1876) 83 Ill. 136, it appeared that the secretary of the defendant corporation, without author-

ity, pledged certain bonds of the corporation, and the latter, with full knowledge of the transaction, received and applied the benefits thereof to the corporate uses. The court held that the defendant could not question the authority of its officer-agent, for by accepting the benefits it impliedly ratified the contract made by him.

In *Bezou v. Pike* (1871) 23 La. Ann. 788, wherein it appeared that the president of a corporation pledged the stock of the corporation as security for the discount of certain corporate notes, and the proceeds of the discounted notes were received and retained by the corporation with knowledge of the president's acts, it was held that the act of the corporation in knowingly receiving the benefits of the authorized contract of its officer ratified the same.

So, in *Hubbard v. Camperdown Mills* (1887) 26 S. C. 581, 2 S. E. 576, wherein it appeared that the president of a corporation pledged its bonds to secure an advance of money needed by the corporation, which was accepted and used by the latter with full cognizance of the transaction, the court held that under the circumstances the company was bound by the acts of its officer, having received the money obtained thereby.

In *Hughes v. First Nat. Bank* (1885) 110 Pa. 428, 1 Atl. 417, wherein it appeared that the cashier of the defendant bank pledged certain bonds in the bank's possession for the benefit and with the knowledge of the bank, and it further appeared that, the pledgee having forced a sale of the bonds and the bank being unable to account to the true owner for the same, this action was brought to recover the value of the bonds. The court held that the defendant corporation, having acquiesced in the act of its officer and accepted and retained the benefits of his fraudulent transaction, had thereby ratified the same and was liable thereon, saying: "The bank cannot retain the fruits of the crime and repudiate the fraud of its agent."

*l. Loan made or money borrowed.*

In *McDougall v. Hazelton Tripod-Boiler Co.* (1898) 31 C. C. A. 487, 60

U. S. App. 209, 88 Fed. 217, the court held that the defendant corporation could not question the authority of its president in borrowing sums of money for corporate purposes, on the ground that he exceeded his authority, where it appeared that the corporation, with knowledge of the transaction, accepted and retained the moneys so received, and by so doing ratified the alleged unauthorized act of its officer.

And in *Fourth Nat. Bank v. Camden Lumber Co.* (1905) 142 Fed. 257, it was held that a corporation could not repudiate an indebtedness created by its president on the ground that the instruments procuring the same were entered into without authority by the officer, where it appeared that the company, with full knowledge and acquiescence in the unauthorized act, accepted and retained its fruits and advantages.

In *Garmire v. McDonough & Co.* (1916) 197 Ill. App. 527, and *Sargent v. McDonough & Co.* (1916) 197 Ill. App. 523, the court held that a corporation was liable for money borrowed by an officer without authority, but applied to the corporate use with knowledge by the corporation of the transaction, for the receipt and retention of the benefits of the transaction constituted a ratification of the officer's acts.

So, in *Bossert v. Geis* (1914) 57 Ind. App. 384, 107 N. E. 95, it was held that a corporation could not question the authority of its president to borrow money for the corporate purposes, where it appeared that the company received the benefits of the alleged unauthorized contracts of its officer, and used the money so received for the corporate uses with full knowledge of the transaction, the court holding that the retention of the benefits of the contract ratified it.

Where it appeared that an officer of a corporation borrowed money for the payment of corporate debts, and the company, knowing the terms of its agent's contract, accepted the benefits thereof, the court held that the use and retention of the benefits of the contract constituted an adoption of the same, and precluded the claim on

the part of the corporation that its officer was without authority to make the contract. *Humphrey v. Patrons Mercantile Asso.* (1879) 50 Iowa, 607.

In *Halstead v. Dodge* (1884) 1 How. Pr. N. S. (N. Y.) 170, a corporation was held liable on a contract executed without authority by its president, whereby the corporation borrowed and received money which was used by it, with knowledge of the transaction, for the corporate purposes.

In *Mohrfeld v. Second German Bldg. Asso.* (1900) 194 Pa. 488, 45 Atl. 335, wherein it appeared that the plaintiff loaned money to the defendant corporation, and the money so loaned was accepted by its secretary, who also made payments of interest thereon by orders, drawn by him, on the company, the court upheld a verdict of the jury finding that the corporation had acquiesced in and ratified the acts of its treasurer by receiving, retaining, and using for the corporate purposes the money so received by its officer.

And in *Episcopal Charitable Soc. v. Episcopal Church* (1823) 1 Pick. (Mass.) 372, it was held that where the officers of a religious corporation borrowed money on the note of the corporation, and the money so procured was received and used for the corporate purposes, an action would lie for the recovery of the money, for, having accepted the benefits of the transaction, the corporation could not evade liability thereunder by showing want of authority to make the contract on the part of its officers.

In *Kirwin v. Washington Match Co.* (1905) 37 Wash. 285, 79 Pac. 928, it was held that an allegation in a complaint was sufficient, which stated that money borrowed by agents of a corporation, acting without authority, was received and used by the corporation through the president and general manager, the court holding that the alleged unauthorized acts of the agents were ratified by the acceptance and retention of the benefits. It does not appear in the present case whether the agents who executed the contract were officers.

In *Troup's Case* (1860) 29 Beav.



353, 54 Eng. Reprint, 664, the court held that a bona fide lender of money could recover from a corporation money borrowed by its directors without authority, but received and used by the corporation for its benefit.

So, in *Hoare's Case* (1861) 30 Beav. 225, 54 Eng. Reprint, 874, 2 Johns. & H. 229, the court held, on the authority of the decision in *Troup's Case* (Eng.) supra, that a corporation was liable for money borrowed by its directors, acting without authority, and received by the corporation for its benefit.

*m. Contract of guaranty.*

In two recent cases (*Armour & Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 773, 173 Pac. 404, and *Cudahy Packing Co. v. R. Rosenberg & Sons Co.* (1918) 36 Cal. App. 818, 173 Pac. 406), wherein it appeared that the defendant's manager executed certain guaranties of payment of the debt of a third party, without the authority of the defendant corporation, which, however, knowingly received and retained a consideration for its contract of guaranty, the court held that, having received benefits under the contract, the defendant had ratified the act of its officer, and could not be permitted to repudiate the burdens resulting therefrom.

Where a contract of guaranty for the payment of a promissory note, executed by the president of a corporation without authority, was beneficial to the corporation, and it received and retained, knowingly, the benefits of the transaction, the court held that it would not be heard to assert the lack of authority of its president to execute the contract and thereby avoid liability, for by receiving and retaining the benefits of the unauthorized contract of its officer it impliedly ratified the same. *Lake Street Elev. R. Co. v. Carmichael* (1899) 82 Ill. App. 344, affirmed in (1900) 184 Ill. 348, 56 N. E. 872.

And in *Hunt v. Northwestern Mortg. Trust Co.* (1902) 16 S. D. 241, 92 N. W. 23, wherein it appeared that the president of the defendant corporation transferred to the plaintiff, and guaranteed payment of, a note owned by the corporation, and it further ap-

peared that the company received and retained the benefits of the transaction, the court held that it was liable thereon, regardless of the officer's original lack of authority to execute the contract, as it had accepted and retained the proceeds derived therefrom, thus ratifying his unauthorized act.

Where it appeared that the president of the defendant corporation executed, without authority, a contract with the plaintiff, whereby it was agreed that the corporation should assume the debts of its predecessor, which were owing to the plaintiff, in consideration that the latter continue to purchase coal mined by the defendant, and, pursuant to this agreement, the plaintiff did continue to patronize the defendant, and the latter accepted, with knowledge of the agreement, the benefits of his patronage, the court held that it thereby ratified the contract made by its president, regardless of his original lack of authority to incur the liability. *Curtis v. Natalie Anthracite Coal Co.* (1903) 89 App. Div. 61, 85 N. Y. Supp. 413, affirmed in (1905) 181 N. Y. 543, 73 N. E. 1122.

*n. Agreement to extend time of payment or stay execution.*

In *Pettengill v. Blackman* (1917) 30 Idaho, 241, 164 Pac. 358, wherein it appeared that certain officer-directors of a banking institution gave to the holder of certificates of deposit a mortgage to secure the payment of the same, in consideration of an extension of time of payment, and, knowing of this transaction, the corporation received the benefits of the extension of time, and did not dissent from the contract, the court held that under the facts the corporation had ratified the unauthorized contract of its officers.

In *Dedrick v. Ormsby Land & Mortg. Co.* (1899) 12 S. D. 59, 80 N. W. 153, it appeared that the defendant corporation's secretary contracted for an extension of a mortgage held by the plaintiff on the corporate property, in consideration of a guaranty by the corporation of the payment of the principal; and it further appeared that the corporation, knowing of this agreement, accepted the benefits

thereof, in the nature of the extension of time. The court held that the original authority, or lack of authority, of the secretary so to bind the company, was immaterial, as the latter ratified all that was done by accepting the benefits derived therefrom.

In *Lyndon Sav. Bank v. International Co.* (1905) 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50, wherein it appeared that the president and general manager of the defendant corporation entered into an agreement for the extension of a corporate note, which at the time was due, and that the corporation subsequently, and with knowledge of the transaction, received the benefits of the extension of time, the court held that it could not question the authority of its officers to make the contract, having acquired and retained the benefits derived from the same, and thereby ratified it.

In *St. Clair v. Rutledge* (1902) 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234, the court found (although it was not the controlling factor in determining the case) that the acceptance of the benefits accruing to a corporation from having its taxes paid on certain land, in consideration of an extension of time granted by its president to a purchaser of standing timber thereon, to cut and remove the same, constituted a ratification of the act and an estoppel to question his authority.

In *Porter v. Farmers & M. Sav. Bank* (1909) 143 Iowa, 629, 120 N. W. 633, it appeared that the plaintiff owed the defendant bank a debt which was secured by a mortgage on certain real property of the plaintiff. The latter, finding himself unable to pay the debt, entered into an agreement with the defendant bank's cashier, whereby he conveyed the property mortgaged, by a quitclaim deed, to the bank as a payment of the debt, with the understanding and agreement with the corporation's officer that he should have a year in which he might redeem the property by a cash payment of the amount owing, or the furnishing of a purchaser for the property. In accordance with this agreement, the bank accepted the deed and retained

the property, but subsequently refused to reconvey in accordance therewith, when the plaintiff offered a money payment. In this action to compel the reconveyance of the property by the bank, the court held that the corporation could not deny the authority of the cashier to make the contract while receiving and retaining the benefits thereof, for by so doing it ratified the alleged unauthorized contract made by its officer-agent.

In *Drescher v. Fulham* (1898) 11 Colo. App. 62, 52 Pac. 685, it was held that, where a corporation accepted the benefits of a consideration for an extension of time of the payment of a note owing to the corporation, it could not assert the lack of authority of its secretary to grant the extension as an element constituting an invalid agreement.

In *Burrill v. Nahant Bank* (1840) 2 Met. (Mass.) 163, 35 Am. Dec. 395, it appeared that the directors of the defendant bank authorized two of their number to execute a conveyance to the plaintiff of the bank property, in consideration of which the plaintiff agreed not to put into circulation certain bank bills on which he had recovered judgment. In this action it was contended that the two directors appointed exceeded their authority, in that they mortgaged the property to the plaintiff instead of conveying, but it appearing that the corporation, knowing of the transaction, had accepted and acted upon a bond of defeasance which referred to the deed, the court held that the facts showed a ratification of the mortgage.

So also, in *Simmons v. Shaw* (1899) 172 Mass. 516, 52 N. E. 1087, wherein it appeared that the president of a corporation executed a supersedeas bond for the purpose of obtaining a stay of execution and a review of a proceeding in which the corporation was interested, the court held that the act of the corporation in availing itself of the stay of execution, and the prosecution, with knowledge of the officer's transaction, of the petition thereon for more than a year, constituted a ratification of the officer's act.

*c. Agreement of compromise or settlement.*

In *Farmers' & Citizens' Bank v. Sherman* (1860) 6 Bosw. (N. Y.) 181, affirmed in (1865) 38 N. Y. 69, wherein it appeared that several of the directors of a banking corporation executed a contract by which the bank agreed to return several notes held against the other party, in consideration of which he was to deliver certain quantities of lumber to a purchaser secured by the bank, and it appeared, further, that the bank, with knowledge of the contract, accepted the property when delivered, the court held that, equitably, the corporation was estopped to deny the authority of its officers to make the agreement, for the acceptance of the benefits of the contract constituted a ratification and adoption of their acts.

So, in *Kneeland v. Gilman* (1869) 24 Wis. 39, wherein it appeared that the attorney, comptroller, and treasurer of a municipal corporation executed a compromise agreement in its behalf, and it further appeared that pursuant to, and with knowledge of, this agreement the city accepted and retained its benefits, the court held that it thereby recognized the authority of its agents to make the agreement, and ratified the same, giving to it the same validity as though it had been authorized by the formal vote of the city council.

Where the attorney of a corporation effected a compromise in a pending litigation, and the proceeds thereof were received knowingly by the corporation, the court held that the acceptance of the sum in compromise ratified the act of the attorney. *Wetherbee v. Fitch* (1886) 117 Ill. 67, 7 N. E. 513.

And in *Trenton Street R. Co. v. Lawlor* (1908) 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668, the court held that where a general manager of a corporation entered into a compromise of a litigation, and the corporation accepted the benefits of the transaction, its action in so doing was tantamount to a ratification of the compromise.

Where it appeared that a corporation received a check, knowing the

same to be the proceeds of a settlement effected by a committee composed of its officers and directors, the court held that the acceptance of the fruits of the transaction amounted to a ratification, and created an estoppel to deny the authority of the committee to make the settlement. *Merchants' Union Barb Wire Co. v. Rice* (1886) 70 Iowa, 14, 29 N. E. 784.

So, in *Peterson v. Elholm* (1906) 130 Wis. 1, 109 N. W. 76, rehearing denied in (1906) 130 Wis. 9, 109 N. W. 1034, wherein it appeared that one who was the president and general manager of a corporation settled a claim by the corporation against a third person, and that pursuant to this compromise agreement, and with knowledge thereof, the corporation accepted and retained the amount agreed upon as a settlement, the court held that the corporation was bound thereby, having received and retained the benefits of the transaction.

*p. Miscellaneous contracts.*

In *Chatham v. Mecklenburg Realty Co.* (1917) 174 N. C. 671, 94 S. E. 447, it appeared that the officers of the defendant corporation, being desirous to have a proposed car line run through property owned by the defendant as suburban home lots, contracted with the plaintiff to subscribe a sum of money toward the construction of the proposed line by him. It further appeared that the corporation, with the knowledge of its officers, accepted a change in the contract, by which it received and retained great benefits. The court held that the facts showed a ratification by the corporation of the unauthorized change in the contract by its officers by the receipt and retention of the benefits incident thereto, the court distinguishing the holding in *Duke v. Markham* (1890) 105 N. C. 181, 18 Am. St. Rep. 889, 10 S. E. 1017, *infra*, IV. b, saying: "That [decision] has no application in this case. This contract, as submitted to the jury, is between the original parties thereto, and was executed by the president and two directors. There was evidence that they were acting in behalf of the corporation as general agents, with the knowledge of the

company, and that subsequently, when there was objection made, there were changes made in the work to the knowledge of the defendant company; that its officers saw the work in progress and under the amended agreement, and made no objection. There was ample evidence, if believed by the jury, that the president and the two directors, in making the contract, were acting within the scope of their authority, and that the subsequent change in the contract was ratified by the defendant, who has been benefited many times the value of the subscription by reason of the work done by virtue of this contract."

So, in *Texas & G. R. Co. v. Whiteside* (1909) 55 Tex. Civ. App. 593, 119 S. W. 126, wherein it appeared that the president of the defendant railroad company entered into an agreement with certain parties, whereby the corporation was obligated to extend its lines to a certain point, in consideration of the payment of donations by the other parties to the contract, and pursuant to this agreement, and with knowledge of it, the defendant company received and retained the proceeds of the donations, the court held that by accepting its benefits the corporation adopted and ratified the contract, although the same was not authorized in the first instance.

In *Coney Island R. Co. v. McIntyre-Paxton Co.* (1912) 119 C. C. A. 197, 200 Fed. 901, the court held that where a corporation received and retained for years the benefits derived from an unauthorized contract, not ultra vires, executed by its president, and had knowledge of the existence and character of the contract, it thereby ratified the act of its officer-agent, and was liable to the plaintiff for a breach of the contract.

Where a corporation retained the consideration of a modified contract executed by its officers, and for a considerable period of time failed to have the same ratified by its board of directors, the court held that the retention of the benefits and the failure to disaffirm or affirm within a reasonable time constituted an implied ratifica-

tion. *Dickinson v. Zubiate Min. Co.* (1909) 11 Cal. App. 656, 106 Pac. 123.

In *ED. SCHUSTER & Co. v. KURYER PUB. Co.* (reported herewith) ante, 1437, wherein it appeared that the general advertising manager of the defendant corporation contracted with the plaintiff to accept the latter's advertising at a stipulated price for a term of years, and also gave to the plaintiff an option to renew the contract, the court held that the corporation ratified and adopted the contract in its entirety, although made without authority, where it appeared that, knowing of the transaction, the defendant corporation received the plaintiff's advertising thereunder, and retained the benefits derived therefrom.

In *Kansas City Star Pub. Co. v. Standard Warehouse Co.* (1907) 123 Mo. App. 13, 99 S. W. 765, wherein it appeared that the vice president of the defendant corporation contracted with the plaintiff for the insertion in its paper of an advertisement of the corporation, and it was shown that the other members and officers of the corporation knew of the contract and its terms, and received the benefit of the plaintiff's performance of the agreement, the court held that the facts showed a ratification of the vice president's act.

Where it appeared that one who owned ninety-eight shares of the stock of a corporation, and was also its general manager, contracted to supply a certain quantity of water for irrigation, on behalf of the corporation, and it appeared that the latter, with knowledge of the agreement, partly performed the same and received the contract price therefor, the court held that it thereby ratified the contract made by its officer-agent, having received and retained the benefits derived thereunder. *Ulrich v. Pateros Water Ditch Co.* (1912) 67 Wash. 328, 121 Pac. 818.

In *Bensiek v. Thomas* (1895) 13 C. C. A. 457, 27 U. S. App. 765, 66 Fed. 104, the court said: "A corporation should not be permitted to allege want of authority on the part of its directors to borrow money, when it has

received a sum of money actually borrowed, and has used it to pay its debts, with full knowledge of the fact on the part of all of its directors, and many of its shareholders. A corporation, as well as an individual, is at least bound to act honestly; and it should not be allowed to say that an act done by its officers was unauthorized, when it has accepted the benefits accruing therefrom, and does not offer to restore what it has received." This action, however, did not involve the unauthorized contract of an officer with third parties, and the foregoing is in the nature of dictum only.

See also *Jones v. New York Guaranty & Indemnity Co.* (1879) 101 U. S. 622, 25 L. ed. 1030, wherein the court said: "Where money has been obtained by a corporation upon its securities, which were irregular and ultra vires, but the money was applied for the benefit of the company with the knowledge and acquiescence of the shareholders, the company and the shareholders are estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company."

And see *Fitzgerald & M. Constr. Co. v. Fitzgerald* (1890) 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36, wherein the court sustained a charge to the jury in the following words: "If you find from the evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes, with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

In *Alabama Fidelity & C. Co. v. Jefferson County Sav. Bank* (1917) 198 Ala. 557, 73 So. 918, in discussing the ratification of an unauthorized act

of an agent not an officer, the court said: "A corporation which accepts the benefit of a contract made by an officer without authority is estopped from denying the authority of such agent or officer, if the contract is one within the charter powers of the corporation."

See also *Argenti v. San Francisco* (1860) 16 Cal. 255, wherein the court said: "It is well settled, in relation to the contracts of corporations, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to question its validity. 'It would be in the highest degree inequitable and unjust . . . to permit the defendant to repudiate a contract, the fruits of which he retains.'"

In *San Francisco Gas Co. v. San Francisco* (1858) 9 Cal. 453, there is dictum to the following effect: "Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them without authority have been ratified."

In *Mulford v. Torrey Exploration Co.* (1909) 45 Colo. 81, 100 Pac. 596, the court said, respecting the alleged unauthorized contract of a manager of a corporation: "Aside from the question of the antecedent authority of the manager, the company is not in a position to assert that he was not clothed with such authority. It appears that the president of the company was fully advised with respect to the contracts and their conditions. The company has elected to affirm the parts of such contracts relating to the sale of the stock by retaining the consideration therefor, but repudiates the

conditions upon which such sale was made. A principal cannot affirm an alleged unauthorized contract in part, and disaffirm the remainder."

In *Winscott v. Guarantee Invest. Co.* (1895) 63 Mo. App. 367, evidence was received of a ratification by a corporation of an unauthorized contract entered into by its officer in receiving and retaining the consideration of the contract. But in that case the evidence was not essential, as the contract was *prima facie* valid.

In *Imeson v. Newport Bridge Co.* (1884) 5 Ky. L. Rep. 685, it was said: "A corporation may contract by an agent, or the acts and conduct of those in authority may evidence such an assent or acquiescence in the performance of work as would impose on the company deriving the benefits an obligation to pay for it."

See also *Elk Valley Coal Co. v. Thompson* (1912) 150 Ky. 614, 150 S. W. 817, wherein the court stated the general rule as follows: "Where the unauthorized act is beneficial to the corporation, and the directors have individual knowledge of it, slight evidence will be sufficient to establish ratification by acquiescence or failure to repudiate, and this upon the theory that a party who accepts benefits will be deemed to have done so with a knowledge of the conditions and circumstances surrounding the transaction out of which the act creating the benefit arose, and must take the burdens with the benefits. But where the corporation does not derive any benefit from an unauthorized act, or when it is doubtful if it has derived benefit, and no third party or innocent party has suffered a loss, evidence of ratification by mere individual acquiescence or failure to repudiate must be clearly shown, and this upon the ground that a party is not to be bound by an act that he did not authorize when he has received no benefits from it, and when the other party or an innocent party has not suffered any loss. It is a further well-settled rule that ratification by acquiescence can only arise when the party acquiescing has full knowledge of the facts relating to the act attempted to be ratified, or

holds such relation to the thing that knowledge will be presumed, as a party will not be held to have ratified an act that he knew nothing about." But in the present case it did not appear that the corporation received any benefits from an unauthorized contract executed by its general manager.

In *Ham & H. Lead & Zinc Invest. Co. v. Catherine Lead Co.* (1913) 251 Mo. 721, 158 S. W. 369, there was dictum as follows: "In the law of agency there is a rule that if one accepts the benefits of an unauthorized contract, made in his behalf by another, he is bound by its terms the same as if he had entered into the contract in person, or had expressly ratified it, provided, of course, that he had full knowledge of all the facts, and he is thereby estopped from repudiating the contract without restoring the benefits and putting the other party in statu quo. This principle is applicable in its fullest sense to corporations which, from their nature, can act only through the instrumentality of agents. If, therefore, an officer of a corporation, or other person assuming to have power to bind the corporation by a given contract, enters into the contract for the corporation, and the corporation receives the fruits of the contract, and retains them after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterwards rescinding or undoing the contract. In other words, by retaining the fruits of the unauthorized contract with knowledge of the circumstances which entitle it to its election either to affirm or disaffirm it, the corporation ratifies the contract and makes it good by adoption." Although, in this case, the court found no evidence showing ratification.

In *Edwards v. Carson Water Co.* (1893) 21 Nev. 469, 34 Pac. 381, it was said: "Before a corporation can be held responsible for the contracts of its officers or its agents, it must affirmatively appear that the officer or agent was authorized to enter into the contract by the company, or that the company received the benefits derived

from the transaction;" but in this case it appeared that there was a failure of consideration, and hence no benefits were conferred upon or received by the corporation.

And see *Bank of Vergennes v. Warren* (1842) 7 Hill (N. Y.) 91, wherein, it appearing that a bank knowingly received payments made to its cashier, who received the same without authority, the court said: "But it is enough that the plaintiffs went to the banking house in business hours, and there made a payment to one of the principal agents of the corporation, who, by accepting the money, professed to have authority to receive it. His authority will be presumed until the contrary expressly appears. . . . Indeed, I think it would not defeat the purchase if it could be shown that the cashier had been forbidden by his principals to transact such business. A creditor, having the right to purchase from a corporation, must of necessity have the right to deal with the principal officer or agent of the company, who may be found at its place of business. To hold that the creditor must go to the board of directors would be to put it in their power, by refusing or neglecting to meet, to deprive him of a right secured to him by law."

In *Seeber v. People's Bldg. Loan & Sav. Asso.* (1899) 36 App. Div. 312, 55 N. Y. Supp. 364, affirmed in (1900) 54 App. Div. 626, 66 N. Y. Supp. 1144, which is affirmed in (1901) 165 N. Y. 670, 59 N. E. 1130, it was said by way of dictum: "A defendant corporation cannot avail itself of . . . subscriptions and, at the same time, avoid responsibility for the representations of the persons by whom they were obtained." The action was on a contract consummated by agents, not officers, of the corporation.

In *Brooklyn Heights R. Co. v. Brooklyn City R. Co.* (1912) 151 App. Div. 465, 135 N. Y. Supp. 990, it was said: "The stockholders of a corporation may ratify an act which they or the corporation might avoid. The act of ratification must be founded upon knowledge of the situation, or upon acquiescence in the action after knowledge, or in the retention of ben-

efits derived from the voidable action. This principle is well recognized."

In *Cincinnati v. Cameron* (1878) 33 Ohio St. 336, the court, with some hesitation, applied the doctrine of estoppel, and ratification of an unauthorized contract made by an officer of a corporation by the acceptance and retention of its benefits, to a contract made in behalf of a municipality by certain of its officers, saying: "The city has received and is enjoying the benefit of the work. We are fully aware of the difficulty and delicacy of applying the doctrine of estoppel on the ground of the city having had the consideration. It is by no means true that because a corporation accepts and makes use of the work done, that therefore it is estopped. The circumstances may be such that it cannot help itself. A railroad cannot forego the use of its entire track, because it has a dispute with some contractor about extras in some bridge. In such case the argument that the company has accepted and used the work has no force whatever. Upon this ground the doctrine of estoppel only applies in those cases where the corporation may accept or reject with equal convenience."

#### IV. Limitation of rule.

##### a. Retention of benefits without knowledge of contract.

The rule that a corporation ratifies an unauthorized contract executed by an officer, by the acceptance and retention of its benefits, is limited to those contracts of whose execution and terms the corporation has full knowledge, either actually or impliedly.

*United States.*—*Pennsylvania Taximeter Cab Co. v. Cressey* (1911) 112 C. C. A. 81, 191 Fed. 337.

*California.* — *Pacific Vinegar & Pickle Works v. Smith* (1907) 152 Cal. 507, 98 Pac. 85; *Black v. Harrison Home Co.* (1909) 155 Cal. 121, 99 Pac. 494; *Palo Alto Mut. Bldg. & L. Asso. v. First Nat. Bank* (1917) 33 Cal. App. 214, 164 Pac. 1124.

*Colorado.*—*Extension Gold Min. & Mill. Co. v. Skinner* (1901) 28 Colo. 237, 64 Pac. 198; *Rizzuto v. R. W. Eng-*

lish Lumber Co. (1908) 44 Colo. 413, 98 Pac. 728.

Iowa.—Tracy v. Guthrie County Agri. Soc. (1877) 47 Iowa, 27; Groeltz v. Armstrong Real Estate Co. (1902) 115 Iowa, 602, 89 N. W. 21; Thompson v. Des Moines Driving Park (1900) 112 Iowa, 628, 84 N. W. 678.

Massachusetts.—Dedham Inst. for Sav. v. Slack (1850) 6 Cush. 408; Bishop v. Burke (1910) 207 Mass. 133, 98 N. E. 254.

Missouri.—Danglade & R. Min. Co. v. Mexico-Joplin Land Co. (1916) — Mo. App. —, 190 S. W. 35. See also Vogel v. St. Louis Museum, Opera & F. A. Gallery (1879) 8 Mo. App. 587.

Nevada.—Yellow Jacket Silver Min. Co. v. Stevenson (1869) 5 Nev. 224, 3 Mor. Min. Rep. 545.

New Jersey.—Leggett v. New Jersey Mfg. & Bkg. Co. (1832) 1 N. J. Eq. 541, 23 Am. Dec. 728; Beach v. Palisade Realty & Amusement Co. (1914) 86 N. J. L. 238, 90 Atl. 1118.

New York.—Camacho v. Hamilton Bank Note & Engraving Co. (1896) 2 App. Div. 369, 37 N. Y. Supp. 725; Caldwell v. Mutual Reserve Fund Life Asso. (1900) 53 App. Div. 245, 65 N. Y. Supp. 826; Giebler Mfg. Co. v. Kraneberg (1905) 102 App. Div. 471, 92 N. Y. Supp. 843; Lord v. United States Transp. Co. (1911) 143 App. Div. 437, 128 N. Y. Supp. 451.

Pennsylvania.—McKibbin v. Hulton Dyeing & Finishing Co. (1910) 227 Pa. 153, 75 Atl. 1038.

Texas.—Morgan v. Washburn Lumber Co. (1915) — Tex. Civ. App. —, 180 S. W. 911; Kansas City, M. & O. R. Co. v. Sweetwater (1911) 104 Tex. 329, 137 S. W. 1117; Southern Kansas R. Co. v. Logue (1914) — Tex. Civ. App. —, 139 S. W. 11; Hurlbut v. Gainor (1907) 45 Tex. Civ. App. 588, 103 S. W. 409.

Vermont.—Lyndon Mill Co. v. Lyndon Literary & Biblical Inst. (1891) 63 Vt. 581, 25 Am. St. Rep. 788, 22 Atl. 575.

Washington. — Elwell v. Puget Sound & C. R. Co. (1893) 7 Wash. 487, 35 Pac. 376.

Canada.—Hedican v. Crow's Nest Pass Lumber Co. (1914) 19 B. C. 416, 7 A.L.R.—94.

17 D. L. R. 164, 6 West Week. Rep. 969, 28 West. L. R. 37.

Thus, in *Pennsylvania Taximeter Cab Co. v. Cressey* (Fed.) supra, it appeared that an assistant secretary of the defendant company, being authorized to employ the plaintiff to place certain insurance on property of the corporation, entered into a contract with the plaintiff, whereby the corporation agreed to give the former all of its insurance business for a period of years, and pursuant thereto the corporation accepted certain policies secured by the plaintiff, but without knowledge of the existing unauthorized contract. The court held the acceptance of the policies did not create a ratification on the part of the corporation of its agent's unauthorized transaction, stating that the rule of ratification by acceptance of the benefits of an unauthorized transaction has a clear and explicit limitation that the ratification can only be implied where actual knowledge exists as to the character of the contract, or the circumstances are such that knowledge may be readily implied.

In *Pacific Vinegar & Pickle Works v. Smith* (1907) 152 Cal. 507, 98 Pac. 85, an action against the estate of the former president of the plaintiff corporation to recover a loss sustained by his unauthorized act in receiving certain notes of a packing company, the court held that the receipt from the maker of the note of payments thereon did not constitute such a ratification as would preclude the plaintiff from recovering from its own agent for the loss occasioned by his unauthorized act, saying: "In many instances, the transaction is one which the principal could not rescind, because of the ostensible power of his agent. The innocent third party is thus fully protected. But can it with reason or justice be said that, because the principal is thus compelled to accept the consideration from the innocent third party, the agent himself must, of necessity, be held harmless for his violation of duty and breach of trust? If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for



not less than a dollar a bushel, shall sell and deliver it for 50 cents a bushel, there is no power in the principal to rescind the sale. Shall the principal, by accepting the 50 cents, be held to have exonerated his agent from liability for the other 50 cents per bushel? Such a doctrine certainly does not commend itself, and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and, failing so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured."

Where the president of a corporation, without authority, entered into a contract for the sale of a part of the corporate property, the court held that the acceptance of part of the purchase price by an unauthorized agent, without the knowledge of the directors of the corporation, did not constitute a ratification, and the corporation, upon learning of the facts, was not estopped from asserting the lack of authority of its officer to act. *Black v. Harrison Home Co.* (1909) 155 Cal. 121, 99 Pac. 494.

In *Palo Alto Mut. Bldg. & L. Asso. v. First Nat. Bank* (1917) 33 Cal. App. 214, 164 Pac. 1124, it appeared that the secretary of a corporation, without authority, indorsed a check made payable to the corporation, and the money realized from the same was applied to property upon which the corporation held a mortgage. The court held that a subsequent renewal of the mortgage, without notice of the secretary's act, did not amount to a ratification, as the benefits were not received with knowledge of the unauthorized transaction, and, further, that upon notice of the officer's act the company was not bound to disaffirm, quoting from 2 C. J. § 133, as follows: "Where . . . when the principal first acquires knowledge of the facts, conditions are such that he cannot in justice to himself repudiate the whole of the agent's

acts, he may stand upon what he has authorized, and the third person must bear the loss resulting from the dealing with an agent without learning the extent of his authority."

Where it appeared that the secretary-treasurer of a corporation entered into a contract with the plaintiff to pay a commission for the sale of certain property, and, the latter having secured a purchaser, the corporation made a sale of the property, the court held that, the defendant having shown that it had no knowledge of the unauthorized contract of its officer the action taken in selling the property to the purchaser procured by the plaintiff did not constitute a ratification, as the company could not ratify a contract of which it had no knowledge, either actual or implied. *Extension Gold Min. & Mill. Co. v. Skinner* (1901) 28 Colo. 237, 64 Pac. 198.

And in *Rizzuto v. R. W. English Lumber Co.* (1908) 44 Colo. 413, 98 Pac. 728, wherein it appeared that the defendant corporation's manager, without authority, executed a note of the corporation to the plaintiff and placed the proceeds thereof to the account of the company, without the latter's knowledge, the court held that the deposit of the proceeds to the corporation's account and use, without its knowledge of the transaction, did not constitute a ratification, as a ratification of an unauthorized contract executed by an officer, by the retention of the benefits, could only arise where the corporation had knowledge of the transaction.

But compare *Hireen v. R. W. English Lumber Co.* (1909) 46 Colo. 216, 104 Pac. 84, subsequent appeal in (1913) 25 Colo. App. 199, 136 Pac. 475, wherein the court held that money so deposited by a manager to his employer's account could be recovered in an action on money had and received. This case, however, is distinguishable from the *Rizzuto Case*, *supra*, in that the action is not founded on a ratification of the unauthorized contract of a corporate officer.

So, in *Tracy v. Guthrie County Agri. Soc.* (1877) 47 Iowa, 27, the court held that a ratification of an unauthorized

contract, entered into by an officer of a corporation, could only be effected by the corporation, acting with full knowledge of the defective transaction, and could not be inferred from the acts of a few of its members.

In *Groeltz v. Armstrong Real Estate Co.* (1902) 115 Iowa, 602, 89 N. W. 21, the court held that the acceptance of the purchase price of a sale of real property by a third party, pursuant to an unauthorized agreement with the company's president, did not constitute a ratification, where the corporation had no knowledge of the unauthorized agreement, saying: "It is well settled that the acceptance of the benefits of a contract, made by an agent acting without authority, will bind the principal to the terms and conditions of the contract, but the acceptance of the benefit of an unauthorized act will not bind the principal to an agreement made by the agent as to the same subject-matter, which was beyond the scope of his authority, and of which the principal, when accepting the benefit of the authorized act, had no knowledge. . . . In order that the principal may be bound by ratification of an agreement of the agent, made without authority, the principal must have knowledge of the unauthorized act."

So, in *Thompson v. Des Moines Driving Park* (1900) 112 Iowa, 628, 84 N. W. 678, it was held that the corporation must have knowledge of the unauthorized contract of its officer before its acts or the receipt of the benefits of the contract would amount to a ratification.

Also in *Dedham Inst. of Sav. v. Slack* (1850) 6 Cush. (Mass.) 408, it was held that the receipt and retention of payments, without knowledge of an assignment executed by the treasurer of a corporation without authority, did not constitute a ratification of the treasurer's act, as the corporation had no knowledge thereof at the time it received the payments.

In *Bishop v. Burke* (1910) 207 Mass. 133, 93 N. E. 254, it was held that where a corporation, acting blindly and without knowledge of its treasurer's unauthorized contract, ac-

cepted the purchase price of a sale of property made by him, such an acceptance, made without knowledge of the transaction, could not be held to constitute a ratification of the same.

In *Danglade & R. Min. Co. v. Mexico-Joplin Land Co.* (1916) — Mo. App. —, 190 S. W. 35, wherein it appeared that a director and treasurer of a corporation executed a chattel mortgage of the corporate property for the purpose of securing an extension of time from pressing creditors, and the extension of time was received by the corporation for its benefit, but without notice of the unauthorized acts of its officers, the court held that receipt and retention of the advantages of the unauthorized contract, without knowledge of the same, did not constitute a ratification of the officers' transactions, saying: "There is no doubt that the giving of this mortgage was a benefit to plaintiff in securing an extension of time to pay its debt, and it was likewise a detriment to defendant in that it was led to forbear taking action to compel payment. In such case, any knowledge by plaintiff of the mortgage being given by its unauthorized agent or officer would call for a prompt repudiation of such act, and any acquiescence therein, with knowledge, would be a ratification of the unauthorized act. . . . In such cases, however, knowledge must be shown, though it may be shown by circumstantial evidence, and such knowledge will not be presumed because known to the wrongdoing officer of agent."

In *Yellow Jacket Silver Min. Co. v. Stevenson* (1869) 5 Nev. 224, 3 Mor. Min. Rep. 545, it appeared that the president of a corporation, acting without authority, leased certain property of the corporation, and the latter accepted and retained money paid as rent for the property, but credited by the officer as money received for the sale of ores, the company having no knowledge, either actual or implied, of the unauthorized agreement made by its president. The court held that the facts did not show a ratification, as the corporation had

no knowledge of the contract, saying: "Not knowing of such occupation, an assent to it could not, with any degree of consistency, be presumed to be given. Here, there is no evidence that the board of trustees, as such, knew of [defendant's] occupation; and the acceptance of the money paid by him could not raise a presumption of such knowledge, because it was returned as for ores sold, and as such it appears to have been accepted by the company. Were it returned as rent, and so accepted, a tenancy would be created, for that fact alone would be a sufficient notification to the company that [defendant] was occupying a portion of the mine, and the acceptance of the rent would be a sufficient assent to such occupancy. But the law does not force contracts upon persons by presumptions unnatural or improbable. Legal presumptions are natural and rational inferences drawn from known or admitted facts. As, for example, if one accepts rent from another in possession of his property, knowing it to be paid as rent, the natural presumption is that he assents to the possession, and such is the presumption of the law; but it would not be rational or natural to infer an assent to such possession if the money were accepted, the owner not knowing it was paid as rent; nor do we think the law raises it in such a case."

In *Leggett v. New Jersey Mfg. & Bkg. Co.* (1832) 1 N. J. Eq. 541, 23 Am. Dec. 728, the court held that, where the evidence failed to show knowledge on the part of a corporation of an unauthorized issue of a mortgage and bond by certain of its officers, the mere receipt of the proceeds thereof, standing alone, did not constitute a ratification.

And in *Beach v. Palisade Realty & Amusement Co.* (1914) 86 N. J. L. 238, 90 Atl. 1118, wherein it appeared that the vice president of a corporation exceeded his authority in contracting for the corporation for the purchase by it of its own stock and bonds, the court held that the acceptance of the benefits of the contract, without knowledge of its existence, did not constitute a ratification, say-

ing: "Ratification will be implied from acquiescence, or acceptance of benefits, with knowledge of the facts. But there was no such implied ratification, because it appears that the other members of the board had no knowledge thereof."

In *Camacho v. Hamilton Bank Note & Engraving Co.* (1896) 2 App. Div. 369, 37 N. Y. Supp. 725, it appeared that the plaintiff was employed, without authority, by the vice president of the defendant corporation, and he rendered services to the corporation, which were received by it, but without knowledge of the unauthorized contract. It was held that the mere rendering of the services and the acceptance of the benefits thereof by the corporation, but without knowledge of the contract, did not constitute ratification; that in order to prove ratification of an unauthorized contract there must be proof of knowledge of its existence on the part of the corporation, or circumstances from which knowledge may be logically inferred.

In *Caldwell v. Mutual Reserve Fund Life Asso.* (1900) 58 App. Div. 245, 65 N. Y. Supp. 826, the court stated the qualification of the rule of ratification, in general, to be as follows: "There can be no such thing as ratification unless the one ratifying acts with full knowledge of what has been done," holding that an unauthorized contract of an executive committee of a corporation would not be deemed ratified by the part performance of the other party, to the benefit of the corporation, where it appeared that the latter's board of directors never knew of the transaction.

In *Lord v. United States Transp. Co.* (1911) 143 App. Div. 437, 128 N. Y. Supp. 451, wherein it appeared that the general manager of a corporation employed, under a contract, a broker to sublet property owned by the corporation, although he had no authority to do so, and it further appeared that the corporation accepted the benefits of the broker's services, but without knowledge, either actual or implied, of the unauthorized contract of employment, the court held

that it could not be held liable thereon, for the acceptance and retention of the benefits of an unauthorized contract do not constitute a ratification where the same are received with no knowledge of the agreement, but the court said further, stating the theory of ratification: "[But] if the defendant, with knowledge that Scholz made a contract as claimed, accepted a customer produced by him and made the contract on a proposition which he was authorized to submit, it would be bound by the contract on the theory of ratification."

So, in *Giebler Mfg. Co. v. Kranenberg* (1905) 102 App. Div. 471, 92 N. Y. Supp. 843, wherein it was claimed that the application of money received from an unauthorized contract of sale of corporate property, executed by the corporation's president, constituted a ratification of the contract, the court held that it could not have that effect, as it appeared that the money was accepted and applied to the corporate debts without the knowledge and consent of the directors.

In *McKibbin v. Hulton Dyeing & Finishing Co.* (1910) 227 Pa. 153, 75 Atl. 1038, wherein it appeared that the president of the defendant corporation contracted for it, without authority, to purchase certain real property from the plaintiff, and it further appeared that the corporation entered upon and used the property in question, but under an independent contract of leasing and without knowledge of the contract to purchase, the court held that the facts disclosed no ratification of the unauthorized contract to purchase the property.

So, in *Morgan v. Washburn Lumber Co.* (1915) — Tex. Civ. App. —, 180 S. W. 911, the court held that in the absence of evidence of knowledge on the part of the defendant corporation, of an unauthorized contract executed by its president, an issue as to its ratification of the contract did not arise.

In *Kansas City, M. & O. R. Co. v. Sweetwater* (1911) 104 Tex. 329, 137 S. W. 1117, reversing (1910) 62 Tex. Civ. App. 242, 131 S. W. 251, wherein it appeared that the vice president of

a railway corporation, in order to secure for it a right to lay its tracks through the streets of a city, contracted, without authority, to bind the corporation to maintain its offices and shops in the city, and subsequently, and in view of the above agreement, an ordinance was passed giving the corporation the right to use the streets, and the latter availed itself of this benefit, but without knowledge of the officer's unauthorized agreement, the court held that such a receipt of the benefits, without knowledge of the transaction, did not constitute a ratification of the same.

So, in *Southern Kansas R. Co. v. Logue* (1914) — Tex. Civ. App. —, 189 S. W. 11, affirmed in (1914) 106 Tex. 445, 167 S. W. 805, the court held, following the opinion in *Kansas City, M. & O. R. Co. v. Sweetwater* (Tex.) *supra*, that the acceptance of land by a corporation did not constitute a ratification by it of a secret agreement between its president and the grantor, whereby the corporation was to erect and maintain a railroad station, no evidence being shown from which knowledge, either actual or implied, on the part of the corporation, could be reasonably inferred.

In *Hurlbut v. Gainor* (1907) 45 Tex. Civ. App. 588, 103 S. W. 409, wherein it appeared that a corporation purchased by patent from the state certain railroad surveys, but without the knowledge that it was enabled so to do by reason of an unauthorized contract made by its president with a third person, enlisting his services in procuring the patents, and, as it appeared, pursuant to whose performance they were obtained, the court held that the purchase of the lands, and therefore the appropriation of the benefits of the unauthorized contract, did not constitute a ratification of the same, as it did not appear that the corporation had knowledge of the transaction.

In *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* (1891) 68 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575, it appeared that the president of the defendant corporation purchased a quantity of lumber to be used in mak-

MINNESOTA LOAN & TRUST COMPANY, Exr., etc., of Curtis H. Pettit,  
Deceased, Appt.,

v.

DEBORAH M. PETTIT et al., Respts.

*Minnesota Supreme Court—December 5, 1919.*

(— Minn. —, 175 N. W. 540.)

**Executor and administrator — expense of appeal from rejection of will.**

An executor nominated in a will, though acting in good faith, is not entitled to reimbursement out of funds of the estate for his services, expenses, and attorney's fees, in an unsuccessful effort to sustain the will upon appeal against a contest by the widow and sole heir on the ground that the will is void under the statute.

[See note on this question beginning on page 1499.]

Headnote by QUINN, J.

(Dibell and Hallam, JJ., dissent.)

**APPEAL** by the executor of the estate of Curtis H. Pettit, deceased, from a judgment of the District Court for Hennepin County (Steele, J.) affirming an order of the Probate Court disallowing reimbursement from the funds of said estate for his services, expenses, and counsel fees, and reversing an order allowing a certain amount for services in caring for the estate subsequent to the filing of the final decree. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cobb, Wheelwright, & Dille  
and J. M. Martin for appellant.

Mr. James E. O'Brien, for respondents:

An executor, which is also the trustee, under certain invalid trust provisions in a will, is not entitled to reimbursements out of the funds of the estate for attorneys' fees paid and for executors' fees, and for printing and other charges incurred and made necessary in unsuccessful appeals from the decree of distribution, distributing said property to the rightful heirs.

Kelly v. Kennedy, 133 Minn. 278, L.R.A.1917A, 448, 158 N. W. 395, Ann. Cas. 1918D, 164; State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129; State v. Royal Mineral Asso. 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918A, 145; Meniffee v. Ball, 7 Ark. 520; 2 Schouler, Wills, Exrs. & Admrs. § 1247; Kelly v. Davis, 37 Miss. 76; Andrews v. His Administrators, 7 Ohio St. 143; Re Soulard, 141 Mo. 642, 43 S. W. 617; Butler v. Bocock, 160 Ill. App. 501; Brown v. Eggleston, 53 Conn. 110, 2 Atl. 321; Reimer's Estate, 159 Pa. 212, 28 Atl. 186; Sheetz's Ap-

peal, 100 Pa. 197; Re Marrey, 65 Cal. 287, 3 Pac. 896; Bates v. Ryberg, 40 Cal. 463; Dewar's Estate, 10 Mont. 422, 25 Pac. 1025; Re Stilphen, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158.

An executor as such is not such an aggrieved party as will permit him to appeal from a decree of distribution.

Casey v. Brabec, 111 Minn. 43, 137 Am. St. Rep. 531, 126 N. W. 401; Re Hardy, 35 Minn. 193, 28 N. W. 219; Re Williams, 122 Cal. 76, 54 Pac. 386; Re Marrey, 65 Cal. 287, 3 Pac. 896; Bates v. Ryberg, 40 Cal. 463; Dewar's Estate, 10 Mont. 422, 25 Pac. 1025; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; Virden v. Hubbard, 37 Colo. 37, 86 Pac. 113; Stineman's Appeal, 34 Pa. 394; Garman's Estate, 32 Pa. Superior Ct. 494; Re Stilphen, 100 Me. 146, 60 Atl. 888, 4 Ann. Cas. 158; Isham v. New York Asso. 177 N. Y. 218, 69 N. E. 367; Bryant v. Thompson, 128 N. Y. 426, 13 L.R.A. 745, 28 N. E. 522; Re Hodgman, 140 N. Y. 421, 35 N. E. 600; Re Richmond, 63 App. Div. 488, 71 N. Y. Supp. 795; Sayre v. Sayre, 16 N. J. Eq. 505; Exton v. Zule, 14 N. J. Eq. 501; Wilson v. University of Colorado, 46 Colo. 100, 102 Pa. 1088; Garrett v.

Kerney, 107 Md. 501, 68 Atl. 1051; Cleaveland v. Draper, 194 Mass. 118, 80 N. E. 227.

Quinn, J., delivered the opinion of the court:

Curtis H. Pettit died intestate May 11, 1914, at his home in Hennepin county, leaving him surviving, his widow, Deborah M. Pettit, and their only child, Bessie P. Douglas, who had three minor children. He left a large estate, consisting of valuable stocks, bonds, real estate, and mineral interests in northern Minnesota, from which large royalties were derived. His will was dated January 22, 1908, in which appellant was nominated executor and trustee. By the terms of the will the entire estate, aside from household furniture, wearing apparel, and personal effects, \$2,000 for the upkeep of the lots in the cemetery, and \$1,000 to a servant, was bequeathed and devised to appellant in trust, to hold, manage, and control during the life of his wife, their daughter, her husband and their three children, and for twenty years after the death of the survivor of them, when the trustee was to turn over the property and net accumulations thereto to the children of the three children of Mrs. Douglas.

At the time of the execution of the will, Mrs. Pettit indorsed thereon her consent to the provisions thereof. On May 15, 1914, Mrs. Douglas presented the will to the probate court of Hennepin county, and asked that it be admitted to probate. The will was admitted to probate, appellant was appointed and duly qualified as executor, and thereafter entered upon the discharge of its duties. At the hearing to admit the will to probate Mrs. Douglas filed notice that she reserved the right to object and contest any provisions of the will.

On June 20, 1914, Mrs. Pettit filed with the probate court a rescission and withdrawal of her consent to the provisions of the will, and gave notice of her intention to take, in lieu of the provisions of the will, the share of her husband's estate to

which she would have been entitled had there been no will. Appellant opposed this action on the part of Mrs. Pettit. A hearing was had thereon, which resulted in a decree of the probate court in favor of the widow, which was affirmed by this court upon certiorari. State ex rel. Minnesota Loan & T. Co. v. Probate Ct. 129 Minn. 442, L.R.A.1915E, 815, 152 N. W. 845.

The executor then proceeded to administer the estate in the usual manner, and on August 6, 1915, filed its final account, and asked that the estate be distributed. From such account it appeared that all of the debts, the legacy of \$1,000, and the expenses of administration including \$5,993.72 for attorneys' and executor's fees, had been paid in full, and that there remained in the hands of the executor for distribution personal property of the value of \$148,038.68 and the real estate, including the mineral holdings.

On January 28, 1916, the probate court made a decree of distribution, adjudging and decreeing that the provisions of the will, except as to the legacy of \$1,000, were invalid, inoperative, and void as a disposition of real and personal property under the laws of this state; that Deborah M. Pettit, widow of deceased, was entitled to an undivided one third of the real and personal property then in the hands of the executor, and that Bessie P. Douglas, a daughter of deceased, was entitled to two thirds thereof. The widow and heirs were satisfied with the decree of distribution. The debts and expenses of administration had all been paid. The estate had been fully administered, and the property was intact with the executor. The executor then appealed, from that part of the decree of distribution which gave the daughter two thirds of the estate, to the district court where an affirmance was had. Thereafter it appealed from the judgment of the district court to this court, and the judgment was affirmed. Minnesota Loan & T. Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

In February, 1917, the executor filed a supplement to its final account, setting forth the receipts and disbursements subsequent to the rendering of the final account, in which it asked credit for \$5,000 as executor's fees, \$4,900 for legal services, and \$437.84 for transcripts and printing, all in connection with the two appeals following the decree of distribution.

The widow and daughter objected to the allowance of these items, upon the ground that they were charges for disbursements made by the executor and trustee under an invalid trust, in connection with unsuccessful appeals by it from the decrees of the probate and district courts. The probate court disallowed all of such claims, except that it allowed the executor \$1,800 for services in caring for the estate subsequent to the filing of the final decree. Thereupon the executor appealed to the district court from that part of the decree of the probate court disallowing such items, and the widow and daughter appealed from the allowance of the item of \$1,800.

In January, 1919, the district court filed its findings of fact and conclusions of law, holding that all the items for which credit was asked were for disbursements in unsuccessful appeals by the executor from the decree of distribution, and affirmed the action of the probate court in disallowing the same and reversed the order allowing the item of \$1,800. Judgment was entered accordingly, and the executor appealed. No question was raised as to the competency of the testator to make his will, nor as to the good faith of the executor throughout.

The question is presented: Is an executor nominated in a will entitled to reimbursement from the funds of the estate for services, expenses, and counsel fees in an unsuccessful appeal to sustain the will, the heirs contesting upon the ground that the will is void under the Statute of Trusts. The identical question, in principle, was passed upon by this court in the case of *Kelly v. Ken-*

*nedy*, 133 Minn. 278, L.R.A.1917A, 448, 158 N. W. 395, Ann. Cas. 1918D, 164. There the executor was nominated in the will, he presented the same for probate, the sole heir contested upon the ground of want of testamentary capacity in the testatrix. The will was allowed in the probate court, and the allowance was affirmed in the district court. On appeal there was a reversal. Upon the second trial in district court the will was disallowed, and upon appeal there was an affirmance. The probate court allowed the executor for his services and disbursements for expenses and counsel fees in connection with the contest of the will. Upon appeal the district court reversed the probate court and disallowed the claims. Throughout the executor acted in good faith. In that case it was held that no legal duty rested upon the executor to procure probate of the will, and that he was not entitled to payment out of the funds of the estate for such disbursements. No different rule applies in this case because the contest is upon the ground that the will is void under the statute, and we see no distinction such as would tend to change the rule adopted in the case cited.

Affirmed.

*Dibell, J.*, dissenting:

I am unable quite to agree with the result reached. The trust created by the will provided for an accumulation of rents and profits of land. At the expiration of twenty years after the death of the testator's wife and his daughter and her husband and their three children there was to be a distribution of the proceeds among the testator's three grandchildren and the children of any deceased grandchild by right of representation; and if it so happened that there was no living descendant of the testator's daughter at the expiration of the trust period the proceeds were to be distributed among the collateral blood relatives of the testator and his wife. This

Executor and administrator—expense of appeal from rejection of will.

was the clearly stated purpose of the testator. Its consummation was happily prevented by Gen. Stat. 1913, §§ 6687, 6688. The will was probated without opposition, the trust company was nominated executor by the will, and was appointed by the court and discharged its duties as such. It was also the trustee in the trust created by the devise. In its efforts to uphold the trust it sought to bring about the result which the testator wished. The trust provision could not be disregarded. The daughter could not safely take her portion as heir, even if she were allowed to have it, without an adjudication of a competent court that the trust was invalid. The ultimate and uncertain beneficiaries contemplated by the trust, not born at the time of the death of the testator, could not participate or be represented in the determination of its validity. Still the testator wished, if there should be beneficiaries within the class defined by him, that they take. His purpose could not be given effect, nor the interests of the possible beneficiaries guarded, unless the executor undertook to maintain the will, for the others were opposed. Its undertaking was in good faith. Under the circumstances it seems to me that it was authorized to take at the expense of

the estate the opinion of the highest court of the state upon the validity of the trust. The rule stated in *Kelly v. Kennedy*, 133 Minn. 278, L.R.A.1917A, 448, 158 N. W. 395, Ann. Cas. 1918D, 164, was advisedly adopted as one likely to work well, and it is to be followed. It does not seem to me that allowing the executor fees under the circumstances of this case is opposed to it.

The trust company, in its capacity as executor or trustee, cannot disassociate itself from itself as a private corporation. Whether the fact that the upholding of the trust would result in profit to itself through the long years of administration should affect the amount of the allowance is not for discussion in this dissent.

Hallam, J., dissenting:

I think the better rule is that when a will makes provision for beneficiaries not yet in being, the court may in its discretion make allowance out of the estate for the fees of an attorney who in good faith conducts litigation to sustain the will for their benefit. As a practical proposition this seems to be necessary. Otherwise the interests of such beneficiaries could not be protected at all.

Petition for rehearing denied.

### ANNOTATION.

#### Right of executor to an allowance for expenses incurred in unsuccessful attempt to uphold particular provisions of will.

In the reported case (*MINNESOTA LOAN & T. Co. v. PETTIT*, ante, 1496) it will be observed that notwithstanding the executor's effort in good faith to carry out the testator's wish and sustain the trust for which he provided in his will, a majority of the court refused an allowance reimbursing the executor for the expenses and attorneys' fees incurred in unsuccessfully attempting to uphold the trust provisions of the will. It will be noticed that the dissenting opinion distinguishes the case from the ordinary case where an allowance is sought for

expenses incurred in unsuccessfully attempting to uphold an entire will attacked on the ground of lack of testamentary capacity or similar ground, and where the executor by hypothesis is not furthering the testator's intention.

In some cases, however, an allowance has been made for expenses incurred in unsuccessfully attempting to uphold particular provisions of a will.

Thus, in *Re Title Guaranty & T. Co.* (1906) 114 App. Div. 778, 100 N. Y. Supp. 243, affirmed without opinion in (1907) 188 N. Y. 542, 80 N. E. 1121,



an executor was held entitled to an allowance from the estate for counsel fees incurred in good faith in unsuccessfully seeking to uphold a provision of a codicil reducing the gift to one of testator's daughters in case she married a certain man, it appearing that after the daughter's marriage to such man she attacked the provision of the will and it was declared invalid in the lower court, and that on appeal by the executor to the appellate division it was unanimously reversed, but that on appeal from this decision it was unanimously reversed by the court of appeals. The court with respect to the disallowance of counsel fees said: "I know of no principle of law which can support this ruling. There is no claim of bad faith, or that the amount expended is excessive. The conduct of the executors is to be tested by the rule of good faith, and not by mere success. It was both their right and their duty to endeavor to uphold the will, so that the wishes of the deceased should be carried out if they lawfully might be. That the question at issue was a difficult one to solve is apparent from the conflicting decisions of the appellate division and the court of appeals. The executors were not compellable at their personal risk to acquiesce in the decision of the special term, and its reversal by the appellate division must be regarded as a complete justification of their course in taking an appeal. With that decision in their favor they could not, without violating their duty, have refused to defend it in the court of appeals. In view of the magnitude of the estate, they were justified in the employment of eminent counsel and in the employment of more than one, always assuming, as I have said, that their good faith in the transaction is not impugned."

And in *Baldwin v. Barber* (1912) 148 Ky. 370, 146 S. W. 1124, modified on other grounds in (1912) 151 Ky. 168, 151 S. W. 686, Ann. Cas. 1915A, 14, where the jury in an action contesting the will returned a verdict sustaining the will with the exception of certain items, and the executors prosecuted an unsuccessful appeal from the

overruling of their motion for judgment probating the entire will, notwithstanding the verdict, it was held that they were entitled to an allowance for counsel fees incurred. The court said: "It was the duty of the executors to resist the contest and to use all legal and honorable means to sustain the will in all its parts. To this end they had authority to employ counsel and to agree on the payment of reasonable fees. Their duties did not cease with the trial in the lower court. In view of the peculiar verdict rendered by the jury, it was right and proper for them to prosecute an appeal to this court, and this without regard to whom the appeal might affect."

In *Gilbert v. Bartlett* (1872) 9 Bush (Ky.) 49, where the will created trusts and made it the duty of the executor to administer them, he was held entitled to costs incurred in attempting to uphold the will, although he was unsuccessful. The court said: "The ordinary costs incurred in the effort to probate the will of the decedent should not be charged against the appellee. The paper purporting to be Gilbert's will makes a devise to his executor of large sums of money, to be held and expended by him for certain persons therein named. Other trusts are also created by this paper, making it the duty of the executor to protect the interests of the beneficiaries therein named. This he could do in no other way than to offer the will for probate, and in such a case, where the executor acts in good faith, in order to probate the will, we see no reason why he should be compelled to pay the costs, although the paper offered for probate is rejected."

While not directly in point the case of *Greenwood v. Zausch* (1915) 190 Mo. App. 638, 176 S. W. 271, is of interest on the question here involved. In that case the executor was charged by the will with the duty of looking after the testatrix's real estate during administration, paying her debts, and paying a certain allowance monthly to her husband, and the executor was held entitled to an allowance of attorneys' fees incurred in successfully

defending a suit brought by the testatrix's husband by which he claimed one half of his wife's real estate in lieu of the benefits given him under the will. The court said: "By the provisions of the will of Mary Jamison, the executor, who was a party to that suit, was directed to take possession of the real estate of which the testatrix died seised, as well as the personal property, and, out of such personalty and out of the net rents of such realty, pay the liabilities of the estate, etc.; and by a further provision the executor was required to hold and manage the real estate during the time of the administration, make all needful repairs, pay taxes, insurance, etc., thereon. It is entirely clear that the executor was made a trustee for the time under the will with respect to the real estate, and, indeed, the principal portion of the personal estate of Mary Jamison came into the hands of her executor through rents monthly collected on the real estate she owned at the time of her death.

It appearing that the executor was a party defendant to the suit instituted by Jesse T. Jamison by which it was sought to take one half of the real estate which yielded the income and constituted the principal part of the corpus of the personal estate, it was competent to charge the portion of the attorneys' fees, as was done, which accrued in defending such trust, against the estate of which he was executor. Obviously this provision of the will created a trust as therein suggested on the part of the executor to manage and control the real estate during the administration, collect the rents, and turn the net income into the personal estate. In protecting the real estate from assault, the executor protected the fount from which were supplied the coffers of the personal estate, and in this view it was well enough to charge such estate with the expense of defending the title to the realty, for such was defending the trust." J. T. W.

WILLIAM F. BEHSMAN, Appt.,

v.

EDNA M. BEHSMAN, Respt.

*Minnesota Supreme Court—November 7, 1919.*

(— Minn. —, 174 N. W. 611.)

**Husband and wife — annulment of marriage for epilepsy.**

1. In an action to annul a marriage contract upon the ground that one of the parties thereto was an epileptic at the time of the marriage, proof that the defendant was an epileptic at the time of such marriage is not, in the absence of a showing of fraud on the part of the afflicted party in concealing the epileptic condition, sufficient to warrant a decree of annulment.

[See note on this question beginning on page 1503.]

— failure to recognize epilepsy as cause for annulling marriage.

2. The legislature not having prescribed epilepsy as a ground for annulment of marriage, and the courts of the state never having recognized that disease as a cause for nullifying a

marriage contract, the judgment of the trial court denying such relief is justified, notwithstanding a finding of fact that the defendant was an epileptic at the time of the marriage.

[See 9 R. C. L. 269.]

**APPEAL** by plaintiff from a judgment of the District Court for Steele County (Childress, J.) in favor of defendant in a suit for the annulment of a marriage. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Moonan & Moonan, for appellant:

An epileptic cannot contract marriage.

Hively v. Golnick, 123 Minn. 498, 49 L.R.A. (N.S.) 757, 144 N. W. 213, Ann. Cas. 1915A, 295; State v. Yoder, 113 Minn. 503, L.R.A. 1916C, 686, 130 N. W. 10.

The concealment of the fact from plaintiff that defendant was epileptic was a fraud within the meaning of the statute.

Gould v. Gould, 78 Conn. 246, 2 L.R.A. (N.S.) 531, 61 Atl. 604.

Inasmuch as the public policy of the state forbids such marriages, it may be doubted whether the subsequent cohabitation, even with the knowledge of the epileptic condition, would validate the marriage.

Hall v. Industrial Commission, 165 Wis. 364, L.R.A. 1917D, 829, 162 N. W. 312, 16 N. C. C. A. 77; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; Spencer v. Pollock, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; Thompson v. Nims, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Severa v. Beranak, 138 Wis. 144, 119 N. W. 814; Sims v. Sims, 121 N. C. 297, 40 L.R.A. 737, 61 Am. St. Rep. 665, 28 S. E. 407.

Plaintiff is within his rights in asking that the nullity of the marriage be judicially declared.

State v. Smith, 101 S. C. 293, 85 S. E. 958, Ann. Cas. 1917C, 149; McGill v. McGill, 99 Misc. 86, 163 N. Y. Supp. 462.

Messrs. A. W. Sawyer and F. W. Sawyer, for respondent:

Neither fraud nor concealment of epilepsy are in the case. Even if they were, they furnish no ground for annulment.

Lyon v. Lyon, 230 Ill. 366, 13 L.R.A. (N.S.) 996, 82 N. E. 850, 12 Ann. Cas. 25; Lewis v. Lewis, 44 Minn. 124, 9 L.R.A. 505, 20 Am. St. Rep. 559, 46 N. W. 323.

The existence of epilepsy at time of marriage is not ground for annulment.

Lewis v. Lewis and Lyon v. Lyon, supra; Peugnet v. Phelps, 48 Barb. 566; McGill v. McGill, 179 App. Div.

343, 166 N. Y. Supp. 397; Elser v. Elser, 160 N. Y. Supp. 724.

Quinn, J., delivered the opinion of the court:

Plaintiff and defendant have been residents of this state since their birth. They were married in June, 1907. They lived together as husband and wife until shortly prior to September, 1915, when the defendant, by reason of and as a result of epilepsy, was adjudged insane and committed to the hospital, where she has since been detained. There are three children, the issue of such marriage, of the ages of eight, five, and three years; but they do not appear to be afflicted with such malady.

An examination of the record as returned leads us to the conclusion that the trial court was right in denying the relief asked for in the complaint. The findings of the trial court are, in effect, that the parties were married on June 7, 1907; that the issue of such marriage is three children; that the defendant is and has been ever since she was two years of age an epileptic; that said disease continued to grow on the defendant until September 3, 1915, when she became insane and was committed to the hospital for the insane at Rochester; that the defendant is becoming more irrational and violent and is not expected to improve in her condition; that the plaintiff and defendant lived together as husband and wife until shortly before defendant became insane; that plaintiff did not know that the disease with which defendant was afflicted was epilepsy until about September 3, 1915; and that this action was commenced in November, 1918.

As conclusions of law the court found that plaintiff is not entitled to have said marriage annulled and set aside, but that he is entitled to the custody of said children.

Plaintiff brings this action to an-

nul the marriage, alleging solely that at the time of such marriage, and long prior thereto, and ever since, defendant was an epileptic, all of which was unknown to plaintiff. There is no allegation or contention that the defendant, in any manner, attempted to conceal her real ailment from the plaintiff, nor that she knew or had any conception of the nature of the malady with which she was afflicted. The question then is whether a marriage is voidable upon the sole ground that one of the parties thereto was an epileptic at the time of the marriage, in the absence of any showing of fraud or concealment, and where it does not appear that the defendant ever knew that her trouble was epilepsy. Section 7090, Gen. Stat. 1915, provides that "no marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; nor between parties who are nearer of kin than second cousins, whether of the half or whole blood computed by the rules of the civil law; nor between persons either of whom is epileptic, imbecile, feeble-minded or insane."

Section 7106 of the statute provides that all marriages which are prohibited by law on account of con-

sanguinity, or on account of either party having a former husband or wife then living, if solemnized within the state, shall be absolutely void, and § 7107 provides that when either party to a marriage is incapable of assenting thereto for want of age or understanding, or when the consent of either has been obtained by force or fraud, and there is no subsequent voluntary cohabitation of the parties, the marriage may be annulled and shall be void from the time its nullity is adjudged. It will be observed that the legislature has not prescribed epilepsy as a ground for annulment of marriage, nor have the courts of this state recognized that disease as cause for nullifying the marriage contract. Apparently, the defendant was in such state of health at and subsequent to the time of her marriage that plaintiff lived with her for eight years and raised a family of three children before discovering the nature of the malady under which she was laboring. She had concealed nothing from the plaintiff as to her ailments. We are of the opinion that the judgment should stand.

Affirmed.

Husband and wife—failure to recognize epilepsy as cause for annulling marriage.

—annulment of marriage for epilepsy.

## ANNOTATION.

### Epilepsy as ground for avoiding marriage.

The decisions involving epilepsy as a ground for annulment of marriage are comparatively few in number, and are so divergent in their conclusions that no general rule on the subject can be formulated.

However, the cases readily resolve themselves into two classes, viz., those wherein the decision is influenced by the existence of a statute prohibiting marriage between persons either of whom is epileptic, and those decided in the absence of such a statute. In the latter class fall the decisions in Illinois and in New York. In Illinois it has been held that the concealment

at the time of marriage of the fact that one of the contracting parties is an epileptic is not such a fraud as will support an action for annulment under the ordinary statute providing therefor. *Lyon v. Lyon* (1907) 230 Ill. 366, 13 L.R.A. (N.S.) 996, 82 N. E. 850, 12 Ann. Cas. 25. In that case it appeared that the parties were married in New York, and subsequent to the marriage the plaintiff learned that his wife was an epileptic, subject to fits occurring at irregular though frequent intervals, and covering a period of more than ten years immediately prior to their marriage. The husband

had known of these attacks several years prior to the marriage, but it was alleged that his wife had falsely and fraudulently represented to him that she had been entirely cured of her epilepsy. Holding that no fraud sufficient to warrant a decree of annulment was shown, the court said: "The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation,—of something making impossible the performance of the duties and obligations of that relation or rendering its assumption and continuance dangerous to health or life.

. . . The statute of New York mentioned in the bill merely declares the law as it exists in Illinois,—that a marriage procured by fraud may be annulled. The kind and degree of evidence required for such purpose must be determined by the court in which the suit is brought, according to the law of the forum. The bill proceeds on the theory that the appellant's consent to the marriage was obtained by fraud, and sets out the facts constituting the fraud. Whether those facts constitute fraud must be determined by the law of the forum, and the superior court did not err in sustaining the demurrer to the bill."

In New York the two decisions on the subject are unsatisfactory and can hardly be said to establish any rule with respect to the concealment of epilepsy as a fraud for which a marriage may be annulled, since in both decisions the conclusion seems to be reached merely that there was no fraudulent concealment.

Thus, in *Elser v. Elser* (1916) 160 N. Y. Supp. 724, the husband sued to annul the marriage on the ground that he was induced to enter into the marriage contract by the fraud of his wife in concealing from him that she was an epileptic, and in leading him to believe that she was in good health. In a brief opinion dismissing the complaint, the court said: "As to the charge of fraud, I find there was none. I had a physician called to examine the wife, and he testified that the statistics show that in about 16 per cent of the epileptic cases covered by

the records from which the statistics were compiled the taint was inherited. The plaintiff's counsel urges that public policy requires an annulment decree in order to prevent the coming into the world of progeny tainted by an epileptic strain, but we have not as yet come to that refinement of civilization."

In *McGill v. McGill* (1917) 179 App. Div. 343, 166 N. Y. Supp. 397, affirmed without opinion in (1917) 226 N. Y. 673, 123 N. E. 877, the husband sued for annulment because of the wife's alleged fraud in concealing from him the fact that at the time of the marriage she was suffering from epilepsy. It appeared that prior to the marriage the husband was acquainted with the fact that his future wife was subject to attacks which had been diagnosed as epilepsy. The husband consulted another physician, who assured him that the defendant was not suffering from epilepsy. Soon after the marriage of the parties it was found that the defendant was in fact epileptic. The plaintiff attended her during her frequent seizures, and with full knowledge of her trouble he lived and cohabited with her as husband and wife. The appellate court, after reviewing the evidence, said: "We are, therefore, of the opinion that the finding of the learned trial court that plaintiff was induced to marry defendant through any deception or misrepresentation on her part was clearly contrary to and against the weight of evidence. The legislature has not prescribed epilepsy as a ground for annulment of marriage, and so far as we know the courts of this state have never recognized that disease as cause for nullifying the marriage contract. That the defendant should suffer from a perhaps incurable malady, resulting in a severance of the marriage relations of the parties, is unfortunate. But the misfortune is not alone that of plaintiff. Doubly unfortunate is the lot of the defendant, who, though herself innocent of fault, must go through life a victim of a terrible malady and in constant dread of recurring seizures, of the approach of which she has no warning, neces-

sitating her virtual imprisonment apart from those to whom she is bound by ties of family and friendship. That she should be forsaken in her distress by one in whose keeping she has confided all that she has, and who by the dictates of humanity should, of all others, sustain her in her suffering, cannot but add to the terrible burden under which she must struggle until a merciful death shall relieve her. That the great misfortune of this defendant should be invoked to relieve plaintiff from obligations which he should discharge with cheerfulness and affection for his afflicted wife does not appeal to our sense of human justice. . . . The evidence conclusively shows that plaintiff voluntarily cohabited with defendant as his wife with full knowledge of the facts constituting the alleged fraud upon him. Such voluntary cohabitation precludes any annulment of the marriage by reason of the alleged fraud."

In this connection it may be noted that the New York courts have not hesitated to annul a marriage for fraud consisting in the concealment of a venereal disease (see annotation in 5 A.L.R. 1022), and a similar ruling with respect to the concealment of epilepsy may reasonably be expected when, if ever, the question is squarely presented for decision.

In those jurisdictions wherein statutes exist which prohibit marriage by or with an epileptic, the decisions are not altogether harmonious as to the validity of a marriage entered into contrary to the provisions of the statute. While the courts apparently agree that such a marriage is voidable merely, and not void, they are not in accord as to the circumstances under which a decree of nullity should be entered. Thus, the Connecticut statute provides that "no man or woman, either of whom is epileptic, imbecile, or feeble-minded, shall intermarry, or live together as husband or wife, when the woman is under forty-five years of age." In *Gould v. Gould* (1905) 78 Conn. 242, 2 L.R.A. (N.S.) 531, 61 Atl. 604, it was held that while a marriage contracted in violation of the statute is not void, it is voidable

on direct attack, and that concealment by one of the parties at the time of marriage of the fact that he or she is epileptic constitutes such fraud as will warrant annulment at the suit of the injured party. In that case it appeared that in 1899 the plaintiff, at the age of twenty-two, married the defendant, who was an epileptic. In 1908 a child was born, issue of the marriage, and soon afterwards the plaintiff, then first learning of the statute mentioned, left the defendant, and brought suit for a divorce or a decree that the marriage was null and void. In her complaint she alleged that the defendant, though an epileptic, falsely and fraudulently concealed this fact from her and represented that he had never had epilepsy, in consequence of which representations she, believing them to be true, had been induced to enter the contract of marriage. The court said: "The fraud which makes the contract of marriage fraudulent, as that word is used in the Statute of Divorce, is a fraud in law and upon the law. Such a fraud is accomplished whenever a person enters into that contract knowing that he is incapable of sexual intercourse, and yet, in order to induce the marriage, designedly and deceitfully concealing that fact from the other party, who is ignorant of it and has no reason to suppose it to exist. Whether such incapacity proceeds from a physical or a merely legal cause is immaterial. The prohibition of the Act of 1895 fastened upon the defendant an incapacity which, if unknown to the plaintiff and by him fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage, in the eye of the law, fraudulent. Whether, on such a state of facts, he could ask for a divorce, or would be precluded from thus taking advantage of his own wrong, we have no occasion to determine. The plaintiff could. The superior court has power to pass a decree of divorce from the bonds of matrimony in favor of a party to a marriage, not an epileptic, who has been tricked into it by the other party, who was an epileptic, through his fraud in

inducing a belief that he was legally and physically competent to enter into the marital relation and fulfil all its duties, when he knew that he was not."

In the case of *Jansa's Estate* (1919) 169 Wis. 220, 171 N. W. 947, it was alleged on collateral attack that a marriage with an epileptic was void under the Wisconsin statute, the provisions of which are very similar to those of the Connecticut statute. The attack on the marriage was made by the sisters of a decedent, who claimed his estate as against his widow. The trial court found that the widow did not know that her husband was an epileptic and that the marriage was entered into in good faith, without any intention on the part of either of the parties thereto to violate the laws of the state. On these facts, the appellate court held, citing with approval *Gould v. Gould* (Conn.) supra, that a marriage in violation of the statute was voidable, but not void, and that the intention of the legislature to that effect was further evidenced by the fact that another section of the Wisconsin statutes was amended in 1917, subsequent to this particular marriage, so as to make an epileptic incapable of contracting marriage. A judgment for the widow was, therefore, affirmed.

In the reported case (*BEHSMAN v. BEHSMAN*, ante, 1501) it is held that under the Minnesota statute, which declares that "no marriage shall be contracted . . . between persons either of whom is epileptic," a marriage is not voidable at the suit of the husband on the sole ground that the wife was an epileptic at the time of the marriage, in the absence of any showing of fraud or concealment, it not appearing that the wife ever knew that her trouble was epilepsy. It is perhaps fairly deducible from this decision that if fraud or concealment had been shown, as in the Connecticut case, a decree of annulment would have been granted.

The case of *Kitzman v. Werner* (1918) 167 Wis. 808, 166 N. W. 789, however, seems to take a somewhat different view of the Minnesota stat-

ute. In that case, the action was brought by a wife to have her marriage declared valid and asking a stay of proceedings instituted by the defendant to have the plaintiff's husband committed to an insane asylum. The defendant, who, prior to the marriage, had been appointed guardian to the plaintiff's husband, answered, alleging that the marriage was void under the statutes of Minnesota, where the marriage ceremony was performed. On the trial the fact was established that the plaintiff's husband had been subject to attacks of epilepsy. The court held that the marriage "must be considered under the laws of the state of Minnesota, where it was performed, as voidable merely, and not void," but declared that under the facts as shown a decree of annulment should be entered. The court said: "The general proposition that a marriage valid where contracted is valid everywhere (*Hall v. Industrial Commission* (1917) 165 Wis. 364, L.R.A.1917D, 829, 162 N. W. 312, 16 N. C. C. A. 77) carries with it as a necessary corollary the further proposition that such marriage comes into a sister jurisdiction with all its inherent infirmities as well as strength. It can acquire no greater sanctity or impregnability by such removal than it had where solemnized. When properly challenged here it can have acquired, by reason of the parties returning to this state to live, no more immunity from attack than it would have had if they, from the time of the ceremony, and thereafter, had lived in Minnesota and the action was there instituted. This marriage in Minnesota was solemnized contrary to the express prohibition of the statutes of that state and contrary to its public policy. It was solemnized there after a fraud upon the clerk of the district court, in his duty to ascertain and to be satisfied that there was no legal impediment to such marriage, had there been perpetrated, either by the concealment by or false statement of the defendant *Kitzman* as to his condition on a material and statutory requirement. It could not properly be held that the public policy of Minnesota, in prohibiting an epileptic from contract-

ing a lawful marriage, was contrary or repugnant to the then public policy of this state, inasmuch as this state then prohibited the marriage of insane persons and idiots; for, although there is a distinction both in the legal and medical sciences between epilepsy and insanity (*Oborn v. State* (1910) 143 Wis. 249, 276, 31 L.R.A. (N.S.) 966, 126 N. W. 737), yet the court may properly take judicial notice that epilepsy is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity. *Gould v. Gould* (1905) 78 Conn. 242, 2 L.R.A. (N.S.) 581, 61 Atl. 604. We should be loath to declare, if not indeed prevented from declaring, that such a prohibition by Minnesota was contrary to the public policy of this state.

. . . The marriage ceremony, therefore, which plaintiff has asked the courts of this state to confirm in this action, was, when performed, contrary to the public policy of the state resorted to by the plaintiff for the sole purpose of performing the ceremony, and we shall give it no higher value here than it had there."

It may well be doubted whether the decision in *Kitzman v. Werner* (Wis.) supra, is of any weight as a construction of the Minnesota statute. The declaration that a marriage with an epileptic, in violation of that statute, is against the public policy of Minnesota, even in the absence of fraud or concealment as between the parties, is hardly consistent with the holding of the reported case (*BEHSMAN v. BEHSMAN*, ante, 1501). H. N. G.

PEOPLE OF THE STATE OF NEW YORK, Respt.,

v.

JAMES VAN EVERY, Appt.

*New York Court of Appeals — December 4, 1917.*

(222 N. Y. 74, 118 N. E. 244.)

**Indictment — amendment of void indictment.**

1. An amendment of an indictment charging commission of a crime at a date subsequent to that of the indictment to conform to proof showing its commission before that date is not authorized by a statute charging that when a variance between indictment and proof with respect to time shall appear, the court may direct the indictment to be amended.

[See note on this question beginning on page 1516.]

— laying commission of crime in future — effect.

2. An indictment charging the commission of a crime at a date subse-

quent to that of the indictment does not charge a crime.

[See 14 R. C. L. 179.]

(Chase and Cuddeback, JJ., dissent.)

**APPEAL** by defendant from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Chautauqua County Court (Ottaway, J.) convicting him of adultery, and an order disallowing a demurrer to the indictment. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Thomas H. Larkins, for appellant:

The indictment was fatally defective.

*State v. Davidson*, 86 Tex. 325; *Ter-*

*rell v. State*, 165 Ind. 443, 2 L.R.A. (N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 Ann. Cas. 851; *Dickson v. State*, 20 Fla. 800, 5 Am. Crim. Rep. 297; *Serpentine v. State*, 1 How.



(Miss.) 256; *Drummond v. State*, 4 Tex. App. 150; *Murphy v. State*, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, 7 Am. Crim. Rep. 264, 107 Ind. 598, 3 N. E. 158; *McGehee v. State*, 26 Ala. 154; *Markley v. State*, 10 Mo. 291; *Com. v. Doyle*, 110 Mass. 103; *State v. Sexton*, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584; *Com. v. McKee*, Addison (Pa.) 33; *Williams v. State*, 12 Tex. App. 226, 4 Am. Crim. Rep. 292; *State v. Litch*, 33 Vt. 67; *Hall v. State*, — Tex. Crim. Rep. —, 38 S. W. 996; *McJunkins v. State*, 37 Tex. Crim. Rep. 117, 38 S. W. 994; *Stephens v. State*, 51 Tex. Crim. Rep. 406, 103 S. W. 904; *State v. Noland*, 29 Ind. 212; *State v. Windell*, 60 Ind. 300; *State v. Dandy*, 3 S. C. L. (1 Brev.) 395; *Hutchinson v. State*, 6 Tex. App. 468; *Wright v. State*, — Tex. Civ. App. —, 92 S. W. 256.

The amendment was not such as contemplated by § 293 of the Code of Criminal Procedure; it was not made under the circumstances provided for by this section, and the court had not the power to grant the motion of the district attorney.

*State v. Springer*, 43 Ark. 91; *Dickson v. State*, 20 Fla. 800, 5 Am. Crim. Rep. 297.

The amendment is not allowable at common law.

Archbald, *Crim. Pl.* (1910) p. 174, chap. 3, § 4; 1 *Bishop. Crim. Proc.* pp. 422, 708.

Mr. Warner S. Rexford, for the People:

An indictment may be amended as to time, places, and names.

*People v. Jackson*, 111 N. Y. 362, 19 N. E. 54; *People v. Johnson*, 104 N. Y. 213, 10 N. E. 690; *People v. Formosa*, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492; *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48; *People v. Davey*, 179 N. Y. 348, 72 N. E. 244.

At the opening of the case is the proper time to amend the indictment.

*People v. Lewis*, 132 App. Div. 259, 116 N. Y. Supp. 893.

Time is not an essence of the crime, and not an error of substance, but of form.

*People v. Davey*, *supra*.

Hogan, J., delivered the opinion of the court:

The grand jury of Chautauqua county on the 8th day of February, 1915, presented to the supreme court an indictment against the de-

fendant, wherein he was charged with a misdemeanor; viz., a violation of § 100 of the Penal Law (Consol. Laws, chap. 40). The indictment alleged that the crime was committed on the 17th day of October, 1915, upwards of eight months subsequent to the finding of the indictment. Defendant was arraigned on the indictment, pleaded not guilty, and the indictment was sent to the county court. The stenographer's minutes of proceedings had before the county judge disclose that on June 28, 1915, the plea of not guilty was withdrawn. Counsel for defendant moved to dismiss the indictment on the ground that the crime charged therein is alleged to have been committed on the 17th day of October, 1915, an impossible date, the same being in the future, and that the indictment does not comply with the provisions of §§ 280-284 of the Criminal Code. The motion was denied and an exception granted defendant. Thereupon defendant interposed a demurrer to the indictment, that the same in manner, form, and substance was insufficient in law; that it does not comply with the requirements of §§ 275 and 276 of the Code of Criminal Procedure; that the facts stated therein do not constitute a crime, and the indictment contains matter which, if true, would constitute a legal justification or excuse for the acts charged or other legal bar to the prosecution. The demurrer was overruled. The court then permitted the indictment to be amended so as to charge the commission of the crime in 1914 instead of 1915. Defendant refused to plead and judgment was pronounced against him. The judgment and orders of the county judge were affirmed by the appellate division. Defendant appeals to this court.

The record in this case contains some unexplainable and contradictory details. Still the question so far as the sufficiency of the indictment, the rulings of the county judge upon the motion made to dismiss the indictment, upon the demurrer, and allowing an amendment to the in-

dictment, sufficiently appear to enable us to pass upon the correctness of the proceedings had therein.

While the precise time at which a crime was committed need not be stated in an indictment, it is essential to the validity of the same that it disclose that the crime was committed before the finding of the indictment by the grand jury. Code Crim. Proc. §§ 280, 284, subd. 5.

An indictment which charges a defendant with the commission of a crime anterior to the time of the finding and presentment of the same by the grand jury, or on or about a certain date, the particular time being unknown to the grand jury, would be a valid indictment, and upon the trial, the day and date appearing by the evidence, the indictment might then be amended. In the present case, the crime was charged as having been committed

months subsequent to the finding of the same by the grand jury, an impossible date, and as matter of law cannot be regarded as charging a crime.

In Indiana the statute provides: "No indictment . . . shall be deemed invalid, nor shall the same be set aside or quashed . . . for any of the following defects: . . . Eighth, For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense; nor for stating the time imperfectly, unless time is of the essence of the offense." Burns's Anno. Stat. 1901, § 1825; Rev. Stat. 1881, § 1756.

The decisions in that state are numerous to the effect that an indictment like the one at bar is invalid and should be set aside on motion. Terrell v. State, 165 Ind. 443, 2 L.R.A. (N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 Ann. Cas. 851; State v. Noland, 29 Ind. 212; State v. Windell, 60 Ind. 300; Murphy v. State, 106 Ind. 96, 55 Am. Rep. 722, 5 N. E. 767, 7 Am. Crim. Rep. 264. The same rule has been applied in Com. v. Doyle, 110 Mass. 103; State v. Smith, 108 Iowa, 440, 79 N. W.

115; McGehee v. State, 26 Ala. 154.

It is argued by the district attorney that the amendment allowed to be made charging that the crime was committed on the 17th day of February, 1914, instead of the same day, 1915, was sufficient to uphold the indictment.

At common law the court was powerless to order an indictment to be amended. In this state the statute (Code Crim. Proc. § 293) provides: "Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable."

The sections following refer to an amendment made upon a trial, indicating clearly the intention of the legislature to permit amendments when the form of the indictment is disclosed by the proof upon the trial to be at variance with the indictment.

In the case at bar the grand jury did not charge the defendant with the commission of a crime at any time prior to the finding of the indictment. Code Crim. Proc. §§ 280, 284, subd. 5. Such omission was not one of form, but of substance. The county judge, however, sought by an amendment of the indictment to make good an invalid indictment and thus exercise the functions of the grand jury, without legal proof that defendant had ever committed a crime, or that he committed a crime on the 17th day of October, 1914. Such practice cannot be sustained. People v. Bromwich, 200 N. Y. 385, 93 N. E. 938; People v. Geyer, 196 N. Y. 364, 90 N. E. 48; People v. Trank, 88

Indictment—  
laying commis-  
sion of crime in  
future—effect.

—amendment of  
void indictment.

App. Div. 294, 85 N. Y. Supp. 55; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122.

It follows that as the grand jury did not present an indictment against the defendant setting forth facts sufficient to constitute a crime, and the county judge was in error in amending the indictment by inserting therein a matter of substance which, if proven upon the trial, would show that the defendant had committed a crime, and as no conviction can be had upon the indictment presented by the grand jury, the judgment and order of the Appellate Division must be re-

versed and the defendant discharged.

Hiscock, Ch. J., and Pound, McLaughlin, and Andrews, JJ., concur.

Chase and Cuddeback, JJ., dissent.

#### NOTE.

The power of the court to amend an indictment is treated in the annotation following *DODGE v. UNITED STATES*, post, 1516, amendment as to date of offense being specifically considered in subdivisions II. d, and III. b, of that note, according to whether the amendment in that respect is regarded as a matter of form or substance.

WILLIAM DODGE, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

*United States Circuit Court of Appeals, Second Circuit — May 16, 1919.*

(169 C. C. A. 316, 258 Fed. 300.)

#### Indictment — amendment — effect.

1. The striking out of portions of a count in the indictment in the absence of the grand jury deprives the court of jurisdiction to proceed upon such count, although the amendment was made with consent of counsel for accused.

[See note on this question beginning on page 1516.]

#### Appeal — communication between judge and jury — absence of counsel.

2. A communication by the judge to the jury after it has retired to consider its verdict as to whether or not conviction could be had on a certain count in the indictment, made without counsel's knowledge of its contents, is not reversible error if no information is given to the jury which was not contained in the original charge.

#### Constitutional law — freedom of speech — Espionage Act.

3. The constitutional guaranty of freedom of speech does not extend to

the protection of utterances in time of war which involve the integrity of the nation or injure or tend to injure it.

#### Appeal — veracity of witnesses.

4. The United States circuit court of appeals cannot pass upon the veracity of witnesses upon appeal from a conviction in the lower court.

#### Criminal law — excessive sentence — effect.

5. The imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void.

[See 8 R. C. L. 237.]

ERROR to the District Court of the United States for the Western District of New York to review a judgment convicting defendant of violating the Espionage Act. *Judgment on third count affirmed.*

The facts are stated in the opinion of the court.

Argued before Rogers, Hough, and Manton, Circuit Judges.

Messrs. Irving M. Weiss and Eustace Reynolds for plaintiff in error.

Messrs. Stephen T. Lockwood and John H. O'Day, for defendant in error:

The impressions of the witnesses were derived from personal observations of defendant's acts and actual knowledge of the substance of his speech at the time and place alleged and were not based on opinions or hearsay.

1 Wigmore, Ev. § 650.

The words and acts of defendant at the time and place, and under the circumstances, had as their natural tendency and reasonably probable effect the obstruction of recruiting and enlistment and incitement of resistance to the United States.

Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252.

It was a question for the jury as to defendant's intent, under all the circumstances.

Ibid.; Ling Su Fan v. United States, 218 U. S. 302, 54 L. ed. 1049, 30 L.R.A. (N.S.) 1176, 31 Sup. Ct. Rep. 21; Humes v. United States, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. Rep. 602.

Evidence of plaintiff's views as to the causes of the war was admissible as bearing on his intent.

Debs v. United States, *supra*.

In answering "Yes" to question propounded by foreman of the jury as to whether defendant could be convicted on the first count, the judge was merely reiterating his instructions given in open court, and defendant was not prejudiced.

Doyle v. United States, 11 Biss. 100, 10 Fed. 269; United States v. Greene, 113 Fed. 693; Fillipon v. Albion Vein Slate Co. 155 C. C. A. 98, 242 Fed. 258; State v. Murphy, 17 N. D. 48, 17 L.R.A. (N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133.

Upon writ of error, no error in law can be reviewed which does not appear upon the record, or has not by bill of exceptions been made part of the record.

Classen v. United States 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; Miles v. United States, 103 U. S. 304, 26 L. ed. 481.

There was no error in imposing "hard labor" as part of the sentence.

United States v. Pridgeon, 153 U. S. 48, 60, 61, 88 L. ed. 631, 636, 14 Sup. Ct. Rep. 746.

Rogers, Circuit Judge, delivered the opinion of the court:

The plaintiff in error, hereinafter called the defendant, comes into this court to reverse a conviction under Espionage Act June 15, 1917, chap. 30, 40 Stat. at L. 217, as amended by Act May 16, 1918, chap. 75, 40 Stat. at L. 553. The indictment was based upon § 3 of title 1 of the act (Comp. Stat. § 10,212c, Fed. Stat. Anno. Supp. 1918, p. 122) which is found in the margin.<sup>1</sup>

The indictment contains four counts. The first count in substance states that the defendant on June 22, 1918, at Buffalo, while the United States was at war with Germany and Austria-Hungary, "did then and there knowingly, wrongfully, unlawfully, feloniously, and wilfully utter and publish language intended to incite, provoke, and encourage resistance to the United States and promote the 'cause of its enemies,' by appearing upon the public streets in the presence and within the hearing of a large crowd of men forming part of the military forces of the United States, and capable of bearing arms, and, with the intent that they should hear, did then and there give utterance to words in substance to the effect that the United States should not be at war; that on July 3, 1918, there

<sup>1</sup>"Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall wilfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States, or the making of loans by or to the United States, and whoever, when the United States is at war, shall wilfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United

would be a meeting at the corner of Spring and Genesee streets, behind closed doors, at which things would be told about the war, and that his hearers were all invited to attend, and by inflection, tone of voice, and innuendo he, the said William Dodge, did then and there convey to his hearers the impression that things would be disclosed at said meeting about the present war that would bring the form of the government of the United States and the military and naval forces of the United States into contempt, scorn, contumely, and disrepute; and he, the said William Dodge, did furthermore then and there wilfully utter, publish, and proclaim to the aforesaid crowd of men words and language in substance as follows: 'Let us organize and follow the leaders, the agitators. Now they call us agitators pro-Germans. What right has the government to call us such now? If there was anything for us to fight for, we would do so, every one of us; but what are we fighting for? Nothing to our advantage; nothing for our good; nothing for our benefit. This war is not worth fighting for.' And at the same time and place the said William Dodge did enter into an argument with one of the audience, who stated that he was enlisted in the Army of the United States, and

States, and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, into contempt, scorn, contumely, or disrepute, or shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or

the said William Dodge did then and there by word of mouth publicly heap scorn and contumely upon the said person because of his enlistment in the said Army."

The second count states that "at the same time and place, and by the same means, the defendant did knowingly, wrongfully, unlawfully, feloniously, and wilfully attempt to cause and incite insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States."

The third count states that "at the same time and place, and in the same manner and by the same means as set forth in the two previous counts, the defendant did . . . knowingly, wrongfully, unlawfully, feloniously, and wilfully attempt to obstruct the recruiting and enlistment service of the United States."

The fourth count states "the manner and means of alleged violation, and charges that under the same circumstances, and at the same time and place, the defendant did in the same way by word and act oppose the cause of the United States in the aforesaid war."

The defendant pleaded not guilty. After a trial which lasted for several days, the jury rendered a verdict acquitting him on the second and fourth counts, and convicting

shall wilfully display the flag of any foreign enemy, or shall wilfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

him on the first and third counts. The defendant was sentenced to be imprisoned in the Maryland state penitentiary at Baltimore, Maryland, at hard labor for a term of six years.

The defendant's father was born in England and his mother in France. He himself was born in Buffalo, and he is a member of the Socialist Labor Party and of the Workers' International Industrial Union, which prior to 1915 had been called the I. W. W.

It appears that while the jury was deliberating on its verdict the bailiff in charge brought to the judge a communication from it. Upon its receipt he summoned the counsel for both sides to his chambers and informed them that he had received a communication from the jury, but that he did not think he should disclose its substance at that time. Thereupon counsel withdrew, and the judge returned an answer to the jury's communication by the bailiff in charge. After the verdict was received the judge informed counsel that what the jury had asked was whether defendant could be convicted on the first count, and that he replied, "Yes;" and he stated that he had not at the time apprised counsel of the contents of the note, or of the reply, as it did not seem to him to be of enough importance, especially as he had in his instructions informed them that the defendant could be found guilty of one or all counts, or none at all; and it has been assigned as error that the court communicated with and instructed the jury, not in open court, and not in the presence, and without the knowledge and consent, of the defendant or his counsel, after the jury had retired to deliberate on their verdict.

It has been held in a few cases that after a jury has retired the court may give an instruction on a question of law in the absence of counsel. *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438; *School Dist. v. Bragdon*, 23 N. H. 507; *Shapley v. White*, 6 N. H. 172; *Goldsmith v.*

*Solomons*, 33 S. C. L. (2 Shrobb.) 296, 300. In the case last cited the court said: "The intercourse between the jury and the bench is, in many respects, very confidential. Often the communications from the jury are of that kind which ought not to be communicated to the bar."

These cases are contrary to the clear weight of authority. In 38 Cyc. 1859, it is said: "It is almost universally held that no communication ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court."

That is undoubtedly the law. The leading case on this subject is *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, which was decided by the supreme court of Massachusetts in 1823. In that case, after a jury had been out for six hours, the foreman wrote to the judge at his chambers that they could not agree and that they waited for his directions. The judge replied in writing, saying that he was unwilling to permit them to separate, and gave such directions as would enable them to reconsider the cause in a more systematic manner. And he directed the jury to bring his letter into court with them in order that it might be filed with the papers in the case. A new trial was ordered. The opinion was written by Chief Justice Parker, who said: "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper, and, if it was not, the party against whom the verdict was is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the cause."

The courts are practically unanimous in holding that private com-

munications between court and jury are improper, and that all communications should be made in public. They are not, however, unanimous in holding that a private communication between judge and jury will in any case in which it occurs nullify the verdict. In *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182, the judge answered a written question from the jury as to the date from which to compute interest; it having been covered in the original instruction. This was held not to require reversal. In *Whitney v. Com.* 190 Mass. 531, 77 N. E. 516 (1906), a civil case, the judge communicated with the jury privately, the communication being a collateral direction as to the manner of using the papers supplied for the reception of a verdict, and the court held that this did not require the verdict to be set aside. The court said in the *Whitney* Case: "There are grave objections to any communication with a jury made as this was. . . . But the facts stated in this case make it certain that no miscarriage of justice has resulted."

In *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, the judge answered a question of the jury, both question and answer being in writing, without informing counsel, who were in court engaged in another case. The court declined on that account to reverse, and declared that, while the better practice is to inform the counsel of any question asked by the jury, the irregularity would not vitiate the verdict, as the answer correctly stated the law and the verdict was plainly right. In *People v. Kelly*, 94 N. Y. 526, the judge answered a written communication from the jury. It did not appear what the communication was. The court held that the question was not properly raised by affidavit, and implied that the harmful nature of such communication should be shown, saying that the presumption is that there was no violation of duty on the part of the court.

The only case in the Federal courts which has come to our at-

tention is *Fillipon v. Albion Vein Slate Co.* 155 C. C. A. 98, 242 Fed. 258, decided by the circuit court of appeals in the third circuit. The court held that under the circumstances of the case a written communication between the court and the jury, after the jury had retired, is not ground for reversal in a civil case, where no harm results; the question and answer being preserved of record. The question in that case concerned the applicable rule of contributory negligence. The court found nothing to complain of in the answer, and the only question was whether there ought to be a reversal because the instruction was not given in open court. In its opinion the court said: "Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside, where such an irregularity has crept in, although it has done no actual harm, and is unlikely to do harm? We do not see our way to answer this question in the affirmative, and must, therefore, affirm the judgment."

And see *State use of Grabinsky v. Smit*, 20 Mo. App. 50; *State v. Nash*, 51 S. C. 319, 28 S. E. 946.

In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge

Appeal—  
communication  
between judge  
and jury—  
absence of  
counsel.

should not have done what he did, to reverse on that ground would, under the circumstances, be so extremely technical that it does not at all approve itself to our judgment.

At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment, and the word "mutiny" from the first paragraph of the second count. Counsel for defendant at once said: "No objection." The court granted the

motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.

The Supreme Court in *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, declared that it was beyond question that in the English courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. In that case the trial court amended the indictment by striking out six words as being surplusage. The Supreme Court held that this deprived the court of power to try the prisoner. There was only one count in the indictment in that case. And the court said: "The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered."

\* "Another subject has been suggested during the course of this trial, in reference to which I conceive that I should give you instructions. You should understand, gentlemen, that it is a constitutional provision that a person has the right of freedom of speech, and Congress, true enough, has no right to enact laws abridging the freedom of speech; but, gentlemen, this is a much-abused term, and I instruct you that the guaranty cannot be successfully resorted to as a protection in time of war, where things that are said or uttered involve the integrity of the nation, or injure or tend to injure the United States—in other words, a citizen would not be permitted to speak or write in the time of war in a way that would interfere with the successful ending of the war. While citizens may fairly criticize the laws of Congress, and even the acts of the President, or of the Army or Navy, yet such criticism must be honest and based upon truth, and not with the intent to violate the Sedition Act in question.

We therefore hold in the instant case that the amendment made in the first two counts <sup>Indictment—  
amendment—  
effect.</sup> deprived the court of power to proceed

upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts. As the jury acquitted on the fourth count, the question is as to the validity of the third count. That count is well drawn, and the conviction under that count must be sustained unless the Espionage Act is unconstitutional.

It was claimed at the argument that the trial judge gave the impression to the jury that the defendant had no right to freedom of speech while the country was at war, and that Congress, in time of war, could enact laws in violation of the 1st Amendment, which provides that Congress shall make no law abridging freedom of speech. That portion of the charge complained of may be found in the margin.\*

We see no error in the above instruction, which in effect amounted to what the Supreme Court said in the cases of *Schenck v. United States*, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; *Frohwerk v.*

When the words uttered are accompanied by a wilful intent to disobey the statute, and to obstruct the recruiting or enlistment service of the United States, or the purposes that the United States has in engaging in the war, or to induce disloyalty or insubordination, or attempt so to do, then, gentlemen, what was said becomes seditious and an infraction of the statute.

"In this respect, gentlemen, the Sedition Act, as amended in May, 1918, and under which this indictment is found, is very broad and comprehensive, and it will bear reading again. This is an extraordinary measure, limited to times when the United States is at war, and by that I mean to be understood as saying that very likely the things that are claimed to be said, if they were said, would not be a violation of the statute if we were not at war, but being at war, a different situation presents itself, and Congress has met the situation by enacting the statute to which am now calling your attention."



United States, 249 U. S. 204, 68 L. ed. 561, 39 Sup. Ct. Rep. 249, and Debs v. United States, 249 U. S. 211, 68 L. ed. 566, 39 Sup. Ct. Rep. 252. The act is constitutional and there

Constitutional  
law—freedom  
of speech—  
Espionage Act.

is evidence which, if the jury believed it, justified the verdict. The evidence was very conflicting, and Dodge, who took the stand, denied flatly that he had said certain things which others stated he had said. But this court cannot pass upon the veracity of the witnesses, and determine whether Dodge or his accusers told the truth.

It appears that, in sentencing the defendant to imprisonment, the court sentenced him to imprison-

ment for "hard labor," and that those words are not found in the act for the violation of which the conviction was obtained. But where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only the portion of it which is in excess. United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

Judgment on third count affirmed.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 18, 1919 (U. S. Adv. Ops. 1919-20, p. 47) 250 U. S. 660, 63 L. ed. 1194, 40 Sup. Ct. Rep. 10.

Judgment on third count affirmed.

## ANNOTATION.

### Power of court to amend indictment.

#### I. Introductory, 1516.

#### II. Amendment of form:

- a. Caption, 1517.
- b. Name of accused, 1520.
- c. Name of third person:
  1. Victim of homicide, 1525.
  2. Owner of property, 1526.
  3. Other injured person, 1529.
- d. Date of offense, 1531.
- e. Description of offense, 1535.
- f. Description of property, 1536.
- g. Miscellaneous defects of form, 1538.

#### I. Introductory.

This annotation, in presenting those cases which discuss the power of the court to amend indictments, does so without regard to whether in each instance the power was exercised on the court's initiative or on the motion of counsel. But cases are excluded wherein it was apparent that the court acted with the consent of the grand jury; and likewise cases in which a discussion of the power of amendment arose in regard to a formal accusation, by information preferred in a jurisdiction possessing no grand jury system.

A century and a half ago considerably over a hundred offenses were punishable by death in England, and a

#### III. Amendment of substance:

- a. Identity of injured person, 1542.
- b. Time when matter of substance, 1543.
- c. Nature of offense, 1545.
- d. Averment of essential fact, 1548.
- e. Miscellaneous defects of substance, 1552.

#### IV. Doctrine of no amendment, 1555.

#### V. Distinctive rules:

- a. Rule in Alabama, 1557.
- b. Rule in Hawaii, 1557.

vigorous strictness in the framing of indictments arose in the courts of that country, from the humane tendency of the judges to seize on any flaw in the indictment when a life might thereby be saved. It was under these circumstances that the common-law doctrine, denying any power in the court to amend indictments, gained its force. But with the abolishment of capital punishment for all but a few offenses, the occasion for the strictness of the common-law courts no longer existed, and statutes were enacted giving the courts the power of amendment as to formal or technical defects which did not affect the substance of the indictment, but which

might have afforded a means of escape to many criminals. But the rule was not changed in respect to amendments of substance, since to amend an indictment in matter of substance would, in effect, render it no longer the finding of the grand jury, and in the United States, at least, the constitutional right of an accused to be tried only on the presentment or indictment of a grand jury must be considered.

The present power of the courts to amend indictments in matters of form is generally based on statute, although there are a few cases apparently decided in the absence of statute, which have held that the court could amend an indictment in respect to its form. But owing to the relatively few cases in this classification, and because of the uncertainty of determining from the cases themselves whether there was a statute existent at the time, such cases have been set forth in conjunction with other cases affirmatively showing the existence of some statutory authority.

## *II. Amendment of form.*

### *a. Caption.*

The caption of an indictment has been defined as that part of the accusation showing where, when, and by what authority it has been taken, found, or executed, and is here taken in its broadest sense. While there is some divergence of opinion as to whether the caption is in law a part of the indictment, it is considered as such for the purposes of this note.

The court may properly allow an amendment to the caption of an indictment, and it seems that this authority could be exercised at common law as well as under statute, since the caption has not been considered as more than a formal statement of the proceedings attendant on the return of the accusation itself.

**Indiana.**—*Moody v. State* (1845) 7 Blackf. 424; *State v. Moore* (1849) 1 Ind. 548.

**Iowa.**—*State v. Pelsner* (1917) 182 Iowa, 1, 163 N. W. 600.

**Louisiana.**—*State v. Humphries* (1883) 85 La. Ann. 966.

**New Hampshire.**—*State v. Jenkins* (1887) 64 N. H. 375, 10 Atl. 699.

**New Jersey.**—*State v. Jones* (1827) 9 N. J. L. 357, 17 Am. Dec. 483; *State v. Norton* (1850) 23 N. J. L. 33; *State v. Society for Establishing Useful Mfrs.* (1880) 42 N. J. L. 504.

**Pennsylvania.**—*Brown v. Com.* (1875) 78 Pa. 122.

**South Carolina.**—*State v. Creight* (1802) 8 S. C. L. (1 Brev.) 169, 2 Am. Dec. 656; *State v. Williams* (1822) 13 S. C. L. (2 M'Cord) 301; *Vandyke v. Dare* (1828) 17 S. C. L. (1 Bail.) 66; *State v. Moore* (1886) 24 S. C. 150, 58 Am. Rep. 241.

**Texas.**—*Bosshard v. State* (1860) 25 Tex. Supp. 207; *James v. State* (1875) 44 Tex. 314; *Mathews v. State* (1874) 44 Tex. 376; *Hauck v. State* (1876) 1 Tex. App. 357; *Long v. State* (1876) 1 Tex. App. 466; *Sharp v. State* (1879) 6 Tex. App. 650; *Banks v. State* (1880) 7 Tex. App. 591; *Osborne v. State* (1887) 23 Tex. App. 481, 5 S. W. 251, later appeal in (1887) 24 Tex. App. 398, 6 S. W. 536; *Murphey v. State* (1891) 29 Tex. App. 507, 16 S. W. 417; *Grayson v. State* (1896) 35 Tex. Crim. Rep. 629, 34 S. W. 961; *Murphy v. State* (1896) 36 Tex. Crim. Rep. 24, 35 S. W. 174; *Reys v. State* (1903) 45 Tex. Crim. Rep. 463, 76 S. W. 457, 77 S. W. 213; *Hightower v. State* (1914) 73 Tex. Crim. Rep. 258, 165 S. W. 184.

**Wisconsin.**—*State v. McCarty* (1850) 2 Pinney, 513, 54 Am. Dec. 150; *Allen v. State* (1856) 5 Wis. 329; *State v. Emmett* (1869) 23 Wis. 632.

**England.**—*Rex v. Darley* (1803) 4 East, 174, 102 Eng. Reprint, 796.

In Iowa, it has been held that the caption, not being a material part of an indictment, is the proper subject of amendment by direction of the court under the statute (Code Supp. 1913, § 5289). *State v. Pelsner* (1917) 182 Iowa, 1, 163 N. W. 600.

In Indiana, the right of the court to authorize the amendment of the caption of an indictment was early declared in *Moody v. State* (1845) 7 Blackf. (Ind.) 424.

And so in *State v. Moore* (1849) 1 Ind. 548, wherein an indictment read: "The grand jurors impaneled and

sworn, ..... upon their ..... present," it was held that the state was properly given leave to amend by inserting the word "oath," the court characterizing the amendment as of no consequence.

In *State v. Humphries* (1883) 35 La. Ann. 966, it was held proper for the court to authorize the correction of a clerical error in the indictment as to the date of the term of court at which the indictment was found.

In the early case of *State v. Jones* (1827) 9 N. J. L. 2, it was held proper for the court to authorize an amendment of the caption of an indictment so as to make it conform to the facts.

And in *State v. Norton* (1850) 23 N. J. L. 33, it was held that a misnomer of one of the grand jurors in the caption of an indictment was a mere clerical error, which was the proper subject of amendment.

Similarly in *State v. Society for Establishing Useful Manufactures* (1880) 42 N. J. L. 504, wherein the defendant moved to quash an indictment on the ground that the caption thereof stated that the indictment had been presented in "the year of our Lord one ..... eight hundred and seventy-nine," the court held that the defect might be cured by amendment at common law, on the authority of *State v. Jones* (N. J.) *supra*.

But compare *Cruiser v. State* (1841) 18 N. J. L. 206, wherein the court stated that it had searched in vain for any authority to order an amendment to an indictment after a writ of error thereto, though the defect in the caption and various other mistakes in the indictment only extended to the form of the charge.

In *State v. Jenkins* (1887) 64 N. H. 375, 10 Atl. 699, it was said that the trial court was clearly authorized by statute (Gen. Laws, chap. 260, § 13) to direct an amendment curing a defect in the caption of an indictment.

And in *Brown v. Com.* (1875) 78 Pa. 122, wherein the caption of an indictment entitled as in the oyer and terminer was amended by direction of the court so as to be entitled as in the court of quarter sessions, this was held a proper amendment, the error being

a technical one not prejudicial to the defendant.

In the early case of *State v. Creight* (1802) 3 S. C. L. (1 Brev.) 169, 2 Am. Dec. 656, it was held that the caption of an indictment could be amended by the court by the insertion of the phrase, "upon their oaths," referring to the method of presentment by the grand jury.

And in *State v. Williams* (1822) 13 S. C. L. (2 M'Cord) 301, it was said that the court had the right to amend the caption of an indictment at any time.

Likewise, in *Vandyke v. Dare* (1828) 17 S. C. L. (1 Bail.) 66, it was held that the caption of an indictment might be amended at any time by the journals of the court.

In *State v. Moore* (1886) 24 S. C. 150, 58 Am. Rep. 241, wherein an indictment alleged the county in which the court was holden, and then alleged that "the jurors of and for the county of ..... aforesaid," etc., it was held that this was a part of the caption of the indictment which might be amended at any time.

In *Bosshard v. State* (1860) 25 Tex. Supp. 207, wherein an indictment for gaming omitted the word "court" after the word "district," shewing in what court the indictment was presented, the trial court permitted an amendment remedying the omission, and the amendment was held proper as going to a defect which article 488 of the Code of Criminal Procedure expressly treated as a defect of form, which class of defects was amendable under article 508.

And in *Mathews v. State* (1874) 44 Tex. 376, where an indictment did not show on its face that it was found in the "district court" of the county, the court, remanding the cause for the act of the court below in overruling an exception to the defect, said: "The court does not now perceive any good reason why this defect of form could not have been amended by motion of the district attorney. When the exception to an indictment is merely on account of form, the same shall be amended, if decided to be defective, and the cause proceed upon such

amended indictment.' *Paschal's Dig.* art. 2977. This was done in the case of *Bosshard v. State* (1860) 25 Tex. Supp. 210, which was sanctioned by this court."

In *James v. State* (1875) 44 Tex. 314, a bill of indictment as presented omitted the word "court," where it should have appeared in order to show that the indictment was presented in the criminal "court" of the city of Jefferson. The omission was corrected under direction of the court, and such amendment was held proper.

And see *Long v. State* (1876) 1 Tex. App. 466, wherein the court said, by way of dictum, that the omission of the word "court" in the allegation of an indictment purporting to show in what court the indictment was presented was a defect of form which might have been cured by amendment in the court below. *Paschal's Dig.* art. 2977.

In *Hauck v. State* (1876) 1 Tex. App. 357, the court refused to reverse a judgment of conviction because the indictment did not state the court in which it was presented, since the omission was "a mere matter of form, and could have been cured by amendment if the objection had been pointed out at the proper time." *Code Crim. Proc.* art. 488.

In *Sharp v. State* (1879) 6 Tex. App. 650, the court allowed an amendment correcting an allegation in the caption of an indictment that described the meeting of the court as in the year "one thousand, eighteen hundred and seventy-six," so as to read "one thousand, eight hundred and seventy-six," and this was held proper, the court saying: "By art. 508 it would seem that an indictment may be amended, so far as form is concerned, whether exception had been taken to it or not. The article is: 'When the exception to an indictment or information is merely on account of form, the same shall be amended, if decided to be defective, and the cause proceed upon such amended indictment or information.' The amendment was one of form merely, and the court did not err in permitting the amendment."

Where an indictment as originally

drawn did not, on its face, show the court or term to which it was presented, it was held that the defect was one of form only, and properly amended under direction of the court. *Banks v. State* (1880) 7 Tex. App. 591.

Where the court permitted the amendment of the caption of an indictment by substituting "fourth Monday" for the words "first Monday," as to the time at which the term of court was being held when the indictment was found, the amendment was held proper under the authority of the statute. *Code Crim. Proc.* arts. 549, 550; *Osborne v. State* (1887) 23 Tex. App. 431, 5 S. W. 251, later appeal in (1887) 24 Tex. App. 398, 6 S. W. 538.

And where an indictment was defective since not showing that it was presented in the district court of the county where the grand jury was in session, the court held that the defect, being one of form, was a proper subject for amendment. *Murphey v. State* (1891) 29 Tex. App. 507, 16 S. W. 417.

Likewise, in *Grayson v. State* (1896) 35 Tex. Crim. Rep. 629, 34 S. W. 901, it was held that an allegation in an indictment as to the term at which the grand jury was organized was surplusage which might be amended by the court at any time.

And in *Murphy v. State* (1896) 36 Tex. Crim. Rep. 24, 35 S. W. 174, wherein the court allowed an amendment to an indictment by inserting the word "October," to show the date of the organization of the grand jury which found the indictment, it was held that, the entry of date being merely formal, the allowance of the amendment constituted no error.

It was held in *Reys v. State* (1908) 45 Tex. Crim. Rep. 463, 76 S. W. 467, 77 S. W. 213, that an indictment which showed that it was presented at the August term of the district court was properly amended by direction of the court, to show its presentation at the July term of the district court.

Likewise, where the court permitted the district attorney to amend an indictment by inserting the date of the term of court at which the grand jury

was organized, it was held that the court committed no error, the amendment being surplusage and a mere matter of form, authorized by Code Crim. Proc. arts. 598, 599. *Hightower v. State* (1914) 73 Tex. Crim. Rep. 258, 165 S. W. 184.

In *State v. McCarty* (1850) 2 Pinney (Wis.) 518, 54 Am. Dec. 150, the court held that it was not error to allow amendments to the caption of an indictment by inserting therein a description of the term of the court at which the indictment was presented, and further describing the grand jurors, since the indictment was in all respects good before the amendments were allowed, and their allowance did not prejudice the defendant.

In *Allen v. State* (1856) 5 Wis. 329, wherein the circuit court permitted the caption of an indictment to be amended by the records of the court so as to show that the day of the actual presentment of the same into court by the grand jury was on a later date than that on which the offense therein charged was alleged to have been committed, the court held that the amendment was properly allowed.

And in *State v. Emmett* (1869) 23 Wis. 632, the court stated that the caption of an indictment was merely a formal statement of the proceedings describing the court before which the indictment was found, and as such might be amended to conform to the records of the term.

And see the early English case of *Rex v. Darley* (1803) 4 East, 174, 102 Eng. Reprint, 796, wherein it was held that the court might authorize an amendment to the caption of an indictment by inserting therein the time when, and the court where, the indictment was found, and the names of the grand jurors presenting it.

#### *b. Name of accused.*

Under a statute permitting amendment in matter of form, it is generally held that the court may allow an amendment to an indictment in correction of a misnomer therein as to the name of the accused, where no change of identity is involved, the defect being one of form only. Compare III. a, *infra*.

**California.** — *People v. Carroll* (1919) — Cal. App. —, 180 Pac. 49.

**Florida.** — *Burroughs v. State* (1880) 17 Fla. 648.

**Kentucky.** — *Louis v. Com.* (1894) 16 Ky. L. Rep. 284; *International Harvester Co. v. Com.* (1907) 124 Ky. 543, 99 S. W. 637; *Russellville Home Teleph. Co. v. Com.* (1908) 33 Ky. L. Rep. 132, 109 S. W. 340; *Com. v. Jenkins* (1903) 115 Ky. 62, 72 S. W. 363.

**Louisiana.** — *State v. Matthews* (1903) 111 La. 962, 36 So. 48; *State v. Grimms* (1918) 143 La. 421, 78 So. 661.

**Mississippi.** — *Wood v. State* (1887) 64 Miss. 761, 2 So. 247; *Orr v. State* (1902) 81 Miss. 180, 32 So. 998; *Smith v. State* (1913) 108 Miss. 356, 60 So. 380.

**Missouri.** — *State v. Schricker* (1860) 29 Mo. 265.

**Nevada.** — *Re Hironymous* (1915) 38 Nev. 194, 147 Pac. 453.

**New Jersey.** — *State, Hubbard, Prosecutor, v. State* (1898) 62 N. J. L. 628, 43 Atl. 699.

**Ohio.** — *Lasure v. State* (1869) 19 Ohio St. 43.

**Texas.** — *State v. Manning* (1855) 14 Tex. 402; *Morris v. State* (1878) 4 Tex. App. 589; *Sinclair v. State* (1895) 34 Tex. Crim. Rep. 453, 30 S. W. 1070; *Colter v. State* (1899) 41 Tex. Crim. Rep. 78, 51 S. W. 945; *Clark v. State* (1903) 45 Tex. Crim. Rep. 456, 76 S. W. 573; *Popinaw v. State* (1908) 52 Tex. Crim. Rep. 409, 107 S. W. 350; *Woods v. State* (1912) 67 Tex. Crim. Rep. 569, 150 S. W. 633; *Peters v. State* (1913) 69 Tex. Crim. Rep. 403, 154 S. W. 563; *Thompson v. State* (1913) 72 Tex. Crim. Rep. 6, 160 S. W. 685; *Carter v. State* (1916) 78 Tex. Crim. Rep. 240, 181 S. W. 473; *Rios v. State* (1916) 79 Tex. Crim. Rep. 89, 183 S. W. 151; *Roberts v. State* (1918) — Tex. Civ. App. —, 201 S. W. 998.

**Vermont.** — *State v. Arnold* (1878) 50 Vt. 731.

**Virginia.** — *Shiflett v. Com.* (1894) 90 Va. 386, 18 S. E. 838.

**West Virginia.** — *State v. Strayer* (1906) 58 W. Va. 676, 52 S. E. 862.

**England.** — *Reg. v. Orchard* (1838) 8 Car. & P. 565.

In *People v. Carroll* (Cal.) *supra*,

the court permitted the amendment of an indictment by striking out the name of a third person appearing therein, and inserting of the name of the defendant. The amendment was apparently but the correction of a typographical error, and was held to be clearly authorized by § 1008 of the Penal Code, which provides that an indictment may be amended in the discretion of the court at any time after the defendant has pleaded, where it can be done without prejudicing his substantial rights and without changing the offense charged.

In *Burroughs v. State* (Fla.) *supra*, an indictment was amended with the court's permission by striking out an erroneous middle initial of the defendant's name after his plea in abatement specifying the misnomer. On appeal, this was held a proper amendment under an act (Laws 1861, chap. 1107, § 3) providing substantially that at any time it shall appear on the application of the accused that there is a defect in the form of the indictment which may expose him to a new indictment, it shall be the duty of the court to obviate the objection.

In *International Harvester Co. v. Com.* (1907) 124 Ky. 543, 99 S. W. 637, where an indictment returned against the "International Harvester Machine Company" was, by order of the court, corrected by an entry of record, setting out the true corporate name of the defendant as the "International Harvester Company of America," this was held a proper change under the authority of § 125 of the Criminal Code.

In *Russellville Home Teleph. Co. v. Com.* (1908) 83 Ky. L. Rep. 132, 109 S. W. 340, an indictment having been brought against the Home Telephone Company, the trial court allowed an order entered of record, changing the name of the defendant to the Russellville Home Telephone Company, which was its true corporate name. Objection was made to this change, but the court held that it was authorized by a statute (Crim. Code, § 125) which provided as follows: "An error as to the name of the defendant shall not vitiate the indictment, nor proceed-

ings thereon, and if his true name be discovered at any time before execution, an entry shall be made on the record of the court of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name."

In *Louis v. Com.* (1894) 16 Ky. L. Rep. 284, it was held that the defendant could not complain of the action of the court in sustaining a motion of the commonwealth's attorney that the description of the defendant in the indictment as "S. J. Lewis" should be corrected by an entry on the record, and the prosecution continued as against "Jo. Lewis."

And in *Com. v. Jenkins* (1903) 115 Ky. 62, 72 S. W. 363, it was held proper for the trial court to correct a mistake in an indictment as to the defendant's name, by changing the style of the prosecution from "Albert Jenkins" to "Jeff Jenkins," since it must be presumed that the grand jury intended to indict the Jenkins guilty of the crime named in the indictment, and such change was expressly authorized by statute. Crim. Code, § 125.

Under § 1047 of the Revised Statutes of Louisiana, it is proper for the court to order the amendment of an indictment by an insertion of the Christian name of the accused. *State v. Matthews* (1908) 111 La. 962, 36 So. 48.

In *State v. Grimms* (1918) 143 La. 421, 78 So. 661, a prosecution for murder, the trial court allowed an amendment to the indictment changing the name of the person accused from Eddie Graham to Eddie Grimms. The accused did not contend that any change was made thereby with reference to the identity of the person accused, and the court held that the amendment, being one as to name only, was proper (Rev. Stat. § 1047).

See, in this connection, the early case of *Com. v. Phillipsburg* (1818) 10 Mass. 78, wherein, the attorney general having moved for an amendment to an indictment against the town of Phillipsburg by changing the name of the defendant to Hollis in accordance with an alteration made by the legislature, the court held that in the

absence of statute it could not authorize the change, although it plainly was an immaterial defect.

And compare *Hammond v. State* (1859) 14 Md. 135. The defendant herein had been indicted as a "free negress" for obtaining goods under false pretenses. At the trial it appeared that she was a slave, and the court directed an amendment to the indictment, describing the defendant as "the negro slave of Philip Hammon." The defendant excepted to the allowance of the amendment which the prosecutor sought to justify under the Act of 1852, chapter 176, which authorized an amendment as to the name of the accused when the misnomer was pleaded. The court held that the case was not within the purview of the statute, since the amendment was as to the degree or condition of the party charged. But, the amendment being surplusage, the judgment below was affirmed.

Where the accused pleaded a misnomer in one count of an indictment which designated him as Charles Dillard, instead of by his correct name as Charles Orr, it was held proper for the court to grant an amendment correcting the error, under the authority of § 1435 of the Code of 1892. *Orr v. State* (1902) 81 Miss. 130, 32 So. 998.

And see *Wood v. State* (1887) 64 Miss. 761, 2 So. 247, wherein the court stated that, under the provisions of § 3081 of the Code of 1880, the trial court could have ordered an amendment of an indictment to conform the Christian name of the accused therein to the evidence of such name on the trial, had the trial court considered the variance not material to the merits of the case. And in view of this amendatory authority, it was held that, since the defendant had failed to object to the variance in the court below, it would not be a ground for reversal here.

It was held in *Smith v. State* (1913) 103 Miss. 356, 60 So. 330, that the court, under the authority of § 1508, Code of 1906, might direct an amendment to an indictment, correcting a misnomer therein as to the Christian name of the accused.

Compare *McGuire v. State* (1857) 35 Miss. 366, 72 Am. Dec. 124, wherein it was held that the court had no power to authorize an amendment to an indictment, correcting a misnomer therein as to the Christian name of the accused, without the concurrence of the grand jury. This case arose previous to the adoption of the Revised Code of 1857, permitting such amendments.

In Missouri, it has been provided by statute (Rev. Code 1855, art. 4, § 25) as follows: "If a defendant be indicted by a wrong name, unless he declare his true name before pleading, he shall be proceeded against by the name in the indictment. If he allege that another name is his true name, it must be entered on the minutes of the court; and after such entry, the trial and all other proceedings on the indictment shall be had against him by that name, referring also to the name by which he is indicted, in the same manner in all respects, and with the same consequences, as if he had been indicted by his true name." Under the authority of this provision it has been held proper for the court to enter the name of an accused on the minutes of the court as William Schricker, and to proceed against him by that name, thus in effect amending the indictment which had been returned against him under the name of William Shuckler. *State v. Schricker* (1860) 29 Mo. 265.

In *Re Hironymous* (1915) 38 Nev. 194, 147 Pac. 459, the court expressed the opinion that the omission to insert the name of the defendant in a blank space in the indictment, where such omission evidently arose through inadvertence, was a defect in form only, which might have been remedied by the trial court under the provision of the statute permitting amendments. Rev. Laws, § 7060.

In *State, Hubbard, Prosecutor, v. State* (1898) 62 N. J. L. 628, 43 Atl. 699, wherein a misnomer appeared in an indictment as to the name of the defendant, it was held that the indictment should not be abated, on motion, for such misnomer, since under

the statute (Gen. Stat. p. 1128, § 41) the court was authorized to amend the indictment so as to cure such a defect.

In *Lasure v. State* (1869) 19 Ohio St. 43, the defendant pleaded in abatement that his name was not Henry Lasure as it appeared in the indictment, but William H. Lasure, and in correction of the misnomer, the court entered his true name on the minutes of the court, the prosecution proceeding on the indictment, but under the corrected name. The defendant claimed that this action of the court was in contravention of the constitutional guaranty that no person shall be held to answer for a capital or infamous crime unless on presentment or indictment of a grand jury; but he did not deny that he was the person accused in the indictment, and the court stated that, a name not being of the substance of an indictment, it could find no error in the action of the trial court.

In *State v. Manning* (1855) 14 Tex. 402, it was held that, on a plea in abatement setting forth a misnomer in an indictment as to the middle initial of the accused, the court should have allowed an amendment in correction thereof under the authority of the Act of February 9, 1854.

In *Morris v. State* (1878) 4 Tex. App. 589, it was held proper under the authority of article 469 of the Code of Criminal Procedure, for the court to direct an amendment to an indictment by inserting therein the names of the defendants as stated in their plea in abatement, in place of the names originally set out in the indictment.

And where the accused appeared on the first day of trial and urged that his true name was not set forth in the indictment, it was held proper for the court to direct an amendment to the indictment by inserting therein the true name of the defendant as suggested by himself, since such amendment was expressly authorized by the Penal Code. *Sinclair v. State* (1895) 34 Tex. Crim. Rep. 453, 30 S. W. 1070.

In *Colter v. State* (1899) 41 Tex. Crim. Rep. 78, 51 S. W. 945, the trial court allowed an amendment to an in-

dictionment, changing the Christian name of the accused therein from "Isaiah" to "Isell," in accordance with the suggestion of the accused. The accused later requested an instruction to the jury to acquit on the ground that the court had authority to make the above change only in the formal portion of the indictment, and not in the charging portion thereof, but this court held that the change was properly authorized wherever the variance occurred, under the provision of article 549, Code of Criminal Procedure.

In *Clark v. State* (1903) 45 Tex. Crim. Rep. 456, 76 S. W. 573, an indictment was amended on the suggestion of the defendant, by changing his name therein from "J. C. Clark" to "Joseph Clark," and this was held to be proper practice although the jury was not resworn after the amendment, the middle initial being an immaterial matter, and the proper subject of amendment. Code Crim. Proc. art. 549.

Where a defendant moved to quash an indictment on the ground that it alleged his name as "J. W. Wood," when his true name was "J. W. Woods," it was held that the court properly directed that the record be changed in this respect, under the express provisions of the statute. Code Crim. Proc. 1911, art. 560. *Woods v. State* (1912) 67 Tex. Crim. Rep. 569, 150 S. W. 633.

Similarly, in *Peters v. State* (1913) 69 Tex. Crim. Rep. 403, 154 S. W. 563, wherein the defendant, who had been indicted under the name of "Pierce," suggested that his name was "Peters," it was held proper for the court to order an amendment in correction of the name.

In *Thompson v. State* (1913) 72 Tex. Crim. Rep. 6, 160 S. W. 685, the defendant suggested, after the reading of the indictment to the jury, that his name was not correctly set forth therein, whereupon the court directed an amendment in correction of the misnomer, and this was held proper.

And in *Carter v. State* (1916) 78 Tex. Crim. Rep. 240, 181 S. W. 473, wherein the defendant objected to being indicted and tried under an er-



roneous appellation, and the court directed an amendment to the indictment curing the misnomer, it was held that the action of the court was strictly in accordance with the statute. Code Crim. Proc. arts. 456, 559-561.

And the action of the court in directing an amendment to an indictment in correction of a misnomer therein as to the surname of the defendant, on his plea in abatement setting out the error, was held proper in *Rios v. State* (1916) 79 Tex. Crim. Rep. 89, 133 S. W. 151, under the provisions of the statute (Code Crim. Proc. art. 560).

In *Roberts v. State* (1918) — Tex. Crim. Rep. —, 201 S. W. 998, it was held that the defendant had a right to have an amendment directed in correction of a misnomer in the indictment as to his name.

And see *Popinaw v. State* (1908) 52 Tex. Crim. Rep. 409, 107 S. W. 350, wherein it was held that the statute authorizing the amendment of an indictment by the correction of a misnomer therein as to the defendant's name was mandatory, and the failure of the court to comply with the defendant's suggestion as to the misnomer was reversible error.

In *State v. Arnold* (1878) 50 Vt. 731, it was held that an amendment to an indictment for adultery by inserting, after the description of the accused as "Roxcena Whitney," the words "otherwise called Rosa Whitney," could only be regarded as a formal alteration, and was properly allowed, although not within the provision of § 1, No. 5, Acts of 1870, permitting amendments in the correction of "formal defects apparent on the face of the indictment." The court said: "It is obvious, without illustration, that a defect that does not affect the merits of the case, or the evidence necessary to be given to maintain the indictment, as is true in the case before us, can be regarded as only formal."

In *Shifflett v. Com.* (1894) 90 Va. 386, 18 S. E. 838, wherein the court ordered the amendment of an indictment by striking out the name of Scott Crawford, and inserting in lieu there-

of the name of Scott Chifflett, alias Scott Crawford, it was held that such amendment was proper under the authority of § 3999 of the Code, providing that "the court may, in case of a misnomer appearing before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact."

But compare *Com. v. Buzzard* (1848) 5 Gratt. (Va.) 694, wherein the attorney for the commonwealth moved for leave to amend an indictment by striking out the name of Benjamin Collins, and inserting in lieu thereof the name of Peter Buzzard, and the trial court, with the consent of Peter Buzzard, referred the question of its right to so amend, to this court, which held that the amendment was not authorized by chap. 20 of the Act of March 14, 1848, relative to proceedings in criminal cases.

And see *Bradshaw v. Com.* (1860) 16 Gratt. (Va.) 507, 86 Am. Dec. 722, wherein the dictum was expressed that an indictment "cannot be changed or altered in the slightest degree, by any power, after it has been returned into court and the grand jury is discharged. The Statutes of Jeofails which, in general terms, authorize corrections and amendments in process and pleadings, have never been held to apply to indictments."

In *State v. Strayer* (1906) 53 W. Va. 676, 52 S. E. 862, wherein the trial court permitted an indictment to be amended so as to state the true name of the defendant, it was held that such amendments were proper under the statute (Code 1899, chap. 158, § 10), authorizing the court, in the case of a misnomer appearing, to forthwith direct an amendment to the indictment in accord with the fact.

Under the authority of the early English statute (7 Geo. IV. chap. 64, § 19), it was held proper in *Reg. v. Orchard* (1838) 8 Car. & P. (Eng.) 565, for the court to direct an amendment to an indictment, changing the description of the defendant as "the wife of John Orchard" so as to read "the widow of John Orchard."

*c. Name of third person.*

*1. Victim of homicide.*

Under statutory authority to amend in matter of form, it is held that the court may properly allow the amendment of an indictment in correction of a misnomer as to the name of the victim of a homicide, such error being considered a defect in form only. Distinction is to be made between a change in the name and a change in the identity of the victim, the latter being a matter of substance, and not the subject of amendment. See III. a, *infra*. *State v. Peterson* (1889) 41 La. Ann. 85, 6 So. 527; *State v. Lee* (1911) 127 La. 1077, 54 So. 356; *State v. Grimms* (1918) 143 La. 421, 78 So. 661; *Miller v. State* (1890) 68 Miss. 221, 8 So. 273; *Wilkinson v. State* (1900) 77 Miss. 705, 27 So. 639; *Thurmond v. State* (1908) 94 Miss. 1, 47 So. 434; *State v. Tolla* (1905) 72 N. J. L. 515, 3 L.R.A. (N.S.) 523, 62 Atl. 675.

In *State v. Peterson* (1889) 41 La. Ann. 85, 6 So. 527, it was held that the court properly directed the amendment of an indictment for murder by a correction of the Christian name of the deceased, under the authority of the statute (Rev. Stat. § 1047).

And in *State v. Lee* (1911) 127 La. 1077, 54 So. 356, wherein it appeared that before trial the court had permitted an amendment to an indictment for murder by changing the name of the person alleged to have been killed from John Williams to James Williams, it was held that such amendment was expressly authorized by statute (Rev. Stat. § 1047).

In *State v. Grimms* (1918) 143 La. 421, 78 So. 661, a prosecution for murder, the trial court allowed an amendment to the indictment, changing the name of the alleged victim of the homicide from that of Jake Graham to that of Jacob Grimms. The accused did not claim that any change was made with reference to the identity of the victim, and the court held that the amendment, being as to name only, was properly allowed under the authority of statute (Rev Stat. § 1047).

The court distinguished this holding from that in *State v. Morgan*

(1888) 35 La. Ann. 1189 (see III. a, *infra*), since in the latter case the change was one of identity, and not alone as to name. The statement therein that § 1047 of the Revised Statutes "only authorized such a change in an indictment as to names as would correct formal errors or misdescriptions in names attempted or intended to be set forth properly therein, and not to make radical and material changes as to persons or things pertaining to the substance of the indictment, and by which the defendant might be prejudiced," applies equally to both cases.

In *Miller v. State* (1890) 68 Miss. 221, 8 So. 273, the direction of the trial court that an indictment for murder be amended so that the Christian name of the deceased, as it appeared therein, should conform to his real name as disclosed on the trial, was held proper.

Section 1485 of the Mississippi Code of 1892 provided for the amendment of indictments to remedy variances in the names or descriptions of any persons alleged therein to have been damaged as the result of the crime of the person indicted, and under the authority of this statute it was held in *Wilkinson v. State* (1900) 77 Miss. 705, 27 So. 639, that the court could properly have directed an amendment to an indictment for infanticide, which would have given the names of the parties slain, in amplification of the allegation in the indictment that the defendant had murdered "two certain human beings, the same being then and there her infant children."

And it was held proper, under the authority of § 1508 of the Code of 1906, for the court to authorize an amendment to an indictment for murder, which changed the designation of the decedent therein from that of "Will Johnson" to that of "Convict No. 12." *Thurmond v. State* (1908) 94 Miss. 1, 47 So. 434.

In *State v. Tolla* (1905) 72 N. J. L. 515, 3 L.R.A. (N.S.) 523, 62 Atl. 675, a variance arose between the allegation of an indictment for murder and the evidence as to the Christian name of the decedent, which variance was

cured by an amendment under direction of the court. This was held proper under the authority of § 34 of the Criminal Procedure Act, as an amendment not changing the identity of the decedent, but only designating it in conformity to the facts developed.

### 2. Owner of property.

The allowance by the court of an amendment to an indictment as to the name of the person alleged therein to be the owner of the property which is the subject of the crime is generally authorized, as the correction of a defect in form.

**Iowa.**—*State v. Kiefer* (1915) 172 Iowa, 306, 151 N. W. 440.

**Louisiana.**—*State v. Elder* (1869) 21 La. Ann. 157; *State v. Holmes* (1871) 23 La. Ann. 604; *State v. Christian* (1878) 30 La. Ann. 367; *State v. Ware* (1892) 44 La. Ann. 954, 11 So. 579; *State v. Satterwhite* (1900) 52 La. Ann. 499, 26 So. 1006; *State v. Sweeney* (1914) 135 La. 566, 65 So. 743.

**Mississippi.**—*Haywood v. State* (1872) 47 Miss. 1; *Murrah v. State* (1875) 51 Miss. 675; *Foster v. State* (1876) 52 Miss. 695; *Peebles v. State* (1877) 55 Miss. 434; *Knight v. State* (1887) 64 Miss. 802, 2 So. 252; *Richburger v. State* (1907) 90 Miss. 806, 44 So. 772.

**New York.**—*People v. Richards* (1887) 44 Hun, 278, 5 N. Y. Crim. Rep. 355; *People v. Herman* (1887) 45 Hun, 175; *People v. Dunn* (1889) 53 Hun, 381, 7 N. Y. Crim. Rep. 178, 6 N. Y. Supp. 805; *People v. Hagan* (1891) 60 Hun, 577, 37 N. Y. S. R. 660, 14 N. Y. Supp. 233.

**Pennsylvania.**—*Rosenberger v. Com.* (1888) 118 Pa. 77, 11 Atl. 782; *Com. v. O'Brien* (1869) 2 Brewst. 506; *Com. v. Livingston* (1896) 5 Pa. Dist. R. 666; *Com. v. Hazlett* (1900) 14 Pa. Super. Ct. 352.

**Vermont.**—*State v. Casavant* (1892) 64 Vt. 405, 23 Atl. 636.

**England.**—*Reg. v. Vincent* (1852) 5 Cox, C. C. 537, 16 Jur. 457, 3 Car. & K. 246, 2 Den. C. C. 464, 21 L. J. Mag. Cas. N. S. 109; *Reg. v. Fullarton* (1853) 6 Cox, C. C. 194; *Reg. v. Marks* (1866) 10 Cox, C. C. 367; *Rex v. Mur-*

*ray* [1906] 2 K. B. 385, 3 B. R. C. 775, 75 L. J. K. B. N. S. 593, 95 L. T. N. S. 295, 22 Times L. R. 596, 70 J. P. 297, 6 Ann. Cas. 161.

**Canada.**—*Reg. v. Jackson* (1869) 19 U. C. C. P. 280.

Where the trial court permitted the county attorney to amend an indictment by averring therein the ownership of certain property alleged to have been obtained by false pretenses, it was held that since such amendment related to a matter of form, and not of substance, the court did not err. Code Supp. 1913, § 5289. *State v. Kiefer* (1915) 172 Iowa, 306, 151 N. W. 440.

In *State v. Elder* (1869) 21 La. Ann. 157, the trial court permitted the district attorney to amend an indictment for arson, by removing an ambiguity as to the ownership of the burned buildings. The defendant urged this amendment as a ground for reversal, but the court held that since the indictment was good before the amendment, and no real change was made, the defendant was not affected thereby. See Stat. 1855, § 137.

It was provided by § 1047, Revised Statutes of Louisiana, that indictments may be amended "on or before the trial when there shall appear to be any variance between the statement in the indictment and the testimony in the names of places, or of persons, or in setting forth the ownership of property, or in the name or description of any matter or thing whatsoever named or described in the indictment, if the court should be of opinion that the variance is not material and the amendment will not prejudice the defendant in his defense." So, where the trial court authorized an amendment to an indictment for larceny by correcting the name of the owner of the stolen property, the amendment was held proper. *State v. Holmes* (1871) 23 La. Ann. 604.

And where the defendant stood indicted for burglary and grand larceny, and the trial court permitted the district attorney to amend the indictment twice, over the defendant's objection, and such amendments were as to the names of the owners of the property

alleged to have been stolen, the court held that the amendments were properly allowed, under the express terms of the statute (Rev. Stat. 1870, § 1047). And see § 18 of the Statute March 14, 1855. *State v. Christian* (1878) 30 La. Ann. 367.

In *State v. Ware* (1892) 44 La. Ann. 954, 11 So. 579, an indictment for horse stealing alleged that ownership of the horse was in one Dansby. During the trial, the court allowed an amendment of the indictment, the defendant not objecting, so that it averred that if the horse was not the property of Dansby, it was the property of one Brooks. On appeal, the court held that the allowance of the amendment was proper. Rev. Stat. § 1047.

And it has been held proper for the court to direct the amendment of an indictment for burglary by the insertion of the name of Jules Birotte for that of Claiborne Birotte, as the owner of the property alleged to have been burglarized. *State v. Satterwhite* (1900) 52 La. Ann. 499, 26 So. 1006.

In *State v. Sweeney* (1914) 135 La. 566, 65 So. 743, it was held that an amendment to an indictment for burglary and larceny, which changed the name of the owner of the premises burglarized, was not a material alteration, and did not tend to deprive the defendant of his constitutional right to be informed of the nature of the accusation brought against him, the court saying that such amendments of the names or descriptions of persons alleged in an indictment to be the owners of property forming the subject of any offense named therein were expressly authorized by the statute.

In *Haywood v. State* (1872) 47 Miss. 1, where it appeared that an indictment for larceny alleged the stolen goods to be the property of James Marshall, it was held proper for the trial court to authorize an amendment thereto, alleging the ownership to be in James Cicero Marshall, such amendment being in accordance with the statute.

Similarly, where an indictment for unlawfully marking an animal alleged the ownership of the animal to be in one John Barton, and on the trial it

appeared that the animal belonged to John Thomas Barton, the allowance of an amendment to the indictment by inserting the middle name of Mr. Barton was held proper under the express provision of the statute. Rev. Code 1871, § 2799. *Murrah v. State* (1875) 51 Miss. 675.

And see *Foster v. State* (1876) 52 Miss. 695, wherein the accused, who had been indicted for larceny, moved for a new trial on the ground that he had discovered evidence which would show that the stolen property did not belong to the person alleged in the indictment as the owner thereof. The court held that the ground for the motion was insufficient, since, had the fact alleged been proved on the trial, the court would have been authorized to direct an amendment to the indictment, in correction of the mistake.

In *Peebles v. State* (1877) 55 Miss. 434, which was a prosecution on an indictment charging the theft of a hog belonging to "Margaret Majors," the evidence disclosed that the owner of the hog was "Clark Majors," and the trial court ordered the indictment amended to conform to the proof. The defendant excepted to the amendment, but the supreme court held that it was properly allowed.

And it was held proper in *Knight v. State* (1887) 64 Miss. 802, 2 So. 252, for the court to authorize the amendment of an indictment of one for going on the land of another, by correcting the name of the alleged owner of the land as therein stated. Such amendment was expressly authorized by the provision of a statute (Code 1880, § 3081), as follows: "Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in such indictment, and the evidence offered in proof thereof, . . . in the name or description of any person, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, . . . it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and

that the defendant cannot be prejudiced thereby in his defense on the merits, to order such indictment and the record and proceedings in said court to be amended, according to the proof."

In *Richburger v. State* (1907) 90 Miss. 806, 44 So. 772, wherein a variance appeared between the allegation of an indictment for embezzlement, and the evidence, as to the full name of the injured banking corporation, the trial court granted an amendment of the indictment correcting this erroneous recital, and the defendant took exception. On appeal, the court held that the variance was an immaterial one, and the amendment unnecessary, but having been made it was held harmless. Code 1892, § 1485.

But compare the earlier case of *Unger v. State* (1869) 42 Miss. 642, wherein the trial court permitted an amendment to be made to an indictment for larceny, by changing the middle initial in the name of the owner of the alleged stolen property, and the state maintained that this amendment was authorized by a statute (Code, art. 262, § 615) providing that a variance between the allegations of an indictment and the evidence, as to the name or description of any person therein, was a proper subject of amendment. The defendant maintained that the qualifying clause of this statute, that such amendment should be lawful only when the court considered the variance not material to the merits of the case, prevented an application of the statute in this case. The court held that the mistake in the name of the owner of the alleged stolen goods was a fatal defect, and the amendment, being one of substance, was improper. But the court added that the error should have been taken advantage of before verdict, since the defect was cured after verdict by the Statute of Jeofails.

In *People v. Richards* (1887) 44 Hun, 278, 5 N. Y. Crim. Rep. 355, the court permitted the district attorney to amend an indictment for burglary by correcting an erroneous recital therein as to the ownership of the burglarized property, and on the de-

fendant's appeal from the refusal of the court to discharge him on motion because of the variance, it was held that the amendment was properly allowed under the authority of the Code of Criminal Procedure (§§ 281, 293, 294), providing for amendments in respect to the name or description of any person or thing, to obviate difficulties arising from a variance between the allegations of the indictment and the evidence. Reversed on other grounds in (1888) 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371.

Where, in a prosecution for larceny, the court allowed an amendment to the indictment in respect to the name of the owner of the stolen property, this was held to be a proper exercise of the court's authority. *People v. Herman* (1887) 45 Hun (N. Y.) 175.

And where, on the prosecution of an indictment for grand larceny, the court allowed an amendment correcting a misnomer therein as to the name of the owner of the alleged stolen property, the allowance of the amendment was held to be a proper exercise of the court's authority. *People v. Dunn* (1889) 53 Hun, 381, 7 N. Y. Crim. Rep. 173, 6 N. Y. Supp. 805.

Similarly, in *People v. Hagan* (1891) 60 Hun, 577, 37 N. Y. S. R. 660, 14 N. Y. Supp. 233, the allowance of an amendment to an indictment for burglary, correcting a misnomer therein as to the name of the owner of the burglarized premises, was held proper.

In *Com. v. O'Brien* (1869) 2 Brewst. (Pa.) 566, the court held that an amendment to an indictment for larceny, by striking out the name of the alleged owner of the stolen goods and inserting the words "of some person unknown," was properly allowed under § 13 of the Act of March 31, 1860.

In *Com. v. Livingston* (1895) 5 Pa. Dist. R. 666, the trial court allowed an amendment to an indictment for larceny, conforming the allegation therein that the ownership of the stolen property was in one Armstrong, to the proof which disclosed the owners to be Armstrong and Stohl. On the defendant's appeal from the allowance of the amendment, it was held that the amendment was specially authorized

by § 18 of the Criminal Procedure Act of 1860, empowering the court to conform the allegations of an indictment to the proof in respect to the name or description of any person or persons therein alleged to be the owner or owners of any property forming the subject of an offense charged therein.

In *Com. v. Hazlett* (1900) 14 Pa. Super. Ct. 352, the trial court granted leave to amend an indictment for embezzlement by inserting after the description of the money deposited as "money of the said Thomas A. De Normandie," the words, "and of another person, being a partner and joint owner with him," so that there would be no variance as to the ownership of the deposit. This was held to be a proper exercise of the court's authority, since the variance was not material to the merits of the case.

And it was held proper in *Rosenberger v. Com.* (1888) 118 Pa. 77, 11 Atl. 782, for the court to authorize an amendment to an indictment for larceny, conforming an allegation therein that the stolen goods were the joint property of Alexander and Catherine Hill, to evidence that the goods were owned by Alexander and Catherine Hill individually, such amendments being expressly authorized by statute.

Similarly, in *State v. Casavant* (1892) 64 Vt. 405, 23 Atl. 636, it was held that the court under the authority of the statute (Acts 1882, No. 86) might properly allow an amendment to an indictment for larceny, changing the name of the person therein alleged to be the owner of the stolen property.

In *Reg. v. Vincent* (1852) 5 Cox, C. C. (Eng.) 537, 16 Jur. 457, 3 Car. & K. 246, 2 Den. C. C. 464, 21 L. J. Mag. Cas. N. S. 109, it was held that an indictment for theft might be amended at the trial by order of the court changing the name of the alleged owner of the stolen property, such amendment being authorized by 14 & 15 Vict. chap. 100, § 1.

And in *Reg. v. Fullarton* (1853) 6 Cox, C. C. (Eng.) 194, wherein a misnomer appeared in the allegation of an indictment as to the ownership of certain property alleged to have been stolen by the defendant, it was held

proper under statutory authority for the court to allow an amendment to the indictment in correction of the misnomer. The amendment herein was allowed after all the evidence was in, the court overruling *Reg. v. Rymes* (1850) 3 Car. & K. (Eng.) 326, wherein it was held that an indictment could not be amended after the counsel for the defense had addressed the jury.

In *Reg. v. Marks* (1866) 10 Cox, C. C. (Eng.) 367, it was held that an indictment charging the secretary of a society with the embezzlement of moneys belonging to the society, and described therein as the property of Thomas Shean and others, might be amended by alleging in addition that Thomas Shean and others were trustees of the society.

And see *Rex v. Murray* [1906] 2 K. B. (Eng.) 385, 3 B. R. C. 775, 70 J. P. 297, 75 L. J. K. B. N. S. 593, 95 L. T. N. S. 295, 22 Times L. R. 596, 6 Ann. Cas. 161. In this prosecution, the counsel for the Crown moved for leave to amend an indictment for the larceny of a wife's separate property, which alleged the ownership of the property to be in the husband, by substituting the wife in place of the husband as the owner of the goods. The trial court refused to grant the leave, and on appeal the conviction was quashed for the variance, the court stating, however, that it regretted the necessity for quashing the conviction, since the court below should have granted leave to amend the indictment, the amendment asked being distinctly authorized by statute (14 & 15 Vict. chap. 100, § 1).

In *Reg. v. Jackson* (1869) 18 U. C. C. P. 280, an indictment which charged the theft of cattle belonging to "Robert McKim," an infant, was amended by substituting the name of "Mary McKim, administratrix of Thomas McKim," as the owner of the cattle, and the court held that the amendment was properly allowed under the authority of the statute. Can. Consol. Stat. chap. 99, § 78.

### 3. Other injured person.

The allowance by the court of an amendment to an indictment in respect to a misnomer as to the name of an

injured party other than the victim of homicide or the owner of property is generally authorized, as the correction of a defect of form only.

**Louisiana.**—*State v. Johnson* (1906) 116 La. 30, 40 So. 521.

**Maryland.**—*Hawthorn v. State* (1881) 56 Md. 530.

**Mississippi.**—*Miller v. State* (1876) 53 Miss. 403; *Mackguire v. State* (1907) 91 Miss. 151, 44 So. 802.

**New York.**—*People v. Johnson* (1887) 104 N. Y. 213, 10 N. E. 690; *People v. Castaldo* (1911) 146 App. Div. 767, 181 N. Y. Supp. 545.

**Pennsylvania.**—*Com. v. O'Neill* (1874) 5 Pa. Co. Ct. 209; *Rough v. Com.* (1875) 78 Pa. 495.

**England.**—*Reg. v. Frost* (1855) 6 Cox, C. C. 526, 1 Jur. N. S. 406, 3 C. L. R. 665, *Dears C. C.* 474, 24 L. J. Mag. Cas. N. S. 116, 3 Week. Rep. 401; *Reg. v. Welton* (1862) 9 Cox, C. C. 297; *Reg. v. Titley* (1880) 14 Cox, C. C. 502.

In *State v. Johnson* (La.) *supra*, it appeared that the indictment charging the defendants with attempt to murder, described the injured man as "Reins Centel." The district attorney moved for the court's permission to amend the indictment by substituting the name of "Remus Ducantel" as the injured man, and the court directed that the change be made. This was held proper, such amendment being authorized by Revised Statutes, § 1047.

Where an indictment charged an assault with intent to kill one Roan Blackman, and during the trial it appeared that the name of the person assaulted was Roan Blackburn, it was held proper under the statute (Code 1871, § 2799) for the court to authorize an amendment of the indictment, substituting "Blackburn" for "Blackman." "The statute," it was said, "allows the court, on trial of an indictment for any offense, to cause an amendment to be made, not to introduce another and distinct offense, but to accurately describe and particularly identify, as to names, the very offense charged, 'if it shall consider such variance' (as disclosed by evidence) 'not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on

the merits.'" *Miller v. State* (Miss.) *supra*.

In *Mackguire v. State* (Miss.) *supra*, the court allowed an amendment to an indictment for forgery, striking out the name of William Foster as the party attempted to be defrauded, and inserting in its stead the name "American Express Company." This was held proper, apparently under the authority of § 1508 of the Code of 1906, since the identity of the offense was in no wise changed, and the defendant was not prejudiced thereby.

In *People v. Johnson* (N. Y.) *supra*, the court directed that an indictment for seduction be amended to conform to the proof, as to the name of the injured party, and this was held to be a proper exercise of the court's authority. Code Crim. Proc. §§ 281, 293-295.

And see *People v. Castaldo* (N. Y.) *supra*, wherein, on the prosecution of an indictment for felonious assault, the court stated that if there was a variance between the allegations of the indictment and the proof as to the description of the person whom the defendant intended to kill, the variance was such as might have been summarily cured by amendment.

Under § 18 of the Pennsylvania Criminal Procedure Act of March 31, 1860, providing that the court may conform allegations of an indictment to the proof in respect to the name or other description of any person named or described therein, it has been held proper for the court to direct an amendment to an indictment for perjury, substituting the name of the person authorized to administer the oath, at whose request it was given, for the name of the clerk who handed to the defendant the book on which the oath was taken. *Com. v. O'Neill* (1874) 5 Pa. Co. Ct. 209.

And the amendment of an indictment for selling liquor without a license, by the insertion of the name of the person to whom the liquor was sold, has been held proper. *Rough v. Com.* (1875) 78 Pa. 495.

In *Hawthorn v. State* (1881) 56 Md. 530, the court authorized the state's attorney to amend an indictment for

forgery by striking out words charging that the forgery was committed with intent to defraud one Joseph Kausler, and leaving it as charging the act, without stating the name of the particular person intended to be defrauded. By the Act of 1862, chap. 80, it was provided that an indictment for forgery need not allege the intent of the defendant to defraud any particular person, and the court held that, since this act rendered the amendment surplusage, it was clearly an amendment in mere matter of form, and not of substance, and was properly authorized. In continuance, the court stated the rule as follows: "An indictment is a finding by a grand jury upon oath, and it cannot, except in cases where the law has specially authorized such proceeding, and in matters of form which are not matters of substance, be amended by a court without the concurrence of the grand inquest by whom it was presented."

In *Reg. v. Frost* (1855) 6 Cox, C. C. (Eng.) 526, 1 Jur. N. S. 406, 3 C. L. R. 665, Dears. C. C. 474, 24 L. J. Mag. Cas. N. S. 116, 3 Week. Rep. 401, it was said, by way of dictum, that the court below might, under the authority of 14 & 15 Vict. chap. 100, § 1, have directed an amendment to an indictment, striking out all but the words "Duke of Cambridge" in the description of the master of an assaulted gamekeeper, as "George William Frederick Charles, Duke of Cambridge."

In *Reg. v. Welton* (1862) 9 Cox, C. C. (Eng.) 297, wherein an indictment charged the defendant with the intent to kill one Annie Welton, but the prosecution was unable to prove that the child had been known by such name, it was held proper to amend the indictment by striking out the words "Annie Welton," and inserting in lieu thereof the words, "a certain female child whose name is to the jurors unknown," the court saying: "The act which gives power of amendment (14 & 15 Vict. chap. 100, § 1) states in the preamble that 'offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case.'

Here the amendment cannot prejudice the prisoner in her defense, and I consider the variance not 'material to the merits of the case.' A statute of this kind should have a wide construction, and I shall not interpret it in favor of technical strictness. Let the indictment be amended as proposed."

And in *Reg. v. Titley* (1880) 14 Cox, C. C. (Eng.) 502, the court allowed an amendment to an indictment charging the defendant with unlawfully supplying drugs with the intent that they be used to procure the miscarriage of a certain woman, by inserting in lieu of the words, "a certain woman" the words, "a woman to the jurors unknown."

#### *d. Date of offense.*

The courts are generally authorized to amend indictments by the correction of erroneous allegations as to the time of the offense, when time is not of the essence of the crime. See III. b, *infra*.

Iowa.—*State v. Brooks* (1892) 85 Iowa, 366, 52 N. W. 240.

Louisiana.—*State v. Johnson* (1883) 35 La. Ann. 842; *State v. Fontenette* (1886) 38 La. Ann. 61; *State v. Pierre* (1887) 39 La. Ann. 915, 3 So. 69; *State v. Hamilton* (1896) 48 La. Ann. 1566, 21 So. 232; *State v. Hardaway* (1898) 50 La. Ann. 1345, 24 So. 320; *State v. Cornelius* (1907) 118 La. 146, 42 So. 754; *State v. Anderson* (1910) 125 La. 779, 51 So. 846; *State v. Lee* (1911) 127 La. 1077, 54 So. 356; *State v. Anderson* (1915) 137 La. 765, 69 So. 167; *State v. Williams* (1918) 143 La. 424, 78 So. 662.

Mississippi. — *Saucier v. State* (1909) 95 Miss. 226, 48 So. 840, 21 Ann. Cas. 1155.

New Hampshire.—*State v. Blaisdell* (1869) 49 N. H. 81.

New Jersey. — *Ketline v. State* (1896) 58 N. J. L. 462, 37 Atl. 183; *State v. Unsworth* (1913) 85 N. J. L. 237, 88 Atl. 1097.

New York. — *People v. Jackson* (1888) 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Crim. Rep. 393; *People v. Formosa* (1892) 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492; *People v. Jones* (1909) 129 App. Div. 772, 113 N. Y. Supp. 1097, affirmed in (1909)



195 N. Y. 547, 88 N. E. 1127; *People v. Lewis* (1909) 132 App. Div. 256, 116 N. Y. S. 896.

**Pennsylvania.**—*Myers v. Com.* (1875) 79 Pa. 308; *Com. v. Tassone* (1914) 246 Pa. 543, 92 Atl. 718.

**South Carolina.**—*State v. May* (1895) 45 S. C. 509, 23 S. E. 513; *State v. Richey* (1911) 88 S. C. 239, 70 S. E. 729.

**Wisconsin.**—*Schultz v. State* (1908) 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571.

**England.**—*Reg. v. Price* (1900) 17 Times L. R. 80.

**Canada.**—*Veronneau v. Rex* (1916) Rap. Jud. Quebec 25 B. R. 275, 31 D. L. R. 332, 26 Can. Crim. Cas. 278.

In *State v. Brooks* (Iowa) *supra*, the action of the trial court in authorizing the amendment of an indictment by the correction of an impossible date, the insertion of which was a mere clerical error not fatal to the indictment, was held proper under a statute (Code, § 4538) requiring the court to render judgment without regard to technical errors or defects not affecting the substantial rights of the parties.

And where the defendant, on appeal from a conviction of larceny, presented an exception to a ruling of the trial court, permitting an amendment of the indictment so as to show that the offense was committed on a different date, and the date was not of the essence of the crime, it was held that the amendment was clearly within the discretion of the court. Rev. Stat. § 1047. *State v. Johnson* (1883) 35 La. Ann. 842.

It has been held that the court may authorize the correction of an impossible and immaterial date in an indictment at any time. *State v. Pierre* (1887) 39 La. Ann. 915, 3 So. 60.

And the court has said that since the date of the offense in an indictment for murder is immaterial, provided it is averred as falling prior to the return of the indictment, the court may direct an amendment in correction of such an erroneous date. *State v. Cornelius* (1907) 118 La. 146, 42 So. 754.

In *State v. Anderson* (1910) 125

La. 779, 51 So. 846, wherein the trial court allowed an amendment to an indictment for a violation of the Liquor Law, by the insertion of April 4th as the day of sale instead of June 15th, which latter date was subsequent to the return of the indictment, it was held that the amendment was properly allowed, even over the defendant's objection, being authorized by statute. Rev. Stat. §§ 1047, 1063, 1064.

And in *State v. Lee* (1911) 127 La. 1077, 54 So. 356, wherein it appeared that before trial the court had permitted an amendment to an indictment for murder by a changing of the alleged date of the crime from December 1, 1902, to December 1, 1901, it was held that such amendment was expressly authorized by § 1047, Revised Statute.

In *State v. Anderson* (1915) 137 La. 765, 69 So. 167, the trial court directed the district attorney to amend an indictment for burglary, by changing the alleged date of the offense from the 22d to the 21st of January, to conform to the proof. The court held that this was a proper amendment, not prejudicial to the accused in his defense.

And where the testimony in a prosecution for rape referred to only one occurrence on or about the 28th of November, 1917, and the indictment charged the commission of the offense on the 1st day of December, 1917, it was held proper for the court to direct an amendment to the indictment on the motion of the district attorney, conforming the date therein to the testimony, the amendment being an unimportant one. *State v. Williams* (1918) 143 La. 424, 78 So. 662.

Section 1064 of the Louisiana Revised Statutes provided as follows: "Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn and not afterward, and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon

the trial shall proceed as if no such defect had appeared." And on the authority of this statute it was held in *State v. Fontenette* (1886) 38 La. Ann. 61, that the court properly permitted an amendment of an indictment by filling in the blank for the year, of the commission of the offense, thus conforming the indictment to the proof.

And in *State v. Hamilton* (1896) 48 La. Ann. 1566, 21 So. 232, it was held proper for the trial court to direct an amendment of an indictment correcting an impossible date therein, which date was not of the essence of the crime.

It was held in *State v. Hardaway* (1898) 50 La. Ann. 1345, 24 So. 820, that an amendment of the date of a murder as set forth in an indictment was not necessary, since time was not of the essence of the crime, but even if it were necessary, the court held that it was proper for the trial court to direct such an amendment.

And where the date of the commission of the offense, as alleged in an indictment for perjury, was not an element of the crime and in no way material, it was held proper for the court to authorize an amendment conforming an erroneous date therein to the evidence. See Code 1906, §§ 1426, 1428. *Saucier v. State* (1909) 95 Miss. 226, 48 So. 840, 21 Ann. Cas. 1155.

A New Hampshire act (Gen. Stat. § 13, chap. 242) provided that no indictment should be quashed for errors or mistakes, where the person and case might be rightly understood by the court, or through any defect or want of form or addition; and courts were given the authority to order amendments on motion in any such case. In *State v. Blaisdell* (1869) 49 N. H. 81, wherein the indictment charged the commission of a burglary on a day subsequent to the return of the indictment, it was held that the error in date was a proper subject of amendment, the allegation being a matter of form, and not of the substance of the offense.

In *Ketline v. State* (1896) 58 N. J. L. 462, 37 Atl. 133, it was held to be proper for the court to authorize an amendment to an indictment, filling a

blank space therein for the date of the commission of the offense, which by oversight had not been filled up.

In *State v. Unsworth* (1918) 85 N. J. L. 287, 88 Atl. 1097, wherein an indictment for conspiracy alleged the commission of the crime as of a date which would have permitted the running of the Statute of Limitations in the interim, and an amendment was made charging the offense as of a later date within the period of limitation, the court held that whether the amendment was legally permissible would depend on whether the date was material. And it appearing that there had been an overt act within the two years preceding the indictment, it was held that time was not of the essence of the crime, and that the amendment was properly allowed.

Under the provision of § 293 of the New York Code of Criminal Procedure, authorizing an amendment as to time when the defendant cannot thereby be prejudiced in his defense on the merits, it has been held proper for the court to authorize an amendment to an indictment for abandoning children, conforming the date of the offense as therein alleged, to the evidence thereof, it appearing that time was not an essential of the offense, and that the defendant could not be prejudiced thereby in his defense on the merits. *People v. Lewis* (1909) 132 App. Div. 256, 116 N. Y. Supp. 893.

See *People v. Jackson* (1888) 111 N. Y. 362, 6 N. Y. Crim. Rep. 393, 19 N. E. 54, wherein it was said by way of dictum that an indictment for murder might be amended by direction of the court so as to conform with the proof of an averment therein as to the date of the commission of the offense.

And see *People v. Formosa* (1892) 181 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492, wherein it was said that if the defendant had objected to the variance between the allegation of the indictment and the proof as to the date of the commission of the offense, the trial court could have allowed an amendment.

In *People v. Jones* (1909) 129 App.

Div. 772, 118 N. Y. Supp. 1097, affirmed in (1909) 195 N. Y. 547, 88 N. E. 1127, the trial court allowed an amendment to an indictment for keeping a disorderly house, changing the date on which the defendant was charged with keeping the house, and this act was held proper. The court cited the cases of *People v. Jackson* and *People v. Formosa* (N. Y.) *supra*, as authorities in support of this power of amendment.

In *Myers v. Com.* (1875) 79 Pa. 308, an amendment was allowed changing the time laid in an indictment for homicide, from October, 1874, to November, 1874, and this was held a proper exercise of the amendatory authority given the court by § 13 of the Act of March 31, 1860, especially when read in connection with the powers of amendment set forth in the 11th and 12th sections of that act.

And in *Com. v. Tassone* (1914) 246 Pa. 548, 92 Atl. 718, it was held that the trial court made no error in allowing an amendment to an indictment for murder, after trial, changing an allegation therein as to the date of the commission of the offense so as to allege the true date of the offense. This, the court held, was authorized.

But see *Com. v. Seymour* (1869) 2 Brewst. (Pa.) 567, wherein it was held that the act allowing amendments to indictments (Act March 31, 1860) would not extend to a case where the commonwealth sought to change the date of the offense alleged in the indictment as the year 1800, by inserting the word "sixty-eight" thereafter.

Where an indictment charged the commission of an offense "on the fifth day of January, in the year of our Lord one thousand eight hundred and ninety ———," it was held proper for the court to allow an amendment filling in the blank with the correct date, under the following provision of § 57 of the Criminal Code: "If there be any defect in form in any indictment, it shall be competent for the court before which the case is tried to amend the said indictment: Provided, such amendment does not change the nature of the offense charged." *State v. May* (1895) 45 S. C. 509, 23 S. E. 513.

And where an indictment which charged that "defendant committed the offense on ——— day of December, 1907," was amended by inserting the 1st day of the month, it was held that the amendment was permissible under the authority of *State v. May*, *supra*, and within the provision of § 58 of the Criminal Code, the court adding: "Whenever it is not necessary to prove the precise time as alleged, it should be competent, under § 58, to amend the allegation as to time." *State v. Richey* (1911) 88 S. C. 239, 70 S. E. 729.

And see *Schultz v. State* (1908) 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571, wherein it was held that the allowance of amendments to an indictment changing the date of threats alleged therein as the basis of the offense charged, and changing an allegation therein as to the business of the person threatened, was clearly justified by statute, and particularly because the amendments did not go to the substance of the indictment, and were not prejudicial to the defendant.

In an English decision (*Reg. v. Price* (1900) 17 Times L. R. (Eng.) 80), wherein the dates in an indictment were expressed in figures and not in words, it was held that the court might properly amend the indictment in this respect, the defect being one of form only, and within the provision of the statute relative to amendments.

And in *Veronneau v. Rex* (1916) Rap. Jud. Quebec 25 B. R. 275, 31 D. L. R. 332, 26 Can. Crim. Cas. 278, it was held that the court might properly direct an amendment to an indictment for perjury, by conforming the date of the offense as alleged therein, to the proof, under the authority of § 889 of the Criminal Code. The court distinguished its holding from that in *Rex v. Lacelle* (1905) 10 Can. Crim. Cas. 229, 11 Ont. L. Rep. 74, wherein it was held that the amendment of an indictment for seduction, as to the alleged date of the offense, would be tantamount to charging a new offense, since in the present case the offense charged was not one of that class as to which a change of date would substantially change the offense charged.

*c. Description of offense.*

Under a statute permitting amendments in matters of form, the court may authorize the amendment of an indictment in respect to the description of the offense, when the amendment does not prejudice the defense of the accused on the merits. *State v. Foxton* (1914) 166 Iowa, 181, 52 L.R.A.(N.S.) 919, 147 N. W. 347, Ann. Cas. 1916E, 727; *Rocco v. State* (1859) 37 Miss. 357; *Gamblin v. State* (1871) 45 Miss. 658; *Larison v. State* (1887) 49 N. J. L. 256, 60 Am. Rep. 606, 9 Atl. 700; *People v. Roof* (1910) 188 App. Div. 633, 122 N. Y. Supp. 677, affirmed in (1910) 199 N. Y. 586, 93 N. E. 1128; *Com. v. Parchem* (1912) 21 Pa. Dist. R. 1129; *Com. v. Gockley* (1904) 14 Pa. Dist. R. 535; *Reg. v. Cronin* (1875) 36 U. C. Q. B. 342; *Reg. v. Flynn* (1878) 18 N. B. 321; *Reg. v. Weir* (1899) 3 Can. Crim. Cas. 262; *Rex v. Mooney* (1905) 11 Can. Crim. Cas. 333, Rap. Jud. Quebec 15 B. R. 57.

In *State v. Foxton* (1914) 166 Iowa, 181, 52 L.R.A.(N.S.) 919, 147 N. W. 347, Ann. Cas. 1916E, 727, wherein the defendant urged that the court had erred in allowing the county attorney to amend an indictment for obtaining money by false pretenses, by more particularly describing the manner in which the defendant received the money, it was held that the amendment was properly authorized under chapter 227 of the Laws of the 38d General Assembly, since it neither changed the nature or degree of the crime charged, nor did it prejudice the substantial rights of the defendant.

In *Rocco v. State* (1859) 37 Miss. 357, the court permitted an amendment to an indictment charging the defendant with unlawfully retailing liquors, by striking out the phrase, "and to divers other persons," which followed the name of the person to whom the illegal sale was charged to have been made, thus conforming the charge to the evidence, which showed a sale only to the person named. This amendment was held to be expressly authorized by the statute (Rev. Code, p. 615, art. 262), providing that when there shall be a variance between the statements

in an indictment and the evidence, "in the Christian or surname, or both, or other description whatever, of any person whomsoever, therein named or described, or in the ownership of any property named or described therein," it shall be lawful for the court, "if it shall consider such variance not material to the merits of the case," to order such indictment amended to conform with the proof.

Where an indictment for a violation of the statutory prohibition against exhibiting a deadly weapon "in a rude, angry, or threatening manner," described the offense in these words, except that the word "manner" was omitted, the court held that the omission was a mere formal defect, and a proper subject of amendment under the authority of the Code. *Gamblin v. State* (1871) 45 Miss. 658.

And where an indictment was technically defective, since charging that the defendant did "send and convey" a certain insulting communication, instead of using the words of the statute, "send or convey," the court stated that the defect might have been cured by directing an amendment to the indictment. Rev. pp. 275, 277, §§ 43, 53. *Larison v. State* (1887) 49 N. J. L. 256, 60 Am. Rep. 606, 9 Atl. 700.

In *People v. Roof* (1910) 188 App. Div. 633, 122 N. Y. Supp. 677, affirmed in (1910) 199 N. Y. 586, 93 N. E. 1128, wherein the court allowed an amendment to an indictment for robbery, by the insertion after the words, "each of said persons being aided by an accomplice actually present," the following: "The said Myron Lamphere being then and there aided by an accomplice actually present, to wit, Fred Roof, and the said Fred Roof being then and there aided by an accomplice actually present, to wit, Myron Lamphere," it was held that no error was committed prejudicial to the accused. See §§ 285, 293, Code Crim. Proc.

In *Com. v. Parchem* (1912) 21 Pa. Dist. R. 1129, wherein an indictment for embezzlement alleged that the money was taken by virtue of the defendant's employment and on account of his "employment," instead of on

account of his "employer," the court, directing an amendment curing the error, said that the defect, being a formal one, was amendable. March 31, 1860, P. L. 427, § 11.

And see *Com. v. Gockley* (1904) 14 Pa. Dist. R. 585, wherein an indictment for false pretense did not state whether the money obtained was given as a loan, gift, or otherwise, and the court, refusing a motion for a new trial, stated that this was at most, an amendable defect.

In *Reg. v. Cronin* (1875) 36 U. C. Q. B. 342, wherein an amendment was allowed to an indictment charging that the defendant feloniously set fire to a certain building, "with intent to defraud," by striking out the phrase quoted, the court held that the amendment was proper, there being no doubt as to the authority therefor, since the enactment of the statute. Can. Consol. Stat. chap. 99, § 78.

And see *Reg. v. Flynn* (1878) 18 N. B. 321, wherein the court said that an indictment for doing grievous bodily harm, which alleged that the accused did "feloniously stab, cut, and wound," instead of describing the offense in the terms of the statute, as that he "unlawfully and maliciously" stabbed, might be amended if considered defective, under the authority of § 32 of 32 & 33 Vict. chap. 29, relative to procedure in criminal cases.

In *Reg. v. Weir* (1899) 3 Can. Crim. Cas. 262, it was held that an amendment to an indictment for making a false bank return, by inserting the word "containing" before the words "a wilful, false, and deceptive statement," was properly allowed under the authority of § 723 of the Criminal Code, the court saying: "The correction in no way changes the character or nature of the offense, and as the defendant knew to the same extent before and after the amendment what he was accused of, he was neither misled nor prejudiced by it. The test whether a defendant can be prejudiced by such an amendment is whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the

defendant might have would be equally applicable to the indictment in the one form as in the other. . . . In fine, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed, but if the amendment would substitute a different transaction from that alleged, or would render a different plea necessary, it ought not to be made."

And where an indictment which charged "that Frank Mooney attempted to kill and murder constable Vicars" was amended so as to read, "That Frank Mooney, with intent to commit murder, shot at constable Vicars," it was held that such amendment was properly allowed. *Rex v. Mooney* (1905) 11 Can. Crim. Cas. 333, Rap. Jud. Quebec 15 B. R. 57.

#### *1. Description of property.*

The allowance by the court of an amendment to an indictment, in respect to the description of any property therein mentioned, is held to be proper under statutory authority to amend, as going to a defect of form only.

Iowa.—*State v. Mullen* (1911) 151 Iowa, 392, 131 N. W. 679, Ann. Cas. 1913A, 399.

Louisiana.—*State v. Carter* (1890) — La. —, 9 So. 128; *State v. Perkins* (1897) 49 La. Ann. 310, 21 So. 839; *State v. Jacobs* (1898) 50 La. Ann. 447, 23 So. 608; *State v. Gregg* (1909) 122 La. 979, 48 So. 426; *State v. Lebleu* (1915) 137 La. 1007, 69 So. 808.

Mississippi.—*Freeman v. State* (1914) 108 Miss. 818, 60 So. 782, 67 So. 460.

New Jersey.—*State v. Johnson* (1918) 91 N. J. L. 611, 104 Atl. 593.

New York.—*People v. Langley* (1906) 114 App. Div. 427, 20 N. Y. Crim. Rep. 281, 100 N. Y. Supp. 123.

South Carolina.—*State v. Rodman* (1910) 86 S. C. 154, 68 S. E. 343.

England.—*Reg. v. Neville* (1852) 6 Cox, C. C. 69; *Reg. v. Sturge* (1854) 18 Jur. 1052, 3 El. & Bl. 734, 118 Eng. Reprint, 1816, 23 L. J. Mag. Cas. N. S. 172, 2 Week. Rep. 477; *Reg. v. Gumble* (1872) 12 Cox, C. C. 248, 27 L. T. N. S. 692, 21 Week. Rep. 290, 42 L. J. Mag. Cas. N. S. 7, L. R. 2 C. C. 1, 1

*Am. Crim. Rep.* 396; *Reg. v. Sutton* (1877) 13 Cox, C. C. 648.

*Canada.*—*Reg. v. Carleton County* (1882) 1 Ont. Rep. 277; *Reg. v. Patterson* (1895) 2 Can. Crim. Cas. 339.

In *State v. Mullen* (1911) 151 Iowa, 392, 131 N. W. 679, Ann. Cas. 1913A, 399, it was held proper for the district attorney to amend an indictment with the court's permission, so as to correct a description of certain property alleged to have been falsely obtained, it being provided by statute (Laws of the 33d General Assembly, chap. 227, ¶ 7) that amendments in correction of errors in name or description of any person or thing might be made, when not prejudicial to substantial rights of the defendant, or charging a different crime or degree of crime.

Under § 1047 of the Louisiana Revised Statutes, it has been held that an indictment charging the larceny of "one lot of clothing valued at \$1.50" may be amended by making the description of the goods read, "One lot of clothing, consisting of one pair of woolen pantaloons and one plaited-bosom shirt." *State v. Carter* (1890) — La. —, 9 So. 128.

And see *State v. Perkins* (1897) 49 La. Ann. 310, 21 So. 839, wherein the court said that had the defendant taken proper objection to the alleged insufficiency of an allegation in an indictment for larceny, which described the property stolen as "one beef of the cow kind," the trial court would have been authorized to amend the indictment.

In *State v. Jacobs* (1898) 50 La. Ann. 447, 23 So. 608, it was held proper for the court to authorize the district attorney to amend an allegation in an indictment for the larceny of a bale of cotton "in the lint," so as to conform to testimony that the cotton was "in the seed."

And where an indictment for burglary and larceny charged the theft, among other articles, of "six pairs of house, each paid of the value of 8 cents," it was held proper for the trial court to authorize an amendment changing the clause so as to read, "six pairs of hose, each pair of the value of 8 cents." The court,

quoting Revised Statutes, § 1047, said: "This law, construed in connection with Revised Statutes, § 1064, has been held to authorize the amendment of defects in indictments, in matters of description, or that are merely formal and not substantial." *State v. Gregg* (1909) 122 La. 979, 48 So. 426.

Where, in a prosecution for stealing cattle, a variance arose between the testimony of the owner of some of the cattle and the description of the cattle in the indictment, as to the brand by which the cattle were marked, it was held proper for the trial court to authorize an amendment of the indictment to make the description therein conform to the testimony. *State v. Lebleu* (1915) 137 La. 1007, 69 So. 808.

And it was held in *Freeman v. State* (1914) 108 Miss. 818, 67 So. 460, that, where an indictment for receiving deposits in an insolvent bank alleged the receipt of \$7.50 in lawful money, and the evidence showed the receipt of money, a check, and a warrant, with the total value of \$7.50, the court properly directed an amendment conforming the indictment to the proof, under the authority of § 1508 of the Code of 1906.

In *State v. Johnson* (1918) 91 N. J. L. 611, 104 Atl. 593, the court held that an amendment to an indictment for fraudulent conversion, by inserting the word "moneys" between the statement of the amount converted and the words, "of the goods and chattels," was properly allowed, since the power of amendment, under § 44 of the Criminal Procedure Act, is applicable to that class of cases where a specific criminal charge can be perceived on the face of the indictment, which fails to be effective only by reason of an error which the court can clearly infer was a clerical oversight.

In *People v. Langley* (1906) 114 App. Div. 427, 20 N. Y. Crim. Rep. 281, 100 N. Y. Supp. 123, on the prosecution of an indictment for grand larceny, which contained a recital that the defendant had misrepresented himself to be in control of a corporation owning valuable land in Virginia,

the court permitted an amendment inserting the word "West" before "Virginia." On the defendant's exception to the allowance of this amendment, it was held that there was no doubt as to the right of the court to amend the indictment by correcting the description of the property, under the authority of § 293 of the Code of Criminal Procedure. For New York authorities to the contrary, see III. e, *infra*.

And an amendment to an indictment for obstructing a public road, which merely made the description of the road more certain, was held proper in *State v. Rodman* (1910) 86 S. C. 154, 68 S. E. 343, under the authority of § 58 of the Criminal Code, providing that the court may amend indictments as to any defect in form, or in conformance to the proof, in all cases where such amendment does not change the nature of the offense charged.

But see *Schenck v. State* (1915) 76 Tex. Crim. Rep. 235, 174 S. W. 357, where on the prosecution of an indictment charging the theft of various articles, including "one distributor leather belt," a variance arose between the proof and the allegation of the indictment as to the description of the belt alleged to have been stolen, and it was held that the court had no authority to strike the item from the indictment.

Where an indictment charged the defendant with perjury while testifying in a prosecution against certain parties for setting fire to a barn, and it appeared from evidence introduced on the trial that the prosecution in question had been for setting fire to a stack of barley, which offense was in fact the same, it was held that the variance might be corrected by amending the indictment, under the authority of 14 & 15 Vict. chap. 100, § 1. *Reg. v. Neville* (1852) 6 Cox, C. C. (Eng.) 69.

And in *Reg. v. Sturge* (1854) 18 Jur. 1052, 3 El. & Bl. 734, 118 Eng. Reprint, 1816, 23 L. J. Mag. Cas. N. S. 172, 2 Week. Rep. 477, wherein a variance arose between the evidence and the allegation of an indictment for obstructing a footway, as to the de-

scription of the footway, the court held that the misdescription might be corrected by amending the indictment, under the authority vested in the court by 14 & 15 Vict. chap. 100, § 1.

It was held in *Reg. v. Gumble* (1872) 12 Cox, C. C. (Eng.) 248, 27 L. T. N. S. 692, 21 Week. Rep. 299, 42 L. J. Mag. Cas. N. S. 7, L. R. 2 C. C. 1, 1 Am. Crim. Rep. 396, that the court had power under 14 & 15 Vict. chap. 100, § 1, to amend an indictment alleging the theft of 19 shillings and 6 pence, by conforming it to evidence that the amount stolen was a sovereign.

And it has been held that a variance between the allegation of an indictment and the proof, as to the occupation of the land on which the indictment charged that the defendants had been poaching, should, if necessary, be corrected by the allowance of an amendment, where the defendants would not thereby be misled. *Reg. v. Sutton* (1877) 13 Cox, C. C. (Eng.) 648.

Where an indictment charged the defendant with obtaining two checks by the false pretense that there was then "a large quantity of beans, to wit, 2,680 bushels of beans," in his warehouse, and it appeared from the evidence that the pretense was that there were "2,680 bushels of beans" in the warehouse, the court held that it was proper to allow an amendment striking out the words "a large quantity of beans, to wit," such amendment being authorized by § 773 of the Criminal Code. *Reg. v. Patterson* (1895) 2 Can. Crim. Cas. 339.

And see *Reg. v. Carleton County* (1882) 1 Ont. Rep. 277, wherein the court said that a misdescription as to the location of a bridge, in an indictment charging a failure to repair the same, was a defect which might have been corrected by amendment at the trial, but could not be so altered on a motion for a new trial after the return of a verdict.

#### *g. Miscellaneous defects of form.*

Under a statute vesting the courts with power to amend indictments as to matters of form, it has been held that any amendment not prejudicial to

the rights of the accused may be allowed.

**Louisiana.**—*State v. Sullivan* (1883) 35 La. Ann. 844; *State v. Crenshaw* (1893) 45 La. Ann. 496, 12 So. 628; *State v. Williams* (1895) 47 La. Ann. 1609, 18 So. 647; *State v. Satterwhite* (1900) 52 La. Ann. 499, 26 So. 1006; *State v. Gibson* (1908) 120 La. 343, 45 So. 271.

**Massachusetts.**—*Com. v. Holley* (1855) 3 Gray, 458.

**Mississippi.**—*Keys v. State* (1916) 110 Miss. 433, 70 So. 457.

**New Jersey.**—*State v. Kern* (1889) 51 N. J. L. 259, 17 Atl. 114; *State v. Minford* (1900) 64 N. J. L. 518, 45 Atl. 817.

**New York.**—*People v. Clegg* (1890) 57 Hun, 591, 10 N. Y. Supp. 675; *People v. Scanlon* (1909) 132 App. Div. 528, 117 N. Y. Supp. 57.

**Pennsylvania.**—*Com. v. Lambrecht* (1885) 3 Pa. Co. Ct. 323; *Com. v. Ferguson* (1897) 8 Pa. Dist. R. 120; *Com. v. Miller* (1903) 13 Pa. Dist. R. 147; *Com. v. Boyd* (1914) 246 Pa. 529, 92 Atl. 705, Ann. Cas. 1916D, 201.

**Texas.**—*Johnson v. State* (1913) 70 Tex. Crim. Rep. 583, 157 S. W. 1196; *Flores v. State* (1917) — Tex. Crim. Rep. —, 198 S. W. 575.

**Vermont.**—*State v. Amidon* (1885) 58 Vt. 524, 2 Atl. 154, 6 Am. Crim. Rep. 41; *State v. Donovan* (1908) 75 Vt. 308, 55 Atl. 611.

**England.**—*Reg. v. Westley* (1859) 8 Cox, C. C. 244, 5 Jur. N. S. 1362, 8 Week. Rep. 63, Bell, C. C. 193, 29 L. J. Mag. Cas. N. S. 35; *Reg. v. Western* (1868) 11 Cox, C. C. 93, 18 L. T. N. S. 299, 37 L. J. Mag. Cas. N. S. 81, L. R. 1 C. C. 122, 16 Week. Rep. 730; *Reg. v. Tymms* (1870) 11 Cox, C. C. 645; *Rex v. Byers* (1907) 71 J. P. 205.

In *State v. Sullivan* (La.) *supra*, it was held proper for the court to permit an amendment to an indictment for forgery, by substituting the word "oblige" for the word "charge."

And the action of the trial court in permitting the district attorney to amend the indictment on the trial, by annexing his signature thereto, was held proper in *State v. Crenshaw* (1893) 45 La. Ann. 496, 12 So. 628, evidently under the authority of

§ 1064 of the Revised Statutes, since the supreme court stated in *State v. Terrebonne* (1893) 45 La. Ann. 25, 12 So. 315, that indictments could not be amended in the absence of statutory authority, except on process issued to the grand jury for that purpose.

In *State v. Williams* (1895) 47 La. Ann. 1609, 18 So. 647, wherein it appeared that an indictment had mistakenly been indorsed "a thru bill," when the indorsement was intended to read "a true bill," it was held that the trial court properly permitted an amendment in rectification of the error, such amendment being one of form and not of substance, and authorized by § 1064, Rev. Stat.

It has been held proper for the court to direct an amendment to an indictment for burglary, changing the description of the place burglarized by substituting the word "store" for the word "dwelling." *State v. Satterwhite* (1900) 52 La. Ann. 499, 26 So. 1006.

In *State v. Gibson* (1908) 120 La. 343, 45 So. 271, it was held proper for the trial court to authorize an amendment of an indictment for felonious assault, by the insertion of the word "him" following the word "at," in the phrase, "wilfully shooting at him," such amendment being within the terms of the statute (Rev. Stat. §§ 1047, 1063, 1064).

In *Com. v. Holley* (1855) 3 Gray (Mass.) 458, in which case the defendant was indicted for being a common seller of spirituous liquors, the trial court allowed an amendment to the indictment, more perfectly setting out the description of a previous conviction for the same crime. The defendant excepted to the allowance of the amendment, but the court affirmed the action of the trial court, saying: "The amendment of an indictment by order of court certainly strikes a person familiar with the practice and principles of the common law with surprise. But in this class of prosecutions, it is expressly provided for by statute (Stat. 1852, chap. 322, § 18), which provides that in any complaint or indictment, or other proceeding for any violation of this act, other than



the first offense, it shall not be requisite to set forth particularly the record of a former conviction, but it shall be sufficient to allege briefly that the defendant has been convicted of a single sale, or of being a manufacturer, or a common seller, as the case may be; 'and such allegation, in any civil or criminal process, in any stage of the proceedings, before final judgment, may be amended without terms and as a matter of right.' And it was held that the statute did not violate the direction of the Declaration of Rights that no subject shall be held to answer for any offense until the same has been fully and formally described to him.

In *Keys v. State* (1916) 110 Miss. 433, 70 So. 457, it was held that the court properly authorized an amendment to an indictment for selling intoxicating liquors, by the insertion of the word "liquors," after the words "spirituous and intoxicating," such amendment not prejudicing the accused in his defense, and being authorized by § 1426 of the Code of 1906.

See *Moore v. State* (1850) 13 Smedes & M. (Miss.) 259, wherein it was held that an indictment defective since lacking an indorsement by the prosecutor could not be amended after trial, the law of amendments not applying to criminal cases. This case arose before the adoption of the Revised Code of 1857.

In *State v. Kern* (1889) 51 N. J. L. 259, 17 Atl. 114, an indictment charging certain public officials with having awarded a contract without advertising for bids contained a statement ostensibly inserted to negative an exception in the statute under which the indictment was found, but which, through clerical error in omitting the word "not," was in effect an affirmative statement apparently vitiating the indictment. The court held that correction of the error by amendment was proper, since § 53 of the Criminal Procedure Act, authorizing amendments to indictments, would apply to that class of cases where a specific criminal charge can be perceived on the face of an indictment,

which fails to be effective only by means of a clerical error.

In *State v. Minford* (1900) 64 N. J. L. 518, 45 Atl. 817, the court held that the conclusion to an indictment was a matter of form, and so where the conclusion ran "against the peace of this state and the dignity thereof," instead of "against the peace of this state, the government and dignity of the same," as prescribed by the Constitution, it was proper for the court to direct an amendment correcting the error, under the authority of the statute. Pamph. Laws 1898, p. 881, § 44.

In *People v. Clegg* (1890) 57 Hun, 591, 10 N. Y. Supp. 675, the defendant maintained that he had been prejudiced by the action of the trial court in allowing an amendment to an indictment for libel, by the insertion of three words which had been inadvertently omitted from the indictment, but the court held that the amendment conforming the indictment to the proof in a matter not prejudicial to the defendant was properly authorized by § 293 of the Code of Criminal Procedure.

It was held proper in *People v. Scanlon* (1909) 132 App. Div. 523, 117 N. Y. Supp. 57, for the court to direct an amendment to an indictment for manslaughter, changing the name of the village where the crime was alleged to have occurred, where there was no claim of surprise or embarrassment by the defendants. The amendment was held to be authorized by § 293 of the Code of Criminal Procedure, providing for the correction of variances between the allegations of an indictment and the proof in respect to the name or description of any place, where such amendment will not be prejudicial to the defendant in his defense on the merits.

In *Com. v. Lambrecht* (1885) 3 Pa. Co. Ct. 323, wherein an indictment for violating regulations of the board of health by doing unauthorized plumbing did not specify with reasonable certainty the places where such work was done, the court held that the defects were amendable under § 13 of the Criminal Procedure Act of March 31, 1860, permitting amendments in

an indictment, of the name of any place, the name and description of persons and property, or any matter therein named or described.

And it has been held that the omission of the word "foreman" from the signature of the foreman of the grand jury, on the return of an indictment, is a defect of form only, which is properly amended by direction of the court, under the authority of the Criminal Procedure Act. *Com. v. Ferguson* (1897) 8 Pa. Dist. R. 120.

In *Com. v. Boyd* (1914) 246 Pa. 529, 92 Atl. 705, Ann. Cas. 1916D, 201, wherein an amendment was allowed to an indictment charging the killing of a woman, naming her, by a man, also named, which simply transposed the pronouns "him" and "her," where, as used in referring to the defendant and the deceased, the pronouns were each in the wrong gender, the court held that the amendment was properly allowed under statutory provision. Act of March 31, 1860, P. L. 427, § 11.

In *Com. v. Miller* (1903) 13 Pa. Dist. R. 147, it was said that, on motion therefor, the court might permit any formal defects in an indictment to be corrected by amendment.

And see *McKinley v. State* (1847) 8 Humph. (Tenn.) 72, wherein it was said, by way of dictum, that the court might properly authorize amendments to indictments in matters of form only.

But see *State v. Hughes* (1851) 1 Swan (Tenn.) 261, wherein the accused, in an indictment for false imprisonment, pleaded in abatement that his name was William B. Hughes, and not William H. Hughes as stated in the indictment, the court stated that in the absence of statute it was unaware of any practice by which the indictment could be amended in this respect, without recommitment to the grand jury. The court herein did not consider the dictum in *McKinley v. State* (Tenn.) supra.

It was held in *Flores v. State* (1917) — Tex. Crim. Rep. —, 198 S. W. 575, that an indictment for the sale of intoxicating liquor in territory where the sale was prohibited, which failed to allege when the prohibition election was held in the county, and when

prohibition went into effect, might properly be amended in these respects by direction of the court, such defects being in matter of form only.

And see *Johnson v. State* (1913) 70 Tex. Crim. Rep. 583, 157 S. W. 1196, wherein an indictment charging the illegal sale of intoxicating liquors after an election putting prohibition in force failed to allege when the election was held, or when prohibition went into effect, and it was held that the omission was a matter of form which might properly be amended by the court.

In *State v. Amidon* (1885) 58 Vt. 524, 2 Atl. 154, 6 Am. Crim. Rep. 41, it was held proper to allow an amendment to a count in an indictment by inserting the words, "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state," at the close of the count, the court saying: "It . . . cannot be seriously contended that the words allowed to be added to the first count of the indictment, by the county court, contain an averment of any fact necessary to constitute the crime charged an assault, or that was required to be proved or disproved to establish the crime charged, or to defend against the same. We conclude, therefore, that the amendment allowed was not matter of substance, but matter of form, and within the jurisdiction of the county court to allow." No mention of any statute was made herein.

And in *State v. Donovan* (1903) 75 Vt. 308, 55 Atl. 611, it was held proper for the trial court to authorize the amendment of an indictment for forgery by setting out the forged instrument therein with greater accuracy, such amendment not prejudicing the defendant in his defense on the merits.

See *Cain v. State* (1888) 4 Blackf. (Ind.) 512, wherein, an indictment not concluding, "against the peace and dignity of the state," as required by the Constitution, the trial judge authorized an amendment correcting the omission. The court held that such an amendment was proper, since the grand jury had nothing to do with

the finding of that conclusion, and the amendment did not embarrass the defendant nor deprive him of any just means of defense. No statute is referred to in the opinion.

And see *McCorkle v. State* (1859) 14 Ind. 39, wherein the defendant consented in open court to an amendment to an indictment as to the date of the offense charged, and it was held that he could not subsequently object to the authorization of such correction.

On the prosecution of an indictment for perjury, it has been held that the court may properly amend the indictment as to the description of an act of Parliament referred to therein. *Reg. v. Westley* (1859) 8 Cox, C. C. (Eng.) 244, 5 Jur. N. S. 1862, 8 Week. Rep. 63, Bell, C. C. 193, 29 L. J. Mag. Cas. N. S. 35.

And where an indictment charged the defendant with the commission of perjury on the hearing of a complaint before certain justices "assigned to keep the peace in and for the said county, and acting in and for the borough of Tiverton," and it appeared that such justices were assigned to the borough only, and not to the county, the court held that the judge had power to correct the variance by way of amendment, under 14 & 15 Vict. chap. 100, § 1. *Reg. v. Western* (1868) 11 Cox, C. C. (Eng.) 93, 18 L. T. N. S. 299, 87 L. J. Mag. Cas. N. S. 81, L. R. 1 C. C. 122, 16 Week. Rep. 730.

And similarly, where the defendant was charged with perjury alleged to have been committed at the hearing of a summons charging a certain woman with being drunk, and it appeared that the summons had been for being "drunk and disorderly," it was held that the court was empowered by 14 & 15 Vict. chap. 100, § 1, to amend the indictment by adding the words, "and disorderly," in correction of the variance. *Reg. v. Tymms* (1870) 11 Cox, C. C. (Eng.) 645.

Where an indictment charged the obtaining of money by the false pretense that the defendant had made funeral arrangements and paid the undertaker for the burial of a certain child, and it appeared from the evidence that the funeral arrangements

had been made for the burial of a different child, it was held that the court might properly amend the indictment in correction of the variance. *Rex v. Byers* (1907) 71 J. P. (Eng.) 205.

It has been held that the court may authorize the amendment of an indictment in respect to the venue as alleged therein. But see III. c, *infra*, for Texas cases holding that such amendments are of the substance of the indictment, and unauthorized. *Welty v. Ward* (1905) 164 Ind. 457, 73 N. E. 889, 8 Ann. Cas. 556; *Winston v. State* (1912) 101 Miss. 101, 57 So. 545; *People v. Bromwich* (1909) 135 App. Div. 67, 119 N. Y. Supp. 833, affirmed in (1911) 200 N. Y. 385, 93 N. E. 933.

Under statutes of Indiana (*Burns's Anno. Stat.* 1901, § 1900, *Rev. Stat.* 1881, § 1831, and *Horner's Anno. Stat.* 1901) it has been held proper for the court to amend an indictment by directing a correction of the venue as laid therein. *Welty v. Ward* (Ind.) *supra*.

And under the provisions of § 1508 of the Mississippi Code of 1906, authorizing the allowance of amendments to indictments to conform allegations therein as to the name of any place, to the proof thereof, it was held proper for the court to permit the insertion of the words, "and district," in the venue of an indictment, to make it read, "in the county and district aforesaid." *Winston v. State* (1912) 101 Miss. 101, 57 So. 545.

Similarly, in *People v. Bromwich* (N. Y.) *supra*, it was held proper under the provision of § 293 of the Code of Criminal Procedure, for the court to direct an amendment to an indictment for false registration, by correcting a clerical error therein as to the district in which the offense was committed, the amendment not prejudicing the accused in his defense on the merits.

### III. Amendment of substance.

#### a. Identity of injured person.

The amendment of an indictment by substituting therein the name of another person as the one injured, when working a change of identity, is

an amendment in substance which the courts are not authorized to make. *State v. Morgan* (1888) 35 La. Ann. 1139; *State v. Taylor* (1897) 49 La. Ann. 319, 21 So. 516; *Blumenberg v. State* (1878) 55 Miss. 528, 3 Am. Crim. Rep. 284.

In *State v. Morgan* (La.) *supra*, wherein the trial court permitted an amendment of an indictment for rape, by the substitution of the name of a different person than the one originally alleged, as the victim of the offense, it was held that since such an amendment effected a change in the identity of the person assaulted, it necessarily worked prejudice to the accused, and constituted reversible error.

And where an amendment to an indictment was asked for the purpose of substituting another person therein for the person injured, it was held that such an amendment was one of substance, which the court could not authorize. *State v. Taylor* (1897) 49 La. Ann. 319, 21 So. 516.

Where the defendant was indicted for unlawfully selling liquor to J. T. Middlebrook, and the trial court allowed an amendment of the indictment to conform it to proof that the liquor was sold to A. T. Middlebrook, the court held that this was not an amendment of a mere mistake in name, which might be authorized by § 2799 of the Code of 1871, but, since it appeared that there were in the county both a J. T. and an A. T. Middlebrook, the amendment worked a change of identity which was an essential of the crime, which could be changed only by a new finding of the grand jury. *Blumenberg v. State* (Miss.) *supra*.

And see *Watts v. State* (1904) 99 Md. 30, 57 Atl. 542. The trial court herein permitted the state's attorney to amend an indictment for murder by conforming the name of the deceased as it appeared in the first count, to the name of the deceased as set forth in the second count. The court held that this amendment was unauthorized, the name of the defendant being a matter of substance, which could only be changed with the consent of the grand jury in the absence of some statutory

provision. And the court added that the only statutory provisions for amendment of an indictment in case of misnomer were §§ 283 and 284 of article 27 of the Code. By § 283, a misnomer of the defendant in an indictment could be corrected only where the misnomer had been pleaded in abatement, and § 284 provided for the correction of errors in setting forth the names of persons other than the defendant, only after a jury had been sworn on the indictment.

See also *State v. Lyon* (1867) 47 N. H. 416, wherein the court stated that under the Statute of July 8, 1863, matters of form in an indictment could be amended, but not matters of substance. And it was held that the name of the owner of the goods, alleged to be stolen in an indictment for larceny, was a matter of substance which could not be made the subject of amendment.

*b. Time when matter of substance.*

While the time of the commission of an offense is ordinarily a matter of form, there are instances in which time becomes a matter of substance, in which event it cannot be made the subject of amendment by the court. *Dickson v. State* (1884) 20 Fla. 800, 5 Am. Crim. Rep. 297; *People v. Van Every* (1917) 222 N. Y. 74, 118 N. E. 244; *Com. v. Seymour* (1869) 2 Brewst. (Pa.) 567; *Com. v. Kaas* (1868) 3 Brewst. (Pa.) 422; *State v. Sowell* (1909) 85 S. C. 278, 67 S. E. 316; *Sanders v. State* (1861) 26 Tex. 119; *State v. Davidson* (1871) 36 Tex. 325; *Kirkendall v. State* (1915) 78 Tex. Crim. Rep. 168, 180 S. W. 676; *Johnson v. State* (1918) — Tex. Crim. Rep. —, 206 S. W. 527; *Drummond v. State* (1878) 4 Tex. App. 150; *Clement v. State* (1886) 22 Tex. App. 28, 2 S. W. 379; *Rex v. Lacelle* (1905) 10 Can. Crim. Cas. 229, 11 Ont. L. Rep. 74.

Where, on the argument of a demurrer to an indictment for being accessory to a burglary, it appeared that the indictment did not allege that the offense was committed in the nighttime, as required in the statutory definition of the offense, the court held that the omission was a fatal defect, which it was not authorized to remedy by amendment, the Act of March 31,

1860, § 11, confining the power of amendment to "formal defects." *Com. v. Kaas* (1868) 3 Brewst. (Pa.) 422.

And see *State v. Johnson* (1888) 85 La. Ann. 842, wherein it was held that an amendment might properly be allowed to an indictment for burglary as to the time of the offense under article 1047 of the Revised Statutes, when the allegation of time was as to the date of the week, month, or year, but the court stated that when the distinction of time was as between day and night, time, in the latter instance, being of the essence of the crime, would not be the subject of amendment.

In *People v. Van Every* (1917) 222 N. Y. 74, 118 N. E. 244, it appeared that on the 8th day of February, 1915, an indictment was returned by the grand jury, charging the defendant with the commission of a misdemeanor on the 17th day of October, 1915. The defendant demurred to the indictment, whereon the court permitted an amendment so as to charge the commission of the crime in 1914. On this appeal from the court's ruling, it was held that since by the statute (Code Crim. Proc. §§ 280, 284, subd. 5) it is essential to the validity of an indictment that it disclose a crime committed prior to the finding of the indictment, the amendment by the court was one of substance, and not of form, and therefore constituted reversible error. And see § 293 of the Criminal Code, which authorizes an amendment as to time, only when the defendant will not thereby be prejudiced in his defense on the merits.

In *State v. Sexton* (1824) 10 N. C. (3 Hawks) 184, 18 Am. Dec. 584, the court said: "It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year, but it is unnecessary to prove, in any case, the precise day or year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted."

In *State v. Sowell* (1909) 85 S. C. 287, 67 S. E. 316, it was held that the amendment of an indictment for house-breaking and larceny, by conforming an allegation that the offense was committed in the daytime to proof that the breaking occurred in the night, was a material amendment, changing the nature of the offense charged, and not authorized by § 58 of the Criminal Code.

See *Com. v. Seymour* (1869) 2 Brewst. (Pa.) 567, wherein it was held that the statute allowing the amendment of indictments (Act March 31, 1860) would not permit the amendment of an allegation that the offense was committed in the year 1800, so as to charge the commission of the offense as in the year 1868.

And see *Dickson v. State* (1884) 20 Fla. 800, 5 Am. Crim. Rep. 297, wherein an indictment alleged the commission of the offense on a day subsequent to the return of the indictment, and the court held that the date of the offense was a matter of substance, which could not be changed by amendment.

In Texas, the courts are even more strict in the protection of the rights of the accused, holding in almost every case that the allegation in an indictment as to the time of an offense is a matter of substance, which the court is not authorized to amend. In *Sanders v. State* (1861) 26 Tex. 119, it was held to be error to allow the district attorney to amend an indictment by correcting a mistake therein as to the time of the commission of the alleged offense, the court saying: "No part of an indictment can be more matter of substance, as distinguished from matter of form, than the part which states the time of the commission of the offense. An indictment may be amended when it is defective on account of form, but where an indictment is defective in substance, the defect cannot be cured by amendment; and the reason is that the substance of the indictment is the finding of the grand jury, and must be taken as it comes from them, whereas the formal part of the bill is supposed to be wholly the work of the officer of the law,

and may be amended by him under the direction of the court."

In *State v. Elliot* (1870) 24 Tex. 148, the court held that the allegation of the time of commission of an offense was a matter of form only, and in this respect an indictment could properly be amended by the court, under the authority of the statute (Paschal's Dig. art. 2977) providing for amendments in matters of form. But the court did not consider the earlier cases to the contrary, and when the same question arose in the case of *Drummond v. State* (1878) 4 Tex. App. 150, the court, on the authority of *Sanders v. State* (Tex.) supra, reversed the holding in *State v. Elliot*, saying: "The substance of the ruling in that case was 'that the averment of time in an indictment is quite uniformly held, in this country, to be a matter of form, and not generally material; and that under our statute (Paschal's Dig. art. 2977) it is to be regarded as matter of form, and amendable as such.' In this latter case, the court seems to have overlooked, or paid no regard to, the decision in *Sanders v. State* above quoted, but predicated the opinion upon the common law and decisions of other states. Our opinion is that *Sanders v. State* enunciates the correct doctrine, and that the allegation of time in an indictment is matter of substance, and not amendable."

It appeared in *Drummond v. State* (Tex.) supra, that the lower court had allowed an amendment to an indictment as to the time of the commission of the alleged offense, and although it was apparent that the error in date was entirely a clerical one, the court, in reversal, held that "the principle involved is too important to be made to yield, even in so palpable a case of error as this."

And in *Clement v. State* (1886) 22 Tex. App. 23, 2 S. W. 379, wherein a discrepancy appeared between the allegation of an indictment and the proof as to the date of the commission of the offense, so that the alleged date was not anterior to the date of the presentment of the indictment, it was held that this error was one of sub-

stance, which was beyond the power of the court to correct or avoid.

In *State v. Davidson* (1871) 36 Tex. 325, wherein an indictment charged the commission of an offense some ten months after the indictment was found, it was held that the error occurred in a material portion of the charge, and could not, therefore, be made the subject of amendment by the court.

And in *Kirkendall v. State* (1915) 78 Tex. Crim. Rep. 168, 180 S. W. 676, it was held that the failure to allege the date on or about which the defendant abandoned his wife, as required by statute in an indictment for abandonment, was a defect in substance which could not be cured by amendment.

And where an indictment for perjury alleged that the defendant appeared before the grand jury on February 6th, 1918, and swore falsely as to something that did not occur until the following March 3d, and it appeared that the true date of his appearance before the grand jury was March 6th, the court held that the trial judge erred in treating the mistake in date as a clerical error, the date herein being not a matter of form, but of substance, which could not have been amended by the court. *Johnson v. State* (1918) — Tex. Crim. Rep. —, 206 S. W. 527.

In *Rex v. Lacelle* (1905) 10 Can. Crim. Cas. 229, 11 Ont. L. Rep. 74, it was held that the allowance of an amendment to an indictment for seduction, changing the alleged date of the offense, would be tantamount to charging a new offense, and improper except when made subject to the right of the defendant to elect on the charge as amended.

#### *c. Nature of offense.*

The courts may not authorize amendments to an indictment which in effect change the nature or grade of the offense charged. Such amendments, going to the substance of the indictment, would be highly prejudicial to the accused and, it seems, would infringe his constitutional right to a presentment or indictment only by a grand jury.

**Kentucky.**—*Com. v. Adams* (1891) 92 Ky. 124, 17 S. W. 276.

**Mississippi.**—*Wilburn v. State* (1912) 101 Miss. 392, 58 So. 7.

**New Hampshire.**—*State v. Goodrich* (1865) 46 N. H. 186.

**New Jersey.**—*State v. De Lorenzo* (1911) 80 N. J. L. 500, 78 Atl. 660.

**New York.**—*People v. Trank* (1908) 88 App. Div. 294, 85 N. Y. Supp. 55; *People v. Motello* (1913) 157 App. Div. 510, 142 N. Y. Supp. 622.

**North Carolina.**—*State v. Jones* (1888) 101 N. C. 719, 8 S. E. 147.

**South Carolina.**—*State v. Sowell* (1910) 85 S. C. 278, 67 S. E. 816.

**Texas.**—*Duty v. State* (1908) 54 Tex. Crim. Rep. 618, 22 L.R.A. (N.S.) 469, 114 S. W. 817.

**England.**—*Reg. v. Wright* (1860) 2 Fost. & F. 320.

**Canada.**—*Rex v. Cohen* (1912) 26 Ont. L. Rep. 497, 22 Ont. Week. Rep. 456, 3 Ont. Week. N. 1409, 5 D. L. R. 437.

In *Com. v. Adams* (Ky.) *supra*, it appeared that in the consideration of the defendant's demurrer to an indictment for forgery, the court had expressed its doubt of the sufficiency of the indictment to support a conviction for that offense, but stated it was of the opinion that the facts were sufficient to constitute the offense of obtaining goods under false pretenses. Thereupon the defendant agreed to an amendment of the indictment so as to make the latter charge, and this was done by order of the court. On appeal, it was held that the amendment was void, the court saying: "It is the sole province of the grand jury, under our law, to find an indictment. It, and not the court, must say upon what charge the party shall be arraigned. The grand jury had not accused the defendant of obtaining goods under false pretenses, but with the crime of forgery, and the judge had no power to assume its duties and alter the charge as fixed by it. There is a total want of power to thus act.

. . . If the judge could, with the consent of the defendant, thus alter this charge, there is no reason why a judge may not, in any case, usurp the functions of the grand jury and

change the nature of any offense, as fixed by its presentment, provided the party accused consents to the alteration. Such a practice would be contrary to good policy."

In *Wilburn v. State* (Miss.) *supra*, the defendant was charged by indictment with the sale of spirituous liquors in violation of § 5032 of the Code of 1906. This section was repealed before the trial of the charge, and the court thereafter permitted an amendment striking out part of the indictment so as to charge a different offense. This was held reversible error, since the repeal of the statute, for the alleged violation of which the indictment was found, rendered the indictment void, and charging no offense at all, and the court was without power to allow an amendment, which in effect usurped the power of the grand jury.

In *State v. Goodrich* (N. H.) *supra*, it was held that the statement of the value of the articles stolen, in an indictment for larceny, was material and a matter of substance, which could not be corrected by the direction of an amendment thereto, since the insertion of the value would change the indictment either to one for simple larceny or for grand larceny.

In *State v. De Lorenzo* (N. J.) *supra*, the defendant attacked the validity of a ruling of the trial court, permitting an amendment to an indictment charging the offense of keeping a disorderly house, which changed the period during which the nuisance was alleged to have run and in effect put the defendant on trial for an offense other than the one charged by the grand jury. This was held reversible error, the amendment being one of substance, and not within the discretion of the court.

Where an indictment charging the abandonment of a child under the age of fourteen was returned at a time when it was not a crime to abandon a child over the age of six years, it was held that the court had no authority, under the Code, to direct an amendment to the indictment inserting the word six in lieu of the word fourteen, so that the indictment

charged the abandonment of a child under six years of age. The court said: "The question is presented whether, when the facts stated in the indictment do not constitute any crime, the trial court may amend it by inserting therein further and other facts which, if proven, would show that the defendants have committed a crime. I am of the opinion that such an amendment cannot be allowed. The indictment must be found by a grand jury, and if the one which it presents does not state any act of the defendant which constitutes a crime, then no conviction can be had thereon." *People v. Trank* (1903) 88 App. Div. 294, 85 N. Y. Supp. 55.

And where an amendment had been allowed to a common-law indictment for murder, by striking out the words "malice aforethought" from the charge that the crime had been committed "wilfully, feloniously, and of malice aforethought," the court held that the allowance of the amendment was error, for, since the words stricken out were essential to a common-law charge of murder, the amendment would change the crime charged to that of manslaughter, and the indictment no longer being that of the grand jury, a prosecution thereon would violate the 5th Amendment of the Constitution of the United States. *People v. Motello* (1913) 157 App. Div. 510, 142 N. Y. Supp. 622.

In *State v. Jones* (1888) 101 N. C. 719, 8 S. E. 147, wherein the court, with the defendant's consent, allowed an amendment to an indictment for arson, which changed the charge from "an attempt to burn a dwelling house" to "an attempt to burn a store," it was held that the court was without authority to amend the indictment so as to charge a different grade of crime.

And where, in the prosecution of an indictment for house-breaking and larceny, the court permitted an amendment changing an allegation that the crime was committed in the daytime so as to conform to proof that the breaking occurred in the nighttime, it was held that the amendment was a material one, changing the nature of the offense charged, and not author-

ized by § 58 of the Criminal Code, permitting the amendment of certain defects in form. *State v. Sowell* (1910) 85 S. C. 278, 67 S. E. 316.

In *Duty v. State* (1908) 54 Tex. Crim. Rep. 613, 22 L.R.A. (N.S.) 469, 114 S. W. 817, wherein the trial court successively quashed all the allegations of an indictment but one, so that the indictment presented an entirely different pleading, it was held that the alteration was fatal, the court saying: "The action of the court in eliminating the averments on the motion to quash so changed the entire indictment that it was no longer the act of the grand jury. The appellant was tried upon a pleading and an indictment not authorized by the grand jury, and not presented by it. As we understand the law to be, this is fatal to the conviction and fatal to the case."

By the English statute (14 & 15 Vict. chap. 100, § 1), a broad power of amendment was given the court, the statute providing that "whenever on the trial of any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof . . . or in the name or description of any matter or thing whatsoever therein named or described, . . . it shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on such merits, to order such indictment to be amended." But in *Reg. v. Wright* (1860) 2 Fost. & F. (Eng.) 320, it was held that the statute would not authorize an amendment of an indictment charging a "felonious" forging, by striking out the word "felonious," since such an amendment would change the nature of the crime charged from a felony to a misdemeanor.

In *Rex v. Cohen* (1912) 26 Ont. L. Rep. 497, 22 Ont. Week. Rep. 456, 3 Ont. Week. N. 1409, 5 D. L. R. 437, the trial court amended an indictment which charged the offense of obtaining "money" by false pretenses, by striking out the word "money" and



substituting therefor the word "credit." The two charges were not substantially the same offense, and the court held that the amendment, being one of substance and substituting a different transaction from that alleged by the grand jury, was not within the power of the court, as defined by the statute (Crim. Code, § 889).

But it has been held that the court may amend an indictment by striking out a part of the crimes therein alleged, since such an amendment would not prejudice the accused. *State v. Clement* (1910) 80 N. J. L. 669, 77 Atl. 1067; *State v. Lamb* (1911) 81 N. J. L. 234, 80 Atl. 111; *Com. v. Smith* (1914) 24 Pa. Dist. R. 936.

In *State v. Clement* (N. J.) *supra*, where the defect of an indictment was not that it did not charge any crime, but that it charged too many, it was held proper for the court to authorize an amendment of the indictment striking out a part of the crimes charged, and leaving but one, since such an amendment would present no violation of his constitutional rights, and was authorized by § 44 of the Criminal Procedure Act.

In *State v. Lamb* (1911) 81 N. J. L. 234, 80 Atl. 111, it was held that the court might properly direct an amendment of an indictment striking out one of two charges therein, under the authority of the statute (Crim. Proc. Act, § 44). But the court added that, under the provision of this statute authorizing the court to amend indictments either in form or substance where the defect is apparent on the face of the indictment, the amendment must not be of such character as to make the indictment charge a crime when, as presented by the grand jury, it fails so to do.

And in *Com. v. Smith* (Pa.) *supra*, wherein an indictment had been returned charging both the offense of assault and battery, and of false imprisonment, it was held proper for the court to direct an amendment of the indictment so as to charge only the offense of assault and battery, the amendment not prejudicing the rights of the accused.

*d. Averment of essential fact.*

An indictment which has omitted an allegation, proof of which is necessary to a conviction, is fatally defective, and the court cannot authorize an amendment curing the defect.

*Louisiana*.—*State v. Durbin* (1868) 20 La. Ann. 408.

*Mississippi*.—*Kline v. State* (1870) 44 Miss. 317; *State v. Cannon* (1918) 118 Miss. 230, 79 So. 85.

*New Jersey*.—*State v. Startup* (1877) 39 N. J. L. 423; *State v. Twinning* (1904) 71 N. J. L. 388, 58 Atl. 1098; *State v. Ham* (1905) 72 N. J. L. 4, 60 Atl. 41.

*Oregon*.—*State v. Moyer* (1915) 76 Or. 396, 149 Pac. 84.

*Texas*.—*Edwards v. State* (1881) 10 Tex. App. 25.

*England*.—*Reg. v. Larkin* (1854) 6 Cox, C. C. 377, 2 C. L. R. 775, Dears. C. C. 365, 23 L. J. Mag. Cas. N. S. 125, 18 Jur. 539; *Reg. v. Ward* (1857) 7 Cox, C. C. 421; *Reg. v. James* (1871) 12 Cox, C. C. 127; *Reg. v. Oliver* (1877) 13 Cox, C. C. 588, 36 L. T. N. S. 114, 25 Week. Rep. 323; *Rex v. Benson* [1908] 2 K. B. 270, 21 Cox, C. C. 631, 72 J. P. 286, 77 L. J. K. B. N. S. 644, 98 L. T. N. S. 933, 24 Times L. R. 557, 52 Sol. Jo. 516.

*Canada*.—*Reg. v. Carr* (1872) 26 Lower Can. Jur. 61; *Reg. v. Morrison* (1879) 18 N. B. 682.

In *State v. Durbin* (La.) *supra*, it appeared that an indictment charging the defendant with robbery did not contain the word "feloniously" before the word "rob." The intention of the party committing the offense was a necessary ingredient of the crime, and the trial court allowed the district attorney to amend the indictment by making the necessary insertion. The court held that the amendment was ground for reversal, since the defect was not merely formal, but material, and prejudicial to the accused.

Where an indictment for prosecuting secular business on Sunday, in violation of statute, failed to negative an exception in the statute in favor of "druggists and apothecaries," the court held that the allowance of an amendment remedying the defect was a material change not authorized by

the following provision of the statute (Rev. Code, p. 615, art. 257): "The indictment may, with consent of the grand jury or of the court, be amended at any time during the term of court at which it was found, or afterwards by the consent of defendant, with permission of the court." The authority therein granted extends only to amendments in matters of form. *Kline v. State* (Miss.) supra.

It was held in *State v. Cannon* (Miss.) supra, on the prosecution of an indictment for a violation of the statute against liquors shipped into the state under a fictitious name, that the omission to charge that the liquor ordered was to be shipped to the defendant was a fatal defect, and as such the court could not remedy the omission by amending the indictment.

Section 43 of the New Jersey Act of 1875, regulating proceedings in criminal cases, provided that amendments might be authorized on the trial of any indictment where there appeared to be a variance in the name of any place, person owning property, or person, property, or thing named therein or in the manner of describing the offense, or in case any error in form appeared in the indictment. And it was further provided by § 53 of the same act that on objection to the indictment, before the jury was sworn, for any defect of form or substance apparent on its face, the court might authorize an amendment curing such defects. In *State v. Start-up* (1877) 39 N. J. L. 423, it appeared that an indictment charging the defendants as members of the board of public works of Jersey City, with having unlawfully entered into a contract for work and materials without advertising for proposals, failed to allege a criminal intent in the failure to advertise. This was an essential element of the crime, and it was held that the omission could not be supplied by amendment under the sections above cited, since, while the expression "defect of substance" contained in § 53 might well cover the special points named in § 43, "it is plain that the legislature cannot constitutionally authorize an amendment in substance,

which will change an indictment found by a grand jury so as to substitute one crime for another charged therein; nor, if the indictment fail to set out any crime, can the court so amend it as to charge the crime which it is supposed they intended."

And since in an indictment for the illegal sale of intoxicating liquors, the place of sale is of the essence of the crime, it has been held reversible error for the trial court to authorize an amendment thereto, substituting another locality for that designated by the grand jury, the court saying: "It will be perceived that the right to direct an amendment of the character specified in the statute [Crim. Proc. Act, § 34] is limited to those cases in which the variance is not material to the merits. In the present case, the variance seems to us to be vital. The sale of liquor is not of itself criminal; it only becomes so when it is made without a license. Consequently, as a license to sell liquor is limited by its terms to a particular place, the existence or nonexistence of the offense may depend altogether upon the place where the sale is made." *State v. Ham* (1905) 72 N. J. L. 4, 60 Atl. 41.

In *State v. Twining* (1904) 71 N. J. L. 388, 58 Atl. 1098, wherein it appeared that an indictment charged the conversion by the defendants of property belonging to a corporation as executor and trustee, for the use of the defendants and the corporation, and an amendment was allowed so as to charge that the defendants converted the property to their own use, it was held that the amendment was not authorized by § 44 of the Criminal Procedure Act, providing that defects of form or substance apparent on the face of an indictment might be amended by the court after demurrer or motion to quash, and before a jury was sworn. Further, the court said: "To convert the corporation's property to the corporation's own use, clearly, is not a criminal offense. . . . The indictment failed, therefore, to charge a crime. The amendment by which it was made to charge a crime was in violation of the constitutional right of the defendants not

to be held to answer to a criminal offense, unless on the indictment of a grand jury."

In *State v. Moyer* (1915) 76 Or. 396, 149 Pac. 84, the trial court permitted an amendment to be made to an indictment for arson, by setting out therein the name of the owner of the property burned, which was a necessary part of the description of the offense. On this appeal the court held that in the absence of legislative authority the amendment, being one of substance, was unauthorized, and ground for reversal.

And where the description of the offense, in an indictment for adultery, was not equivalent to or synonymous with the statutory definitions of adultery, the court held that the indictment, being insufficient in a matter of substance, was not amendable. *Edwards v. State* (1881) 10 Tex. App. 25.

In *Reg. v. Larkin* (1854) 6 Cox, C. C. (Eng.) 377, 2 C. L. R. 775, *Dears. C. C.* 365, 23 L. J. Mag. Cas. N. S. 125, 18 Jur. 539, it was held that the court had no authority, after verdict, to direct an amendment to an indictment for receiving stolen goods, in correction of an erroneous allegation therein that the prosecutor, instead of the accused, knew that the goods were stolen, since the indictment was clearly bad as not alleging "scienter."

And an indictment for larceny and receiving stolen goods, which failed to allege the person to whom the goods belonged, was held defective in substance, and not amendable by the court, under the statute (14 & 15 Vict. chap. 100, § 8) applying to formal defects. *Reg. v. Ward* (1857) 7 Cox, C. C. (Eng.) 421.

And see *Sill v. Reg.* (1853) 17 Jur. 207, *Dears. C. C.* 132, 1 El. & Bl. 553, 118 Eng. Reprint, 542, 22 L. J. Mag. Cas. N. S. 41, 1 Week. Rep. 147, wherein it was said that the omission to state, in an indictment for obtaining property by false pretenses, to whom the property belonged, was not a formal defect such as might have been amended by the court under the authority of the state.

In *Reg. v. James* (1871) 12 Cox, C. C. (Eng.) 127, it was held that the

words, "with intent to defraud," were a material part of an indictment for obtaining money through false pretenses, and when omitted they could not be supplied by amendment, under the authority vested in the court by statute.

Similarly, in *Reg. v. Carr* (1872) 26 Lower Can. Jur. 61, it was held that the omission of the words, "of malice aforethought," in an indictment for wounding with intent to kill, was a defect of substance, and that such defects could not be remedied by amendment, under the Criminal Procedure Act.

In *Reg. v. Oliver* (1877) 13 Cox, C. C. (Eng.) 588, 36 L. T. N. S. 114, 25 Week. Rep. 323, wherein it appeared, after verdict, that an indictment did not substantially show an offense under the statute, and that it would be necessary for the court to amend it in a material averment to make it good and complete, it was held that the statute did not authorize the allowance of such an amendment.

And in *Rex v. Benson* [1908] 2 K. B. (Eng.) 270, 21 Cox, C. C. 631, 72 J. P. 286, 77 L. J. K. B. N. S. 644, 98 L. T. N. S. 933, 24 Times L. R. 557, 52 Sol. Jo. 516, wherein an amendment was allowed to an indictment for obtaining goods by false pretenses, striking out certain words and inserting the words, "by means of fraud," it was held that this was an amendment as to substance which was not authorized by common law or statute.

In *Reg. v. Morrison* (1879) 18 N. B. 662, an indictment charging that the defendant "did steal, take, and carry away" certain property, but which omitted the word "feloniously," was amended by the trial court, in correction of the defect. On appeal, the attorney for the Crown maintained that such amendment was properly allowed under the authority of § 32 of the Act 32 & 33 Vict. chap. 29, which provided that "every objection to any indictment for any defect apparent on the face thereof," etc., "must be taken by demurrer or motion to quash . . . and every court before which such objection is taken may, if it be thought necessary, cause the indictment to be

forthwith amended in such particular." But the court held that the statute did not authorize the amendment of a defect of substance, such as this, saying: "When we consider the extent to which such an unlimited power of amendment might be carried, and the consequences of it, I doubt whether the Parliament of the Dominion intended to give a greater power of amendment in such cases than is given by the Imperial Act 14 & 15 Vict. chap. 100, § 25, that is, to amend formal defects only. If such a construction was given to the section as has been contended for on the part of the Crown, a person might be tried for an offense for which the grand jury had never found a bill. In the present case, no doubt, the objection is purely technical, and no injustice could possibly have been done to the prisoner by the amendment, but, on principle, I cannot see how we can avoid deciding in her favor."

It has been held that an indictment which does not show the jurisdiction of the court is fatally defective, and that the court cannot cure the defect by amendment. *State v. Armstrong* (1860) 4 Minn. 335, Gil. 251; *State v. Chamberlain* (1871) 6 Nev. 257; *State v. Kelley* (1891) 66 N. H. 577, 29 Atl. 843; *State v. Blakeney* (1890) 33 S. C. 111, 11 S. E. 637.

In *State v. Armstrong* (Minn.) *supra*, an indictment charging the defendant with adultery failed to aver that the crime was committed within the jurisdiction of the court. The trial court subsequently directed an amendment to the indictment, supplying the defect. On appeal, an attempt was made to justify the amendment, under the provisions of a statute (Comp. Stat. p. 765, § 7) conferring on the courts the right to amend an indictment on demurrer, in those cases in which "the defendant will not be unjustly prejudiced thereby." But the court, in reversal, said: "To supply an averment by amendment, which is necessary to perfect the charge, is in effect to 'hold the defendant to answer for a criminal offense' in a manner other than 'on the indictment of a grand jury,' and is, in a high degree,

unjustly prejudicial to his rights as a citizen. Courts are bound to give effect to statutes, if possible, and this one, allowing an indictment to be amended, may be satisfied by permitting it to operate upon mere matters of form, as, for instance, the date or place of the finding; or the court in which found, if omitted, might be supplied by amendment when actually within the knowledge of the court; but matters of substance can never be inserted in an indictment, as the statutes now stand, by any other tribunal than the grand jury."

In *State v. Chamberlain* (1871) 6 Nev. 257, an indictment charging the defendant with murder contained no allegation as to the locus of the crime. The trial court, on motion, allowed an amendment to the indictment supplying the omission, after which the trial proceeded to a verdict of guilty. On appeal, the defendant claimed that the trial court had erred in allowing the amendment, and the court said: "This point we think well taken. An allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself.

... Such allegation being a material and essential part of the indictment, it is clear the court could not amend it by the addition of such allegation, for the obvious reason that the Constitution of this state (art. 1, § 8) prohibits the trial of any person for a 'capital or other infamous crime ... except on presentment or indictment of a grand jury.' There can be no difference of opinion as to what is meant by the expression, 'indictment of a grand jury.' It manifestly means a written accusation made and presented by the inquisition known as a grand jury. But if, after being presented to the court, an indictment so found be in any particular materially modified or altered, if anything of substance be added to or taken therefrom by the court, it cannot with any degree of propriety be denominated an indictment of a grand jury."

In *State v. Kelley* (1891) 66 N. H. 577, 29 Atl. 843, on the prosecution of an indictment for housebreaking,

it appeared that the crime had been committed in the town of Hudson, county of Hillsborough. The indictment alleged the commission of the offense in the town of Nashua, same county, and the trial court permitted the state to amend the indictment so as to conform the allegation therein to the evidence. This was held error, the court saying that the words "there situate," referring to the locality described in the indictment, constituted a material part of its description, and that an amendment thereto was not authorized by the statute (Gen. Laws, chap. 260, § 13).

And it was held in *State v. Blakeney* (1890) 33 S. C. 111, 11 S. E. 637, that an indictment for homicide which failed to state the place of death was fatally defective, and such omission could not be cured by amendment, the court saying: "Much of the useless phraseology which characterized indictments in former times may be dispensed with, and omissions of mere form may be cured by amendment; but this act [Act of 1887, p. 830, § 5] has neither dispensed with essential allegations, nor has it attempted to cure their omission by allowing amendments to that end."

*c. Miscellaneous defects of substance.*

"In indictments, matters of form may be amended; matters of substance may not be. It may be difficult to express in exact language that will be applicable to every case, what constitutes the substance of an indictment, and what is merely formal. In general, I think it may be laid down that the statement of every fact necessary to be proven to make the act complained of a crime is matter of substance in an indictment, and that all beyond the order of arrangement, the precise words, unless particular words alone will convey the proper meaning, is formal." *State v. Amidon* (1885) 58 Vt. 524, 2 Atl. 154, 6 Am. Crim. Rep. 41. See to the same effect:

*Mississippi*.—*Hall v. State* (1907) — *Miss.* —, 44 So. 810.

*Nevada*.—*State v. Chamberlain* (1871) 6 Nev. 257.

*New Hampshire*.—*State v. Squire* (1840) 10 N. H. 558.

*New Jersey*.—*State v. Johnson* (1918) 91 N. J. L. 611, 104 Atl. 593.

*New York*.—*People v. Campbell* (1859) 4 Park. Crim. Rep. 386; *People v. Poucher* (1883) 30 Hun, 576, appeal dismissed in (1885) 99 N. Y. 610, 1 N. E. 151; *People v. Geyer* (1909) 196 N. Y. 364, 90 N. E. 48.

*Rhode Island*.—*State v. McCarthy* (1891) 17 R. I. 370, 22 Atl. 232.

*Texas*.—*Calvin v. State* (1860) 25 Tex. 789; *Wade v. State* (1908) 52 Tex. Crim. Rep. 619, 108 S. W. 677; *Rutherford v. State* (1914) 74 Tex. Crim. Rep. 617, 168 S. W. 1157.

*England*.—*Reg. v. Bailey* (1852) 6 Cox, C. C. 29; *Reg. v. —* (1853) 6 Cox, C. C. 391.

In *Hall v. State* (*Miss.*) *supra*, it was held that an indictment charging that the defendants "wilfully, feloniously, of their malice aforethought, kill and murder one Joe Mizelle," could not be amended by the court's permission to insert the word "did," since its omission, on the authority of *Cook v. State* (1895) 72 *Miss.* 517, 17 So. 228, was a fatal defect.

In *State v. Squire* (*N. H.*) *supra*, wherein an indictment was returned into court without the signature of the foreman of the grand jury, it was held that the indictment could not thereafter be amended by permitting the foreman to affix his signature, the court saying: "An indictment once found is unalterable; or, if it be amended, can only be done by recommitment to the grand jury."

In *State v. Johnson* (*N. J.*) *supra*, the court said: "The well-recognized rule is that under § 44 of the Criminal Procedure Act the court cannot, by amendment, make the indictment charge a crime when none is presented, or charge a crime different from that presented by the grand jury." But this appears to be the only restriction under the New Jersey act, authorizing the court to amend indictments in its discretion in matters of substance as well as of form.

And in *People v. Campbell* (1859) 4 Park. Crim. Rep. (*N. Y.*) 386, it was said that the power of the court, in the absence of statute, did not extend

to the addition or expunging of substantial allegations of an indictment.

Section 293 of the New York Code of Criminal Procedure lodged with the court the power of authorizing amendments to indictments in cases where a variance arose between the allegations therein and the proof, as to the time, or in the name or description of any place, person, or thing. In apparent accord therewith, the trial court in *People v. Poucher* (1883) 30 Hun (N. Y.) 576, appeal dismissed in (1885) 99 N. Y. 610, 1 N. E. 151, permitted an amendment to an indictment for grand larceny by striking out the description of the things stolen as gold and silver coin, and inserting therein a description of currency. But it was held that this was error, the court saying: "We do not see how one thing named, to wit, coin, can be stricken out and another thing, to wit, currency, be substituted in place of the thing stricken out, under the guise of amending the description of the thing named. In short, we are of the opinion that the section does not authorize an amendment of an indictment which charges the larceny of coin enumerated, by inserting an allegation of currency or of 'bank bills, lawful money of the United States, of a kind, number, and denomination unknown, and upon a bank unknown.' Therefore, we say the amendment was not warranted by § 293 of the Criminal Code, and its allowance was error, prejudicial to the defendant."

In *People v. Geyer* (1909) 196 N. Y. 364, 90 N. E. 48, reversing (1909) 132 App. Div. 790, 117 N. Y. Supp. 662, the appellant, having been convicted of grand larceny, urged an exception to the ruling of the trial court permitting an amendment to the indictment, conforming the charge that he had stolen a check for \$500 on one date, with evidence that he had stolen "\$500, good and lawful money of the United States," on a different date. The court held that the allowance of the amendment was error, not authorized by § 293 of the Code of Criminal Procedure, providing for amendments in correction of variances between the allegations of an indictment and the

proof, in respect to the time, or the name or description of any place, person, or thing, when not prejudicial to the defendant in his defense on the merits. The court said: "The appellant was charged with stealing a check on a given date. He was convicted of misappropriating at a different date the proceeds of a check which he had a perfect right to receive and procure to be cashed. The property set forth in the indictment, and that for the alleged larceny of which he has been convicted, were entirely distinct and distinguishable. The check mentioned in the indictment . . . for the purposes of this discussion is not to be regarded at all as the same thing as bills or coin. The variation between indicting a man for stealing a horse, and convicting him for stealing articles of household furniture, would not be any more pronounced in principle than the variation between the indictment and proof in the present case."

But compare *People v. Langley* (1906) 114 App. Div. 427, 100 N. Y. Supp. 123, 20 N. Y. Crim. Rep. 281, wherein it was held that the amendment of an indictment in respect to a description of certain property, by inserting the word "West" before "Virginia" as the location thereof, was a proper exercise of the authority vested in the court by the statute.

In *State v. Chamberlain* (1871) 6 Nev. 257, in a discussion of the right of the court to amend indictments, it was said that "the courts have no more authority to add any material charge, accusation, or allegation to it than they have to find the bill in the first instance."

And see *State v. Joseph* (1888) 40 La. Ann. 5, 3 So. 405, wherein the supreme court held that it could not remand a case to permit an amendment of the indictment in essential particulars, since amendments must be made during the trial.

By § 4, chap. 243, of the Public Statutes of Rhode Island, it was provided that every defect and want of substance in any indictment could be cured by amendment, with the consent of the accused. In *State v. McCarthy* (1891) 17 R. I. 370, 22 Atl.

282, the trial court allowed an amendment to an indictment for house-breaking, in correction of a variance between an allegation therein and the proof as to the Christian name of the owner of the house in question, but the court held that the amendment was one of substance, which could not be amended without the consent of the accused or the concurrence of the grand jury.

In *Calvin v. State* (1860) 25 Tex. 789, wherein the district attorney and the attorneys for the defendant had agreed to an amendment of an indictment charging the defendant with the murder of one Vina, a slave described as "the property of the heirs of the said Robert Smith, deceased," by striking out the said description, the court held that the amendment was one of substance, and contrary to law, saying: "The question is whether or not the counsel, or the district attorney, and the prisoner, or even the court, can make an alteration in an indictment in a material respect. We think not. The indictment is the sworn declaration of the grand jury, and what they in substance 'do say' must stand as they have said it. The law prescribes the extent to which their finding may be amended. The amendments which are allowed relate to matters of form only, and to the name of the party who is accused. There can be no amendment as to any declaration of a fact by the grand jury."

And in *Wade v. State* (1908) 52 Tex. Crim. Rep. 619, 108 S. W. 677, it was held that no indictment could be amended in a matter of substance, and where the court had permitted the amendment of an allegation in an indictment for a violation of the local option law, as to the particular election and the publication in the newspaper under it, the allowance of the amendment was held reversible error, as going to a matter of substance prohibited by § 567 of the Code of Criminal Procedure.

In *Rutherford v. State* (1914) 74 Tex. Crim. Rep. 617, 168 S. W. 1157, on the prosecution of an indictment charging the defendant with the illegal practice of medicine, the word

physician, in an allegation that the defendant "followed the occupation of a physician," was spelled "physicial." The defendant moved to quash the indictment on the ground that there was no such occupation as "physicial," whereupon the court directed an amendment to the indictment, correcting the error. This was held to be improper, the word in question being a matter of substance which the court had no power to amend.

And see *Stinson v. State* (1915) 76 Tex. Crim. Rep. 169, 178 S. W. 1039, wherein the action of the trial court in permitting the district attorney to amend an allegation in an indictment, by inserting the letter "t" which had been omitted from the end of the word "intent," was held improper and unauthorized, although not sufficient ground for reversal.

Where an indictment for obtaining money by false pretenses alleged that the defendant had pretended that he had served a certain order personally, and was entitled to a certain fee therefor, and the evidence was that the defendant said that he had left the order with a third person to serve for him, it was held that, the variance not being "in the name or description of any matter or thing named or described in the indictment," the court had no power to order an amendment under 14 & 15 Vict. chap. 100, § 1, in correction of the variance. *Reg. v. Bailey* (1852) 6 Cox, C. C. (Eng.) 29.

And where an indictment for concealing the birth of a child averred that the body of the child had been concealed in and among a certain heap of carrots, and the evidence was that the body had been laid in back of the heap of carrots so that it was concealed by the height of the pile, it was held that the variance between the indictment and the proof was not such as could be corrected by amendment, under the authority of 14 & 15 Vict. chap. 100, § 1. *Reg. v. —* (1853) 6 Cox, C. C. (Eng.) 291.

It has been held in Texas that the amendment of an allegation in an indictment, in respect to the venue, is one of substance and not authorized. But see other jurisdictions to the con-

trary in subd. II. g. supra. *Collins v. State* (1879) 6 Tex. App. 647; *Robins v. State* (1880) 9 Tex. App. 666; *Patterson v. State* (1918) — Tex. Crim. Rep. —, 205 S. W. 986.

In *Collins v. State* (Tex.) supra, the trial court permitted an amendment to an allegation as to the venue that the grand jurors were charged to inquire "in and for the body of the county of six," by striking out the word "six" and inserting the word "Morris," the name of the county. Without this amendment it appeared that the venue would not have been laid, and the court held that the amendment, directly affecting the validity of the indictment, and not merely its form, was beyond the province of the court.

In *Robins v. State* (1880) 9 Tex. App. 666, wherein an indictment failed to aver the venue of the offense, it was held that the defect was a fatal one, which could not be made the subject of amendment by the court.

And in *Patterson v. State* (Tex.) supra, it was held that, an allegation in an indictment as to the county in which the offense was committed being a matter of substance, the allowance of an amendment thereof by the court was reversible error, § 598 of the Code of Criminal Procedure forbidding amendments in matters of substance.

#### IV. *Doctrine of no amendment.*

There are a few jurisdictions wherein it is held that indictments cannot be amended by the court. But the cases so holding have arisen in the absence of statute, and hence are, in effect, a reiteration of the early common-law doctrine. See supra, I.; *Ex parte Bain* (1886) 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; *United States v. Dembowski* (1918) 252 Fed. 894; *State v. Springer* (1884) 43 Ark. 91; *Henderson v. State* (1909) 91 Ark. 224, 120 S. W. 966; *Patrick v. People* (1896) 132 Ill. 529, 24 N. E. 619. And see the reported case (*DODGE v. UNITED STATES*, ante, 1516).

In *Ex parte Bain* (1886) 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, the defendant was convicted on an indictment which, as

returned by the grand jury, charged him with returning false statements as cashier of a banking association, "with intent to deceive the comptroller of the currency and the agent appointed to examine the affairs of said association," but which indictment had been amended by order of the court by striking out the words, "the comptroller of the currency and." The defendant made application for a writ of habeas corpus to release him from the custody of the United States marshal, on the ground that the indictment as amended was void, and the court, granting the writ, said: "The proposition that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the 5th of those articles of amendment adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that 'no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury,' except in a class of cases of which this is not one. . . . After the indictment was changed it was no longer the indictment of the grand jury which presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court, in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court in regard to the pre-



requisite of an indictment, in reality, no longer exists." And it was held that the fact that the court, in striking out the surplus words, may have deemed the change an immaterial one, would make no difference in the principle.

In *United States v. Dembowski* (1918) 252 Fed. 894, the court, quoting *Ex parte Bain* (U. S.) *supra*, said that it was well established that, "in view of the 5th Amendment to the United States Constitution, which provides that no person shall be held to answer for . . . an infamous crime unless on the presentment of the indictment of a grand jury, except in certain military cases, an indictment returned by a Federal grand jury cannot be amended without being first resubmitted to the grand jury for that purpose."

And in the reported case (*DODGE v. UNITED STATES*, ante, 1510) the court holds that an indictment cannot be amended by the court, and characterizes an attempt to do so as a serious error which will be fatal to a conviction on the count.

In *State v. Springer* (1884) 43 Ark. 91, it was said that, when an indictment was returned into court by the grand jury and filed, it could not thereafter be withdrawn for amendment, and, further, the court said: "If the indictment was supposed to be insufficient, either for uncertainty or for want of proper legal words, the proper practice was to enter a *nolle prosequi* and have the grand jury find a second indictment on the original evidence. But there is no such thing known to our law as the amendment of an indictment. . . . In fact, there are constitutional objections to such amendments."

In *Henderson v. State* (1909) 91 Ark. 224, 120 S. W. 966, the court stated that to secure a conviction the proof, in a prosecution on an indictment, must correspond with the allegations of the indictment, since the indictment could not be amended to conform to the proof.

See *Com. v. Child* (1832) 18 Pick. (Mass.) 198, wherein Shaw, Ch. J., said: "It is a well-settled rule of law

that the statute respecting amendments does not extend to indictments, that a defective indictment cannot be aided by a verdict, and that an indictment, bad on demurrer, must be held insufficient upon a motion in arrest of judgment." Justice Miller in *Ex parte Bain* (1886) 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, set out the foregoing statement of Shaw, Ch. J., as authority against the right of a court to amend any part of the body of an indictment, without reassembling the grand jury.

And see *Com. v. Mahar* (1834) 16 Pick. (Mass.) 120, wherein it was held that under the common law an indictment for arson could not be amended by inserting therein the name of the owner of the dwelling set on fire, even with the consent of the accused.

See also *Com. v. Drew* (1849) 3 Cush. (Mass.) 279, wherein the court said: "Where it is found that there is some mistake in an indictment, as a wrong name, or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects in the first." But the common-law rule has since been changed by statute.

In *Patrick v. People* (1890) 132 Ill. 529, 24 N. E. 619, the court held that it was reversible error on the part of the trial court to allow the amendment of an indictment which charged an attempt to "set at liberty and rescue a prisoner," by striking out the words "and rescue," saying: "There is nothing in our statute that purports to authorize anyone to change or modify the language of an indictment as presented by the grand jury."

And see *State v. Sexton* (1824) 10 N. C. (3 Hawks.) 184, 14 Am. Dec. 584, wherein it was said: "Nor are indictments within the operation of the Statutes of Jeofails, and cannot, therefore, be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found."

**V. Distinctive rules.****a. Rule in Alabama.**

In Alabama, it is provided by statute that an indictment may be amended "with the consent of the defendant," and this is construed to mean that the court shall not allow any amendment to an indictment without the consent of the accused. *Gregory v. State* (1871) 46 Ala. 151; *Johnson v. State* (1871) 46 Ala. 212; *Shiff v. State* (1887) 84 Ala. 454, 4 So. 419, 7 Am. Crim. Rep. 240; *Dix v. State* (1913) 8 Ala. App. 338, 62 So. 1007.

Thus, it has been held that while the insertion of the words "of Montgomery county," after the words "city court" in the caption of an indictment, might appear immaterial, it constituted reversible error. *Gregory v. State*, *supra*.

And on the authority of *Gregory v. State*, *supra*, it was held in *Johnson v. State* (1871) 46 Ala. 212, that the insertion of the words "of Montgomery" after the word "court," etc., in the caption of an indictment, without the consent of the defendant, was reversible error.

In *Shiff v. State* (1887) 84 Ala. 454, 4 So. 419, 7 Am. Crim. Rep. 240, wherein it did not affirmatively appear that the defendant had given his consent to an amendment of the indictment as to his Christian name, the court held that it was reversible error so to amend the charge, saying: "Mere silence, or failure to object, ought not to operate as a forfeiture of the defendant's right to be tried on the indictment in the form it has been framed by the grand jury."

And where the trial court had, in effect, permitted an amendment of an indictment without the consent of the accused, it was held error to overrule a demurrer to the indictment, saying: "An indictment is the act of the grand jury, and cannot be amended, even as to immaterial matter, without the defendant's consent." *Dix v. State* (1913) 8 Ala. App. 338, 62 So. 1007.

But see *Ross v. State* (1876) 55 Ala. 177, wherein it appeared that the defendant, on trial for larceny, had given his consent to an amendment in the indictment as to the Christian name of the person to whom the goods belonged, and the court held that such amendment was proper.

And where an indictment charged the theft of three \$1 bills and two \$5 bills, and the proof showed the theft of two \$5 bills and three \$10 bills, but no \$1 bills, the court held that it was proper to allow an amendment in correction of the misdescription, with the defendant's consent. *Reynolds v. State* (1891) 92 Ala. 44, 9 So. 398.

**b. Rule in Hawaii.**

In Hawaii, it has been provided by statute (Compiled Laws, § 33, p. 347) that every objection to an indictment for a defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment, and that in such cases the court may, if it be thought necessary, cause an amendment of the indictment in such particular. *Rex v. Ho Fon* (1889) 7 Haw. 757; *Reg. v. Bush* (1891) 8 Haw. 274.

Thus, in *Rex v. Ho Fon*, *supra*, wherein an indictment for conspiracy alleged that the defendant had conspired "to commit the crime of treason," the court held that the indictment was insufficient, as not setting out a statutory description of the crime, but said: "We will not order judgment to be entered in his favor, as under § 33 of the 'Act To Regulate the Practice and Procedure in Criminal Cases,' we have authority to cause the indictment to be amended."

And in *Reg. v. Bush*, *supra*, it was held that under the statute the court had authority to order an amendment so as to make an indictment good and sufficient, and that the authority of the court was not limited by the statute as to the character of the amendment.

R. E. B.

**SAM E. REYNOLDS, Admr., etc., of Alice M. McCollum, Deceased,**  
v.

**METROPOLITAN LIFE INSURANCE COMPANY, Appt.**

*Kansas Supreme Court—December 6, 1919.*

(105 Kan. 669, 185 Pac. 1051.)

**Insurance — forfeiture without notice — industrial policy.**

1. The provision of § 1, chap. 212, Laws of 1913 (Gen. Stat. 1915, § 5292), making it unlawful for any life insurance company, other than fraternal, doing business in the state, to forfeit or cancel a policy on account of the nonpayment of premiums without first giving notice in writing to the holder of any such policy of its intention to forfeit or cancel the same, is held to include industrial policies issued upon the payment of monthly or weekly premiums.

[See note on this question beginning on page 1562.]

**— provision for waiver of notice — validity.**

2. The policy of insurance sued on was an industrial policy, which made it the duty of the company's agent to call upon the insured on Monday of each week to collect a weekly premium of 25 cents. Printed upon the policy with a rubber stamp was a provision as follows: "The insured under this policy, by the acceptance thereof, expressly waives, both for himself and for any other person who has now, or who may subsequently acquire any interest herein, the giving of any notice provided for by chapter 212 of the

Laws of 1913 of the state of Kansas, and consents that said policy may be lapsed or forfeited for nonpayment of premium as herein provided." Held, that this provision of the policy was void.

[See 14 R. C. L. 982.]

**— abandonment of policy.**

3. On the facts stated in the opinion, it is held that the insured and the insurance company had not by mutual agreement abandoned and canceled the policy, and that it was in full force and effect at the time of the death of the insured.

Headnotes by PORTER, J.

**APPEAL** by defendant from a judgment of the District Court for Clay County (Smith, J.) sustaining a demurrer to the answer in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Robert Stone, E. H. Gamble, George T. McDermott, Robert L. Webb, William J. Tully, and H. O. Caster, for appellant:

If chapter 212 of the Laws of 1913 ever had any application to this class of policy, the force and effect of that statute has been waived and set aside by the original contract of the parties.

*Mutual L. Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295.

The parties by their own acts and by mutual agreement have abandoned and canceled the policy.

*Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *Mutual L. Ins. Co. v. Sears*,

178 U. S. 345, 44 L. ed. 1097, 20 Sup. Ct. Rep. 912; *Mutual L. Ins. Co. v. Hill*, 178 U. S. 348, 44 L. ed. 1097, 20 Sup. Ct. Rep. 914; *Mutual L. Ins. Co. v. Allen*, 178 U. S. 351, 44 L. ed. 1098, 20 Sup. Ct. Rep. 918.

Mr. C. Vincent Jones for appellee.

Porter, J., delivered the opinion of the court:

The action is upon a policy of life insurance. From a judgment sustaining a demurrer to its answer, the insurance company appeals.

In May, 1915, the appellant issued an industrial policy upon the life of

Alice M. McCollum, and agreed in case of her death to pay to her executor or administrator the sum of \$200. The particular kind of policy made it the duty of the company's agent to call upon the insured on Monday of each week and collect a weekly premium of 25 cents. It was provided in the policy that "if any premium shall not be paid when due, this policy shall be void." After the first premium, a grace of four weeks was granted for the payment of premiums, "during which time the insurance shall continue in force." In the same clause there was a provision that "if death occur within the days of grace, the overdue premiums shall be deducted from the amount payable hereunder, but neither this concession nor the acceptance of any overdue premiums shall create an obligation on the part of the company to receive premiums which are in arrears over four weeks."

The insured died on May 22, 1917. The last payment of premiums was made March 19, 1917, and the next payment was due on the 26th of that month. At the time the policy was written, chapter 212, Laws of 1913, was in force, with this provision: "It shall be unlawful for any life insurance company other than fraternal doing business in the state of Kansas to forfeit or cancel any life insurance policy on account of the nonpayment of any premium thereon, without first giving notice in writing to the holder of any such policy of its intention to forfeit or cancel the same." Gen. Stat. 1915, § 5292.

In the petition it was alleged that, for the purpose of avoiding the effect of this statute, the appellant, in violation of the laws of the state and against the public policy of the state, had stamped upon the insurance policy, with a rubber stamp, the following: "The insured under this policy, by the acceptance hereof, expressly waives, both for himself and for any other person who has now, or who may subsequently acquire any interest herein, the giv-

ing of any notice provided for by chapter 212 of the Laws of 1913 of the state of Kansas, and consents that said policy may be lapsed or forfeited for nonpayment of premium as herein provided."

The petition was drawn upon the theory that this provision of the policy was void. The appellee therefore contended that the four weeks of grace carried the policy to and including April 23d, and that the earliest date the appellant could have mailed a written notice was April 24th, and that under the statute the earliest date it could have forfeited the policy was thirty days thereafter, which was May 25, 1917, and that, the death of the insured having occurred three days before May 25th, the policy was still in force.

The appellant makes the following contentions:

"I. That chapter 212, Session Laws of 1913, being §§ 5292 and 5293 of the General Statutes of 1915 for the state of Kansas, does not apply to industrial policies—the class of policy upon which this suit is based.

"II. That if chapter 212, Session Laws of 1913, ever had any application to this class of policy, the force and effect of that statute has been waived and set aside by the original contract of the parties.

"III. The parties by their own acts and by mutual agreement have abandoned and canceled the policy."

The principal contention is that the Statute of 1913 does not apply to industrial policies. The argument is that the ordinary life insurance policy provides for a premium payable annually, semiannually, or quarterly, and that under any one of these three methods it often happens that the exact date when payment is due escapes the memory of a policyholder, the notice being often laid aside and forgotten, and the time allowed to slip by without making the payment; that the holder has a vested interest in an ordinary policy, and, because of the great importance to him that it

should not lapse, the statute was enacted requiring thirty days' notice after the payment becomes due before the policy can be lawfully canceled by the company; and that, by reason of the peculiar character of industrial policies, the legislature could not have had them in mind when the law was passed. It is said: "The assured's attention was called every week to the fact that premium was due; and this was done by the representatives of the insurance company in person."

In this connection it is urged that the appellant alone has in force in this state more than 118,000 policies of this peculiar kind, and that a very large percentage of the policyholders are in the habit of getting in arrears in the payment of their premiums. It is urged that the application of the statute to this class of policies might require the company to mail fifty-two written notices a year advising a policyholder of its intention to cancel his policy, and that this would be unreasonable and extremely burdensome. It is said that the industrial policyholder already pays in his premium for the service of a personal collector calling every week to remind him that his premium is due and to collect the premium; that this personal service, more efficacious than any written or printed notice sent by mail, is already included in the present cost of the policy; and that to add the unnecessary expense of sending written notices by mail would not benefit the policyholder, but, on the contrary, would be reflected in the decreased earnings of the industrial insurance companies, and in the end return upon the policyholder himself. While these considerations furnish a forcible argument against the expediency of a law that would require industrial insurance policies to give such a notice, they furnish no assistance to the court in arriving at the true interpretation of the plain language of the statute. The statute is broad and sweeping. The title reads: "An Act to Prevent the Cancellation or

Forfeiture of Life Insurance Policies, without Notice."

The language of the first section, that "it shall be unlawful for any life insurance company, other than fraternal, doing business in the state, etc.," shows that the legislature had in mind the exclusion of certain kinds of life insurance; and the fact that it expressly excludes from its provisions "fraternal" life insurance companies, and fails to exclude "industrial" policies, is an argument against the construction that it was the intention to exclude from its operation any other than "fraternal" insurance companies.

In *Priest v. Bankers Life Asso.* 99 Kan. 298, 161 Pac. 683, the conclusion was reached that the Kansas statute was based on the New York statute, "only in the sense that the same general legislative subject is dealt with, and New York acted first." (p. 300). It is, perhaps, of some significance, however, that the New York statute expressly excludes from its operation life insurance policies "issued upon the payment of monthly or weekly premiums," and there is some force to the contention of the appellee that, with the New York statute before it, our legislature appears to have acted with deliberation in leaving out the exception of "industrial" policies, although its attention was directed to the matter of the difference in the character of insurance policies, as appears by its express exclusion of "fraternal" insurance companies.

The conclusion we have reached is that, notwithstanding the obvious hardships imposed upon industrial policies of insurance by the provisions of the statute, the statute itself can bear but the one interpretation, and that to follow appellant's interpretation would require the court to depart from its judicial functions and to place an exception into the statute which the legislature did not see fit to do.

The second contention, that the force and effect of the statute has

Insurance—  
forfeiture without  
notice—indus-  
trial policy.

been waived and set aside by the original contract of the parties, does not seem to be insisted upon very strenuously by the appellant. It is sufficient answer to the contention to say that the broad terms of the statute would seem to forbid the parties to the contract from stipulating upon a clause in the policy in contravention of the statute. So far as the statute is indicative of a public policy, its provisions must be regarded as mandatory, and as not subject to waiver by reason of any provision in the policy itself. To hold otherwise would make the efficacy of the statute depend entirely upon the terms of the policy of insurance, and, manifestly, the insurance companies would refuse to issue contracts of life insurance that did not contain a provision in evasion of the statute. The legislature could not have

—provision for  
waiver of notice  
—validity.

intended that the public policy, which is the primary purpose of the act, should be made to depend upon the contract between the parties.

The third contention is that the parties by their own acts and by mutual agreement have abandoned and canceled the policy. This defense was set out in the answer, in substance, as follows:

After the insured quit paying premiums, appellant's agent called upon her each Monday for four consecutive weeks seeking to collect the premium, and orally notified her and her sister, who was her agent, that the policy would lapse unless the premiums were paid, and that, upon the day when the policy would lapse by its terms for the nonpayment of premiums, the agent orally notified them that unless the premium was paid the policy would lapse at midnight of that day; that thereafter he called upon the insured and her sister and sought to have the policy reinstated by the payment of the premiums, and they both replied that they did not wish longer to carry the insurance;

whereupon the policy was lapsed by the mutual agreement of the insured and the agent of the appellant. We have examined the cases cited in support of the contention. In our opinion, none of them apply to the situation presented by the facts in this case, for the reason that the four weeks of grace kept the policy in force to and including April 23d, and therefore the earliest date the appellant could have mailed a written notice was April 24th, and, since the insured died three days before the expiration of the thirty days from the time notice under the statute must have been mailed, it was in force at the time of her death.

No notice had been given under the statute, and the policy had not, in fact, lapsed. Besides, the statement of the insured that she did not wish longer to carry the insurance, made at a time when she still had an interest in it, and still retained the policy itself, must be construed to mean that she did not intend to make further payments of premiums but retained whatever interest she had in it according to its terms, which, regardless of what she may have believed, included a provision requiring the giving of thirty days' notice of an intention on the part of the appellant to forfeit the policy. It is clear, too, that the statement in the answer, that upon the date the policy would lapse by its terms for the nonpayment of premiums the agent orally notified the insured that the policy would lapse at midnight of that day, was predicated upon the appellant's interpretation of the policy. The statute requiring the giving of a written notice was a part of the policy, and the oral notice given the insured could not change the terms of the policy. The oral notice was given upon the mistaken theory of the appellant that the statute did not apply.

The judgment is affirmed.

## ANNOTATION.

**Applicability to industrial life insurance of statutory provision making notice a condition of forfeiture or cancelation of insurance for nonpayment of premiums.**

An extended search has disclosed no decision other than the reported case (*REYNOLDS v. METROPOLITAN L. INS. CO.* ante, 1558) discussing the applicability to industrial life insurance of a statutory provision making notice a condition of forfeiture or cancelation of insurance for nonpayment of premiums. An industrial policy has been defined as "a small policy issued in consideration of weekly payments, in contradistinction to the ordinary insurance, where premiums are payable annually, semiannually, or quarterly." See *Ann. Cas.* 1918B, 1186. Such a policy is held in the reported case to be within the provision of a statute making it unlawful for any life insurance company other than a fraternal insurance company doing business within the state to forfeit or cancel any life insurance policy on account of the nonpayment of any premium thereon, without first giving notice in writing to the holder of the policy of its intention to forfeit or cancel the same. It appeared that the insurer had issued a policy in the sum of \$200 to the plaintiff's intestate, conditional on the weekly payment of 25 cents. The last payment of premiums was made on March 19 and the insured died May 22. The plaintiff contended that the policy was still in force and effect as the thirty days of grace provided for by the policy, added to the thirty days' notice of forfeiture provided for by the statute, would bring the date of actual forfeiture to May 25, three days after the insured's death. The court holds that the stat-

ute applied to the policy, as the legislature, in enacting the statute, expressly excluded fraternal insurance companies, but made no reference to policies such as the one involved in the case, and to follow the insurer's interpretation would require the court to usurp legislative functions by placing an exception in the statute which the legislature did not see fit to make.

While the question does not appear to have arisen in any other jurisdiction where a statute requiring notice of forfeiture has been enacted, the New York statute (*Insurance Law*, § 92; 27 *McKinney, Consol. Laws*, 144) recognizes the peculiar nature of industrial policies by providing that when issued on the payment of monthly or weekly premiums, the notice is not required. Thus, in *Baldwin v. Provident Sav. Life Assur. Soc.* (1897) 23 *App. Div.* 5, 48 *N. Y. Supp.* 463, affirmed in (1900) 162 *N. Y.* 636, 57 *N. E.* 1103, the court said: "The plaintiff's counsel also contends that the notice or call for the payment of the mortuary premiums is not a sufficient compliance with § 92 of the *Insurance Law* (2 *Rev. Stat.* 9th ed. p. 1174), because it does not contain a reference to the right of the assured to a surrender value or paid-up policy. The policy, however, falls within the exception of the section, that is, it is either a policy issued upon the payment of a monthly premium, or it is a term insurance contract for a year or less, in which case no notice is necessary."

E. C. B.

AMERICAN NATIONAL BANK, Appt.,  
v.

A. L. PATTERSON.

(145 La. —, 83 So. 218.)

*Louisiana Supreme Court — June 2, 1919.*

**Bills and notes — consideration — other note.**

1. One promissory note is a good and sufficient consideration for another given in exchange therefor.

[See note on this question beginning on page 1569.]

**— use for payment of indebtedness.**

2. The holder and owner of a negotiable promissory note, acquired for good and sufficient consideration, may use it for the extinguishment of his obligations, and when so used his transferee is entitled to recover the amount thereby called for, as is also the transferee of his transferee, even though the latter acquires the instrument after maturity.

**— demand note — delay — effect.**

3. Seven months is an unreasonable time for a national bank in a failing condition to delay demanding payment of a demand note, and another bank which, after such delay, takes over its assets and agrees to pay its debts, is not a holder in due course of the note so acquired.

[See 3 R. C. L. 1047.]

Headnotes by MONROE, Ch. J.

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division "B" (King, J.), in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Monroe, Ch. J.:

Plaintiff prosecutes this appeal from a judgment rejecting its claim as holder for value before maturity of defendant's note, reading (in part):  
"\$10,000.

Macon, Georgia, 1—4—1914.

"On demand, after date, I, we, or either of us, promise to pay to the order of the Commercial National Bank of Macon, Georgia, \$10,000.

"For value received, payable at said bank, with interest from date, at the rate of 8 per cent per annum, with all costs of collection, including 10 per cent attorney's fees."

And then follow certain waivers and a stipulation which are not involved in this controversy, and the signature of the defendant, as the maker of the note.

Defendant, in an answer setting forth a good many details, pleads want of consideration, and denies

that plaintiff has full ownership of the note.

The facts of the case, as we interpret the evidence, are as follows:

Defendant resided and was engaged in business in New Orleans. His uncle, J. J. Cobb, resided in Macon, Georgia, and was vice president of the Commercial National Bank and cashier of the Commercial Savings Bank of that city. Cobb's brother-in-law, Mallary, was president of both of those institutions, and Mallary's stepson, Lewis, was cashier of the one and assistant cashier of the other. For some years prior to the transaction out of which this litigation has arisen, defendant and Cobb had frequently exchanged notes for their mutual accommodation, and shortly before January 4, 1914, Cobb wrote to defendant, requesting him to make such an exchange, saying that he did not wish to put his own note in



the bank (meaning the bank of which he was an officer), that he hoped to return the note which defendant might furnish within a short time, and that he would have the president and cashier of the bank (meaning the Commercial National) guarantee the note that he would furnish, to which request defendant gave his assent, and the exchange was effected; he forwarding to Cobb the note sued on, and Cobb forwarding to him his (Cobb's) note for a like amount, payable on demand to the order of A. L. Patterson & Co., after which, on January 12th, Mallary and Lewis mailed to defendant a guaranty reading: "We hereby guarantee the note of J. J. Cobb, held by you, in the sum of \$10,000, for which you have given your demand note of like amount in favor of the Commercial National Bank. We have received from J. J. Cobb certificates of stock to the value of \$10,000, which we likewise hold for your security."

The certificates thus referred to represented stock in the two banks of which Mallary, Lewis, and Cobb were officers, and somewhat later (prior to August 1st) they were withdrawn by Cobb and bonds of an Alaska Mining Company, of the par value of \$10,000, were substituted in their stead; the explanation thereof, as given by Lewis, in his testimony, being as follows: "In the early summer of 1914 the Commercial National Bank had received some severe criticism as to its condition by the bank examiner, and Mr. Cobb became somewhat worried about the value of the security he had behind his note of Patterson, and he took those bonds [certificates?], and put in their stead \$10,000 worth of first mortgage bonds of the Eagle River Mining Company."

As the Commercial National Bank failed on or about August 1st following, it is evident that the exchange of collaterals was made in the interest of the defendant, and, though he was not consulted about

it at the time, he accepted the bonds after the failure of the bank, and states, in his answer, that he now has them in his possession; but that they have no market value, and that he is willing to surrender them in the event of his being discharged from liability with respect to the claim here set up.

Concerning the disposition that was made of the proceeds of the note here sued on, we have only the testimony of the three bank officers:

Mallary, the president, was able to testify that Cobb came to him one day and stated that he had a note of Mr. Patterson that he would like the bank (Commercial National) to discount, and that, after discussing the matter with him and Lewis, he agreed to the discount. He goes on to say that the note ~~was discounted~~ by the bank, and that he understood that Cobb received the proceeds; but his subsequent examination shows that, save as to his consent to the discount, he knew nothing about the matter except what he was told—by Lewis or Cobb.

Cobb gives the following, with other testimony, to wit:

Q. Were you indebted to the Commercial National Bank? If so, in what way?

A. I suppose the money was turned over—

Q. Tell us what you know. . . .

Q. Do you know whether or not it was applied to any obligation of yours with the Commercial National Bank?

A. I did not have any that it could have been applied to, as far as I can recall now. . . . I had obligations that Mr. Lewis was looking after for me, and I wanted to put them in better shape and relieve him of that.

Q. To whom were these obligations due?

A. I think in the Commercial Savings Bank—I said obligations—they were things that I felt that I was more responsible for, and I wanted to relieve him of carrying them in the shape they were.

Q. Do you know they were not Commercial National obligations?

A. I think so—I am not sure—I think so.

Q. What kind of obligations were they?

A. They were some that I felt responsible for, occasioned by a loss of a former employee of my insurance agency, or bond agency, and some indebtedness for carrying life insurance premiums.

Q. Whose were they?

A. Mr. E. Y. Mallary's and my own, principally; they were for the benefit of the bank; and some obligations in connection with the Eagle River mine, and there were others I do not recall now.

Q. Did not Mr. Patterson's note liquidate all those obligations, or did you raise some other money in addition to that?

A. Some other money.

Q. Did that have anything to do with the fact that you cannot recall definitely what were paid from the proceeds of this note and what were paid from other sources?

A. My recollection is that I simply had Mr. Mallary O. K. the note and left it with Mr. Lewis to use as he saw best.

Q. In caring for those obligations you speak of?

A. Yes, sir.

Lewis, after testifying, categorically, that he discounted the note for Cobb, and paid him \$10,000 in cash, that the Commercial National Bank had no interest in the matter (not being the creditor of Cobb), except to buy the note from him, that it paid him full value therefor, and that the note was sold by the bank, with its other assets, gives the following further testimony, on his cross-examination:

Q. This money, the \$10,000 which Mr. Patterson's note was discounted for, how was that paid to Mr. Cobb?

A. Mr. Cobb, I think, used that money in the Commercial Savings Bank.

Q. It was not put in the Commercial National Bank and checked

out by Cobb for any other purpose, for all you know?

A. No, sir. . . . My impression is that Mr. Cobb used that money and took up some papers on which he considered himself morally, and not legally, bound.

Q. They were taken up in the Savings Bank, of which you were an officer?

A. Yes, sir. . . .

Q. You don't know what these obligations were that were taken up in the Commercial Savings Bank?

A. No, sir; I have no doubt but what I knew at the time, but I don't know now.

Q. Was the money immediately applied to the taking up of the obligations, or did it stay in the Commercial National Bank for any length of time?

A. I think it was immediately applied.

Q. Do you know who applied it—Mr. Mallary or Mr. Cobb?

A. Very probably I did.

Q. You applied the money yourself to the obligations in the Commercial Savings Bank?

A. Yes, sir.

Q. Mr. Cobb had no charge of the money, individually, except in so far as you applied it to those obligations?

A. He handed me the note.

Q. He handed you the note, and you took the money and paid those obligations to the Commercial Savings Bank?

A. Yes, sir. . . . He owed the Commercial National nothing. . . .

Q. This paper of Patterson went along with the other assets of the Commercial National Bank, when the American National Bank took over the assets?

A. Yes, sir. . . .

Q. The consideration of the transfer of those assets was that the American National Bank should pay the debts of the Commercial National Bank and repay itself out of the assets of the Commercial National Bank—practically so?

A. Yes, sir. . . .

Q. Were the papers that were

paid to the Commercial Savings Bank obligations upon which Mr. Cobb was either maker, indorser, surety, or how was it?

A. He did not appear in any of these capacities.

Q. What were those papers?

A. I cannot recall what they were.

Q. What sort of papers were they?

A. They were loans held by the bank on which it was stated Mr. Cobb was not directly liable, either as maker, indorser, guaranty, or surety; but they were papers with some doubt as to their collection, and for which Mr. Cobb felt a sense of moral responsibility and wanted to take up.

It seems to be conceded that no demand was made for the payment of the note here sued on until after it had come into the possession of the plaintiff, or say some eight months after its date.

Messrs. Dart, Kernan, & Dart and Orville A. Park, for appellant:

The note was given for a valuable consideration.

Joyce, *Defenses to Commercial Paper*, § 227; *Randolph, Com. Paper*, §§ 479, 480; *Greenwood v. Lowe*, 7 La. Ann. 197; *Benner v. Van Norden*, 27 La. Ann. 473.

The note was transferred for value by the Commercial National Bank to the plaintiff. If it is accommodation paper, the plaintiff is a holder for value, and as such is entitled to recover, even if the note was past due when plaintiff bought it.

Joyce, *Defenses Com. Paper*, § 282; 2 *Randolph, Com. Paper*, 2d ed. § 677; 1 *Dan. Neg. Inst.* 5th ed. § 726; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254; *Lowell v. Bickford* 201 Mass. 543, 88 N. E. 1; *Marling v. Jones*, 138 Wis. 82, 131 Am. St. Rep. 996, 119 N. W. 931; *Selover, Neg. Inst.* § 66, p. 105.

The plaintiff having bought the assets of the Commercial National Bank, including the note, it therefore acquired all the rights of that bank.

*Exchange Bank v. Butner*, 60 Ga. 654; *Tarbell v. Sturtevant*, 26 Va. 513; *Sawyer v. Cutting*, 23 Vt. 486; *Mersick v. Alderman*, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254.

If notes are exchanged, each note is

a valid consideration for the other and is fully available in the hands of its holder.

*Greenwood v. Lowe*, 7 La. Ann. 197; *Dan. Neg. Inst.* 6th ed. p. 259, § 187.

Where the maker of a note receives a valuable consideration for its execution, the note is a business paper, available in the hands of any holder, whether such holder pays consideration therefor or not.

*Benner v. Van Norden*, 27 La. Ann. 473; *Fuller v. Leonard*, 27 La. Ann. 635; *Iberia Cypress Co. v. Christen*, 112 La. 448, 36 So. 490; *Matthews v. Williams*, 25 La. Ann. 585; *Moore v. Hubbard*, 15 Ind. App. 84, 42 N. E. 962; *Murphey v. Illinois Trust & Sav. Bank*, 57 Neb. 519, 77 N. W. 1102; *Wright v. McKittrick*, 2 Kan. App. 508, 43 Pac. 977; *Madison County Bank v. Graham*, 74 Mo. App. 251; *Harrod v. Black*, 1 Duv. 180; *Shabata v. Johnston*, 53 Neb. 12, 73 N. W. 278; *Newmarket Sav. Bank v. Hanson*, 67 N. H. 501, 32 Atl. 774; *First Nat. Bank v. Engebretson*, 28 S. D. 185, 132 N. W. 786.

A valuable consideration having passed for the note at the time of its execution, it is available in the hands of any subsequent holder, whether such holder gave value for it or not, and whether taken before or after maturity.

*Smith v. Adams*, 14 La. Ann. 411; *Davidson v. Keyes*, 2 Rob. 254, 38 Am. Dec. 209; *Louisiana Union Bank v. Roos*, 21 La. Ann. 513; *Farber v. National Forge & Iron Co.* 140 Ind. 54, 39 N. E. 250.

Messrs. John May and R. B. Ellis, for appellee:

Absence or failure of consideration is a defense available against any person not a holder in due course.

*Franz v. Schiro*, 136 La. 841, 67 So. 925.

One who acquires a note after maturity can claim no greater rights than could the person from whom he acquires.

*Gajan v. Patout*, 138 La. 1060, 63 So. 585.

Where a note is without consideration and is saved from nullity in the hands of a third person only because taken in good faith before maturity, such third person can only recover to the extent of the sum paid.

*Fidelity & D. Co. v. Johnston*, 117 La. 880, 42 So. 357.

One who takes paper as collateral security for a debt will be limited in

his recovery to the amount of that debt.

*Cromwell v. Sac County*, 96 U. S. 60, 24 L. ed. 687; *Duncan v. Gilbert*, 29 N. J. L. 521; *Fisher v. Fisher*, 98 Mass. 303; *Citizens' Bank v. Payne*, 18 La. Ann. 222, 89 Am. Dec. 650; *Gardner v. Maxwell*, 27 La. Ann. 561; *Mechanics' & T. Bank v. Barnett*, 27 La. Ann. 177; *Mechanics' Bldg. Asso. v. Ferguson*, 29 La. Ann. 543; *Fidelity & D. Co. v. Johnston*, 117 La. 880, 42 So. 357.

*Monroe, Ch. J.*, delivered the opinion of the court:

The Negotiable Instruments Law (as enacted in this state) declares that where a negotiable instrument is payable on demand, presentment must be made within a reasonable time after its issue (an exception being made in the matter of the presentment for payment of bills of exchange), that, if it is negotiated an unreasonable time after its issue, the holder is not deemed a holder in due course; and that, "in determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade, or the business (if any) with respect to such instruments, and the facts of the particular case." Act No. 64 of 1904, §§ 53, 71, and 193. There is no evidence before us as to the usages of trade; but, considering the nature of the instrument here in question, the fact that it was held by a national bank for seven months, while the bank was drifting towards failure, and that plaintiff acquired it after the bank had failed, without having made demand for its payment, we are of opinion that plaintiff cannot be re-

Bills and notes—  
demand note—  
delay—effect.

garded as a holder in due course, and hence that, as to its

right of recovery, it stands in the shoes of the Commercial National Bank, from which the instrument was acquired.

Counsel for defendant admitted, in their first brief, that there was "a technical consideration" for the note, as between Cobb and Patterson, but argued that this is not a suit by Cobb; that he has no inter-

est in it; that he did not indorse the note to the Commercial National Bank; and that the party in interest is the plaintiff, by which it was acquired after maturity, and which, therefore, has only such rights as the payee might have had. In their "second, or reply," brief the learned counsel announced the discovery that, as the note which the defendant received from Cobb was made payable to the order of A. L. Patterson & Co., and not to the order of A. L. Patterson, the defendant, A. L. Patterson, did not receive even a technical consideration for the note which he gave in exchange.

The question of the exchange of notes was, however, the subject of a correspondence between defendant and Cobb, and, as Cobb apparently wanted defendant's note to be made payable to the order of the Commercial National Bank, it is fair to assume that defendant preferred to have Cobb's note made payable to A. L. Patterson & Co. At all events, he accepted the note in that form; he has retained it up to the present time without complaint on that score; and it is not now suggested that it is any the less available to him, personally, because so drawn. The fact that the notes were made as they were, with the full knowledge and approval of the parties to the exchange, in no wise, therefore, affects the question of the consideration; and, whilst it appears to us that "technical consideration" is about all that is required for the purposes of the case, the authorities are agreed that one —consideration —other note. promissory note is

a good and sufficient consideration for another, given in exchange. *Joyce*, Defenses to Com. Paper, § 227; *Randolph*, Com. Paper, §§ 479, 480; *Selover*, Neg. Inst. p. 103, § 66; *Tiedeman*, Com. Paper, p. 286, § 172a; *Greenwood v. Lowe*, 7 La. Ann. 197; *Rice v. Grange*, 131 N. Y. 149, 80 N. E. 46; *Crampton v. Newton*, 132 Mich. 149, 93 N. W. 250; *Franklin Nat. Bank v. Roberts*

Bros. Co. 168 N. C. 473, 84 S. E. 706.

Having, then, acquired defendant's note for a good and sufficient consideration, Cobb was at liberty to make of it the use that he had in view when he acquired it, and of which the defendant was fairly advised, since the note was made payable to the order of the Commercial National Bank, and it was obvious that it was intended for negotiation through that bank. The learned counsel argue that it was not "discounted" by the bank, since the date of its maturity was not fixed, and, according to the testimony of Lewis, no discount was deducted, to which it may be added that the proceeds were not credited to Cobb in the ordinary way, and were not checked out by him.

Notwithstanding, however, that the testimony of Lewis is not as frank as it should have been, and inspires no great confidence, we are satisfied, all the circumstances considered, that, in consideration of the receipt of the note, the funds of the Commercial National Bank, to the amount called for upon the face of the note, were used, at the instance of Cobb, in the extinguishment of his obligation, and as it must have entered into defendant's contemplation, when he executed and delivered

—use for payment of indebtedness.

it, that it would or might be used in some such way, he has no just cause of complaint in the fact that, having served its purpose, he is now called on to pay it.

It is therefore adjudged and decreed that the judgment appealed from be annulled, and that there now be judgment in favor of the American National Bank, plaintiff herein, and against the defendant, Andrew L. Patterson, in the sum of \$10,000, with interest thereon at the rate of 8 per cent per annum from January 4, 1914, until paid, together with 10 per cent as attorney's fees, upon the aggregate amount of said principal and interest, and all the costs of this suit.

A petition for rehearing having been granted, Dawkins, J., on November 8, 1919, handed down the following additional opinion:

In disposing of this case on rehearing, we find it unnecessary to further discuss the legal questions involved, as we feel that they have been fully and properly determined in our former opinion. The matter, in our opinion, has resolved itself to a question of fact as to whether or not the Commercial National Bank, payee of the note, paid to Cobb, or to other persons at his request, the amount thereof, to wit, \$10,000. If it did, it makes no difference whether it or the present plaintiff be a third holder, in a legal sense, or not. Defendant evidently intended that the note might be so used, if Cobb saw fit, and if he received the money, or if others received it for his benefit, or at his instance, the Commercial National Bank could have enforced payment in full, and its transferee can do likewise, regardless of what may have been paid therefor. The note would represent a debt owed by defendant, and he would not be concerned as to what consideration the original payee may have been willing to receive for it.

The witness Lewis, who was cashier of the Commercial National Bank, and assistant cashier of the Commercial Trust & Savings Bank, testified that he received from the Commercial National Bank the amount of this note and applied the same to the discharge of obligations in which Cobb was interested at the bank of which he was assistant cashier, all as requested by Cobb. This testimony is corroborated by that of Mallery, who was president of the payee bank, who swore that he approved the loan, and by Cobb, who says that he discussed and concluded such an arrangement with Mallery. It is true that Lewis and Cobb were unable, or at least failed, to give the details with regard to the obligations which were so discharged at Cobb's request; but shall

we, on that account, hold that the main fact of the Commercial National Bank's having parted with its money had not been established, when defendant was afforded every opportunity for cross-examination, and when he had the right to call for and have produced the books and records, not alone of the Commercial Trust & Savings Bank, but also of the Commercial National Bank, or to take the testimony of those now having the custody of same, which was not done? It does seem that it would have been a very easy matter to have proven, by the note register and cash account of the payee bank

of the date of the alleged loan, whether or not it had been made. There is no proof to the contrary in the record, other than the inference to be drawn from the failure or inability of Lewis and Cobb to detail the items to which the proceeds of the note were applied, at a bank other than that at which the loan was made, and in which the lender bank had no concern.

We conclude that the preponderance of the evidence shows that the loan was made, and for this reason our former decree is reinstated and made the final judgment of this court.

### ANNOTATION.

#### Cross notes, bills, or checks as consideration for each other.

- I. In general, 1569..
- II. Nonpayment of one of the notes or bills, 1571.
- III. Exchange as a question of intent of the parties, 1571.

##### I. In general.

The present annotation deals with the question of consideration where cross notes, bills, or checks are exchanged by the makers thereof. It does not include in general cases where a note or other commercial paper of a third party is given in exchange.

In the annotation the term "cross notes" is used in the sense employed generally in the cases; i. e., notes given for mutual accommodation of the parties thereto, or of one of them, in which the maker and the payee of one note are respectively the payee and maker of the other note. A similar relationship exists as between acceptors of cross bills of exchange or the makers of cross checks.

It is well settled that cross notes, bills, or checks, though made for the accommodation of the parties, are not accommodation, but business, paper, provided there is no restriction on use or negotiation, the one note, bill, or check being a good consideration for the other received in exchange.

Alabama.—Farley Nat. Bank v.

7 A.L.R.—99.

Henderson (1897) 118 Ala. 441, 24 So. 428.

Indiana.—Farber v. National Forge & Iron Co. (1894) 140 Ind. 54, 39 N. E. 249.

Iowa.—Iowa College v. Hill (1861) 12 Iowa, 462.

Louisiana.—Crescent City Bank v. Hernandez (1873) 25 La. Ann. 43; AMERICAN NAT. BANK v. PATTERSON (reported herewith) ante, 1563.

Maine.—Dockray v. Dunn (1854) 37 Me. 442.

Maryland.—Williams v. Banks (1858) 11 Md. 198 (rule recognized); Stickney v. Mohler (1862) 19 Md. 490.

Massachusetts.—Eaton v. Carey (1831) 10 Pick. 211; Higginson v. Gray (1843) 6 Met. 212; Whittier v. Eager (1861) 1 Allen, 499; Backus v. Spaulding (1875) 116 Mass. 418; see also Luke v. Fisher (1852) 10 Cush. 271.

New Hampshire.—Newmarket Sav. Bank v. Hanson (1893) 67 N. H. 501, 32 Atl. 774.

New Jersey.—Savage v. Ball (1864) 17 N. J. Eq. 142, 2 Mor. Min. Rep. 579 (recognizing rule).

New York.—Rice v. Mather (1829) 3 Wend. 62; Dowe v. Schutt (1846) 2 Denio, 621; Wooster v. Jenkins (1846) 3 Denio, 187; Odell v. Greenly (1855) 4 Duer, 358; Coburn v. Baker (1857) 6 Duer, 532; Cobb v. Titus (1854) 10

N. Y. 198; *Newman v. Frost* (1873) 52 N. Y. 422; *Cohu v. Husson* (1889) 113 N. Y. 662, 21 N. E. 703; *Leslie v. Bassett* (1892) 129 N. Y. 523, 29 N. E. 834; *Rice v. Grange* (1892) 131 N. Y. 149, 30 N. E. 46 (note of third party; rule recognized); *State Bank v. Smith* (1898) 155 N. Y. 185, 49 N. E. 680; *Canda v. Zeller* (1888) 21 N. Y. S. R. 164, 3 N. Y. Supp. 128; *Shannon v. Horley* (1900) 32 Misc. 623, 66 N. Y. Supp. 471 (exchange of check of third party; rule approved); *Mutual Loan Assn. v. Brandt* (1901) 34 Misc. 400, 69 N. Y. Supp. 652, reversed on other grounds in (1901) 35 Misc. 270, 71 N. Y. Supp. 770; *Milius v. Kauffmann* (1905) 104 App. Div. 442, 93 N. Y. Supp. 669; see also *Bassett v. Bassett* (1870) 55 Barb. 505.

**North Carolina.**—*Franklin Nat. Bank v. Roberts Bros. Co.* (1915) 168 N. C. 473, 84 S. E. 706.

**Ohio.**—*Rankin v. Knight* (1871) 1 Cin. Sup. Ct. Rep. 515; *Lord v. Graveson* (1904) 26 Ohio C. C. 371.

**South Dakota.**—*State Bank v. Hayes* (1902) 16 S. D. 365, 92 N. W. 1068.

**England.**—*Rolfe v. Caslon* (1795) 2 H. Bl. 570, 126 Eng. Reprint, 708; *Cowley v. Dunlop* (1798) 7 T. R. 565, 101 Eng. Reprint, 1135; *Cardwell v. Martin* (1808) 9 East, 190, 103 Eng. Reprint, 545, 1 Campb. 79, 180; *Kent v. Lowen* (1808) 1 Campb. 177; see also *Buckler v. Buttivant* (1802) 3 East, 72, 102 Eng. Reprint, 523 (exchange of acceptance of third parties).

The rule above indicated is also approved, on facts not within the scope of the annotation, in *Cameron v. Chappell* (1840) 24 Wend. (N. Y.) 94, and *Davis v. McCready* (1858) 17 N. Y. 232, 72 Am. Dec. 461.

The fact that an exchange of notes is made not for mutual accommodation, but for the accommodation of one of the parties only, will not affect the rule that cross notes are a consideration the one for the other, if there is no restriction as to the use to be made of either note. *Odell v. Greenly* (1855) 4 Duer (N. Y.) 358.

It is well settled, it was said in *Higginson v. Gray* (1843) 6 Met. (Mass.) 212, that exchange notes, though made for the accommodation of the parties,

are not what is known and recognized as accommodation paper, there being a mutuality in the former transaction which does not exist in the latter, on account of which the exchange is in law a good consideration between the parties, each for the other.

"An exchange of notes may have been accommodating, but such a transaction constitutes none of the elements of accommodation paper in the mercantile sense of that term. A mutual independent promise, in writing, is a good consideration to uphold the contract of each, and it may be enforced, even by the original party." *Dockray v. Dunn* (1854) 37 Me. 442.

And, referring to an exchange of notes, the court in *Coburn v. Baker* (1857) 6 Duer (N. Y.) 532, said: "The settled doctrine would seem to be that any indorsee of such a note, before its maturity, has the same rights against the maker of it as if each note had its origin in a distinct and independent transaction, and the consideration of it was property sold and delivered to the maker."

Also in *Whittier v. Eager* (1861) 1 Allen (Mass.) 499, the court said: "Nothing is better settled than that a promissory note given by the maker in exchange for a note given to him by the payee is for a good consideration, and is in no proper sense an accommodation note, although made for the mutual convenience of the parties. . . . Being a valid note on which the defendant was liable, it was wholly immaterial whether the plaintiff, as indorsee, took it for value."

Where there is an exchange of notes without restriction as to use, the transaction is the same, so far as consideration is concerned, as though value had been received in goods or money. *Wooster v. Jenkins* (1846) 3 Denio (N. Y.) 187. In this case it was held that each party to an exchange of notes was bound to pay his own note, and that where the plaintiff and the defendant had exchanged notes, and the former had paid both notes, the defendant having failed and the plaintiff having paid the defendant's note as an indorser, the plaintiff could not recover for money paid on his own

note, but his action should have been on the note of the defendant.

It was contended in *Wooster v. Jenkins* (N. Y.) *supra*, that as between the original parties, cross notes should be regarded as accommodation paper, in contradistinction to business securities; but the court stated that the rule was settled to the contrary; that each party may prove the debt against the other under a commission of bankruptcy; and that while as long as the notes remained in the hands of the original parties they balanced each other, this was only by way of set-off.

An exchange of notes, without any limitation upon the use of the same, vests the title to the respective notes in the holder, the one being a consideration for the other, and when discounted the proceeds can be applied as the holder may direct. *Lord v. Graveson* (1904) 26 Ohio C. C. 371.

Although the annotation does not include in general cases involving notes or checks of third parties, attention is called to *Luke v. Fisher* (1852) 10 Cush. (Mass.) 271, holding that the plaintiff's indorsement of a note of a third party was a good consideration for the defendant's note to him.

## *II. Nonpayment of one of the notes or bills.*

It follows from the rules above stated that, the transaction being complete at the time of the exchange, the question of original consideration is not affected by subsequent events, such as a failure of one of the parties to pay his note when due or the surrender and cancelation of one of the notes without payment. *Farber v. National Forge & Iron Co.* (1894) 140 Ind. 54, 39 N. E. 249; *Iowa College v. Hill* (1861) 12 Iowa, 462; *Wooster v. Jenkins* (1846) 3 Denio (N. Y.) 187; *Coburn v. Baker* (1857) 6 Duer (N. Y.) 532; *Milius v. Kauffmann* (1905) 104 App. Div. 442, 98 N. Y. Supp. 669; *Franklin Nat. Bank v. Roberts Bros. Co.* (1915) 168 N. C. 473, 84 S. E. 706; *Lord v. Graveson* (1904) 26 Ohio C. C. 371; see also *Rice v. Grange* (1892) 131 N. Y. 149, 30 N. E. 46, which applies the rule in the case of an exchange of a note of a third party.

Where there is an exchange of notes,

failure of consideration is not shown, so as to prevent recovery in an action by a transferee of one of the notes against the maker, by evidence that after the transfer the defendant canceled and surrendered to the maker the note received by him in exchange. *Iowa College v. Hill* (1861) 12 Iowa, 462, *supra*.

If one of the parties to an exchange of cross notes out of proceeds of the note of the other makes a payment to the latter on account, it constitutes a final payment thereon, although he fails to pay his own note, given in exchange therefor. *Lord v. Graveson* (1904) 26 Ohio C. C. 371, *supra*.

And in *Newmarket Sav. Bank v. Hanson* (1893) 67 N. H. 501, 32 Atl. 774, it was held that where there is an exchange of notes, the one being a consideration for the other, either party can recover against the other without paying his own note, the defendant having the right to avail himself of the plaintiff's note only by way of set-off.

As to right to set-off as between original parties, see also *Wooster v. Jenkins* (N. Y.) *supra*, I.

A promissory note given by the maker in exchange for a promissory note given by the payee is for a good consideration, although made for the mutual accommodation of the parties, and although the note given in exchange by such payee is worthless. *Farber v. National Forge & Iron Co.* (1894) 140 Ind. 54, 39 N. E. 249, *supra*.

Of course, the fact that the check or note given in exchange for the one in suit is not paid will not be a defense as against a bona fide holder for value. This was the situation in *Crescent City Bank v. Hernandez* (1873) 25 La. Ann. 43.

## *III. Exchange as a question of intent of the parties.*

The cases holding that cross notes are a good consideration the one for the other are based on the assumption or determination that the one was given and received in exchange for the other, that they are both valid notes, unrestricted as to use, and that neither of them is, by the understanding of the parties, a mere memorandum,



receipt, or security. And if the understanding was that there should not be such an exchange of securities, this fact may be shown, and will affect the question of consideration.

Ordinarily, on an exchange of cross notes, without restriction as to use, the maker of one of the notes cannot defend an action against him thereon on the theory that the other note was given to him merely as a receipt and that, therefore, there was no consideration for his own note. *Eaton v. Carey* (1831) 10 Pick. (Mass.) 211.

But whether an exchange of notes is intended to make one a consideration for the other is a question of the intent of the parties; and so where a married woman, in exchange for her note given for the accommodation of the payee, received a note of the latter for the same amount, with the understanding that it was not to be used, it was held that she had not received value within the meaning of the enabling act relating to married women, which provided that nothing therein contained should enable a married woman to become a guarantor or surety unless she received money, property, or other thing of value, for her own use, on the faith of her contract. *Vliet v. Eastburn* (1899) 63 N. J. L. 450, 43 Atl. 741.

The note received with the understanding that it was not to be used was said, in *Vliet v. Eastburn* (N. J.) *supra*, to be in effect a memorandum; the agreement that it should not be used, though oral, was valid and admissible in evidence in an action on the note; and the fact that such an action was brought by the payee, it was held, would not render valid the note given in exchange therefor.

For the rule to apply that cross notes given in exchange are for sufficient consideration, it must appear that it was the intention of the parties to make a mutual exchange of paper, and whether this was their design will depend on the particular circumstances of each case. *Williams v. Banks* (1857) 11 Md. 198. In this case it was held that the evidence was insufficient to show that a grandparent had given the note in question to her

grandson in exchange for the latter's note bearing the same date and for twice the amount, found among her papers after her death, where it appeared that the grandson was known to the maker of the note as a spendthrift, totally insolvent, who was relying on money furnished him by his grandparent for his maintenance, and there was no proof that he had ever paid to her any of the many notes he received from her. Under these circumstances the court said it could not for a moment suppose that she gave her note in consideration for his, or that she intended the transaction between them should be what the law regarded as a mutual exchange of notes.

The rule that the intent of the parties will determine whether there has been an exchange of notes so as to constitute the one a consideration for the other is supported also by the case of *Wooster v. Jenkins* (1846) 3 Denio (N. Y.) 187, in which the court, although holding that there had been an exchange of notes in this instance so as to constitute a valid consideration, stated that if a party lends his note or acceptance, and takes a counter security of the same kind, by way of indemnity merely, the lent note or bill will not have inception as a valid security until it passes into the hands of a bona fide holder.

An exchange of notes constituting a consideration the one for the other does not arise where a blank note is left by the payee with the maker of the other note merely as a receipt to indemnify him in case of misuse of funds raised on his note; and if the note of the latter is returned to him without being used, but he fills out the blank note received as indemnity, the latter is without consideration in his hands. *Iowa College v. Hill* (1861) 12 Iowa, 462.

And where an exchange of checks is made for accommodation, but the evidence shows that one of the checks is merely loaned, and the other is given merely as a memorandum or guaranty for the protection of the payee, the latter, if he has not paid or been called upon to pay his own check, cannot enforce payment of the check given

him as a guaranty, since he stands in the position of a surety who, without discharging the debt, cannot sue his principal. *Burdsall & Co. v. Chrisfield*, (1855) 1 *Disney* (Ohio) 51.

A presumption of an exchange of notes between parties thereto, so as to constitute the one a consideration for the other, arises from similarity in date, amount, and terms of the notes; but this presumption is rebuttable. *Mutual Loan Asso. v. Brandt* (1901) 35 *Misc.* 270, 71 *N. Y. Supp.* 770.

To rebut such presumption, the maker of one of the notes, who defends an action on it on the ground that it was given without consideration and was discounted with the plaintiff at a usurious rate, may show what occurred at the time of the alleged exchange. *Ibid.*

The fact that the payee, for whose accommodation only the defendant exchanged notes, promised to protect the note of the defendant, was held in *Odell v. Greenly* (1855) 4 *Duer* (N. Y.) 358, not to require submission to the jury of the question whether there was in fact an exchange of notes within the rule that on such an exchange one note is a good consideration for the other, where there was no evidence of any restriction in the use of the notes.

An allegation in a pleading that a note was given "in consideration" of

an acceptance by the payee of a bill of exchange drawn by the maker of the note was held in *Farley Nat. Bank v. Henderson* (1897) 118 *Ala.* 441, 24 *So.* 428, not a sufficient allegation that the note was given in exchange for the acceptance, and not merely as security therefor, so as to preclude the bill from being merely accommodation paper.

But the acceptor of the bill was held estopped to assert that it was given merely for accommodation, where, before the maturity of the acceptance, he attempted to enforce the note against the maker by legal proceedings, since the attempt was consistent only with the theory that the note was given in exchange for the acceptance, and not merely as security therefor. *Ibid.*

Where there is an exchange of checks for the accommodation of one of the parties, the fact that the latter's check is not used, but is retained by the other party to the transaction, who produces it in evidence when sued on his own check by a third party, does not sustain the defense of failure of consideration, on the theory that the check he received in exchange was a mere memorandum and was not to be used, even if this was the expectation of the parties, provided there was no agreement to this effect. *Rankin v. Knight* (1871) 1 *Cin. Sup. Ct. Rep.* (Ohio) 515. R. E. H.

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H. STANLEY HANSON, Appt.,

v.

FLORENCE VOSE et al., Respts.

*Minnesota Supreme Court — December 12, 1919.*

(— Minn. —, 175 N. W. 113.)

**Fixtures — ranges and beds.**

1. Where the holder of a ground lease erects an apartment building and installs a gas range and a door bed in each flat and thereafter forfeits his lease, these articles will pass as fixtures to the owner of the realty if no rights of third parties are infringed and there be no agreement to the contrary.

[See note on this question beginning on page 1578.]

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Headnotes 1-6 by TAYLOR, C.

— what are.

2. A chattel does not become a fixture unless physically or constructively annexed to the freehold.

[See 11 R. C. L. 1058-1060.]

— ease of removal — effect.

3. An article annexed to the freehold, but which can be removed without substantial injury to the realty, may remain a chattel if the circumstances show that such was the intention.

[See 11 R. C. L. 1060.]

— right of landowner.

4. As against third parties having rights in these ranges and beds, the landowner is in substantially the same position as a prior mortgagee of the land.

— conditional sale to lessee.

5. Where the holder of the ground lease purchased these ranges and beds under a conditional contract of sale by which title and right of removal remained in the vendors, and, after defaulting in his payments, transferred all his rights in them to a third party, not concerned in the real estate, whom

the vendors accepted as the purchaser in his stead, he never had the right to make them a part of the realty, and such third party is entitled to them as against the landowner.

— removal by tenant.

6. The rule requiring a tenant to remove his removable fixtures at or before the end of his term does not apply to a person in the position of such third party.

— article intended for permanent use.

7. If an article is not attached to the freehold, and is not a component part of some structure or appliance which is attached to it, it remains a chattel, although intended for permanent use on the premises.

— manner of annexation.

8. If an article is annexed to the freehold, the manner in which it is annexed may convert it into realty regardless of other considerations, but ordinarily the manner of annexation is not decisive, but is only one of several facts to be taken into account in determining the question.

[See 11 R. C. L. 1060.]

**APPEAL** by plaintiff from an order of the District Court for Hennepin County (Fisk, J.) denying a new trial in an action of replevin brought to recover possession of certain property. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. George S. Grimes, for appellant:

The property in suit was personal property, and plaintiff was the owner and entitled to the possession of the same.

Capehart v. Foster, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257; Lyons v. Wester Dahl, 128 Minn. 288, 150 N. W. 1083.

If plaintiff was not entitled to a directed verdict, he was at least entitled to have the question of title and right of possession submitted to the jury.

Cohen v. Whitcomb, — Minn. —, 170 N. W. 851; Ames v. Trenton Brewing Co. 56 N. J. Eq. 309, 38 Atl. 858; Pond & H. Co. v. O'Connor, 70 Minn. 266, 73 N. W. 159, 248; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964; Shapira v. Barney, 30 Minn. 59, 14 N. W. 270; Edwards & B. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; Sisson v. Hibbard, 75 N. Y. 542; Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899; Sword v. Law, 122 Ill. 487, 13 N. E. 826; Towne v. Fiske, 127

Mass. 125, 34 Am. Rep. 353; Philadelphia Mortg. & T. Co. v. Miller, 20 Wash. 607, 44 L.R.A. 559, 72 Am. St. Rep. 138, 56 Pac. 382.

Delay in removing the ranges, stoves, and beds during negotiations looking to the settlement and purchase of plaintiff's interest in the property by defendant did not work a forfeiture of plaintiff's title to the property.

Ray v. Young, 160 Iowa, 613, 46 L.R.A.(N.S.) 947, 142 N. W. 393, Ann. Cas. 1915D, 258.

Mr. William B. McIntyre, for respondents:

Plaintiff was not entitled to the possession of the property in suit, even if it were personal property, at the time of the commencement of the action, or at the trial.

Armstrong v. Freimuth, 78 Minn. 94, 80 N. W. 862.

The nineteen Murphy door beds are fixtures and a part of the building.

Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works, 35 Minn.

543, 29 N. W. 349; Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

The nineteen gas ranges and two laundry stoves were fixtures.

Capehart v. Foster, 61 Minn. 182, 52 Am. St. Rep. 582, 63 N. W. 257; Lyons v. Westerdahl, supra; White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

The intention of the parties is often the controlling consideration in determining whether an article is personal property or a fixture.

Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works, 35 Minn. 543, 29 N. W. 349; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964; Medicke v. Sauer, 61 Minn. 15, 63 N. W. 110; Edwards & B. Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765.

There was an abandonment of the property in question at the termination of the lease.

Erickson v. Jones, 37 Minn. 459, 35 N. W. 267; Wood, Land. & T. p. 908.

Taylor, C., filed the following opinion:

Replevin to obtain possession of nineteen Murphy door beds, nineteen gas ranges, and two laundry stoves. The court directed a verdict for defendant and plaintiff appealed from an order denying a new trial.

Defendant Vose, who will be designated as defendant hereafter, leased a parcel of land in the city of Minneapolis to Harold N. Falk for a term of one hundred years at a specified annual rental payable quarterly. The lease required Falk to erect a brick apartment building on the property "divided into flats and all complete and ready to live therein and to rent," and provided for the execution of a mortgage on the building and land for a part of the cost of the building. Falk erected a building divided into nineteen flats and installed a Murphy door bed and a gas range in each flat and two gas laundry stoves in the basement. He purchased the ranges and stoves from the Minneapolis Gaslight Company under a contract which provided for payment of the purchase price in monthly instalments, and

further provided that the company retained ownership of them, with the right to take possession of and remove them in case of default in such payments. He purchased the beds from the New England Furniture & Carpet Company under a similar contract. These contracts were duly filed in the office of the city clerk. After making the stipulated payments for a considerable time, Falk defaulted therein, and on account of such default the Gas Company was about to reclaim and remove the ranges and stoves, and the Furniture Company was about to remove the beds. Falk was also indebted to A. R. Chesnut in the sum of \$4,000. He and Chesnut made an arrangement with plaintiff by which he conveyed to plaintiff by bill of sale all his interest in the ranges, stoves, and beds, and plaintiff agreed to make the remaining payments to the companies as they accrued, and to sell the ranges, stoves, and beds as soon as they were fully paid for, and, after deducting his advances with interest from the proceeds, to pay the balance thereof to Chesnut, to be applied on Falk's indebtedness to Chesnut. Falk assigned to plaintiff his contract with the Furniture Company, and that company assented thereto. Falk's contract with the Gas Company was surrendered and canceled and in lieu thereof a new contract was executed by that company directly to plaintiff. Plaintiff made the payments to the companies as they accrued until the amounts unpaid were reduced to the sums of \$35 and \$20 respectively.

In the meantime defendant had canceled Falk's ground lease of the land for nonpayment of rent, and took possession of the building and the ranges, stoves, and beds, claiming them as a part of the realty. About five weeks later, and after an unsuccessful attempt to adjust the matter, plaintiff brought this action.

The question presented is whether the court erred in ruling as a matter of law that the ranges, stoves,

and beds had become a part of the realty.

While there are well-settled general rules for determining whether an article, originally personal property, has become a fixture, that is, a part of the realty, it is frequently difficult to determine whether, under the peculiar facts of a particular case, a particular article has become a part of the realty or still remains personal property.

To become a fixture the article must be physically or constructively attached to the freehold. If not attached to the freehold, and not an essential or component part of some structure or appliance which is attached to it, the article remains a chattel, although intended for permanent use on the premises. If annexed to the freehold, the manner in which it is annexed may convert it into realty regardless of other considerations, as where brick or other material has been incorporated into a permanent building, or where an article, otherwise a severable chattel, cannot be removed without leaving the freehold in a substantially worse condition than before the annexation. Usually, however, the manner of annexation is not decisive, but only one of several facts to be taken into account in determining whether the article has become realty or remains personalty as between the parties concerned. Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

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In the present case the ranges and stoves were annexed to the building only by the ordinary plumbing fixtures, and could be unscrewed from the gas pipes and removed without injury to the building itself. The door beds were arranged to swing back into closets when not in use. In order to receive them the closets were constructed of a greater size and with wider

doors than ordinary closets. Each bed rested on a pedestal which was fastened to the floor by screws and served as a pivot on which the bed was swung from the room into the closet or from the closet into the room. There was also an appliance for holding the bed in position which was fastened to the door casing by screws. These beds could be removed without material injury to the building. Both the ranges and stoves and the beds were annexed to the building sufficiently to constitute them fixtures under some circumstances. So far as annexation is concerned they are in about the same situation as the radiators and office desk held to be fixtures as between mortgagor and mortgagee in *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257.

Falk took possession of the land as lessee for a term of one hundred years under a lease which required him to erect an apartment building, divide it into flats, and fit them ready to rent. In completing the building he placed a gas range and door bed in each flat for the use of those who should rent the flats. These articles were adapted to the purpose for which the building was constructed, and enhanced its rental value, and were intended to be rented with the flats as a part thereof. Under such circumstances Falk's position was different from that of an ordinary tenant who rents a building and installs conveniences therein for his own use, and these articles would clearly be fixtures as between him and defendant if no rights of third parties were involved. But Falk purchased these articles under a conditional sale contract by which they were to remain chattels, with the title and right of removal in the vendors. They never became Falk's property and he never acquired the right to make them a part of the realty. He defaulted in the stipulated payments, and when the vendors were about to retake their property, he made an agreement

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with the vendors and the plaintiff by which the plaintiff was substituted in his stead as purchaser, and was to become the owner of these articles on completing the payments as provided in the contracts. Plaintiff had no interest in the real estate, either as tenant or otherwise; neither had Chesnut, for whose benefit plaintiff seems to have taken over the contracts. Plaintiff dealt with these articles as chattels, and intended that they should remain chattels. This clearly appears from the fact that if they became a part of the realty in which he had no interest, he would acquire nothing by his payments and would be unable to carry out his contract with Chesnut. He clearly had the right, as against Falk, to remove these articles from the building, and the question here is whether he also had that right as against defendant.

The rule that articles so annexed to the freehold as to appear to be fixtures pass to a subsequent purchaser who buys the land, without notice of the rights of third parties in such articles, does not aid defendant, for she is not a subsequent purchaser, but acquired all her rights in the land before the articles in controversy were annexed to it. As against plaintiff, she is in substantially the same position as a subsequent purchaser with notice of his rights, and has no better claim to these

—right of  
landowner.

articles than a prior mortgagee of the realty would have. Such a mortgagee cannot hold as a part of the realty articles annexed to it by the mortgagor, but to which the mortgagor never acquired title. *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 655.

In *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110, trade fixtures purchased under a conditional contract of sale were installed by the vendee in a leased building, and were subsequently surrendered with the building to the landlord, who thereafter claimed them as part of the realty, and leased the building with the fixtures therein to other parties.

It was held that the landlord had no better title to the fixtures than the vendee in the conditional contract of sale, and that the vendor was entitled to recover their value from him on his refusal to surrender them.

In *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, 97 N. W. 1028, 1064, a refrigerating plant purchased under a conditional contract of sale was installed in a cold storage warehouse owned and operated by the vendee. The action was between an assignee of the vendor and the holder of a mortgage on the realty, executed and recorded prior to the installation of the refrigerating plant. It was held that the vendee had no conveyable title in the refrigerating plant which he could vest in another so as to defeat the rights of the vendor, and that the vendor was entitled to the property as against the mortgagee of the real estate.

In *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491, 56 N. W. 821, an oatmeal mill was erected and equipped with appropriate machinery by one Dobson on land belonging to Stanton, and in which Dobson had no interest other than that of a mere licensee. The court said that in the absence of an agreement to the contrary, the building and machinery would become a part of the realty; that having been placed on the land with Stanton's permission, they were personal property as between him and Dobson; and that the plaintiff, claiming under a mortgage of the real estate, executed by Stanton prior to the erection of the mill, had "no better or greater right to these annexations than Stanton would have."

In *Pioneer Sav. & L. Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831, the owner of a lot with an uncompleted dwelling house thereon mortgaged it under a promise to complete the building, and, among other things, agreed to complete the fireplace by putting in a mantel, grate, and tiling. Instead of doing so, he leased

the building under an agreement by which the tenant installed the mantel, grate, and tiling, with the right to remove them. It was held, following *Merchants' Nat. Bank v. Stanton*, *supra*, that, although the mortgagee was not a party to the agreement with the tenant, and these articles would be a part of the realty except for that agreement, the tenant had the right to remove them.

In *Pabst v. Ferch*, 126 Minn. 58, L.R.A.1915E, 822, 147 N. W. 714, it was held in effect that a purchaser of real estate without notice of the rights of third parties in articles which appear to be fixtures is entitled to such articles as a part of the realty, but that a purchaser with notice of the rights of third parties is not entitled to them as against such third party.

The question as to whether the holder of a chattel mortgage on an article annexed to the freehold is entitled to such article as against the owner of the real estate, or the holder of a mortgage or other lien thereon, has been answered in favor of the holder of the chattel mortgage by several courts. *Edwards & B. Lumber Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; *Ames v. Trenton Brewing Co.* 56 N. J. Eq. 309, 38 Atl. 858; *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Hewitt v. General Electric Co.* 164 Ill. 420, 45 N. E. 725; *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 655.

The case of *Best Mfg. Co. v. Cohn*, 3 Cal. App. 657, 86 Pac. 829, is much like the present case in its facts. There the lessee under a lease

which provided for the construction of a mining plant equipped with machinery, and that the land with all improvements thereon should revert to the lessor if the lease should be forfeited for breach of its covenants, purchased the machinery under a conditional contract of sale and annexed it to the realty. He forfeited his lease and failed to pay for the machinery. The lessor took possession of the land and also of the machinery, claiming it as a part of the realty. It was held that the vendor of the machinery was entitled to it as against the lessor of the real estate. See, to the same effect, *Wetherill v. Gallagher*, 217 Pa. 635, 66 Atl. 849.

As already stated, defendant occupied no better position in respect to the articles in controversy than a subsequent purchaser of the real estate with notice, or the holder of a prior mortgage on it, and we have reached the conclusion that she was <sup>—conditional sale to lessee.</sup> not entitled to them as against plaintiff, and that plaintiff had the right to remove them.

The rule requiring a tenant to remove what are frequently termed removable fixtures <sup>—removal by tenant.</sup> at or before the end of his term does not apply where the duration of the term is uncertain (*Ray v. Young*, 160 Iowa, 613, 46 L.R.A.(N.S.) 947, 142 N. W. 393, Ann. Cas. 1915D, 258, and note attached to the L.R.A.(N.S.) report); nor to a person in the position of the plaintiff herein (*Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110).

The order appealed from is reversed.

Petition for rehearing denied.

## ANNOTATION.

### Gas range as fixture.

The rule adopted in a majority of the decisions is that a gas range, when installed in a dwelling and connected with a supply pipe, does not thereby become a fixture, although it may be-

come such by agreement between the parties. *Hook v. Bolton* (1908) 199 Mass. 244, 17 L.R.A.(N.S.) 699, 127 Am. St. Rep. 487, 85 N. E. 175; *Cosgrove v. Troesch* (1901) 62 App.

Div. 123, 70 N. Y. Supp. 764; *Wynne v. Friedman* (1905) 49 Misc. 616, 96 N. Y. Supp. 838; *Central Union Gas Co. v. Browning* (1913) 210 N. Y. 10, 103 N. E. 822, reversing (1911) 146 App. Div. 783, 131 N. Y. Supp. 464. See also *Vaughen v. Haldeman* (1859) 33 Pa. 522, 75 Am. Dec. 622. Compare the reported case (*HANSON v. VOSE*, ante, 1573) and *Lyle v. Rosenberg* (1915) 192 Ill. App. 378.

In *Hook v. Bolton* (Mass.) supra, an action for the conversion of certain articles, including a gas stove, alleged by the plaintiff to be chattels, but claimed by the defendants to be fixtures and a part of the realty, the court said: "The gas stove and the window shades, running on rollers, stand differently. It may be that certain apartment houses, or other dwelling houses designed for occupation by tenants, are constructed in some of our cities and intended to be used in such a way that the introduction of such gas stoves and window shades by the owner, to go with the house as a part of it, for use by the tenants, may hereafter be proved at a trial. . . . In the present case we discover no evidence to warrant the jury in finding that the gas stove and window shades were a part of the realty. So far as appears, the building in question was an ordinary dwelling house for a single family, and there is nothing to show that it was intended to be occupied or used differently from common-dwelling houses. These were ordinary articles of merchandise, not peculiarly fitted for use in this house, were of a standard pattern, loosely affixed and easily removed, and were of the nature of personal property. They were put into the house by the mortgagor, and were of a kind of articles which usually are carried away by an outgoing occupant. There was nothing to show that the owner intended to annex them as a permanent addition to the real estate. We think, upon the evidence, the judge was wrong in submitting to the jury the question whether they were a part of the realty."

In *Cosgrove v. Troescher* (1901) 62 App. Div. 123, 70 N. Y. Supp. 764, an

action for conversion, it appeared that the plaintiff's assignor constructed three apartment houses and placed in the kitchen of each apartment a gas range resting on four legs on a concrete hearth, and attached to the supply pipe and connected with a flue. After the construction of the house, the plaintiff's assignor mortgaged the premises to the defendant. On the foreclosure of the mortgage the plaintiff demanded the ranges on the ground that they were personal property. It was held that the property was not part of the realty, the court saying: "We are also of opinion that the ranges were movable as matter of law. They were not set in any place specially constructed for them. They stood out on the floor, wholly disconnected from the walls, floor, or ceiling, except that they rested on feet which were not attached, and were connected with the flues as stoves are generally connected. Their connecting pipes were screwed onto the gas supply pipes, but this was similar to the connection between an ordinary stove and a permanent boiler, and in no material respect differs from the attachment of gas fixtures."

*Central Union Gas Co. v. Browning* (1913) 210 N. Y. 10, 103 N. E. 822, reversing (1911) 146 App. Div. 783, 131 N. Y. Supp. 464, was an action for the alleged conversion of one hundred gas ranges which the plaintiff installed in certain housekeeping apartments under a contract with the owner of the premises. It appeared that the defendant was a bona fide purchaser at a foreclosure sale of the premises. In holding that the ranges were personal property, the court said: "We have to decide the naked question whether the defendant, as a bona fide purchaser at a foreclosure sale of the premises in which the ranges were installed, acquired any title to the ranges. Upon the facts in the record we think he did not. According to our view of the evidence, these ranges were not so 'attached' to the building that, as matter of law, they became part of it. They were connected with the building by the usual service gas pipe and a



stovepipe flue. The one could be severed by simply unscrewing a coupling and the other by lifting it out of the aperture made for it. This is not such an attachment to the building as would give a mortgagee any right of ownership as against his mortgagor, and we do not see how a purchaser at a foreclosure sale could acquire any greater right. We think that these ranges, situated as they were, lost none of their characteristics as personal property."

In *Wynne v. Friedman* (1905) 49 Misc. 616, 96 N. Y. Supp. 838, it appeared that the defendant agreed to sell a parcel of land, with the buildings and improvements thereon, and for a sum certain to execute and deliver a proper deed, containing full covenants and warranty for conveying the premises, expressly adding: "The chandeliers, gas fixtures, ranges, heating and hot water apparatus, water-closets, bathtubs, and other plumbing are to be included in the sale and in the warranty above set forth." No mention of these things was made in the deed proffered and accepted on passing the title. Not long after the title was taken a gas company showed that it owned the ranges, and took them away. In an action to recover for the value of the ranges, the court held that, while movable, they were so of kin to fixtures that the parties might, by agreement, treat them as of the realty, so as to make it unnecessary to mention them in the conveyance in order to pass with the land and appurtenances, and as the covenant of sale did not merge in the conveyance, the vendor was held liable for their value.

In *Vaughen v. Haldeman* (1859) 33 Pa. 522, 75 Am. Dec. 622, a case involving the ownership of gas chandeliers and side brackets, the court, in comparing gas stoves with other fixtures, said: "Gas stoves are largely used for bath and other rooms, and are necessarily connected with gas pipes in the same way; but no one would think of saying that they were fixtures, which it would be waste to remove. It is, therefore, more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and

entry lamps, droplights, or table lamps, as governed by the same rule as the articles for which they are substituted."

In at least one case, it seems to have been held squarely that a gas range or stove of the style used in modern apartments is to be regarded as a fixture. In *Lyle v. Rosenberg* (1915) 192 Ill. App. 378, an action brought to foreclose a mortgage deed of trust made by the defendant, and conveying certain real estate, including an apartment house, an intervening petition was filed by a corporation, alleging that it had furnished the defendant with gas ranges and laundry stoves, and had installed the same in the dwelling in question. It was sought by the petition to establish a mechanics' lien on the property so furnished. The statute (Mechanics' Lien Act 1903, § 1) provided as follows: "Any person who shall by any contract . . . with the owner of a lot . . . of land . . . furnish material, fixtures, apparatus or machinery for the purpose of or in the building, altering, repairing or ornamenting any house or other building . . . shall have a lien upon the whole of such lot . . . for the amount due to him for such material, fixtures, apparatus, machinery. . . ." The court held that the gas ranges and stoves came within the term "fixtures, apparatus, or machinery," and were the subject of a mechanics' lien.

In the reported case (*HANSON v. VOSE*, ante, 1573) it appeared that the defendant leased certain lands to the plaintiff's assignor, under an agreement by which the lessee erected an apartment building and installed a gas range in each apartment. Subsequently the lessor canceled the lease for nonpayment of rent, and refused to surrender the gas ranges and other property, whereupon an action of replevin was brought. It is held that, as between the lessor and the lessee, the ranges would be fixtures, but as they were purchased under a conditional contract of sale, and the rights of the lessee therein were transferred to the plaintiff, the defendant was not entitled to them as against the plaintiff. E. C. B.

SWIFT & COMPANY  
v.  
JAMES TEMPELOS, Trading as Busy Bee Café,  
and  
J. E. BEFARRAH, Appt.

*North Carolina Supreme Court — November 12, 1919.*

(— N. C. —, 101 S. E. 8.)

**Bulk Sales Law — contents of restaurant as stock of merchandise.**

1. The goods and fixtures used in a restaurant conducted on the ordinary plan are not a stock of merchandise within the meaning of the Bulk Sales Law.

[See note on this question beginning on page 1587.]

**Statutes — construction — Bulk Sales Law.**

2. The Bulk Sales Law is in derogation of the common law and must be strictly construed.

[See 12 R. C. L. 525.]

**Definition — stock of merchandise.**

3. The words "stock of merchan-

dise" as used in the Bulk Sales Law mean goods or chattels which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily used and understood among merchants and tradesmen.

[See 12 R. C. L. 527.]

APPEAL by defendant Befarrah from a judgment of the Superior Court for Wake County (Allen, J.) in favor of plaintiff, against him, in an action brought to recover the amount alleged to be due for goods sold and delivered by plaintiff to defendant Tempelos. *Reversed.*

**Statement by Walker, J.:**

The plaintiff alleged that the defendant James Tempelos, who owned and conducted an ordinary restaurant in the city of Raleigh, at No. 225 South Wilmington street, known as the "Busy Bee Café," was, at the commencement of this action, indebted to it, for goods sold and delivered, in the sum of \$755.90, which has been due since November 12, 1917, and that, while that amount was still due to it, the defendant sold and conveyed to his codefendant, J. E. Befarrah, all the property in said restaurant, consisting of canned goods and other groceries and food supplies, and the furniture and fixtures used in connection with the business, for \$2,300, and that the sale was made in bulk, contrary to the Bulk Sales Law (Gregory's Supp. to Pell's Revisal, § 964a), which reads as follows: "The sale in bulk of a large part or the whole of a stock of merchandise, other-

wise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be prima facie evidence of fraud, and void as against the creditors of the seller, unless the seller," etc.

Plaintiff therefore alleges that, as the requirements of that act were not complied with by the parties to the sale, it is void and of no effect against the creditors of the defendant James Tempelos. Plaintiff prays judgment for the debt, and that the property be seized and applied to its payment.

Defendant answered and denied the material allegations, except as to the debt due the plaintiff and the sale of the goods.

The jury returned the following verdict:

"(1) Is the defendant Tempelos indebted to the plaintiff, and, if so, in what amount? Answer: Seven hundred, fifty-five dollars and ninety

cents (\$755.90), and interest from November 12, 1917.

"(2) What was the value of the goods purchased from Tempelos by the defendant Befarra, other than the fixtures, that is to say:

"1. What was the value of the eggs? Answer: Two hundred dollars (\$200).

"2. What was the value of all including the eggs? Answer: Four hundred fifty dollars (\$450)."

The court gave judgment against J. E. Befarra for \$450, and directed that the \$200, the value of the eggs, which had been attached, be applied to it, as a credit thereon. It also adjudged that the property which was sold by Tempelos to Befarra be seized under execution, or other legal process, and sold, for the satisfaction of the balance of the judgment. There seems to have been no judgment for the debt of \$755.90 against James Tempelos, but that may not be material in the view taken of the case, and may yet be entered below if desired, when the case is remanded for judgment there.

Defendant James Befarra appealed from the judgment.

Messrs. J. C. Little and Manning, Kitchin, & Mebane, for appellant:

A café or restaurant keeper, where people are fed and nothing sold in same condition as when bought, but where such condition is materially and frequently changed by the labor of the café, is not a merchant and has no stock of merchandise within the meaning of the act, and does not come within the evil intended to be remedied.

Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 269; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Pender v. Speight, 159 N. C. 612, 75 S. E. 851; Off v. Morehead, 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067; Johnson v. Kelly, 32 N. D. 116, 155 N. W. 683; Connecticut Steam Brown Stone Co. v. Lewis, 86 Conn. 386, 45 L.R.A. (N.S.) 495, 85 Atl. 534; Balter v. Crum, 199 Mo. App. 380, 203 S. W. 506; Everett Produce Co. v. Smith Bros. 40 Wash.

566, 2 L.R.A. (N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Lee v. Gillen, 90 Neb. 730, 134 N. W. 278; Saqui v. Wiricks, 167 N. Y. Supp. 661; Hellmann v. Powelson, 101 Misc. 230, 167 N. Y. Supp. 662; Bowen v. Quigley, 165 Mich. 337, 34 L.R.A. (N.S.) 218, 130 N. W. 690; Ferrat v. Adamson, 53 Mont. 172, 163 Pac. 112; Stewart v. Sulger, 174 App. Div. 838, 161 N. Y. Supp. 489; Swanson v. De Vine, 49 Utah, 1, 160 Pac. 872; Musko-gee Wholesale Grocer Co. v. Durant, 49 Okla. 395, 153 Pac. 142; Marshon v. Toohey, 38 Nev. 248, 148 Pac. 357; Boise Asso. v. Ellis, 26 Idaho, 438, L.R.A. 1915E, 917, 144 Pac. 6.

Mr. J. M. Broughton, for appellee:  
The sale of a café or restaurant comes within the provisions of the Bulk Sales Act.

Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; 12 R. C. L. 525-527; Pender v. Speight, 159 N. C. 612, 75 S. E. 851; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174.

The phrase "a stock of merchandise," as used in the act, is sufficiently broad and inclusive to include within its provisions the stock and equipment of a café.

Plass v. Morgan, 36 Wash. 160, 78 Pac. 784; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A. (N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Sakelos v. Hutchinson Bros. 129 Md. 300, 99 Atl. 357; Johnson v. Kelly, 32 N. D. 116, 155 N. W. 683; Seattle Brewing & Malting Co. v. Donofrio, 34 Wash. 18, 74 Pac. 823; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; Parham v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Virginia-Carolina Chemical Co. v. Bouchelle, 12 Ga. App. 661, 78 S. E. 51; Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133; Minneapolis Drug Co. v. Keairnes, — Minn. —, 167 N. W. 326.

Trade fixtures and equipment are included within the provisions of the Bulk Sales Act.

Sakelos v. Hutchinson Bros. 129 Md. 300, 99 Atl. 357; Plass v. Morgan, 36 Wash. 160, 78 Pac. 784; Larson v. Judd, 200 Ill. App. 420; Seattle Brewing & Malting Co. v. Donofrio, 34 Wash. 18, 74 Pac. 823; Parham v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Saqui v. Wiricks, 167 N. Y. Supp. 661; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77.

Walker, J., delivered the opinion of the court:

The question is whether the goods and fixtures used in a restaurant which is conducted on the ordinary plan are a "stock of merchandise" within the words and meaning of the Bulk Sales Act,

**Bulk Sales Law—**  
contents of  
restaurant as  
stock of  
merchandise.

copied above. We do not think that they come within that designation.

The Bulk Sales Act is in derogation of the common law and must be strictly construed. Fair-

**Statutes—**  
construction—  
Bulk Sales Law.

field Shoe Co. v. Olds, 176 Ind. 526, 96 N. E. 592; Cooney v. Sweat, 133 Ga. 511, 512, 25 L.R.A. (N.S.) 758, 66 S. E. 257; Taylor v. Folds, 2 Ga. App. 453, 58 S. E. 683; 9 Current Law, 1511.

It is said that the word "merchandise" is usually, if not almost universally, limited to things which are ordinarily bought and sold in the way of merchants, and as the subjects of commerce and traffic. Van Patten v. Leonard, 55 Iowa, 520, 8 N. W. 384; Burwell's Law Dict. The word came into use as a term descriptive of the goods and wares exposed to sale in fairs and markets. Passaic Mfg. Co. v. Hoffman, 3 Daly, 495-512. Speaking of an innkeeper, it is said in Toxaway Hotel Co. v. Smathers, 216 U. S. 439-446, 54 L. ed. 558, 561, 30 Sup. Ct. Rep. 264, and it may be affirmed with great force and significance of a restaurateur: "To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink, and the price includes rent, service, heat, light, etc. To say that such a business is that of a 'trader' or a 'mercantile pursuit' is giving those words an elasticity of meaning not according to common usage."

The specific subject is treated with closer reference to our facts, and more at large, in the case of Re Wentworth Lunch Co. 86 C. C. A.

393, 159 Fed. 413, where it is held at pages 394, 395, of 86 C. C. A.:

"The specific categories of the section are corporations engaged principally in printing, publishing, and mining, under which, clearly, a restaurant company does not fall. It remains to inquire whether it falls within the general categories of the section, viz., corporations engaged principally in manufacturing, trading, or in mercantile pursuits. In one sense of the word transformation of raw provisions into cooked dishes is manufacturing; but no one would ever speak of a cook as a manufacturer, and that category may be excluded. A trader is one who buys to sell again, a definition which might apply to a saloon, but not to a restaurant where the proprietor does not sell the provisions he buys in the form in which he buys them, but changed by combination and cooking into edible dishes. The word 'mercantile,' though including trade, is larger, being extended to all commercial operations, so that we speak of shipping merchants, commission merchants, and forwarding merchants. Still we do not think that the dishes of a restaurant would ever be described as merchandise, or the proprietor as a merchant, or as engaged in mercantile pursuits. Printing and publishing companies were specified, presumably because they did not fall within the general categories, and we think the same reasoning applies to a restaurant company."

See also Re Chesapeake Oyster & Fish Co. (D. C.) 112 Fed. 960, and Re Excelsior Café Co. (D. C.) 175 Fed. 294, where it is said: "'A trader is one who buys to sell again, a definition which might apply to a saloon, but not to a restaurant;' and, further, the circuit court of appeals in that opinion [Re Wentworth Lunch Co., supra] holds that the word 'mercantile' is not broad enough to cover the business of keeping a restaurant for the cooking and selling of food. . . . This

case is the latest and the controlling decision upon the question."

The supreme court of Iowa had this question before it, and held that "the permission [in a contract] to use the building for 'any mercantile purpose,' granted pursuant to plaintiff's application, does not authorize the use for a restaurant, which is not a mercantile purpose. The word 'mercantile' means 'pertaining to merchants, or the business of merchants; having to do with trade, or the buying and selling of commodities; commerce.' Webster. The business of keeping a restaurant is in no sense commerce. If a restaurant be a mercantile establishment, the term is equally applicable to taverns, boarding houses, and the like, which cannot be admitted. The point demands no further attention. Permission to use a building for 'any commercial purpose' does not authorize its use as a restaurant." *Garretson v. Merchants' & B. Ins. Co.* 81 Iowa, 727-729, 45 N. W. 1047.

This case was approved in *Garretson v. Merchants' & B. Ins. Co.* 92 Iowa, 293, 60 N. W. 540.

The Federal cases cited above arose under the Bankrupt Act (Act July 1, 1898, chap. 541, 30 Stat. at L. 544, Comp. Stat. § 9585, 1 Fed. Stat. Anno. 2d ed. p. 509), but this fact did not in any degree influence the decisions of the courts. They considered the question as one of general law, and construed the statute according to the ordinary, natural, and popular meaning of its language, and as understood among merchants and traders. *Re Kingston Realty Co.* 87 C. C. A. 406, 160 Fed. 445; *Re New York & W. Water Co.* (D. C.) 98 Fed. 711-713; *Re United States Hotel Co.* 68 L.R.A. 588, 67 C. C. A. 153, 134 Fed. 225. Referring to the business of the tavern keeper, and quoting from *Newton v. Trigg*, 1 Showers, 96, 89 Eng. Reprint, 474, Justice Lurton says in the *United States Hotel Co. Case*: "He doth not get by buying and selling, he gets by the price and hire of his lodging, also by the

profit or use of his kitchen. The profits from the stables do not arise from hay alone, but from the standing." *Gallagher v. De Lancey Stables Co.* (D. C.) 158 Fed. 381.

In that case the court said: "I think it so clear that the corporation [engaged in keeping a boarding stable] was principally engaged neither in trading nor in mercantile pursuits that discussion is unnecessary. It is well settled that a trader or a merchant is a person who is engaged in the business of buying and selling, one who buys in order to sell; and I think it must be conceded that the foregoing facts do not bring the bankrupt within either class,—if, indeed, the two classes should be distinguished."

And finally in the case of *Re Willis Cab & Automobile Co.* (D. C.) 178 Fed. 113, 114, it was said: "It was carefully pointed out [in the *Wentworth Lunch Co. Case*, supra] that the preparation of food by cooking was not manufacturing, and that the sale of the food so prepared by an incorporated restaurant keeper in small quantities to the ultimate customer was not a mercantile or trading occupation. Preparing pies by the thousand and biscuits by the ton might perhaps savor of manufacturing; but it is obvious that the vending thereof to the consumer on the premises is something not to be performed by one engaged in mercantile or trading pursuits. . . . It is plainly impossible to draw any practical distinction between feeding men and feeding horses."

The words "stock of merchandise," in our statute, are used in the common and ordinary acceptance of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily used and understood among merchants and tradesmen. *Off v. Morehead*, 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434.

But it is contended that it was

Definition—  
stock of  
merchandise.

held in *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784, that a restaurant or café comes within the meaning and operation of the Bulk Sales Law; but a careful reading of that case leads us to believe, without much hesitation, that the learned court based its decision entirely upon the peculiar and "comprehensive" language of their statute, and it appears that, if it had not been for this feature of the case, the result would have been different. And we say so, because counsel for the respondent there contended that the law uses the special term "stock of merchandise," which, according to accepted English definitions, relates to the business of merchandising alone, and was clearly so intended by the legislature; that courts will not so construe the language of the statute as to make it include that which its plain and usual meaning will not import, or render its application absurd or ridiculous in its operation. In answer to this suggestion, the court, after repeating the contention, stated that the learned counsel, however, did not strictly quote the language of their statute: "It does not use the special term 'stock of merchandise,' but uses the term 'any stock of goods, wares, or merchandise in bulk.' The word 'any' is comprehensive and so is the word 'stock.' There is no limit placed by the legislature on the meaning of the word 'stock.'"

The court laid great stress upon the use of the words "any stock of goods and wares," which are not in our statute, and seemed to think, when replying to counsel's argument, that a "stock of merchandise," by itself, would be too restricted and not be sufficient in its scope to include a restaurant or café, and, if this be not so, why suggest to counsel the difference between his language and that of the statute, if the two were synonymous, one not embracing any more, in meaning, than the other. And it was said in *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683, that the Washington court, in the later

cases of *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628, and *Everett Produce Co. v. Smith Bros.* 40 Wash. 566, 2 L.R.A. (N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798, had practically receded from its holding in the earlier case. We need not express an opinion as to whether this be correct or not.

The court said in *Johnson v. Kelly*, *supra*: "The decision in *Plass v. Morgan* is based upon the terms of their Bulk Sales Statute voiding sales of 'any stock of goods, wares, and merchandise.' The word 'any' was held to broaden the statute, making it apply to 'any stock,' which therefore covered restaurant stocks. Our statute does not so read, but by its plain terms applies only to stocks of merchandise or goods a part of 'mercantile stock or supply which is kept for sale.'"

It also is true that the court distinguished that case from one like ours by directing attention to the special words of the local statute, emphasizing the use of the word "any," and laid stress upon the use of the other words "goods and wares," so that the case, when properly considered, lends strong support to our conclusion.

The statute was evidently intended to apply to a stock of merchandise, in the sense of a stock of goods which have been bought for resale in a substantially unchanged condition, and not to a stock of provisions on shelves, or in a pantry or store-room, kept for no other purpose than to supply the tables, and provide meals for the patrons and customers of the restaurateur. This is not selling articles kept in stock, but furnishing meals to those who come for them, at a stated price. The groceries are not bought by him in the raw state, and some of them have completely lost their identity when prepared for the table. The customer buys only a meal to satisfy his hunger. This is not selling at retail, according to our common understanding. The statute contemplates a stock which is itself kept for

sale, and when there is a sale out of the ordinary and regular course of business, it is fraudulent if, in other respects, it violates the provisions of the statute.

Learned counsel for the plaintiff has cited us to several cases which, he contends, are analogous to this one, where it was held that the sales of the stocks were governed by the statute; but we do not see the similarity, and we think they can easily be distinguished, such as the stocks of drug stores, saloon keepers, retailers of crackers and biscuits, butchers who sell meat products, stock of a garage (*Gallup & Co. v. Rozier*, 172 N. C. 283, 90 S. E. 209), and others, perhaps, of like kind could be mentioned, but they are not parallel cases.

If we should hold that this stock was within the Bulk Sales Statute, it would seem that it should be extended also to a stock of supplies or provisions kept by a boarding house proprietor, and we would long hesitate before coming to such a conclusion. As said in one of the cases cited by us (216 U. S. 439, 54 L. ed. 558, 30 Sup. Ct. Rep. 263), such a view of the law would be utterly inadmissible, and, we may add, indefensible.

As to the furniture and fixtures used in the business of the keeper of the café, they are not kept for sale, and are not within the provisions of the statute. Now, if this stock itself is within it, it may be that, when the furniture and fixtures are sold with it, so as to be, in fact, a "clean-up" sale of the whole business, the appellee's position might, perhaps, be correct; but we do not decide or intimate any opinion as to such a question. Our view coincides with that of the court which

decided *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067, and, as it is clearly expressed in that case, we state it in the language there used: "The plaintiff still further insists that the statute does not apply to the fixtures, and this view seems correct. The phrase 'stock of merchandise,' as used in the statute, properly and naturally describes articles which the seller keeps for sale in the usual course of his business. It does not naturally describe fixtures. It would hardly be within the usual course of business for a storekeeper at any time to sell his fixtures, and it is not to be presumed that the legislature intended to prohibit the sale of a fixture, unless such intent is clearly expressed. The natural reading of the statute makes it applicable, as has been said, only to the articles which, in the ordinary course of his business, the seller keeps for sale, and that must be taken to be its legal meaning," citing *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628.

We are constrained to think that the learned judge was in error, when he held that the sale of the café stock was governed by the Bulk Sales Statute, and therefore was fraudulent and void within the meaning and intent of the same; the defendants not having complied with its terms. This being so, the evidence fails to establish any cause of action under the statute, and none is stated in the complaint against J. E. Befarrah. This suit should therefore be dismissed as to him, and judgment to that effect will accordingly be entered below. Plaintiff may have judgment, upon the verdict, against James Tempelos, its debtor, if so advised.

Error.

## ANNOTATION.

**Applicability of Bulk Sales Act to hotel, restaurant, boarding house, saloon, pool hall, or livery stable.**

- I. Hotel, 1587.
- II. Restaurant or boarding house, 1587.
- III. Saloon, 1588.
- IV. Pool hall, 1589.
- V. Livery stable, 1589.

**I. Hotel.**

It has been held that a Bulk Sales Act is not applicable to the sale of the furniture and fixtures of a hotel. Thus, in *Stewart v. Sulger* (1916) 174 App. Div. 838, 161 N. Y. Supp. 489, it was held that the provisions of the New York Sales in Bulk Act (40 McKinney, Consol. Laws, p. 88, § 44) had no application to the sale of the "furniture and fixtures of a hotel, with a half interest in an automobile."

In *Charles J. Off & Co. v. Morehead* (1908) 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434, the Illinois supreme court, in holding a bulk sales act confined to the sale of a stock of merchandise unconstitutional, observed *arguendo* that the law would not apply to a sale by a hotel keeper of his entire business and all the property therein. This, however, was obiter, no such question being involved.

In *Barthels, S. & Co. v. Peterson* (1914) 24 Manitoba L. R. 794, 6 West. Week. Rep. 396, 27 West. L. R. 734, 16 D. L. R. 465, the question of law was submitted for decision whether a hotel keeper who was licensed under the Liquor License Act was within the provisions of the Manitoba Bulk Sales Act, which extended to "persons who, as their ostensible occupation, buy and sell goods, wares, and merchandise ordinarily the subject of trade and commerce." The court ruled that the act was not so applicable, saying: "The description 'hotel keeper' is a well-known one in this country, and has a meaning distinct from that of a merchant or trader; and if the legislature intended the Bulk Sales Act to extend to hotel keepers, the act would have been explicit."

While the decision in the case last

cited apparently extends to a sale of the stock in trade as well as a sale of fixtures, a distinction was made under the Saskatchewan act in *Barthels, S. & Co. v. Sloane* (1914) 7 Sask. L. R. 376, wherein the court said: "The Bulk Sales Act, chap. 38 of the Acts of 1910-11, applies to sales in bulk of 'any stock of goods, wares, and merchandise.' It does not, therefore, apply to the sale of the hotel premises, nor to the fixtures and furniture therein, as the furniture of an hotel cannot be considered 'goods, wares, or merchandise ordinarily the subject of trade and commerce,' as provided by § 6. The part of the property affected by the Bulk Sales Act would, therefore, be confined to the stock of goods for sale in the bar, the liquor license (§ 6), and probably the provisions, etc., used for sale to the guests at their meals."

**II. Restaurant or boarding house.**

There is at least one case in addition to the reported case (*SWIFT & Co. v. TEMPELOS*) which holds that a bulk sales act is not applicable to the sale of the fixtures and furniture of a restaurant or boarding house.

*Johnson v. Kelly* (1915) 32 N. D. 116, 155 N. W. 683, wherein the court, discussing the North Dakota Bulk Sales Act, said: "This drastic measure is leveled only at sales, transfers, or assignments in bulk 'of any part or the whole of a stock of merchandise or merchandise and fixtures pertaining to the conducting of said business otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller.'" In that case the goods levied on under the act were the utensils and equipment used in a restaurant business and the court held that the act was not applicable.

And in *Lewis, H. & Co. v. Loughran* (1919) — W. Va. —, 101 S. E. 465, the statute, which is directed against the sale in bulk of any part or the whole



of a stock of merchandise otherwise than in the ordinary course of trade was held not to embrace the sale of a lunch wagon with its equipment and supplies on hand.

But in *Sakelos v. Hutchinson Bros.* (1916) 129 Md. 300, 99 Atl. 357, the court held that the steam tables, ovens, kitchen utensils, and similar articles used in a restaurant, although not intended for resale, were within the category of "goods, wares, and merchandise," and thus within the purview of the Maryland Bulk Sales Act.

In *Plass v. Morgan* (1904) 36 Wash. 160, 78 Pac. 784, it was held that the Sales in Bulk Act of Washington was applicable to a sale of goods, wares, and merchandise of a person engaged in the business of conducting a boarding house and restaurant, the court evidently proceeding on the theory that the intent of the legislature was to prevent the perpetration of fraud on the creditors of persons engaged in business without qualification. But in *Everett Produce Co. v. Smith Bros.* (Wash.) *infra*, V., the court confined the application of the Washington statute to sales of the fixtures of a business consisting in the sale of merchandise in some form, and refused to extend the holding in *Plass v. Morgan*.

### III. Saloon.

In two jurisdictions the courts have distinguished between the fixtures and the stock in trade of a saloon keeper, holding that a sale of the latter is within a bulk sales law, but a sale of the former is not. *Kolander v. Dunn* (1905) 95 Minn. 422, 104 N. W. 371, rehearing denied in (1905) 95 Minn. 424, 104 N. W. 483; *Marshon v. Toohey* (1915) 38 Nev. 248, 148 Pac. 357.

In *Kolander v. Dunn* (Minn.) *supra*, wherein a sale of the fixtures and stock of merchandise of a saloon was attacked as within the purview of the Minnesota Bulk Sales Act, it appeared that the sale of the fixtures had been made on one day, and that of the merchandise shortly afterward, and the court ruled that the statute did not apply to the sale of the fixtures, but that the sale of the stock of mer-

chandise was within the statute and presumptively fraudulent.

In *Marshon v. Toohey* (Nev.) *supra*, wherein it appeared that a sale in bulk was made of the bar fixtures, stock of liquor, and furnishings of a saloon and dance hall, the court held that the sale was within the provisions of the Nevada Sales in Bulk Act as to the stock of liquors sold, but that the bar fixtures and furnishings did not constitute a stock or a "portion of a stock of merchandise" within the meaning of the statute.

But it was held in *Pritz v. Jones* (1907) 117 App. Div. 643, 102 N. Y. Supp. 549, that the sale of his business and stock of liquors by the proprietor of a saloon, who was a lessee of the premises from one who owned the building and fixtures, was not a sale within the provision of the New York Sales in Bulk Act. 40 McKinney, Consol. Laws, p. 88, § 44.

Other jurisdictions have held that both the fixtures and the stock in trade of a saloon keeper, when sold together, are within the purview of a bulk sales act. *Parham v. Potts-Thompson Co.* (1907) 127 Ga. 303, 56 S. E. 460; *Seattle Brewing Co. v. Donofrio* (1904) 34 Wash. 18, 74 Pac. 823.

In *Parham v. Potts-Thompson Co.* (Ga.) *supra*, it was said that bar fixtures, a stock of liquor, cigar cases, pool tables, and the like, used in a business to which they were appropriate, were, when included in a sale with other goods, within the Georgia Bulk Sales Act, as part of the "stock of goods, wares, and merchandise."

So in *Seattle Brewing Co. v. Donofrio* (Wash.) *supra*, it was held that the purchaser of the entire stock of goods and fixtures used in a saloon business was justified in refusing to carry out the agreement when the vendor had failed to comply with the Sales in Bulk Act of Washington.

But in *Albrecht v. Cudihee* (1905) 37 Wash. 206, 79 Pac. 628, the court held that a statute regulating the sale of a "stock of goods, wares, or merchandise," did not apply to the sale of a cash register used in a saloon business, saying: "We think the legislature intended the provisions of the

statute to apply only to goods belonging to the mercantile stock or supply which is kept for sale."

#### IV. Pool hall.

A bulk sales act is not applicable to a sale of the fixtures and paraphernalia used in a pool hall. *Ferrat v. Adamson* (1917) 53 Mont. 172, 163 Pac. 112; *Independent Breweries Co. v. Lawton* (1918) 200 Mo. App. 238, 204 S. W. 730.

In *Independent Breweries Co. v. Lawton* (Mo.) supra, it was held that the Missouri Bulk Sales Act did not apply to the sale of a billiard and pool-hall business, including the billiard and pool tables, racks, cues, etc., since the purpose of the act was to protect creditors who sold articles of merchandise for resale.

So, in *Ferrat v. Adamson* (Mont.) supra, the court held that the Montana Bulk Sales Act did not apply to a sale of the tables, cues, and balls used in a pool room, saying: "The scope of these acts has been considered in many cases, and the decided weight of authority and the better reasoning justify the conclusion that it was the legislative purpose to regulate the sale in bulk of such articles only as the merchant keeps for sale in the ordinary course of his business."

But see *Parham v. Potts-Thompson Liquor Co.* (1906) 127 Ga. 303, 56 S. E. 460, wherein it was held that the sale of pool tables and the like, when included in a sale of other fixtures in a saloon, was within the meaning of the Bulk Sales Law of Georgia as a part of a "stock of goods, wares, and merchandise."

#### V. Livery stable.

A bulk sales act is not applicable to a sale of the personal property used in the operation of a livery stable. *Balter v. Crum* (1918) 199 Mo. App. 380, 203 S. W. 506; *Everett Produce Co. v. Smith Bros.* (1905) 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; *Brown v. McLeod* (1915) 8 West. Week. Rep. (Can.) 110.

In *Balter v. Crum* (Mo.) supra, the court said: "While Bulk Sales Statutes are now common, most of them

seem to apply only to sales of a 'stock of merchandise' or a 'stock of goods, wares, merchandise, or stock of merchandise and fixtures;' but the Missouri statute applies to the 'sale, trade or other disposition of the major part in value, or the whole of a stock of merchandise, or merchandise, fixtures and equipment or equipment pertaining to the vendor's business.' . . . It is clear that the intent of the law-makers was to regulate the sale, trade, or disposition of stocks of merchandise and in connection with any such stock of merchandise, the fixtures or equipment or both pertaining thereto. The words 'stock of merchandise' are here used in the common and ordinary acceptance of those terms, and are intended to mean goods or chattels which a merchant has for sale, such as is often referred to by the phrase 'stock in trade,' and the words fixtures and equipment mean fixtures and equipment or either one, pertaining to the vendor's business of merchandising. In view of the language of the statute itself we hold that this last has no application to the sale of the wagons, horses, harness, etc., of one whose business is that of owning and operating a livery and boarding stable."

In *Everett Produce Co. v. Smith Bros.* (1905) 40 Wash. 566, 2 L.R.A. (N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798, it was held that the Washington statute relative to the sale of "any stock of goods, wares, or merchandise in bulk," was not applicable to a sale of the horses, wagons, and harness which were used in the operation of a livery stable. The court, construing the statute and reconciling the decision with the ruling in *Plass v. Morgan* (Wash.) supra, II., said: "The construction of this statute has been before this court frequently, and it is insisted by the appellant here that this cause falls within the decision of this court in *Plass v. Morgan* (1904) 36 Wash. 160, 78 Pac. 784. In that case it was held that the buying of all goods, wares, and merchandise in a restaurant was a purchase, within the contemplation of the statute. . . . It may be a little difficult to distinguish that

case from the case at bar, and yet we think that there is in reality a distinction, and that the goods, wares, and merchandise necessarily used by a restaurant keeper can more appropriately be termed a 'stock of merchandise,' than the horses and carriages in a livery stable. It is true that a restaurant keeper, when he buys a ton of flour, does not buy it for the purpose of selling the article again in the same condition that it was in when he bought it, as does the ordinary merchant; but he does dispose of the same goods in a changed condition, and it is a business which from necessity calls for constant and continued purchases from the wholesale dealers. While, on the other hand, there is no sale of horses or carriages contemplated at all in the conducting of a livery business, and the stock, when once obtained, outside of the feed required for the feeding the

horses, is less mutable. In any event, we do not see our way clear to extend the doctrine announced in *Plass v. Morgan*."

In *Brown v. McLeod* (1915) 8 West Week. Rep. (Can.) 110, the court held that the provisions of a bulk sales act relative to a "sale or transfer of a stock of goods, wares or merchandise" were not applicable to the transfer of the horses, wagons, harness, and fixtures of a livery stable.

In *Tupper v. Barrett* (1919) 233 Mass. 565, 124 N. E. 427, a statute directed against the sale of "merchandise" was held to embrace the sale of five tip wagons, one show wagon and six sets of double harness by one who maintained a stable where he sold horses, wagons, and harnesses, and also did some transient livery business,—some of his horses, wagons, carts, and harnesses being used at the time of the sale in doing a certain excavating job.

R. E. B.

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**RE JUDICIAL SETTLEMENT OF FIRST INTERMEDIATE ACCOUNT OF EUGENE L. BUSHE et al., Surviving Trustees, etc., of Frederick T. Adams, Deceased, Appts.**

**THOMAS H. LOW et al., Exrs., of Alpheus C. Dwight, Deceased, et al., Respts.**

*New York Court of Appeals — July 15, 1919.*

(227 N. Y. 85, 124 N. E. 154.)

**Trust — right of testamentary trustee to commissions — death before accounting.**

1. The surrogate has discretionary power to allow commissions to a testamentary trustee who dies after receiving the estate but before accounting, to compensate him for the work done, although the statute provides for commissions only on settlement of the estate.

[See note on this question beginning on page 1595.]

**Courts — power of surrogate to grant commissions.**

2. There is no distinction between the powers of the supreme court of

New York and those of the surrogate in dealing with the compensation of testamentary trustees.

(Hiscock, Ch. J., and Hogan and McLaughlin, JJ., dissent.)

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**APPEAL** by the surviving trustees under the will of Frederick T. Adams, deceased, from an order of the Appellate Division of the Supreme Court, Third Department, modifying and affirming a decree of the Surrogate

Court for Greene County (Tallmadge, S.) judicially settling the accounts of the said trustees and the deceased trustee. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Messrs. Osborn, Bloodgood, & Wilbur, for appellants:

It was error for the appellate division to hold that the representatives of the deceased trustee were entitled, as matter of law, to statutory commissions.

Re Ingraham, 60 Misc. 46, 112 N. Y. Supp. 763; Re Rutledge, 162 N. Y. 31, 47 L.R.A. 721, 56 N. E. 511; Flynn v. Judge, 149 App. Div. 278, 133 N. Y. Supp. 794; Whitehead v. Draper, 182 App. Div. 799, 117 N. Y. Supp. 539; Re Barker, 186 App. Div. 318, 174 N. Y. Supp. 230; Re McCormick, 46 Misc. 386, 94 N. Y. Supp. 1071; Re Worthington, 141 N. Y. 9, 23 L.R.A. 97, 35 N. E. 929; Re Furniss, 86 App. Div. 96, 83 N. Y. Supp. 530; Re Dunkel, 5 Dem. 188, 10 N. Y. S. R. 213; Naylor v. Gale, 73 Hun, 53, 25 N. Y. Supp. 934; Re Willets, 112 N. Y. 289, 19 N. E. 690; Robertson v. De Brulatour, 188 N. Y. 801, 80 N. E. 938; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748; Re Boyle, 151 App. Div. 568, 136 N. Y. Supp. 96.

Mr. Fred P. Harrington, with Mr. Thomas H. Low, for respondents:

The order of the appellate division modifying the decree of the surrogate's court so as to award to the estate of Alpheus C. Dwight one half of the full statutory commissions for receiving so much of the principal and income of the estate of Adams as were received during said Dwight's lifetime, and also one half of the full statutory commissions on such amounts as were paid out of principal and income to the date of Dwight's death, is correct and should be affirmed.

Re Roosevelt, 5 Redf. 601; Re Kellogg, 7 Paige, 265; Palmer v. Dunham, 53 Hun, 637, 3 Silv. Sup. Ct. 159, 6 N. Y. Supp. 262, affirmed in 125 N. Y. 68, 25 N. E. 1081; Re Todd, 64 App. Div. 435, 72 N. Y. Supp. 277; Re Willets, 112 N. Y. 289, 19 N. E. 690; Robertson v. De Brulatour, 111 App. Div. 882, 98 N. Y. Supp. 15; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748; Re Smith, 86 Misc. 136, 141 N. Y. Supp. 131; Re Johnson, 57 App. Div. 494, 67 N. Y. Supp. 1004, affirmed in 170 N. Y. 139, 60 N. E. 63; Savage v. Sherman, 87 N. Y. 277; Re Fisk, 45 Misc. 298, 92 N. Y. Supp. 394; Linsly v. Bogert, 87 Hun, 187, 67 N. Y. S. R. 653, 33 N. Y. Supp. 975, 152 N. Y. 646, 46 N. E. 1148; Re Whipple, 81 App. Div.

589, 81 N. Y. Supp. 393; Pflug's Estate, N. Y. L. J. May 25, 1915; Lanfer's Estate, N. Y. L. J. Nov. 4, 1914, p. 1099; Re Newland, 7 Misc. 728, 28 N. Y. Supp. 496; Halsey v. Van Amringe, 6 Paige, 12.

The surrogate erred in determining that the estate of Dwight was not entitled to commissions, and that Dwight's compensation should be based upon the length of time he had been in office.

Re McCormick, 46 Misc. 386, 94 N. Y. Supp. 1071; Halsey v. Van Amringe, 6 Paige, 12; Collier v. Munn, 41 N. Y. 143; Robertson v. de Brulatour, 111 App. Div. 882, 98 N. Y. Supp. 15, affirmed in 188 N. Y. 301, 80 N. E. 938; Re Roberts, 3 Johns. Ch. 43; Heaton, Surrogate Cts. 3d ed. p. 579; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748; Re Fisk, 45 Misc. 298, 92 N. Y. Supp. 394.

Crane, J., delivered the opinion of the court:

On December 21, 1910, letters testamentary upon the last will and testament of Frederick T. Adams, of the town of Coxsackie, Greene county, New York, deceased, were issued to Eugene L. Bushe, Edward P. Dwyer, and Alpheus C. Dwight. The three executors subsequently filed an account of their proceeding to December 31, 1912, and by a decree judicially settling their accounts they paid over to themselves as trustees about \$800,000 of personal property, after having been granted \$32,297.76 for commissions and allowances. The three trustees continued to act until August 5, 1914, when Alpheus C. Dwight died, and thereafter the remaining two trustees carried on the work of the trust. In January of 1917, Bushe and Dwyer, the surviving trustees, filed their accounts from December 31, 1912, to December 31, 1915, and cited Harriet M. Dwight and Thomas H. Low, as executors of the last will and testament of Alpheus C. Dwight, as parties to the proceeding.

The surrogate decided that the estate of Alpheus C. Dwight was not

entitled to full commissions for receiving the amount above stated, and that he had a discretionary power to fix this trustee's compensation according to the value of the services which he had performed. In his memorandum opinion he said: "The legal representatives of the estate of Alpheus C. Dwight, deceased, are entitled to an allowance for services actually performed for the benefit of the estate by the deceased executor and trustee of Frederick T. Adams, not by way of commissions, but as payment for such services. . . . I have not computed the value of services of the deceased executor and trustee at full one-half commissions for receiving, where the amount has not been paid out, for the reason that the law does not contemplate that an executor or trustee shall be entitled to commissions for the mere act of receiving property. Such commissions are allowed for the services of legal representatives in taking care of, investing, and reinvesting such property, and for the responsibility connected therewith. He having served after the accounting in 1913 to the time of his death, approximately one half the time that the surviving executors and trustees have served to the time of the accounting, I have computed such services to be of the value of one half the legal commissions due the surviving executors and trustees, believing this to be the fair and just compensation for such receiving."

On appeal the appellate division reversed the surrogate regarding these commissions and held that as a matter of law the estate of Alpheus C. Dwight was entitled to receive one-half commissions on all the principal received and on all the principal paid out and on the income received and paid out during his lifetime. The order of the appellate division states that this modification is made as a matter of law, and not in the exercise of the court's discretion. The trustees of the Adams estate having appealed to this court, we must decide what

right the estate of a testamentary trustee dying before a judicial settlement of his accounts has to compensation.

It is urged that such a trustee who does not continue until judicial accounting is entitled to no compensation, that commissions are a matter of statute, and that no provision has been made by the law for such a case. Section 2753 of the Code of Civil Procedure, as amended by chapter 443 of the Laws of 1914 and by chapter 596 of the Laws of 1916, reads: "On the settlement of the account of any executor, administrator, guardian or testamentary trustee the surrogate must allow to him" the rates of commissions therein fixed.

These words indicate that commissions as a matter of right can only be allowed to an accounting testamentary trustee. There is nothing in the Code provisions fixing the compensation of a testamentary trustee who dies before a judicial settlement of his accounts, or whose estate, he having died, is made a party to the accounting proceedings of a substituted or surviving trustee. As it has been held that a trustee is not entitled to any commissions until allowed by the court (*Re Worthington*, 141 N. Y. 9, 23 L.R.A. 97, 35 N. E. 929; *Beard v. Beard*, 140 N. Y. 260, 35 N. E. 488; *Re Ziegler*, 168 App. Div. 735, 154 N. Y. Supp. 652; s. c., 218 N. Y. 544, 113 N. E. 553), and the statute gives the surrogate power to allow commissions only on the settlement of the account of a testamentary trustee, there may be some force in this view that the estate of Alpheus C. Dwight, under these circumstances, was entitled to no commissions.

On the other hand, it is said that where a testamentary trustee dies after having received the estate and before final accounting his estate is entitled as a matter of right to one half the statutory commissions fixed for receiving, but nothing for turning over, the property to his successor or survivor. This reasoning is

based upon that line of authorities which hold that executors, administrators, and trustees are entitled to one-half commissions for receiving funds and the other half for paying them out (*Re Willets*, 112 N. Y. 289, 665, 19 N. E. 690), and to a practice, which is said to exist, of allowing such half commissions for receiving where the executor or trustee has died before an accounting (*Palmer v. Dunham*, 53 Hun, 637, 3 Silv. Sup. Ct. 159, 6 N. Y. Supp. 262, affirmed in 125 N. Y. 68, 25 N. E. 1081).

Still another view is that the surrogate or supreme court has discretionary power and may award or withhold commissions in certain cases; and under circumstances such as here existing may allow such sum as is reasonable for the services of a deceased trustee, not exceeding the statutory percentage.

Trust—right of  
testamentary  
trustee to com-  
missions—death  
before  
accounting.

The reasoning to sustain this view is that the testator in selecting a trustee intended to pay him, and that he is entitled to compensation, and that commissions are allowed for the care and management of the estate, and not for the simple act of receiving and paying out. *Wagstaff v. Lowerre*, 23 Barb. 209.

All of these views have some reason to support them and perhaps some authorities, but the latter view, in our opinion, has been the general practice adopted by the courts, and finds support in the decisions.

It is fully established that a surrogate may, in his discretion, refuse commissions altogether by reason of an executor's or trustee's misconduct (*Re Rutledge*, 162 N. Y. 31, 47 L.R.A. 721, 56 N. E. 511), and yet no such power is given by statute.

In *Re Allen*, 96 N. Y. 327, 330, a testamentary trustee had resigned and his successor had been appointed. A dispute arose over his right to compensation. This court said: "The testator thought proper not only to create the trust but to re-

quire for its execution three trustees, and the law now permits compensation to persons placed in that situation, and who serve to the end of the trust without regard to the actual trouble or labor to which they have been put. *Collier v. Munn*, 41 N. Y. 143. It is true the petitioner cannot claim on that ground. He does not intend to continue. For reasons involving no blame, he resigns, leaving the trust still existing and to be further executed by another person. Compensation, therefore, cannot be claimed as of course, and if allowed must also be measured by a different rule from that which the law applies when the trusts created by the terms of a will, or otherwise, have been fully executed. He takes it, if at all, as one of the terms or conditions of his discharge. The court has power to award it, and within the statutory limit by which fees are allowed to executors and trustees, its amount is discretionary."

In *Re Welling*, 51 App. Div. 355, 358, 64 N. Y. Supp. 1027, it was said: "In *Re Rutledge*, 162 N. Y. 31, 47 L.R.A. 721, 56 N. E. 511, the court of appeals held that the language of § 2730 of the Code of Civil Procedure is 'not necessarily exclusive of all discretion in the surrogate, and that its exercise should be left to him upon all the facts, in the review of which by the appellate division ample opportunity for correction is afforded.' These executors stand in the shoes of their testator. *Re Wiley*, 119 N. Y. 642, 23 N. E. 1054; Code Civ. Proc. § 2606. Commissions are allowed to trustees as compensation for services in the execution of a trust, and in the case of gross neglect and unfaithfulness the court may properly disallow them." Section 2730 referred to is now § 2753.

*Re Douglas*, 60 App. Div. 64, 68, 69 N. Y. Supp. 690, determined the right of an executor to compensation where he was discharged upon his own motion before the complete execution of his trust. The court said this: "As to commissions, we

are of the opinion that the surrogate was right in holding that the executor was not entitled to full commissions. Upon his own motion he was discharged before the final completion of the trust created in the will. Under such circumstances, he ought not to have full commissions, that is, commissions for receiving and disbursing the money which came into his hands. The surrogate allowed him one-half commissions, and this is all he was entitled to. In any view, the amount to be awarded, he having asked to be discharged before the final completion of the trust, was in the discretion of the surrogate."

*Whitehead v. Draper*, 132 App. Div. 799, 801, 117 N. Y. Supp. 540, determined that, a substituted trustee having died, his estate was entitled to reasonable compensation: "The law does not contemplate that an estate is to be charged with full commissions by every person who shall be called in to administer a trust, nor that such persons are to perform their part of the duties without any compensation whatever; but §§ 2730, 2802, and 3320 of the Code of Civil Procedure clearly contemplate that an estate shall be charged certain fees for the receiving and paying out of moneys coming into the hands of persons administering a trust. . . . Upon the death of the original trustees the execution of the trust devolved upon the supreme court, and thereafter it became its duty to appoint someone to execute the trust and invest the appointee with all or any of the powers and duties of the original trustee. . . . The court appointed Jarvis, and he thereupon became its agent to execute the trust so far as it then remained unexecuted. *Wetmore v. Wetmore*, 44 App. Div. 52, 60 N. Y. Supp. 437. He died before the trust was fully executed, and then he had received neither commissions on receiving the property nor on paying it out. The court having appointed him as its agent, he should be allowed some compensation for the services, which

it is conceded were faithfully and efficiently rendered."

No distinction should be made between the powers of the supreme court and those of the surrogate in dealing with the compensation of a testamentary trustee. It was held in *Re Runk*, 200 N. Y. 447, 94 N. E. 363, that a surrogate's court has power to entertain a proceeding for the judicial settlement of the accounts of a trustee appointed by the supreme court as the successor of a deceased testamentary trustee, and that any trustee appointed by will or other competent authority is now authorized by express legislative enactment to render his accounts to that court.

Courts—power of surrogate to grant commissions.

Section 2490 of the Code of Civil Procedure says of the incidental powers of the surrogate that he may proceed in all matters subject to the cognizance of his court according to the course and practice of a court having by the common law jurisdiction of such matters.

If, therefore, the supreme court may, in its discretion, fix the compensation of a substituted testamentary trustee, such discretion must also rest with the surrogate.

There is no apparent reason for a discretionary power existing for a substituted testamentary trustee, and not for a testamentary trustee who has died before completing his work and judicial accounting. In this particular executors, administrators, testamentary trustees, and substituted trustees must all be treated alike. If the law is to approximate a science it must be uniform in similar cases.

*Re Barker*, 186 App. Div. 317, 325, 174 N. Y. Supp. 235, has recently passed upon this very point. After giving the authorities it is stated: "There has, however, grown up in this state the judicial rule that, when a trustee ceases the performance of his duties as such, prior to complete administration of the trust estate, he is, in the discretion of the court, entitled to reasonable

compensation for the services performed."

We do not consider *Re Todd*, 64 App. Div. 435, 72 N. Y. Supp. 277, *Linsly v. Bogert*, 87 Hun, 137, 33 N. Y. Supp. 975, and *Olcott v. Baldwin*, 190 N. Y. 99, 82 N. E. 748, as authorities to the contrary of the proposition we are here stating. The question of the surrogate's authority to allow less than the statutory compensation was not up for decision. The fact that the statutory allowance in these and other cases was given is not the same as holding that the surrogate had no authority to allow a less amount in a proper case.

In this matter before us we do not say that it would have been improper for the surrogate to have allowed in his discretion all that has been given by the appellate division.

The facts are not before us, and we could not pass upon them if they were. We do hold, however, that as to the compensation to the estate of Alpheus C. Dwight the surrogate had a discretion to be reasonably exercised, in view of all the circumstances and the services rendered by the said Dwight, and that having fixed the amount within the statutory limits he did not err as a matter of law.

The order of the Appellate Division should therefore be reversed, and the decree of the surrogate affirmed, with costs to the appellant in this court and in the Appellate Division.

Chase, Collin, and Cuddeback, JJ., concur.

Hiscock, Ch. J., and Hogan and McLaughlin, JJ., dissent.

### ANNOTATION.

#### Death of trustee, executor, administrator, or guardian as affecting right to compensation.

Although commissions, as a matter of right, do not accrue until accounting, the courts have adopted the judicial rule that although an executor, administrator, or trustee may have died prior to a complete administration of the trust estate, his estate is, in the discretion of the court, entitled to reasonable compensation for the services performed.

Maryland.—*Bentley v. Shreve* (1849) 2 Md. Ch. 215; *McPherson v. Israel* (1832) 5 Gill. & J. 60; *Widener v. Fay* (1878) 51 Md. 273; *Crothers v. Crothers* (1914) 123 Md. 603, 91 Atl. 691.

New York.—*RE BUSHE* (reported herewith, ante, 1590); *Linsly v. Bogert* (1895) 87 Hun, 137, 33 N. Y. Supp. 975; *Re Todd* (1901) 64 App. Div. 435, 72 N. Y. Supp. 277; *Re Whipple* (1903) 81 App. Div. 589, 81 N. Y. Supp. 393; *Re Wilcox* (1908) 125 App. Div. 152, 109 N. Y. Supp. 564, reversed on other grounds in (1909) 194 N. Y. 288, 87 N. E. 497; *Whitehead v. Draper* (1909) 132 App. Div. 799, 117 N. Y. Supp. 539; *Re Barker* (1919) 186 App.

Div. 325, 174 N. Y. Supp. 235; *Palmer v. Dunham* (1889) 53 Hun, 637, 3 Silv. Sup. Ct. 159, 6 N. Y. Supp. 262, affirmed in (1890) 125 N. Y. 68, 25 N. E. 1081; *Re Newland* (1894) 7 Misc. 728, 28 N. Y. Supp. 496; *Re Fisk* (1904) 45 Misc. 298, 92 N. Y. Supp. 394; *Re McCormick* (1905) 46 Misc. 386, 94 N. Y. Supp. 1071; *Re Silliman* (1900) 67 Misc. 27, 124 N. Y. Supp. 622; *Pflug's Estate*, N. Y. L. J. May 25, 1915; *Re Naylor* (1917) 164 N. Y. Supp. 462.

North Carolina.—*Scroggs v. Stevenson* (1888) 100 N. C. 354, 5 S. E. 111.

Ohio.—*Bates v. Creed* (1913) 15 Ohio C. C. N. S. 433, 2 Ohio App. 59.

Oregon.—*Young v. Hughes* (1901) 39 Or. 586, 65 Pac. 987, 66 Pac. 272.

Pennsylvania.—*Sweatman's Estate* (1909) 223 Pa. 552, 72 Atl. 895; *Lloyd's Estate* (1900) 23 Pa. Co. Ct. 267.

South Carolina.—*Griffin v. Bonham* (1856) 30 S. C. Eq. (9 Rich.) 71.

The court will allow a reasonable commission to the estate of a deceased trustee for the benefit of creditors,



who died before completing his trust. *Bentley v. Shreve* (1849) 2 Md. Ch. 215.

So, also, in the case of a trustee to whom property has been conveyed to secure a debt to a third person, it is proper to allow a reasonable compensation to the estate of a deceased trustee who dies before the completion of the trust. *Widener v. Fay* (1878) 51 Md. 273.

In *Young v. Hughes* (1901) 39 Or. 586, 65 Pac. 987, 66 Pac. 272, where a trustee who had received the proceeds of the sale of the property of a corporation to distribute to the shareholders, and who was to have a specified sum for his entire services, did not live fully to discharge the trust, it was held that his estate was entitled to such a proportion of the sum promised him as his disbursements bore to the sum required to be paid to the stockholders.

The rule that, in the case of a continuing trust, the trustee cannot diminish the fund which is to create the income during the life of the trust, does not preclude the allowance of a commission on the corpus of the estate to the representatives of a trustee who had died before the termination of the trust. *Lloyd's Estate* (1900) 23 Pa. Co. Ct. 267.

The discretion to be exercised by the surrogate in fixing the compensation, when any at all is allowed, of executors, or administrators, upon their death, follows the standard of the percentage upon receipts and disbursements fixed by the statute as allowable upon accounting. *Re McCormick* (1905) 46 Misc. 386, 94 N. Y. Supp. 1071.

Where one of two joint executors dies, the commission allowed upon the passing of an account by the surviving executor may be apportioned between him and the estate of the deceased executor. *Crothers v. Crothers* (1914) 123 Md. 603, 91 Atl. 691.

In *Scroggs v. Stevenson* (1888) 100 N. C. 364, 5 S. E. 111, where in consequence of the death of the original executor an administrator d. b. n. was appointed, it was held that where an estate passes through several hands,

whatever sum is allowed by way of commissions, within the limit fixed by the statute, should be apportioned among the representatives according to their respective merits and services rendered.

Although a statute fixes the minimum percentage which may be allowed as compensation to the administrator of a decedent's estate, the court has the power, where the administrator dies before completion of the administration and there is a further administrator to be paid for services, to allow such compensation, though less than the statutory minimum, as the services performed actually merit. *McPherson v. Israel* (1832) 5 Gill & J. (Md.) 60.

See also, to the same effect, *Re Baxley* (1877) 47 Md. 555, a case involving the right of an administrator pendente lite to commission.

#### **Basis of allowance.**

Although the compensation of testamentary trustees is given for the care and management of the estate, and not for the simple act of receiving and paying out, full commissions are not deemed to be earned until the trustee has both received and paid out the sum upon which the commission is to be computed; hence the estate of a deceased trustee is properly awarded one half of the commission allowed by law to trustees for receiving and paying out money. *Palmer v. Dunham* (1889) 53 Hun, 637, 3 Silv. Sup. Ct. 159, 6 N. Y. Supp. 262, affirmed on another point in (1890) 125 N. Y. 68, 25 N. E. 1081; *Linsly v. Bogert* (1895) 87 Hun, 137, 33 N. Y. Supp. 975; *Pflug's Estate*, N. Y. L. J. May 25, 1915.

The estate of a deceased executor may be awarded compensation on the same basis, and, in addition, commissions should be computed on the cash amount paid out during the life of the deceased executor. *Re McCormick* (1905) 46 Misc. 386, 94 N. Y. Supp. 1071.

The transfer of the property to a new trustee, which was rendered necessary by the death of the prior trustee, is such a payment as to entitle the deceased trustee's estate to commis-

sions on account of such payment. *Palmer v. Dunham* (1889) 53 Hun, 687, 3 Silv. Sup. Ct. 159, 6 N. Y. Supp. 262; *Re Todd* (1901) 64 App. Div. 435, 72 N. Y. Supp. 277; *Re Fisk* (1904) 45 Misc. 298, 92 N. Y. Supp. 394; *Whitehead v. Draper* (1909) 132 App. Div. 799, 117 N. Y. Supp. 539; *Re Silliman* (1910) 67 Misc. 27, 124 N. Y. Supp. 622; *Re Naylor* (1917) 164 N. Y. Supp. 462; *Pflug's Estate* (N. Y.) supra.

The reason for this is that the property passes by operation of law to the new trustee upon his due appointment. *Re Silliman* (1910) 67 Misc. 27, 124 N. Y. Supp. 622.

So, also, the administrator of a deceased executor, upon accounting to his decedent's coexecutor, is not entitled, on behalf of his decedent, to commissions on the amount turned over to the coexecutor, such money not being paid out in the course of his decedent's administration, but as a debt due by his decedent. *Griffin v. Bonham* (1856) 30 S. C. Eq. (9 Rich.) 71.

In *Re Wilcox* (1908) 125 App. Div. 152, 109 N. Y. Supp. 564, reversed on another point in (1909) 194 N. Y. 288, 87 N. E. 497, where a life beneficiary entitled to the income of a trust fund was appointed trustee and died with the fund in her possession, it was held that as the commission, though allowed in name for receiving and paying out the fund, is really for its care and management, and as the beneficiary was properly made trustee and performed the service of caring for the fund, and her executor would have to distribute and pay it over to the parties entitled thereto, her estate was entitled to the full commission for receiving and paying out the fund.

The allowance to be made for services of a testamentary trustee who has died prior to a complete administration of the trust estate cannot lawfully exceed one-half commissions upon the value of the property. *Re Barker* (1919) 186 App. Div. 317, 174 N. Y. Supp. 230.

A trustee appointed by the supreme court to execute a testamentary trust, who by statute is "entitled to such

compensation for his services as the court appointing him shall determine, which shall in no case exceed that now allowed by law to executors and administrators," and who died before the trust was fully executed, is properly allowed commissions of half the statutory rates, not only upon the moneys which came into his hands originally, but also upon the moneys which he received in the course of his administration in the liquidation of securities which he originally received, and which, as principal of the fund, he was bound to reinvest. *Whitehead v. Draper* (1909) 132 App. Div. 799, 117 N. Y. Supp. 539.

In *Re Newland* (1894) 7 Misc. 723, 28 N. Y. Supp. 496, where two executors had acted together in administering the estate, during a period of sixteen months, during which time they had collected, paid out, and distributed a considerable portion of the estate, and the size of the estate was such that each would, under the statute, have been entitled to a full commission upon final settlement, it was held by the surrogate that the executor of the estate of the deceased coexecutor was entitled to full compensation for commissions allowed by law upon all the property of the estate actually received, paid out, and distributed to legatees and others, by both of the executors up to the time of the death of said coexecutor, and also to one half the commissions allowed by law upon all the property of the estate held by both executors and remaining undistributed at the time of his death.

Under a statute fixing compensation on the basis of money received and paid out, the estate of a deceased executor may be allowed commissions only upon such sums as were received and paid out during the lifetime of such executor. *Re Whipple* (1903) 81 App. Div. 589, 81 N. Y. Supp. 393.

Payments directed to be made by a decree signed and entered after the death of an executor will not justify the allowance to the estate of a deceased executor who died after a determination by the surrogate of the questions presented on the accounting

but before the decree was signed, of commissions for making such payments. *Re Ziegler* (1916) 218 N. Y. 544, 113 N. E. 550, affirming (1915) 168 App. Div. 735, 154 N. Y. Supp. 652, which reversed (1914) 85 Misc. 673, 148 N. Y. Supp. 1055.

The representatives of a deceased executor are not entitled to commissions for paying out where the executor died before any payment was actually made by him. *Re Naylor* (1917) 164 N. Y. Supp. 462.

In *Bates v. Creed* (1915) 15 Ohio C. C. N. S. 433, 2 Ohio App. 59, it is held that as in contemplation of law the commissions fixed by statute (General Code, § 10,837) for executors and administrators are to be received by them in full compensation for all their ordinary services, when, by reason of the death of the original executor, it becomes necessary to have an administrator de bonis non succeed him, it is not intended that the cost of administration should thereby be increased, but the statutory

commissions should be equitably apportioned between or divided among the successive executors and administrators in proportion to the value of the services rendered by them respectively in such administration; and that the ordinary rule is that where there are two such successive officers, the funds allowable for compensation shall be equally divided unless the work performed is unequal, and the one claiming more than such equal proportion must show the reason for such allowance.

**Where testator has fixed the amount of compensation.**

Where a testator directs that each of his executors shall receive a certain sum "in lieu of all commissions" and one of them dies before the settlement of the estate is completed, his estate is entitled to such sum in full, the testator having, by determining the sum that he should receive, assumed the risk of his executor's illness or death. *Sweetman's Estate* (1909) 223 Pa. 552, 72 Atl. 895. E. S. O.

**JEPHTHA CROUCH et al., Doing Business under the Style and Firm Name of J. Crouch & Son, Appts.,**  
v.

**ROBERT H. PARKER et al.**

*Indiana Supreme Court — December 17, 1919.*

(— Ind. —, 125 N. E. 453.)

**Principal and surety — extension of time of warranty — release of surety.**

1. The extension of time of the warranty of a stallion and its final release in consideration of surrender of a portion of the note given for the purchase price without consent of the surety will release an uncompensated surety who signed the note upon faith of the warranty.

[See note on this question beginning on page 1605.]

**Appeal — error in overruling demurrer — effect of instructions.**

2. Error in overruling a demurrer to a paragraph of an answer is not available if the court instructed the jury that in their deliberations, they should consider only other paragraphs of the answer.

[See 2 R. C. L. 244.]

**Contract — sale and warranty as one.**

3. A contract of sale and a warranty

of the chattel sold, executed at the same time, constitute one contract.

[See 24 R. C. L. 153.]

**Principal and surety — discharging surety — varying terms of contract.**

4. Sureties are not to be made liable beyond their contract, and any agreement with the creditor which varies essentially the terms of the contract, without the assent of the surety, will discharge him from responsibility.

[See 21 R. C. L. 1004.]

**Appeal — overruling demurrer to cross complaint — failure to secure judgment.**

5. The overruling of a demurrer to

a cross complaint presents no reversible error, if no judgment was rendered in favor of the cross complaint. [See 2 R. C. L. 244.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Johnson County (Wickens, Special J.) in their favor in part only in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. De Witt C. Wilson and White & Owens, for appellants:

The remedy of the parties is not a release from payment of purchase money, but an action in damages for actual loss caused by plaintiffs not complying with the contract of warranty.

Crouch v. Fahl, 63 Ind. App. 257, 113 N. E. 1009; Nave v. Powell, 52 Ind. App. 496, 96 N. E. 395; Walters v. Akers, 31 Ky. L. Rep. 259, 101 S. W. 1179; Oltmanns Bros. v. Poland, — Tex. Civ. App. —, 142 S. W. 653.

A plea of failure of consideration can be made only by a party to the contract.

Lasher v. Williamson, 55 N. Y. 619; Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Cunningham v. Potter's Sons, 23 Ky. L. Rep. 847, 64 S. W. 493.

The contract of warranty was not executed by appellee, and she is not a party thereto; hence, has no right to assert any defense based on it, or resulting from its breach.

Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Newton v. Lee, 139 N. Y. 332, 34 N. E. 905; Kinzie v. Rieley, 100 Va. 709, 42 S. E. 872; Elliott v. Brady, 192 N. Y. 221, 18 L.R.A.(N.S.) 600, 127 Am. St. Rep. 898, 85 N. E. 69; Stockton Sav. & L. Soc. v. Giddings, 96 Cal. 84, 21 L.R.A. 406, 31 Am. St. Rep. 181, 30 Pac. 1016.

Appellee Hannah Parker cannot, as surety on said note, avail herself of a defense for breach of warranty given by plaintiffs to her principal, which the principal has surrendered and which he is estopped to assert.

McCabe v. Raney, 32 Ind. 309; Van Kirk v. Adler, 111 Ala. 104, 20 So. 336; Hiner v. Newton, 30 Wis. 640; Brown v. Wright, 23 Ky. 396, 18 Am. Dec. 190; Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155; Griswold v. Hazard, 28 Fed. 597; Patterson's Appeal, 48 Pa. 342; Young v. Perry, 187 Ala. 122, 52 L.R.A.(N.S.) 1146, 65 So. 817.

Unless the surety or her principal show that they have complied with the contract themselves, they nor either of them can recover thereon.

Armstrong v. Rockwood, 53 Ind. 506; Walker v. Sawyer, 34 Ind. App. 239, 70 N. E. 540; Home Ins. Co. v. Gagen, 38 Ind. App. 680, 76 N. E. 927.

Messrs. William Featherngill and Ivory J. Drybread, for appellee:

The memoranda attached to the demurrers of plaintiffs to the second, third, and fourth paragraphs of the separate answer of Hannah Parker are so indefinite, uncertain, and ambiguous that no specific objection to the sufficiency of either of said paragraphs of answer or cross complaint was pointed out to the trial court thereby, and for that reason no available error can be predicated upon the action of the trial court in overruling said demurrers.

State ex rel. Devening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Stiles v. Hasler, 56 Ind. App. 88, 104 N. E. 878; Gillisspie v. Darroch, 57 Ind. App. 482, 107 N. E. 475; Quality Clothes Shop v. Keeney, 57 Ind. App. 500, 106 N. E. 541; Hedekin Land & Improv. Co. v. Campbell, 184 Ind. 643, 112 N. E. 97; Gary & Interurban R. Co. v. Gunn, 184 Ind. 306, 111 N. E. 183.

No available error can be predicated upon the action of the trial court in overruling appellants' motion for a new trial.

Prescott v. Haughey, 152 Ind. 517, 51 N. E. 1051, 53 N. E. 766; Crouch v. Shantz, 62 Ind. App. 476, 113 N. E. 13; Kendel v. Judah, 63 Ind. 291.

No judgment was rendered against the appellants, Crouch & Son, on the cross complaint of appellee, and for this reason the fourth assignment of error, based on the overruling of the demurrer to the third paragraph of her cross complaint, presents no available error.

Winnemucca Water & Light Co. v.

Model Gas Engine Works, 179 Ind. 542, 101 N. E. 1007; Royse v. Turnbaugh, 117 Ind. 589, 20 N. E. 485.

The surety on a promissory note given for the purchase price of a warranted article may plead as a defense thereto a breach of the warranty, although the principal does not avail himself of this remedy.

Springfield Engine & Thresher Co. v. Park, 3 Ind. App. 173, 29 N. E. 444.

The notes, executed by Robert H. Parker as principal, and the appellee as surety, as evidence of the purchase price of the stallion and the written guaranty thereon executed by plaintiffs and accepted by Robert H. Parker, with the full knowledge of the appellee, constitute the sale contract of the horse and are as much one contract as if all of the writings had been embodied in one instrument.

Hickman v. Rayl, 55 Ind. 551; Wood v. Ridgeville College, 114 Ind. 320, 16 N. E. 619; Woodward v. Mathews, 15 Ind. 339; Allen v. Nofsinger, 13 Ind. 494; McDonald v. Huestis, 1 Ind. App. 275, 27 N. E. 509; Rosenthal v. Rambo, 165 Ind. 584, 3 L.R.A.(N.S.) 678, 76 N. E. 404.

Any material alteration of the sale contract without the surety's consent will release the surety.

Judah v. Zimmerman, 22 Ind. 388; Campbell v. Gates, 17 Ind. 126; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 419, 10 L. ed. 419; Bailey v. Boyd, 75 Ind. 125; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232.

When a surety has been once discharged his liability cannot be renewed without his consent.

Leggett v. Humphreys, 21 How. 66, 16 L. ed. 50.

The promise to pay the notes was based upon the corresponding promises of the appellants to make good the horse as a satisfactory breeder.

Rosenthal v. Rambo, *supra*.

When appellants failed to furnish a horse of equal value in exchange, and thus comply with their said agreement, there was a total failure of consideration between appellants and appellee.

Campbell v. Gates, 17 Ind. 126; Swope v. Forney, 17 Ind. 385; Armstrong v. Cook, 30 Ind. 22; Jeffries v. Lamb, 73 Ind. 202; Trentman v. Fletcher, 100 Ind. 105.

Plaintiffs refused to comply with their part of the guaranty, and no formal delivery of the horse to them at La Fayette, Indiana, was necessary to complete the breach of contract.

Blair v. Hamilton, 48 Ind. 32; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; 38 Cyc. 131, note 1; Ohio Thresher & Engine Co. v. Hensel, 9 Ind. App. 323, 36 N. E. 716.

Willoughby, J., delivered the opinion of the court:

On December 29, 1908, Crouch & Son, appellants, sold and delivered to Robert H. Parker, also named as appellant, a certain stallion at the agreed price of \$1,950; for which sum the said Robert H. Parker and his mother, Hanna Parker, appellee, executed their three several promissory notes each calling for \$650 and interest. As a part of the contract of sale, and contemporaneously with the execution and delivery of said notes, the said Crouch & Son, hereinafter designated as appellants, executed and delivered to said Robert H. Parker their written contract, by which they warranted said stallion to be a "satisfactory sure breeder," and agreed that, if said horse should not be as warranted, they would, on or before April 1, 1910, take him back, if delivered to them at La Fayette, Indiana, and give in exchange another stallion of equal value and of the same breed.

The horse did not prove to be as warranted, and appellants were so notified prior to April 1, 1910, whereupon appellants, without the knowledge or consent of appellee, extended said warranty for a period of one year, at the expiration of which time, and on April 13, 1911, appellants entered into a new agreement with Robert H. Parker, by the terms of which appellants surrendered to said Parker the note due April 1, 1910, on which there was a balance due in the sum of \$324.34, and said Robert H. Parker released said appellants from all liability on said warranty. Thereafter the last of the three \$650 notes became due, was unpaid, and this action was begun by appellants against Robert H. Parker and appellee to collect said note. Appellee filed four affirmative paragraphs of answer designated as the second, third, fourth, and fifth paragraphs; also, a cross com-

plaint against appellants. Separate demurrers for want of facts were filed to these answers and to the cross complaints, which demurrers were overruled, except the demurrer to the fifth paragraph of answer, which was sustained. Appellants' reply in denial to the several paragraphs of answer, and their answer in denial to the cross complaint, closed the issues, and the cause was submitted to a jury, resulting in a verdict and judgment against Robert H. Parker for the full amount of the note, and a verdict in favor of appellee. Appellants' motion for a new trial was overruled. The errors relied on for reversal are: (1) The rulings of the court on the demurrers to the three affirmative paragraphs of answer and the ruling of the court on the demurrer to the third paragraph of the cross complaint of appellee; and (2) the overruling of the motion for a new trial.

The court having specially instructed the jury that in their deliberations they should consider only

Appeal—error  
in overruling  
demurrer—effect  
of instructions.

the third and fourth  
paragraphs of ap-  
pellee's answer,  
there is no avail-

able error in the action of the court in overruling appellants' demurrer to the second paragraph of answer. *Life Assur. Co. v. Haughton*, 31 Ind. App. 626, 628, 67 N. E. 950.

The third and fourth paragraphs of answer each aver that the note sued on and the warranty given by appellants were contemporaneously executed and delivered; that the execution and delivery of the warranty was a consideration for appellee's execution of the note as surety; that the stallion was not as warranted; and that the extension of the warranty was without her knowledge and consent, as was the new agreement of April 13, 1911. The only objection to these paragraphs of answer which appellants specified in their memorandum to the demurrers thereto is that appellee "had not executed the warranty, was not a party to it, and

therefore has no right to base a defense thereon." The question thus presented for our consideration is whether or not the changes in the original contract, which changes were made by agreement between the principal on the note and the appellants, without the knowledge of appellee, discharged appellee as surety. Appellants concede that, if appellee had been a party named in the warranty, the extension and surrender of that instrument without her consent would have released her from liability on the note; but they contend that, inasmuch as her name does not appear in the warranty, she is not released.

A contract of sale and the warranty of the chattel sold, executed at the same time, constitute one contract. *La Grange v. Coyle*, 50 Ind. App. 140, 98 N. E. 75; *McCarty v. Williams*, 58 Ind. App. 440, 108 N. E. 370; *Shordan v. Kyler*, 87 Ind. 38, 41.

Contract—sale  
and warranty  
as one.

In *Allen v. Nofsinger*, 13 Ind. 494, it is held that a promissory note, and the contract in writing out of which it arises, if both are executed at the same time, constitute but one agreement.

In *Cunningham v. Gwinn*, 4 Blackf. 342, it is held that, if a title bond be executed in such case bearing the same date with the note, they constitute one contract, and the note is subject to the same defense as if it showed, on its face, the consideration for which it was given.

In *Wood v. Ridgeville College*, 114 Ind. 320, 16 N. E. 619, it is held that when, at the time a promissory note was executed to a college for a scholarship therein, a certificate of scholarship was issued to the maker, to which was appended an agreement that the note was to be returned if \$10,000 worth of scholarships were not sold within a given time, the note and the agreement constitute one contract.

In *Woodward v. Mathews*, 15 Ind. 339, it is held that a written contemporaneous agreement showing the consideration and conditions

upon which a promissory note was given, may, in a suit upon the note, be given in evidence as part of the same contract.

In *McDonald v. Huestis*, 1 Ind. App. 275, 27 N. E. 509, it is held that an agreement in writing, executed at the same time a promissory note is executed, with reference thereto, becomes a part of the contract, and it and the note must be construed together in ascertaining the liability of the maker of such note and his surety.

In *Rosenthal v. Rambo*, 165 Ind. 584, 3 L.R.A. (N.S.) 678, 76 N. E. 404, the court, in construing a contract similar to the one at bar, said the promise to pay the notes was based on the corresponding promise of Crouch & Son to make good the horse as a satisfactory breeder, and the duty to pay, in whole or in part, remained inchoate during the breeding test, and until performance or default by the sellers. So blended were the transactions that no assignment of the notes, which carried upon their face notice of probable or possible defenses, could separate these equities from the terms of the contract.

The case of *Hickman v. Rayl*, 55 Ind. 552, was an action founded on a promissory note, and an answer to the complaint alleges that the note was executed by the defendant Silas Hickman as principal, and by the defendant George W. Hickman as surety for the said Silas, in consideration of the rent of a farm owned by the plaintiff, which he rented to the defendant Silas Hickman by articles of agreement made between the said plaintiff and said Silas, on the same day the note was executed, and as a part of the same agreement, by which articles the plaintiff, in consideration of the obligation of the defendant Silas, thereafter named, agreed to rent to the said Silas the farm then owned by the plaintiff; that the note was given for the rent of the place. It is further alleged in the answer that plaintiff never delivered the

premises to the said Silas Hickman as provided for in the contract.

The court in that case says the making of the note sued on and the execution of the agreement set up in the answer were simultaneous acts, done by the same parties, about the same subject-matter; the note and the agreement, therefore, belong to the same transaction, and, taken together, constitute but one contract, as much as if they were written on the same piece of paper.

In the case of *Zimmerman v. Judah*, 13 Ind. 286, which was a suit by the appellee against the appellant on a promissory note, it appears by the answer of defendant, appellant, that, at the same time that the note sued on was executed, Judah and Brown entered into a contract by which Brown was to erect for Judah a certain building, to be wholly completed ready for occupancy by the 1st day of November, 1856. The agreement fixes the amount to be paid, the time of payment, etc. The last clause of the agreement is as follows:

"(5) As to the balance, 2,000 dollars, it is agreed as follows: Said Judah herewith advances to said Brown, as and for a loan on a note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract is provided; and which note, also, shall not become or be payable so long as said Brown shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided." Dated October 13, 1855, which is the same date as the note, and signed by Brown, Zimmerman, and Judah.

The answer further shows that on the 5th day of June, 1856, the following further agreement was made without the knowledge or consent of Zimmerman, by which said Brown and one Stokes should, by the 1st day of November, 1856, put

an additional story on the building then under contract between Brown and Judah, for the further consideration of \$1,700, to be paid on the completion thereof.

It was held that the second contract was such an alteration of the original agreement that it discharged Zimmerman, the surety.

Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189, holds that the contract of the surety is to be strictly construed, and is not to be extended beyond the scope of its terms.

Under the facts shown by the undisputed evidence in the instant case, the note sued upon and the written guaranty of appellant constitute the sale contract of the horse, and are as much one contract as if all of the writings had been embodied in one instrument.

In Judah v. Zimmerman, 22 Ind. 388, it is held that any material alteration of a contract, without the consent of the surety, will discharge him. The liability of a surety cannot be extended beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. Chitty, Contr. 529; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189.

In Campbell v. Gates, 17 Ind. 126, the court says, ordinarily a surety is liable to the creditor in the same manner, and to the same extent, as the principal debtor; but as an exception to this rule the surety is allowed to set up in defense any matter which ought, in equity, to go to his personal exoneration. If the contract of suretyship is, as between the creditor and the surety, subject to a condition, the surety is discharged if the condition be not performed. Burge, Suretyship, pp. 115, 116. Indeed, we perceive no valid reason why the engagement of

the surety, who, as such, executes a written contract, may not be founded upon a consideration variant from that which induces its execution by his principal. And if, as in the case at bar, such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would evidently operate as a fraud upon the surety, and, upon that ground, release him from all liability upon his engagement. 2 Am. Lead. Cas. p. 262; Pidcock v. Bishop, 3 Barn. & C. 605, 107 Eng. Reprint, 857, 5 Dowl. & R. 505, 3 L. J. K. B. 109, 27 Revised Rep. 430. And it is plainly competent for the surety to set up and prove such failure of consideration, because it has been often adjudged that such defense is not in conflict with the legal effect of the contract.

It is a sound and well-settled principle of law that sureties are not to be made liable beyond their contract, and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge him from responsibility. Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201, 10 L. ed. 419.

In Bailey v. Boyd, 75 Ind. 125, it is held that if a creditor holding a composition bond, by an agreement with the debtor, for a valuable consideration, without the knowledge or consent of the surety, materially change the terms of the contract of indebtedness, he thereby releases the surety.

In the Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232, the court holds a surety is not bound beyond the terms of his contract, reasonably interpreted. In that case, on page 246 of 110 Ind., the court says: "‘Nothing,’ says Judge Story, ‘can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the ex-

Principal and surety—discharging surety—varying terms of contract.



tent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.' *Miller v. Stewart*, 9 Wheat. 680, 6 L. ed. 189. Such has always been the doctrine of this court. *Judah v. Zimmerman*, 22 Ind. 388; *Markland, Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140; *Weed Sewing Mach. Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881."

A surety is "a favored debtor." The slightest fraud on the part of the creditor touching the contract annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability. *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23 L. ed. 699.

In *Jeffries v. Lamb*, 73 Ind. 202, the court holds, where the payee of a note induces another to become surety thereon, by agreeing that he would deliver to the maker a previous note and chattel mortgage for cancelation, so that such surety might indemnify himself by obtaining a first mortgage on the property mortgaged, a failure and refusal to comply with such agreement constitute a failure of consideration as between such payee and surety.

In *Trentman v. Fletcher*, 100 Ind. 105, the court says, on page 109, where a surety signs a note, in consideration of an agreement with the payee that the latter should do something in the future, if the agreement is sufficiently certain and of such a character that the surety has a right to rely on its performance, and such agreement is not a contradiction of the note, or some of its terms, we perceive no reason

why a failure on the part of the payee to perform should not be held a failure of the consideration as between the payee and surety.

In judging of the character of sufficiency of the defense of the appellee, there should be taken as a guide the rule, which is perhaps without an exception, that sureties not for hire are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions of equities are never allowed to enlarge or in any degree to change their legal obligations. This rule is thus forcibly put by Chancellor Kent in *Commentaries*, vol. 3, p. 124, where he says: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication." *Leggett v. Humphreys*, 21 How. 66, 16 L. ed. 50.

The case at bar was a suit by the payees of the note against the makers. No equities of third parties have intervened. The contract of the appellee was one of surety for the purchase price of the horse. She was induced to enter into the contract of suretyship by the warranty of the appellants, which was read to her by appellants' agent before she signed the note sued on. The maturities of the notes were so arranged that the breeding test could be completed before any note became due. At or about the time the first note became due, the original contract was, without the knowledge or consent of appellee, changed, in this, that on April 1, 1910, the warranty was extended for one year, and that on April 13, 1911, the note due April 10, 1910, on which there was at that time an unpaid balance of \$324.34, was canceled by appellants Crouch & Crouch, and appellants were re-

leased from all liability on the warranty.

Any agreement or dealing between the creditor and principal which materially varies the terms of the contract by which the surety is to be bound, without the consent of the surety, will release the surety from his obligation. *Bailey v. Boyd*, 75 Ind. 125; *Weed Sewing Mach. Co. v. Winchel*, 107 Ind. 260, 7 N. E. 881; *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695, 2 Ann. Cas. 764.

The court did not err in overruling the demurrers to the third and fourth paragraphs of answer.

No judgment was rendered against appellants on the cross complaint of appellee. Therefore the overruling of the demurrer to the

third paragraph thereof presents no available error.

*Winnemucca Water & Light Co. v. Model Gas Engine Works*, 179 Ind. 542, 544, 101 N. E. 1007; *Royse v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485.

The appellants claim that instruction No. 2 required the plaintiff to prove the execution of the note in suit; that instruction No. 3 does not correctly state the material averments of each of the third and fourth paragraphs of answer; and that instruction No. 3 embodies a wrong conception of the law.

These instructions are not subject to the infirmities claimed by appellants. The instructions, taken as a whole, state the law of the case correctly, and the verdict is sustained by sufficient evidence.

No error appearing in the record, the judgment is affirmed.

Appeal—overruling demurrer to cross-complaint—failure to secure judgment.

## ANNOTATION.

### Release of payee from warranty constituting a part of the consideration for a note as releasing a surety.

An extensive search has failed to disclose any case other than the reported case (*CROUCH v. PARKER*, ante, 1598) passing upon the question therein involved as to whether the release of the payee of a note from a warranty, thus making the principal's obligation absolute, releases a surety on the note. It is a general principle of the law of suretyship that the surety is released by any material change in the contract between the principal and the creditor. In fact, the rule

seems to be laid down in some cases that any change in the contract releases the surety. 21 R. C. L. pp. 1004 et seq. The change made in the contract involved in the reported case seems to satisfy the requirements of the rule that the change must be material, for thereafter an obligation of the principal debtor against which he might have defended by showing a breach of the warranty was rendered an absolute one not open to such defense.

W. A. E.

## MARY A. PHILLIPS

v.

FARMERS' MUTUAL FIRE INSURANCE COMPANY of Kalamazoo  
County, Plff. in Err.*Michigan Supreme Court — December 22, 1919.*

(— Mich. —, 175 N. W. 144.)

**Insurance — change of title — deed to broker.**

1. The execution and delivery by a property owner of a warranty deed of it to a broker to facilitate the transfer of title to a purchaser should one be found is not a change of title within the provision of a fire insurance policy avoiding the policy if the title to the property should be in any way changed.

[See note on this question beginning on page 1608.]

**Deed — delivery — placing in hands of broker.**

2. No delivery of the deed occurred sufficient to effect a change in the title to the property by placing a warranty deed in the hands of a broker who is named as grantee merely to aid him in transferring title to a purchaser should one be found.

**Appeal — raising question waived below.**

3. A party who in arguing a motion for directed verdict concedes that there is no disputed question of fact for the jury cannot insist on appeal that there were questions of fact which should have been submitted to the jury.

**ERROR** to the Circuit Court for Kalamazoo County (Weimer, J.) to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. E. M. Irish for plaintiff in error.

Mr. Charles L. Dibble for defendant in error.

Sharpe, J., delivered the opinion of the court:

The following statement of facts is taken from the brief of counsel for appellant:

"The defendant is a mutual fire insurance company. On the 17th day of January, 1916, the plaintiff took out a policy on some buildings in the amount of \$2,500. On the 2d of February, 1917, the buildings were burned. The loss was total. Defendant refused to pay the loss on the ground that plaintiff had violated the conditions of the policy by a change of the title without consent of the company.

"The conditions of the policy contained this clause: 'If the title to said property shall be in any way changed, or a failure of the assured to show ownership or interest, . . .

the risk hereon shall cease and terminate and the policy be null and void.' The by-laws were a part of the policy, and by-law 11 repeated the above condition. On November 22, 1916, the plaintiff executed and delivered to one Stephen Chilson, a Michigan warranty deed of the property in question, the warranty being subject to a mortgage, and took a promissory note from him for \$2,500. The deed was not placed on record. This deed was absolute on its face. The evidence in the record consists of a detail of the circumstances under which it was given."

It also appears that the plaintiff had theretofore entered into a land contract with one Lanning for the sale of the property to him. This contract was also assigned by her to Chilson. It is the claim of the defendant that the execution and delivery of the deed to Chilson was such a change of title, within the

language of the policy and by-law, as rendered the policy void, and that a verdict should have been directed in its favor. This claim is denied by the plaintiff, who claims the deed was executed and delivered under such circumstances as show that the parties did not intend it to operate as a conveyance. Plaintiff also claims that, if defendant's contention stated above should be sustained, it then devolved on defendant to show that it had been injured by such breach, under § 9481, Comp. Laws 1915, which reads as follows:

"(9481) Section 1. No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, and by reason of such breach of condition."

To this defendant replies that this statute was repealed by Act No. 256, Public Acts 1917.

At the close of the proofs, both parties moved for a directed verdict. It seems to have been conceded that there was no disputed question of fact to submit to the jury except the question of plaintiff's damages. This question the court submitted, instructing the jury that there was no change of title such as would affect the policy. The defendant afterwards, and before judgment was entered on the verdict, moved for a judgment for defendant non obstante veredicto, the right to do so having apparently been reserved under the provisions of Act No. 217, Public Acts 1915. In denying the motion, the trial judge said:

"If the court is to determine the intent with which the deed was executed and delivered, then it would seem possible to reach but one result. In my opinion, under the undisputed testimony, it was clearly not the intention of either the plaintiff or Chilson to vest the latter with any right, title, or interest in or to the property or any ownership of the same. Certainly Mrs. Phillips had no thought of relinquishing proprietorship over the property to

Chilson. She was dealing with him as a real estate broker. He was acting as her agent in the transaction for the purpose of finding a purchaser, and that alone. She may have been, and probably was, improperly induced to execute and deliver a writing in such form that in the hands of an unscrupulous agent it might have caused her serious embarrassment, but that could in no way affect her intention in the matter. Whatever suspicion may have been aroused afterwards regarding Chilson's conduct as shown by the bill in chancery, the record in this case fails to disclose that he entertained any other or different intention in the transaction than she. Everything in the testimony of plaintiff, Chilson, and the attorney, Goembel, who drafted the deed, shows beyond doubt that it was the contemplation of the parties that Chilson was to act as the agent of plaintiff in handling, looking after, and negotiating a sale of her property.

"It is my conclusion, therefore, that the execution and delivery of the writing, in form of warranty deed, under the particular circumstances shown, did not constitute a transfer of the title within the meaning of the policy."

Counsel for defendant relies on the case of *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279, and kindred cases, in which it is held that a deed absolute on its face, though given as a security, avoids the policy. It also holds that a conveyance intended to create a secret trust in the grantee for the use of the grantor creates a change of title within the language of the policy.

The distinction between the *Riker* Case and the one at bar lies in the fact that, as found by the trial judge, there was no present intention on the part of the parties to pass any title to Chilson. While it was in his power, in fraud of his duty to plaintiff and her rights, to have conveyed this property independent of his agreement with her that it should only be done if he secured a purchaser thereof, such

power on his part, not having been exercised, should not be held to have created such an interest in the property in him as in any way changed the title thereto. The arrangement was in effect the same as though plaintiff had given Chilson a power of attorney to convey the property for her when a purchaser was secured.

We are also of the opinion that the trial judge might well have found that there was no such delivery of the deed from plaintiff to Chilson as would pass title to him. The plaintiff testified that at the time the deed was prepared she said to Mr. Goembel, the attorney who drew it, "I am giving Mr. Chilson a deed of this property so he can sell it for me." Mr. Goembel testified that at that time the plaintiff said to him, "Well, Mr. Chilson is going to sell this property." Chilson testified: "The deed was simply held by me. The deed wasn't mine."

As was said by Mr. Justice Os-trander in *Pollock v. McCarty*, 198 Mich. 66, 164 N. W. 391: "The test is whether it can be said that delivery of the deed was such as to convey a present interest in the land."

Many Michigan cases are cited by him in its support, to which reference is here made. Applying this test, in view of the finding of the trial judge, in which we concur, that "it was clearly not the intention of either the plaintiff or Chilson to vest the latter with any right, title, or interest in or to the property or any ownership of the same,"—it must be held that there was no such delivery of the deed to Chilson as conveyed "a present interest in the land."

"The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument." *Thatcher v. St. Andrew's Church*, 37 Mich. 264, 269.

Counsel for defendant now insists that the intent with which the deed was executed and delivered should have been submitted to the jury. In view of the concession made by him at the time the motions to direct were argued, we think he is foreclosed from raising this question.

The conclusion reached renders it unnecessary to pass upon the effect of the repealing statute.

The judgment will stand affirmed.

## ANNOTATION.

**Insurance:** provision against change in interest, title, or possession as affected by a deed or other instrument which was merely colorable or has not been delivered.

As indicated in the title this annotation is confined to cases where there was no real intention to pass the title or affect any interest in the property. It does not include cases of delivery of deeds in escrow.

The object of the provision of a policy avoiding it in case of change of title, interest, or possession is that the insured shall have no greater motive to destroy the property, or less interest in guarding it, and it is held that such provision is not violated by the execution of an instrument which was not intended to affect the title.

**California.**—*Mackintosh v. Agricul-*

*tural F. Ins. Co.* (1907) 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102.

**Connecticut.**—*Wiley v. London & L. F. Ins. Co.* (1914) 89 Conn. 35, 66 Atl. 678.

**Illinois.**—*Westchester F. Ins. Co. v. Jennings* (1897) 70 Ill. App. 539.

**Iowa.**—*Cone v. Century F. Ins. Co.* (1908) 139 Iowa, 205, 117 N. W. 307; *House v. Security F. Ins. Co.* (1909) 145 Iowa, 462, 121 N. W. 509.

**Michigan.**—*PHILLIPS v. FARMERS' MUT. F. INS. CO.* (reported herewith) ante, 1606; *Hogadone v. Grange Mut. F. Ins. Co.* (1903) 133 Mich. 339, 94 N. W. 1045.

**Missouri.**—Terminal Ice & Power Co. v. American F. Ins. Co. (1917) 196 Mo. App. 241, 194 S. W. 722, former appeal (1916) — Mo. App. —, 187 S. W. 564, reversed on other grounds in (1916) 269 Mo. 410, 190 S. W. 879.

**New York.**—Forward v. Continental Ins. Co. (1894) 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615.

**Pennsylvania.**—Bemis v. Harbor-creek Mut. F. Ins. Co. (1900) 14 Pa. Super. Ct. 528.

**Texas.**—New Orleans Ins. Co. v. Gordon (1887) 68 Tex. 144, 3 S. W. 718.

It will be observed that in the reported case (PHILLIPS v. FARMERS' MUT. F. INS. CO. ante, 1606) there was held to be no change of title which avoided an insurance policy where the insured, who wished to sell the property covered by the policy, executed and gave a warranty deed to a real estate dealer and assigned a land contract for the sale of the property to him, and took his promissory note, it appearing that the deed was not recorded and that it was not the intention of the parties to vest the agent with any title or interest.

And it has been held that there is no violation of the provision against change in the interest, title, or possession where the insured delivered a deed of the insured property to another in which the name of the grantee was left blank, although another instrument was executed and attached to the deed by which the one to whom they were delivered was authorized to fill in the name of the grantee, which he never did. Westchester F. Ins. Co. v. Jennings (1897) 70 Ill. App. 539. The court said: "The deed from Jennings and wife was a nullity and conveyed no interest whatever in the property insured. It lacked one of the essentials to a valid grant, viz., a grantee, and was therefore void. . . . Even the authority to Burnham to insert the name of a grantee was never exercised, but the deed when offered in evidence was without the name of any grantee. It would seem to require no argument to show that such a paper executed by Jennings and wife did not divest the title of Jen-

nings, nor deprive him of the ownership and right of possession. Burnham had no contract in relation to the property which could have been enforced in any court either at law or in equity. There was, therefore, no legal change of title or interest, and Jennings could at any time have recovered possession of the property."

And in New Orleans Ins. Co. v. Gordon (1887) 68 Tex. 144, 3 S. W. 718, where the insured gave a deed to another for the sole purpose of securing a loan in an association of which the grantee was a member, but no loan was ever secured, there was held to be no violation of the provision for forfeiture in case of change in interest, title, or possession.

And the provision against change of interest, title, or possession is not violated where the owner of property, to avoid having it attached for a debt, executed a deed to a friend and simultaneously took one from her, the one to the friend being recorded, but the other remaining in the possession of the insured's attorney, there being nothing more than a colorable or nominal transfer, and there being no consideration, or change of possession. Wiley v. London & L. F. Ins. Co. (1914) 89 Conn. 85, 66 Atl. 678.

And it has been held that there was no change or diminution in the interest, title, or possession where the insured to escape a possible lien on the insured property made a mere colorable deed to another which was recorded, but never delivered, and which was made subject to a colorable mortgage, which he executed to a bank without its knowledge, it appearing that he also simultaneously took a reconveyance of the property. Cone v. Century F. Ins. Co. (1908) 139 Iowa, 205, 117 N. W. 307.

And where the insured to frighten off his creditors made a deed of property to his wife and left it for recording, but never delivered it to the grantee, and did not intend that the title should pass by the transaction, it was held that there was no violation of the provision against a change of title or ownership. Hogadone v.

Grange Mut. F. Ins. Co. (1903) 133 Mich. 339, 94 N. W. 1045.

And in *Forward v. Continental Ins. Co.* (1894) 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615, a mere colorable bill of sale of the insured personal property, without consideration, and without delivery of possession of the property, although it was recorded, was held not to constitute a change of title. The court said: "When the transfer or encumbrance is merely colorable or nominal, and not real or effective, the reasons that induced the stipulation do not apply. Was there any real sale or transfer of this property, within the meaning of the policy? Nothing was done, except to execute and file a paper. There was no intention, in fact, to transfer the title, or vest any beneficial interest in the nominal vendee. There was no debt to be enforced, no consideration passed, and the use and possession remained unchanged. The filing of the paper added nothing to its validity. It was not a mortgage, nor intended as security for any debt. It was a mere paper transfer, without consideration, and without delivery of possession; and while it had the form, it had none of the legal elements, necessary, even between the parties, to constitute a valid contract of sale. In legal effect, it was, I think, the same as an unexecuted gift. The worst that can be said of it is that it was intended to defraud creditors; but, if that be true, still the moral hazard which was the basis of the condition of the policy would still be absent, since the plaintiff's interest in the property at the time of the insurance was in fact the same as before the paper was executed."

And a bill of sale without delivery does not effect a change of interest. *Omaha F. Ins. Co. v. Thompson* (1897) 50 Neb. 580, 70 N. W. 30.

And there was held to be no change of ownership within the meaning of a policy where a deed was executed by the insured as a result of certain negotiations, but was never delivered. *Whitney v. American Ins. Co.* (1900) 127 Cal. 464, 59 Pac. 897.

And in *Schaeffer v. Anchor Mut. F.*

*Ins. Co.* (1900) 113 Iowa, 652, 85 N. W. 985, there was held to be no change of title within the meaning of the policy by reason of a deed executed to his wife by the insured which was never delivered before his death, and of which the wife knew nothing prior to that event.

And in *Bemis v. Harborecreek Mut. F. Ins. Co.* (1900) 14 Pa. Super. Ct. 528, there was held to have been no violation of a provision for forfeiture if any change should take place in the interest or title, where the insured, for the purpose of barring his wife's dower, together with his wife, executed a deed to another, which was recorded, it appearing that there was no change of possession, and no intent to change the title, and there having been a reconveyance to the insured. The court said: "The conveyance by the insured to Morse passed no interest to the latter. All of the interest, which was absolute ownership, remained in the insured. The property was as much his after, as it was before, the making of the deed. While a deed in form, it, in substance, as between the parties, differed in nothing from a power of attorney to convey upon the request of the grantor. The reconveyance by Morse to the plaintiff operated as a revocation of the power. It certainly passed no interest. There was, therefore, no change of interest by the transaction within a fair construction of the language of the clause. It is strongly urged, however, that there was a change of 'title.' There undoubtedly was a recorded conveyance by the insured to Morse. A deed to an innocent purchaser by Morse would have estopped any claim of title by the insured. But the rights of third parties are not for determination here. They are governed by principles not involved in this discussion. The grantee had power to convey away the title of the grantor. This, if done in violation of the agreement proven in the case, would have been an act of fraud. The position of Morse was, as between the original parties, simply that of a vehicle for the passage of title, should it become necessary to convey. As

between the two parties he held no more 'title' than if he had been given a deed signed and acknowledged with the name of the grantee omitted, but to be filled in and delivered in accordance with the instructions of the grantor. If it be said that Morse had power to make a good deed to a stranger, it may be answered that the grantor of a power loses nothing of his title until the execution of the power. Here, there was no execution of the power, but a surrender of it before the loss covered by the insurance in dispute. 'Title,' by the old definitions, was said to be the means whereby a man holdeth land. It means, as modern attempts at definition have shown, much more than this. We need here, however, no technical definition. 'Title,' in its accepted daily untechnical use, means 'ownership.' The deed held by Morse was not 'title.' It was evidence of title. It was in form a muniment of title. But between the original parties it conveyed no more than it was intended to convey, which was nothing. Not one tittle of interest passed; not one vestige of actual ownership vested."

And it has been held that a contract of sale in the nature of an option, which was abandoned, and under which title never passed, does not constitute a breach of the condition against change of interest, title, or possession. *Mackintosh v. Agricultural F. Ins. Co.* (1907) 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102; *House v. Security F. Ins. Co.* (1909) 145 Iowa, 462, 121 N. W. 509; *Terminal Ice & P. Co. v. American F. Ins. Co.* (1917) 196 Mo. App. 241, 194 S. W. 722, former appeal (1916) — Mo. App. —, 187 S. W. 564, reversed on other grounds in (1916) 269 Mo. 410, 190 S. W. 879.

But where the insured and his wife in order to place his real estate so that a judgment could not be enforced against it executed a warranty deed to his son and had it recorded, and it appeared that the son had had the deed in his possession, it was held that there was a breach of the condition of a policy on the property that it should be void if any change should take place in the interest, title, or possession, although the parties testified that it was not intended that the transfer should be effective. *Rosenstein v. Traders' Ins. Co.* (1903) 79 App. Div. 481, 79 N. Y. Supp. 736, subsequent appeal in (1905) 102 App. Div. 147, 92 N. Y. Supp. 326. The court distinguished the case of *Forward v. Continental Ins. Co.* (1894) 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615, supra, on the ground that the property in that case was personalty, and that a change of possession was necessary to transfer title to such property.

J. T. W.

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**E. BAGGOT COMPANY, Plff. in Err.,  
v.  
INDUSTRIAL COMMISSION et al.**

*Illinois Supreme Court — December 17, 1919.*

(290 Ill. 580, 125 N. E. 254.)

**Workmen's compensation — rupture of aorta as accident.**

1. Rupture of the aorta by increased blood pressure due to the effort of a workman in operating a windlass to lift a heavy weight, in the regular course of his employment, is an accident within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 1614.]



**Definition — accidental injury.**

2. The words "accidental injury," as used in the Illinois Workmen's Compensation Act, were meant to include every injury suffered in the course of employment for which there was an existing right of action, and to extend the liability of the employer to make compensation to injuries for which he was not previously liable.

**Workmen's compensation — accidental injury — what is.**

3. Any injury which is traceable to

a definite time, place, and cause, and which occurs in the course of employment, is accidental within the meaning of the Workmen's Compensation Act.

**— power of court upon affirmance of award.**

4. The court cannot, upon certiorari to review the action of the Industrial Commission in awarding compensation for injury to an employee, order execution, but, in case of affirmance, it must remand the case to the Commission for further proceedings.

**ERROR** to the Circuit Court for Cook County (Torrison, J.) to review a judgment affirming an award of the Industrial Commission in favor of claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her decedent. *Reversed with directions.*

The facts are stated in the opinion of the court.

Messrs. Ralph F. Potter and Kenneth B. Hawkins for plaintiff in error.

Mr. Philip Sultan for defendants in error.

Thompson, J., delivered the opinion of the court:

This is a writ of error sued out by the E. Baggot Company to review a judgment of the circuit court of Cook county, affirming an award of the Industrial Commission in favor of Mary C. Cripps, administratrix of the estate of Joseph C. Cripps, deceased; the circuit court having certified that the cause is one proper to be reviewed by this court.

Joseph C. Cripps, deceased, was a plumber employed by plaintiff in error. On September 26, 1917, deceased, with Michael Brodie, was engaged in his regular work upon a building under construction where plaintiff in error was the plumbing contractor. A part of the work consisted of lifting pipe from the ground to the sixth floor, where these men were working. The pipe was lifted by a hand derrick of the usual type, equipped with an arm over the end of which passed a rope attached to a windlass. At each end of the windlass was a handle, by means of which the rope was rolled upon the drum, lifting the pipe attached at the other end of the rope. The windlass was operated by the two men, deceased turning one

handle and Brodie the other. The last load of pipe hauled up by these men weighed between 250 and 300 pounds. After the pipe was landed on the sixth floor, and while Brodie was untying the rope, deceased started to walk away from the windless and was seen to be spitting blood. Brodie asked him what was the matter, but deceased was unable to talk. The latter then proceeded to the construction office of plaintiff in error, on the first floor of the building, where he requested the foreman, Edwin Schutz, to get a doctor. While in the office he had two hemorrhages and coughed up blood. When deceased first came into the office, the foreman noticed that he held over his mouth a handkerchief saturated with blood and was coughing. Schutz asked deceased if he was hurt, to which deceased made no reply in words, but shook his head in the negative. Nothing unusual happened while the work of lifting this last load of pipe was in progress. The work was heavy, but it was the same kind of work that the two men had been doing for a couple of days. The hemorrhages recurred from time to time until October 8th, when deceased died. A post mortem examination disclosed a large longitudinal tear and several smaller transverse tears in the walls of the aorta. Prior

to September 26th, deceased was a strong, healthy man and had never suffered from hemorrhages or any trouble with his heart or lungs.

Plaintiff in error contends that there is no evidence to support the award of the Industrial Commission, for the reason that there is no competent evidence to support a finding that deceased sustained an accidental injury arising out of and in the course of his employment. The word "accident" is not a technical legal term with a clearly defined meaning, and no legal definition has ever been given which has been found both exact and comprehensive as applied to all circumstances. Anything that happens without design is commonly called an "accident," and, at least in the popular acceptance of the word, any event which is unforeseen and not expected by the person to whom it happens is included in the term. The words "accident" and "accidental injury," as used in the Workmen's Compensation Act of Illinois (Laws 1913, p. 335), were meant to

**Definition—  
accidental  
injury.**

include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also to extend the liability of the employer to make compensation for injuries for which he was not previously liable, and to limit such compensation. If an injury can be traceable to a definite time, place, and cause, and the injury occurs in the

**Workmen's  
compensation—  
accidental  
injury—what is.**

course of the employment, the injury is accidental within the meaning of the act, and the obligation to provide and pay compensation arises. *Matthiessen & H. Zinc Co. v. Industrial Bd.* 284 Ill. 378, 120 N. E. 249. Where a workman died from a pre-existing disease which was aggravated or accelerated under circumstances which can be said to have been accidental, his death may be said to have resulted from accidental injury. *Peoria R. Terminal Co. v. Industrial Bd.* 279 Ill. 352, 116 N. E.

651, 15 N. C. C. A. 632; *Western Electric Co. v. Industrial Commission*, 285 Ill. 279, 120 N. E. 774. In *Schroetke v. Jackson-Church Co.* 193 Mich. 616, L.R.A.1917D, 64, 160 N. W. 383, the supreme court of Michigan reviews at length decisions on the question of what constitutes an accident under compensation acts similar to ours, and it there holds that where an aged watchman, whose duties were to guard the plant and give alarms of fire, had been afflicted with heart disease, and, on discovering a fire and giving warning, and attempting to extinguish the fire, became excited and died from heart failure, his death was accidental. In *Gilliland v. Ash Grove Lime & Portland Cement Co.* 104 Kan. 771, 180 Pac. 793, the supreme court of Kansas had under consideration a case quite similar to the case at bar. There a workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car. At noon he was in apparent good health and spirits. In the afternoon, while at his working place, and shortly after he had been seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant. The court, after reviewing the authorities, held that the evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor, and that the workman did not know, or in any event was inattentive to, the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort. This breaking down of a part of this man's body was held to be an accident.

In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. The circumstances were clearly such that the Commission

was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the first hemorrhage, the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid. There was ample evidence in the record to justify the finding of the Industrial Commission that the deceased came to his death by accident, and the circuit court therefore properly confirmed the award. *Peoria R. Terminal Co. v. Industrial Bd. and Matthiessen & H. Zinc Co. v. Industrial Bd. supra*; *Western Electric Co. v. Industrial Commission*, 285 Ill. 279, 120 N. E. 774; *State ex rel. Puhlmann v. District Ct.* 137 Minn. 30, 162 N. W. 678.

Counsel for plaintiff in error rely upon *Jakub v. Industrial Commission*, 288 Ill. 87, 123 N. E. 263, but that case is clearly distinguishable from the case under consideration. In that case the evidence showed that Jakub died from organic heart disease and kidney disease. The court confirmed the finding of the Industrial Commission that the deceased did not sustain accidental in-

juries arising out of and in the course of his employment. There was no evidence in the record in that case that any part of the body was broken, by exertion or otherwise. That case is further distinguished, so far as a review by this court is concerned, in that this court cannot weigh the evidence, but must confirm the award of the Industrial Commission if there is evidence to support it. *Swift & Co. v. Industrial Commission*, 287 Ill. 564, 122 N. E. 796. It is essentially a different judicial problem to set aside a decision of the Industrial Commission which finds that a certain state of facts proves that the death resulted from accidental injuries, than to confirm a decision of the Commission that the death was not by accident.

The circuit court erred in entering a judgment directing the payment of the award of the Commission, and ordering execution thereon. The only authority which the circuit court had on review by certiorari was to confirm the findings and award of the Industrial Commission or to set aside the same and enter such a decision as is justified by law, or remand the cause to the Commission for further proceedings. *Baum v. Industrial Commission*, 288 Ill. 516, 6 A.L.R. 1242, 123 N. E. 625; *Otis Elevator Co. v. Industrial Commission*, 288 Ill. 396, 123 N. E. 600.

The judgment is therefore reversed, and the cause remanded to the Circuit Court of Cook county, with directions to enter an order confirming the decision of the Industrial Commission.

## ANNOTATION.

### Workmen's compensation: hemorrhage as an accident.

It will be observed that some cases have been included which were not strictly cases of hemorrhages, but which involved facts somewhat similar.

It has been held that a hemorrhage was due to an accident within the Workmen's Compensation Acts where it resulted while the workman was engaged in performing his usual work,

the injury under such circumstances being unforeseen and undesigned.

**Illinois.**—*E. BAGGOT Co. v. INDUSTRIAL COMMISSION* (reported herewith) ante, 1611.

**Kansas.**—*Gilliland v. Ash Grove Lime & P. Cement Co.* (1919) 104 Kan. 771, 180 Pac. 793.

**Michigan.**—*Crosby v. Thorp, H. & Co.* (1919) 206 Mich. 250, 6 A.L.R. 1253, 172 N. W. 535.

**Minnesota.**—*State ex rel. Puhlmann v. District Ct.* (1918) 137 Minn. 30, 162 N. W. 678.

**New York.**—*Fowler v. Risedorph Bottling Co.* (1916) 175 App. Div. 224, 161 N. Y. Supp. 535.

**Texas.**—*Southwestern Surety Ins. Co. v. Owens* (1917) — Tex. Civ. App. —, 198 S. W. 662.

**England.**—*Johnson v. Torrington* (1909) 3 B. W. C. C. 63.

It will be noticed that in the reported case (*E. BAGGOT Co. v. INDUSTRIAL COMMISSION*) a finding that the workman's death was due to an accident is held justified where it appears that he was a plumber, and that, while assisting in the work of turning a windlass, in the ordinary manner, he suffered a hemorrhage from a rupture of the aorta, there being no direct evidence of extraordinary exertion suddenly displayed.

And in *Gilliland v. Ash Grove Lime & P. Cement Co.* (Kan.) supra, where an employee had worked for about three years in the sacking department of a cement plant, which was an exceedingly dusty place, and was subsequently employed in a quarry of the company, loading rock onto cars, a part of his duty being to break rock with a sledge, it was held that the facts indicated an injury by accident, there being evidence that he was in apparently good health at noon; that shortly after he was seen beating a large rock with a sledge he suffered a pulmonary hemorrhage from which he shortly died. The court said: "The word 'accident' does not have a settled legal signification. It does have, however, a generally accepted meaning, which is the same whether considered according to the popular understanding or the approved usage of language. An

'accident' is simply an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force. The word 'undesigned' must not be taken too literally in this connection, because a person may suffer injury accidental to him, under circumstances which include the design of another. The same warning may be extended regarding other elements of the definition; but, as definitions go, the one here proposed is correct, at least for present purposes. In this instance all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. While no one saw the workman strike a blow with his heavy sledge, or lift a heavy piece of rock the moment before the hemorrhage occurred, the circumstances were clearly such that the jury would have been authorized to relate the hemorrhage to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the pulmonary blood vessel by force from within was as distinctly traumatic as if the canal had been severed by the violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed, the deceased was working in the manner habitual to the employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid. . . . It seems quite clear that if, because of some unobserved defect, the car which the workman was loading had broken down under its usual weight of stone, the giving way of the physical structure of the car would have been called an accident. The jury might not have considered they derived much enlightenment from the physician's very indefinite statement that the workman might have expected almost anything after working in the dust of the defendant's sacking department for three years. Certainly he would not expect

typhoid fever from cement dust. The evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor. He certainly did not intend to kill himself by breaking rock and loading cars at a price per car. He did not know, or at any event he was inattentive to, the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort. Out of this ignorance or miscalculation of forces came misadventure, and the term 'accident' applies to what happened to him, as clearly as it would apply to what happened to the car had it broken down under the assumed circumstances."

And in *Southwestern Surety Ins. Co. v. Owens* (1917) — Tex. Civ. App. —, 198 S. W. 662, where an employee, while lifting heavy cans of paint, strained himself and caused a blood vessel to burst in his lungs, resulting in a hemorrhage and death, it was held that he suffered an accidental injury in the course of his employment. The court here stated that the accidental injuries referred to in the Workmen's Compensation Act were designated accidents only as contradistinguished from intentional injuries.

And in *Fowler v. Risedorph Bottling Co.* (1916) 175 App. Div. 224, 161 N. Y. Supp. 535, a workman who was engaged in a hazardous employment, and who suffered a cerebral hemorrhage as a result of unusual strain or exertion while prosecuting such employment, was held to have suffered an accidental injury within the meaning of the New York Compensation Act.

And in *Manning v. Pomerene* (1917) 101 Neb. 127, 162 N. W. 492, it was held that an employee who, while attempting to move iron beams out of his way by pushing against them with his body, felt pain in his stomach, became faint and weak, and was compelled to cease work, and was assisted home, and on the third day afterwards vomited blood, and after that had a paralytic stroke, might be found to have suffered an accident.

And in *Clark v. Lehigh Valley Coal Co.* (1919) 264 Pa. 529, 107 Atl. 858,

an employee was held to have met death as a result of accidental violence to the physical structure of the body where, while engaged in his work, he died from a rupture of the aorta caused by extra effort in vomiting.

And in *State ex rel. Puhlmann v. District Ct.* (1918) 137 Minn. 30, 162 N. W. 678, it was held that the rupture of a blood vessel might be found to be accidental where the employee was, at the time he was stricken, wheeling a heavily loaded wheelbarrow, there being medical testimony that the rupture resulted from the exertion.

And in *Crosby v. Thorp, H. & Co.* (1919) 206 Mich. 250, 6 A.L.R. 1253, 172 N. W. 535, it was held that an employee who was a traveling salesman had met with an accident within the Workmen's Compensation Act where he suffered paralysis due to the breaking of a blood vessel in his brain, which was caused by overexertion and excitement in hurrying to catch a train.

And in *Johnson v. Torrington* (1909) 3 B. W. C. C. (Eng.) 68, the court refused to disturb the finding of fact by the lower court that the death of a fireman on a ship resulted from cerebral hemorrhage brought about by the conditions of his work, and that it arose by accident, there being testimony that while in the fire room he frequently drank water; that soon afterward he became unconscious and died; that there was no post mortem examination, but medical testimony only, which was contradicted, that his death was due to cerebral hemorrhage, brought about by the heat and excessive drinking of water.

The injury has also been held an accident within the Compensation Acts where a hemorrhage resulted while the workman was performing his usual work, although he was, at the time, suffering from a diseased condition. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632; *Indian Creek Coal & Min. Co. v. Calvert*, — Ind. App. —, 119 N. E. 519; *La Veck v. Parke, D. & Co.* (1916) 190 Mich. 604, L.R.A. 1916D, 1277, 157 N. W. 72; *Clover, C. & Co. v. Hughes* [1910] A. C. (Eng.)

242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; *M'Innes v. Dunsmuir* [1908] S. C. (Scot.) 1021.

It has been held that the death of a locomotive fireman, who fell from a train and suffered a fractured skull and hemorrhage of the brain, might be found to have resulted from an accident, although the hemorrhage emanated from a soft portion of the brain, caused by disease, where it appeared that the hemorrhage would not have occurred but for the fall. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651, 15 N. C. C. A. 632.

And it has been held that a coal miner suffered a personal injury by accident where, a few minutes after assisting in pushing a partially loaded car over a grade, he suffered a rupture of the aorta and hemorrhage from which he died within a short time, although an autopsy disclosed a diseased condition at the point of the rupture, and there existed an unnatural thinness of the wall. *Indian Creek Coal & Min. Co. v. Calvert* (1918) — *Ind. App.* —, 119 N. E. 519.

And paralysis due to cerebral hemorrhage, because of prolonged exertion in a hot room in the course of his employment, has been held within the operation of the Michigan act providing for compensation for accidental injuries, although he was suffering from arterial sclerosis. *Le Veck v. Parke, D. & Co.* (1916) 190 Mich. 604, L.R.A.1916D, 1277, 157 N. W. 72.

And in *M'Innes v. Dunsmuir* [1908] S. C. (Scot.) 1021, a cerebral hemorrhage caused by exertion in the employee's work was held an injury

caused by an accident, although at the time of the first attack the arteries were in a degenerate condition, which rendered such an attack more likely to occur.

And in *Clover, C. & Co. v. Hughes* [1910] A. C. (Eng.) 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885, where the workman was suffering from an aneurism in such an advanced stage that it might have burst at any time, and it burst while he was engaged in tightening a nut, which caused a strain ordinary in his work, it was held that there was an accident within the meaning of the English Workmen's Compensation Act.

In *Federal Gold Mine v. Ennor* (1910; H. C.) 13 C. L. R. (Austr.) 276, it was held that a miner could not be said to have suffered an injury by accident where he was employed in the mine but three days, and the work which he had been doing was of a very light nature, not requiring any great exertion or strain, and on each of the first two days he had complained of illness, and upon the third day, and after a few hours, suffered an attack of cerebral hemorrhage after doing but very little work, and appearing to be ill at ease all of the time.

In *Stombaugh v. Peerless Wire Fence Co.* (1917) 198 Mich. 445, 164 N. W. 537, where there was evidence that an employee had heart disease so that an exertion might cause a rupture, it was held that a bursting of the wall of an auricle was not an accidental injury, it appearing that it occurred while he was lifting heavy rolls in the ordinary course of his work.

J. T. W.

## STATE OF WISCONSIN EX REL. DAVID ATWOOD v.

HENRY JOHNSON, State Treasurer, et al.

*Wisconsin Supreme Court — November 17, 1910.*

(— Wis. —, 175 N. W. 589.)

**Constitutional law — power of states to grant bonus to soldiers.**

1. The power conferred upon Congress by the Federal Constitution over  
7 A.L.R.—102.

the Army and Navy, and the act of Congress in pursuance thereof, do not preclude states from raising by taxation a bonus for soldiers who entered the Federal Army from the states, to protect the people from a common disaster.

[See note on this question beginning on page 1636.]

**Tax — public purpose — granting of bonus to soldiers.**

2. The granting of a bonus to soldiers entering the Great War, from a state, as an appreciation of the character and spirit of their patriotic service and to perpetuate such appreciation as a part of the history of the state, is a public purpose for which the power of taxation may be exercised.

[See 26 R. C. L. 47, 68.]

**Constitutional law — effect of practical construction.**

3. Long-continued practice of the legislature in raising money by taxation for particular purposes is of great weight on the question of the validity of legislation exercising the power of taxation for a similar purpose.

[See 6 R. C. L. 63, 64.]

**— powers of states.**

4. Powers not expressly or by necessary implication granted by the Constitution to the Federal government, nor prohibited by it to the states, are reserved to the states, or to the people.

[See 6 R. C. L. 134 et seq.]

**— military policies of states.**

5. The states have reserved to themselves, under the Federal Constitution, certain military policies.

**— power of states to legislate.**

6. In matters of concurrent jurisdiction between the Federal government and the states, the states have the right to legislate where such legislation is not in conflict with the act of Congress.

[See 6 R. C. L. 139, 140.]

**Conflict of laws — state and Federal statutes.**

7. Statutes of Congress and a state are in conflict when, if one obeys the state law he incurs the penalty of the Federal law, and if he obeys the Federal law he incurs the penalty of the state law.

[See 6 R. C. L. 140:]

**Tax — bonus for soldiers — special legislation.**

8. A tax at uniform rate upon all taxable property in the state to provide a bonus for soldiers is not objectionable as special legislation, or as violating the provision for equal protection of the laws.

**Constitutional law — special legislation — surtax on incomes to raise bonus for soldiers.**

9. Imposing a surtax upon incomes of a particular year to raise a bonus for soldiers is not invalid as special legislation.

**Tax — income — uniformity.**

10. The uniformity clause of the Constitution does not apply to income taxes.

[See 26 R. C. L. 142, 143.]

**— classification of income tax.**

11. Classification may be upheld under the Income Tax Law if there is no discrimination in favor of one as against another of the same class, and the methods of assessment and collection of taxes are not inconsistent with natural justice.

**Courts — power over Tax Law.**

12. Unless the court can say that exemptions granted in an Income Tax Law are manifestly unjust, arbitrary, or whimsical, it cannot interfere with the tax merely because it might have reached a different conclusion as to the policy or wisdom of the law.

**— income — difference in exemptions.**

13. That exemptions in one class are different from those in another is no valid objection to an Income Tax Law, if there is a proper classification.

**— discrimination between corporations and individuals.**

14. An exemption of \$4,000 of income to individuals while allowing only \$1,000 to corporations, in an Income Tax Law, does not make the exemption arbitrary or whimsical so as to invalidate the statute.

[See 26 R. C. L. 183.]

**— refusal to permit offset of personal property.**

15. That an offset of the value of personal property allowed by the general Income Tax Law is not permitted in a provision for a surtax to raise a bonus for soldiers does not render the statute discriminatory.

**— deduction of percentage of capital — effect on foreign corporations.**

16. No discrimination in favor of foreign corporations is effected by permitting a deduction of 6 per cent of capital stock and surplus before as-

sessing an income tax, if the basis of deduction is the property out of which the income is earned.

**Legislation — delegation of power — authority to issue bonds.**

17. Permission granted to counties to issue bonds to meet a tax levied by the state is not an unlawful delegation of legislative power.

— **conferring ministerial duties on board.**

18. The investing by the legislature of a board with merely ministerial duties is not a delegation of legislative power.

[See 6 R. C. L. 179.]

**Secretary of state — interference with constitutional powers as auditor.**

19. Conferring upon a board control of payments of soldiers' bonuses, with authority to adopt rules for the distribution of the funds and the ascertainment and selection of proper beneficiaries, is not a violation of the constitutional provision making the secretary of state auditor.

**Legislature — power to refer statute to people.**

20. The legislature may make the taking effect of a law dependent upon a vote of the people.

ON DEMURRER to a complaint by the state on relation of David Atwood, in an action in the Supreme Court, to test the constitutionality of an act known as the Soldiers' Bonus Act. *Demurrer sustained and action dismissed.*

**Statement by Kerwin, J.:**

This action was originally brought in this court to test the constitutionality of chapter 667, Laws 1919, known as the Soldiers' Bonus Act, and, if found unconstitutional, to restrain the enforcement of the act. The attorney general declined to commence the action, and upon application the court granted leave to the relator here to institute the action in the name and behalf of the state. The defendants are charged with the administration and enforcement of the act.

The complaint is as follows:

"Now comes the plaintiff in the above-entitled cause, pursuant to leave of said honorable court, and for a complaint against the above-named defendants respectfully shows to the court:

"I. At its last session the legislature of the state adopted an act which is numbered and known as chapter 667, Laws 1919. The act was approved on July 30, 1919, and, at a special election held on September 2, 1919, a majority of the electors of the state voted in the affirmative upon the question embraced in § 9 of the act. Pursuant to § 1 of the act, the governor of the state has appointed W. F. Lorenz as one of the members of the service recognition board, which board has been

organized pursuant to the act, and consists of Emanuel L. Philipp, governor, Orlanda Holway, adjutant general, and W. F. Lorenz. Substantial doubt and controversy have arisen as to the validity of said act and as to the right of the service recognition board, the Tax Commission of Wisconsin (now Nils P. Haugen, Thomas E. Lyons, and Carrol Atwood), the secretary of state (now Merlin Hull), and the state treasurer (now Henry Johnson), to estimate, determine, assess, or collect the taxes provided for by the act, to certify or audit for payment or make any payments thereunder, or otherwise to proceed with the administration or execution of the act.

"II. Plaintiff is advised and believes that the act is subject to the following, among other, infirmities affecting its constitutionality, and that by reason thereof it is not a valid law:

"(1) The act provides for the assessment and collection of taxes and the expenditure of the funds thereby collected for other than the estimated expenses of the state, and for purposes which are not public, thereby violating the provisions of §§ 2 and 5 of article 8 of the Wisconsin Constitution and of the 14th Amendment to the Federal Consti-



tution, and transcending the limitation, inherent in constitutional taxation, that taxes may only be levied and collected for public purposes.

"(2) The act violates the provision of § 3 of article 8 of the Constitution, which inhibits the giving or loaning of the credit of the state in aid of any individual.

"(3) The act provides for extraordinary expenditures not within the purview of the expenses which the legislature is, by § 5 of article 8 of the Constitution, authorized to provide for by current taxation.

"(4) The act provides for the payment, from moneys raised by taxation, of what is designated by the legislature as a 'bonus' to Wisconsin soldiers, sailors, marines, and nurses who served in the armed forces of the United States. Such forces were the forces of the United States, and not of the state. The Congress of the United States, pursuant to the exclusive power vested in it by § 8 of article 1 of the Federal Constitution, has by numerous laws made provision for compensating its armed forces during their service, for allotments to their families, for additional compensation to them or their dependents in case of disability or death, for vocational training of those disabled, for insurance in case of disability or death, and for the payment of a bonus upon discharge from service. The granting of benefits such as those provided for in said act is a matter of Federal power exclusively, and the exercise of such power by the Congress has excluded its exercise by the state, even though the purpose were otherwise public.

"(5) The benefits provided for by the act are declared to be given as a token of appreciation of the character and spirit of the patriotic service of soldiers, sailors, marines, and nurses who served in the armed forces of the United States during the war with Germany and Austria. The amount of benefits is largely governed by time of service. They

are payable only to those of the classes named who were residents of Wisconsin at the time of induction into service. Benefits are payable irrespective of manner of induction or character of service or discharge. Such classification and limitation of beneficiaries is not germane to the consideration of appreciation or gratitude which is the expressed purpose and object of the act. The act, therefore, denies the equality before the law which is guaranteed by §§ 1, 9, and 22 of article 1 of the Constitution of the state, and by § 2 of article 4 and the 14th Amendment of the Constitution of the United States.

"(6) The act provides for the assessment and collection of a surtax upon incomes, and for the assessment and collection by property taxation of a special tax, not exceeding 3 mills, and it is left to the estimate and determination of the service recognition board as to the amount, within prescribed limits, to be paid to the beneficiaries, and as to the amount, within the limit of 3 mills, to be raised by property taxation, thereby unlawfully delegating legislative power and violating the provisions of §§ 2 and 5 of article 8 of the Constitution of the state.

"(7) The act provides for the levy and collection of a property tax (the rate not to exceed 3 mills) only if and in so far as the prescribed surtax upon incomes may be insufficient to meet the expenditures provided for by the act. The exemptions from income taxes to be collected for the special and extraordinary purposes of the act are different from the exemptions allowed by law in the assessment of income taxes for other and general purposes. The surtax is laid upon a particular class of taxpayers. The act thus constitutes special legislation for the levy and collection of taxes, makes the burdens of taxation and the amount of exemption therefrom dependent on the purpose to which the moneys raised are to be applied, and, for the special

purposes of the act, discriminates against particular classes of taxpayers. This violates § 31 of article 4 of the state Constitution, prohibiting special legislation for the assessment or collection of taxes, the rule of uniformity prescribed by § 1 of article 8 of the state Constitution, and the equality and justice guaranteed by §§ 1, 9, and 22 of article 1 of the state Constitution, and by the 14th Amendment of the Federal Constitution, and is violative of the inherent principles of constitutional taxation and government.

"(8) The property taxes provided for by the act are to be levied for the current year. The surtax is retroactively laid upon incomes for the year 1918. In arriving at the surtax a large deduction is allowed to corporations and their stockholders which is not allowed to partnerships or other individuals, thereby violating the rule of uniformity prescribed by § 1 of article 8 of the Constitution of the state, and denying the equality before the law guaranteed by §§ 1, 9, and 22 of article 1 of the state Constitution, and by the 14th Amendment to the Constitution of the United States.

"(9) The provisions of §§ 3 and 4 of the act are in violation of § 2 of article 6 of the Constitution of the state, providing that the secretary of the state shall be ex officio auditor, and invest in such board discretionary powers which the legislature is without power to delegate.

"(10) The act makes the levy of taxes to meet the expenditures provided for dependent upon a majority vote of the electors, thereby unlawfully delegating a power which resides exclusively in the legislature, and contravening the provisions of §§ 2 and 5 of article 8 of the Constitution of the state.

"III. Many of the soldiers and sailors who served with the armed forces of the United States during the war with Germany and Austria have not yet been discharged, but are still serving as a part of the Army and Navy of the United States, and are receiving the com-

pensation and benefits provided by acts of Congress, and are subject to the control and discipline provided by Federal laws and regulations.

"As plaintiff is informed and believes, many of the states of the Union have not adopted laws giving a bonus, gratuity, or other aid to residents of the state who served with the armed forces of the United States during said war.

"The government of the United States is now actively seeking to recruit by voluntary enlistment the Navy and Marine Corps, and measures are in contemplation looking to an increase in like manner of the Army of the United States, and that such voluntary enlistments are being sought in the states which have not adopted laws giving a bonus, gratuity, or other aid to their residents who served in said war, as well as in this state.

"As plaintiff is informed and believes, various measures have been introduced and are pending in Congress having for their object the granting of benefits (additional to those already provided by Congress) to those who served in the armed forces of the United States during said war. Among them is a bill providing for a bonus similar to that provided for by said chapter 667.

"Among the residents of Wisconsin who served in the armed forces of the United States during said war there exists, as is judicially known to the court, differences as regards methods of induction into and discharge from service, time, place, and character of service, effect of service upon health, strength, and ability to earn, financial needs, and as regards other circumstances and conditions. There also exist differences between the character and extent of the service of the military units which composed the armed forces of the United States, which units were not generally made up of the residents of any particular state to the exclusion of the residents of other states, and some of which units composed wholly or

in part of residents of other states, had the opportunity to perform and did perform military service conspicuous for its valor and its effect in accelerating the armistice. Some or all of the above and other facts which the court may judicially notice will be referred to upon the hearing hereof.

"IV. The officials constituting the defendants herein are proceeding to the administration and execution of said act as though it were a valid law. Unless restrained by the court, vast sums of money, probably aggregating upwards of \$15,000,000, will be collected by taxation and expended in the administration and execution of the provisions of the act. The making of estimates as to the amount to be raised by income taxation, and the amount to be levied by direct taxation is already in process, and the validity or invalidity of the act vitally affects the levy and collection of taxes for the current year throughout the state. Should taxes be levied or expenditures be made under the provisions of the act, and should the act remain in operation for several months, during which taxes were collected and their proceeds disbursed, and then be attacked and held unconstitutional, there would be involved questions as to the duties of state officials with respect to the recovery back of funds expended under the law, of the liability of the state treasurer for the making of such expenditures, of the obligation of accounting and reimbursement by the state for taxes unlawfully levied and collected, and infinite confusion would result. Upon request duly made to the attorney general of the state, he refused, and still refuses, to commence or maintain upon his own motion any action to test the validity of said act.

"V. Relator is a citizen of Wisconsin and a resident of and taxpayer in the city of Janesville, in said state.

"Wherefore, plaintiff respectfully prays the judgment of this court:

"(1) That the validity of chap-

ter 667, Laws of 1919, be determined, and the rights and duties of those charged with its administration be declared.

"(2) That, in case chapter 667, Laws of 1919, be held invalid, its enforcement be restrained.

"(3) That such order and further relief be granted as may be proper."

Mr. Harry L. Butler for plaintiff.

Messrs. John J. Blaine, Attorney General, and M. B. Olbrich for defendants.

Messrs. Crownhart & Wylie for certain soldiers.

Mr. Roy P. Wilcox, amicus curiæ.

Kerwin, J., delivered the opinion of the court:

The many difficult and doubtful questions arising upon the validity of the act under consideration in this case, as well as the proper construction and administration of it, if the law be declared valid, rendered it highly important and eminently proper that the present suit be brought for the purpose of finally settling the questions involved.

The able and exhaustive presentation of the case in this court on both sides makes clear the importance of final determination of the issues tendered by the complaint and demurrer.

The defendants, charged with the administration of the law, are entitled to have the question of its validity settled, and, if valid, be advised respecting their rights and duties under it.

The act provides:

"Section 1. Section 1 of chapter 452 of the Laws of 1919 is amended to read: Chapter 452, Laws of 1919. Section 1. The service recognition board is hereby created to consist of the governor, the adjutant general and . . . a returned soldier to be appointed by the governor.

"Sec. 2. For the purpose of raising a sum sufficient to assure each soldier, sailor, marine, and nurse, including Red Cross nurses, who served in the armed forces of the United States during the war

against Germany and Austria, and who at the time of his or her induction into the service was a resident of Wisconsin, a sum not exceeding ten dollars for each month of service, with a minimum of fifty dollars, as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin, a tax of not exceeding three mills on each dollar of the assessed valuation in addition to the income surtax hereinafter mentioned is hereby levied and authorized to be included in the next tax levy: Provided that in case any county shall elect by resolution of the county board of such county, adopted prior to the levy of such tax, to raise said amount by a bond issue, authority is hereby conferred upon said county to issue such bonds and thereupon the proper authorities shall remit said levy in such county. If any person entitled to the benefits under this act be deceased before receiving such payment, then the payment accruing to said deceased shall be paid to the surviving widow, child or children, mother or dependent father, in the order herein stated, and in such case July 1, 1919, shall be deemed the date of termination of such service. The benefit of this act shall not accrue to any person for the time spent while taking training in any student army training camp, nor to any person who, although inducted into service, did civilian work at civilian pay.

"Sec. 3. All sums levied and collected by taxation or raised by the issue of bonds by any county shall be paid into the state treasury and held there as a special fund to be known as the service recognition fund and disbursed upon certificates of the service recognition board, as to the persons entitled thereto and the amount to which each person is entitled.

"Sec. 4. The service recognition board shall have complete charge and control of the general scheme of such payments. It shall adopt gen-

eral rules, uniform throughout the state, for the distribution of said fund, the ascertainment and selection of proper beneficiaries and the amounts to which beneficiaries are entitled, and for procedure, and may select or create such agents as it may deem necessary.

"Sec. 5. Subsection (5) of § 658 of the statutes is renumbered to be subsection (6) thereof.

"Sec. 6. There is added to § 658 of the statutes a new subsection to read: Sec. 658. (5) For the purpose of carrying out the provisions of chapter 452 of the Laws of 1919; but bonds issued in any county for such purpose shall not exceed in amount three mills on each dollar of the total assessed valuation of such county."

Subsection 1 of § 7 provides for a surtax in addition to the normal tax imposed by § 1087m6, Stat., to be laid upon the taxable incomes of individuals, except as otherwise provided by law, in excess of \$3,000, the surtax rate starting with  $1\frac{1}{2}$  per cent on the fourth \$1,000, and progressively increased until it reaches 6 per cent of \$12,000 or more of taxable incomes.

Subsection 2 of § 7 provides for a surtax in addition to the normal tax imposed by § 1087m6, Stat., upon the incomes of corporations, joint-stock companies, or associations, except as otherwise provided by law, beginning with 2 per cent on the first \$1,000, and progressively increasing until it reaches 6 per cent of taxable incomes in excess of \$7,000.

Section 7 further provides:

"(3) In computing the tax upon the income of corporations, joint stock companies or associations, there shall be deducted, before such tax is computed, from the net income an amount equal to six per cent of its capital stock, surplus and undivided profits.

"(4) The surtax provided for herein shall be upon the income received during the year ending December 31, 1918, and shall be returned, assessed and collected in the

same manner and at the same time as is provided for the return, assessment and payment of the normal income tax provided for under §§ 1087m1 to 1087m30, both inclusive, except as otherwise herein provided.

"(5) Deductions and exemptions as are provided by law in the assessment of the normal income tax under § 1087m6 shall be the same with respect to the assessment of this surtax, but said deductions and exemptions shall not be additional thereto and shall only be made once.

"(6) In the collection of said surtax the tax collector shall give his separate receipt therefor and there shall be no offset upon the personal property tax, and § 1087m26 shall not apply to said surtax.

"(7) The whole amount collected as surtax shall, through the same channels as other income taxes are paid, be paid into the state treasury, and § 1087m23 of the statutes shall not apply to said surtax. The amount so paid into the state treasury shall be set apart for the service recognition fund.

"(8) The service recognition board shall estimate or cause to be estimated the amount which may be collected under this section and determine as nearly as practicable the balance needed for said fund, which balance shall be raised by taxation or bond issues as provided by § 2 of this act.

"Sec. 8. There is appropriated from the service recognition fund in the state treasury to the service recognition board:

"(1) Such sums as may be necessary to pay each soldier, sailor, marine and nurse, including Red Cross nurses, who served in the armed forces of the United States during the war against Germany and Austria, and who at the time of his or her induction into the service was a resident of Wisconsin, a sum not exceeding ten dollars for each month of service, with a minimum of fifty dollars.

"(2) Such sums as may be necessary to cover the cost of administering this act."

Sections 9, 10, and 11 provide for a special election.

The important questions raised by counsel for the relator are: (1) Is the purpose of the act public within the meaning of the Constitution? (2) Does the power of Congress under the Federal Constitution to raise and support armies, and to provide and maintain a navy, exclude state legislation such as here involved? (3) Is the taxing scheme embodied in the act constitutional? (4) Does the act unlawfully delegate the taxing power of the legislature? (5) Does the law in question violate § 2, art. 6, of the Wisconsin Constitution, providing that the secretary of state shall be ex officio auditor?

I. The learned counsel for the relator contends that the money appropriated under the act in question is not for a public purpose, and does not subserve the common interest and well-being of the people of the state; that, where there is no public purpose in the sense of carrying on some part of the machinery of government, there is no power to tax; that, where the public benefit which may come from an exercise of the taxing power is merely incidental or remote, the power is lacking; that there can be no legitimate taxation unless for the uses of the government levying the tax.

These propositions are ably argued by counsel for relator, and it is true that they are among the important questions involved under this head. It may be conceded that the purpose of the law must in some sense be a public purpose in order to justify the exercise of the taxing power. Under the act, the money appropriated is awarded "as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin."

It is insisted that the services performed were performed for the United States, not for the state of Wisconsin, that the beneficiaries did not enter nor remain in the service at the instance of the state,

but of the United States, and that there is no reciprocal benefit such as lies at the foundation of constitutional taxation.

However, the benefit which flows to the United States from the services performed is also a benefit to the state. The United States is composed of the family of states which in the aggregate constitute the United States. The common defense by the nation can only be successfully maintained by co-operation of the states; hence, when a war is waged by the nation, those supporting it are performing service as well for their respective states as for the nation. *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711. In the above case, at page 652 of 19 Wis., it is said: "I think the consideration of gratitude alone to

**Tax—public  
purpose—grant-  
ing of bonus  
to soldiers.**

the soldier for his services, be he volunteer, substitute, or drafted man, will

sustain a tax for bounty money to be paid to him or his family. Certainly no stronger consideration of gratitude can possibly exist than that which arises from the hardships, privations, and dangers which attend the citizen in the military service of his country; and all nations have ever so regarded it. Who will say that the legislature may not, in consideration of such services, either directly or indirectly, or through the agency of the municipality or district to which he is credited, give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired? I certainly cannot."

Even in the dissenting opinion in the above case, this doctrine was recognized. At page 665 of 19 Wis., Justice Downer, dissenting, says: "Is the raising of money to pay bounties to volunteers who shall enlist in the service of the United States a public purpose? The whole United States had an interest in putting down the Rebellion. To put it down was a public benefit, a benefit to the Union, a benefit to each state, a benefit to every town, city,

and village. Here, then, is a public interest or benefit, in the largest sense of the term. It is sufficient to authorize a state to tax its citizens, or the United States to tax all their citizens."

This court has recognized the doctrine of the *Brodhead* Case in several subsequent cases, among others: *Curtis v. Whipple*, 24 Wis. 350, 355, 1 Am. Rep. 187; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 672, 9 Am. Rep. 622; *Lafebre v. Superior Bd. of Edu.* 81 Wis. 660, 667, 51 N. W. 952; *Lund v. Chippewa County*, 93 Wis. 640, 650, 34 L.R.A. 131, 67 N. W. 927; *State ex rel. Garrett v. Froehlich*, 118 Wis. 129, 142, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50.

While there is language in some of the decisions of this court since the *Brodhead* Case was decided, which in the abstract might seem out of harmony with the rule of that case, we feel warranted in saying that the doctrine enunciated there has never been overruled by this court. The *Brodhead* Case has been approved in other jurisdictions. The following are a few of the many cases on the subject: *Cass Twp. v. Dillon*, 16 Ohio St. 38; *Speer v. Blairsville*, 50 Pa. 150; *Coffman v. Keightley*, 24 Ind. 509; *Veazie v. China*, 50 Me. 518; *State v. Holm*, 139 Minn. 267, L.R.A. 1918C, 304, 166 N. W. 181; *People ex rel. Doscher v. Sisson*, 180 App. Div. 464, 167 N. Y. Supp. 801; *State v. McClure*, — Del. —, 105 Atl. 712; *State ex rel. Campbell v. Stewart*, 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918D, 1101; *State ex rel. Morris v. Handlin*, 38 S. D. 550, 162 N. W. 379; *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Opinion of Justices*, 175 Mass. 599, 49 L.R.A. 564, 57 N. E. 675; *Opinion of Justices*, 190 Mass. 611, 77 N. E. 820; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; *Judson, Taxn.* 2d ed. § 386.

In *Judson on Taxation*, *supra*, at page 407, it is said: "Whatever legitimately tends to inspire patri-

otic sentiments, and to enhance the respect of citizens for the institutions of their country, and incites them to contribute to its defense in time of war, has been held to be a lawful public purpose, such as will justify the exercise either of the power of taxation or of the power of eminent domain."

The doctrine is well stated in *State ex rel. Morris v. Handlin*, 38 S. D. 555, 162 N. W. 380: "Looking at the substance and general spirit of the situation, we are of the view that any assault upon the government of the United States by insurrection or invasion is also an assault against each and every state government in the Union, and that it is equally the duty of the state to assist in repelling such assaults.

"The services performed while under the draft were public and rendered in part for the benefit of this state as one of the states of the nation. It would seem from a reading of the state and Federal Constitutions that the interests and duties on the part of the state and nation in relation to the common defense, in resisting threatened invasion or insurrection, are so inseparably wound and woven together that it would make but little difference, if any, whether the members of the military organization which were to receive the benefit of the appropriation were state or national."

And in *Opinion of Justices*, 190 Mass. 611, 77 N. E. 820, *supra*, it is said: "The doubt which arises as to the rights of the states of this country in this respect grows out of our dual system of government. The Federal government alone has power to declare war, and our soldiers in the Civil War were in the military service of the United States. So far as we have been informed, since the adoption of the Federal Constitution, none of the states has assumed to grant pensions to soldiers for service in the armies of the United States. For such purposes it is generally under-

stood that our government is the Federal government; but for many purposes, and in a certain field, Massachusetts is a sovereign state, maintaining an independent government. In another relation, it is a member of the family of states, and a constituent force in the national organization. We are inclined to the opinion that in this relation it is so identified with the nation that it may treat the services of its citizens who serve to its credit in the armies of the United States as entitled to recognition from Massachusetts as a sovereign state. Each of us is a citizen of Massachusetts, as well as a citizen of the United States. Massachusetts may honor her citizens for what they do for the national government in those fields to which she sends them, as her representatives under the Constitution and laws of the United States."

The gratitude due the soldier is no idle sentiment. He who leaves his home and kindred, enters upon the trials and hardships of a soldier, risks his life upon the battlefield for the good of his country, is certainly entitled to the gratitude of all citizens.

There is another question which is important in considering the public purpose of the law. The assertion of power for a long period of time on the part of the state in adopting legislation similar to that here involved, while perhaps not controlling, is entitled to great weight on the question of public purpose. The state of Wisconsin from early times has passed statutes awarding money by taxation for purposes not more public than the purpose involved in the act under consideration. A long line of legislative enactments of the state of Wisconsin as well as similar legislative enactments in other states are collected in the briefs of counsel for the defendants, which show that not only the state of Wisconsin, but other states, have regarded such or similar purposes as that here involved, public. Such affirmance on the part of the legislatures, and

continued custom amounting to practical construction of constitutional provisions, has great weight on the question of validity of the legislation, as appears from decisions not only of this state, but of the United States Supreme Court. *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455. In the latter case the court said: "They must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

We have in the instant case not only this assertion of power on the part of the legislature, and long-continued custom, but we also have the overwhelming vote of the people at a special election held for the purpose of ratifying the levy of the tax. A review of the numerous statutes referred to in the briefs will show how liberal our legislature has been in making provisions in aid of soldiers of the Civil War.

We feel warranted in holding upon principle and authority that the purpose of the act is a public purpose within the meaning of the Constitution.

II. It is further insisted by counsel for relator that the power of Congress under the Federal Constitution to raise and support armies, and to provide and maintain a navy, excludes state legislation such as is involved in the instant case.

This contention is based upon § 8, art. 1, of the Constitution of the United States, which provides:

"The Congress shall have power:

- "(11) To declare war; . . .
- "(12) To raise and support armies; . . .
- "(13) To provide and maintain a navy;
- "(14) To make rules for the government and regulation of the land and naval forces;
- "(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
- "(16) To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; . . .

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Section 10 of article 1 of the United States Constitution provides that "(3) no state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Article 6 of the Constitution of the United States provides: "(2) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or



laws of any state to the contrary notwithstanding."

The following cases are cited in support of relator's position under this head: 12 C. J. 744; *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. ed. 529, 548; *Tarble Case*, 13 Wall. 397, 405, 20 L. ed. 597, 600; *Chinese Exclusion Case*, 130 U. S. 581, 604, 605, 32 L. ed. 1068, 1075, 9 Sup. Ct. Rep. 623; *Selective Draft Law Cases (Arver v. United States)* 245 U. S. 366, 381, 62 L. ed. 349, 354, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856; *Ferguson v. Landram*, 1 Bush, 548, 562; *People ex rel. Barlow v. Curtis*, 50 N. Y. 321, 326-328, 10 Am. Rep. 483; *Konkel v. State*, 168 Wis. 335, 339, 340, 170 N. W. 715.

In considering the arguments of counsel and cases, it may be well to refer to some general provisions involving the relative powers of the state and Federal government. It must be borne in mind that the Federal government under the Constitution has only delegated powers, and powers not delegated to it or prohibited to the states are reserved to the states or to the people of the several states. It follows, therefore, that powers not expressly or by necessary implication granted by the Constitution to the Federal government, nor prohibited by it to the states, are reserved to the states respectively, or to the people. United States Constitution, art. 10 of Amendments.

The objection raised by counsel under this head was urged in the *Brodhead Case*, 19 Wis. 624, 88 Am. Dec. 711, and disposed of as follows: "Still another objection is that the whole power of levying troops, organizing armies, fixing compensation, paying bounties, etc., resides in Congress, and that the states can take no action in the matter. This objection was urged and fully met in the *Pennsylvania decision*. If Congress has the power and may legislate to the entire exclusion of the states, which is very doubtful so far as state aid to the persons and fam-

ilies of volunteers or drafted men is concerned, still Congress has not done so."

It is clear that Wisconsin has reserved to itself a certain military policy not inconsistent with that granted to the Federal government under the United States Constitution. Under the Wisconsin Constitution the legislature "shall determine what persons shall constitute the militia of the state, and may provide for organizing and disciplining the same in such manner as shall be prescribed by law." Article 4, § 29. "The governor shall be commander in chief of the military and naval forces of the state." Article 5, § 4. "The legislature may also borrow money to repel invasion, suppress insurrection, or defend the state in time of war. . . ." Article 8, § 7. "The military shall be in strict subordination to the civil power." Article 1, § 20.

Amendments, Federal Constitution, art. 2, provides: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

It is clear, therefore, under the Federal Constitution as well as under our state Constitution, that certain military policy is reserved to the state. See Wis. Stat. 1917, §§ 21.01 to 21.68, and 22.01 to 22.08, and U. S. Comp. Stat. § 3041.

The case of *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648, involved the power given to Congress under the Federal Constitution to regulate commerce. Under a statute of the state of New York imposing penalties for failure by the master or commander of a ship to make report, it was held that the statute was valid, and that the power of Congress under the commerce clause of the Constitution was not exclusive. At page 139 of 11 Pet. the court said: "That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits

—powers of states.

—military policies of states.

as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated."

It may be conceded for the purpose of this case that the power to raise and support an Army and a Navy rests with Congress, and that the states are precluded from adopting laws which may obstruct or embarrass such exercise of power. But the Soldiers' Bonus Law under consideration, does not interfere with the exercise of the power to raise and support an army. Justice Cooley, in his work on Taxation (page 217), lays down the rule as follows: "The general government having authority to declare war and conduct warlike operations, no question can exist of its right to levy taxes in order to pay bounties for military services performed or promised. The several states may with as little question do the same."

In matters of concurrent jurisdiction between the Federal government and the states, the state has the right to legislate where such legislation is not in conflict with the act of Congress. *Bosworth v. Harp*, 154 Ky. 559, 45 L.R.A.(N.S.) 692, 157 S. W. 1084, Ann. Cas. 1915C, 277; *State v. Holm*, 139 Minn. 267, L.R.A.1918C, 304, 166 N. W. 181. This rule is recognized and asserted in *Konkel v. State*, 168 Wis. 335, 170 N. W. 715. At page 341 of 168 Wis., it is said: "The United States and the states have a concurrent right in respect to the subject-matter here under consideration. The question then arises whether or not there is

a conflict between chapter 409 and the Soldiers & Sailors' Civil Relief Act [Act March 8, 1918, chap. 20, 40 Stat. at L. 440, Comp. Stat. 1918, §§ 3078½a-3078½ss, Fed. Stat. Anno. Supp. 1918, pp. 812-825]. If there be a conflict, the act of Congress, by paragraph 2, art. 6, of the Federal Constitution, is made the supreme law of the land."

Now, it is clear from the decisions of this court, including the *Brodhead Case*, as well as numerous decisions in other courts, that there is no conflict between the legislation here under consideration <sup>—power of states to grant bonus to soldiers.</sup>

and the Constitution of the United States and laws passed in pursuance thereof. It is true, as stated in *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529, relied upon by counsel for relator, that "whenever the terms in which a power is granted to Congress, or the nature of the power, requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

The above rule, when applied to the particular facts of the case, is a correct statement of the law, and is as strong authority in favor of the relator's position as any cited by counsel. The point involved in the *Crowninshield Case* is briefly stated in the syllabus at page 122 of 4 Wheat., as follows: "Since the adoption of the Constitution of the United States a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution, art. 1, § 10, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law."

At page 340, *Konkel v. State*, 168 Wis. 335, this court said: "In certain cases it is held, where the United States and the state have concurrent powers, that the exercise of the power of the United States is exclusive, and the enactment of the

state must stand aside. *Sturges v. Crowninshield*, supra. In certain other cases it is held that the enactments of both the United States and the state may stand together if there is in fact no conflict. *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 14 Ann. Cas. 1101, 28 Sup. Ct. Rep. 485; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. In a particular case classification is often difficult, and the decisions of the Federal as well as of the state courts are not always consistent."

Counsel for the relator have brought to the attention of the court numerous acts of Congress respecting Federal military regulations. We do not feel warranted in discussing at length such legislation; it is sufficient to say that in our opinion there is nothing in the Soldiers' Bonus Law of Wisconsin conflicting with the Federal legislation. The Federal acts relied upon have reference primarily to the status of the soldier, as such, while engaged in the service of the United States. *Konkel v. State*, supra.

The Soldiers' Bonus Law, based as it is upon the interest of the state in the successful prosecution of the war, and "as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin," does not burden or interfere or conflict with the several Federal acts to which counsel refer.

As pointed out in *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, acts of Congress and state laws are in conflict

when, if one obeys the state law, he incurs the penalties of the Federal law, and, if he obey the Federal law, he incurs the penalties of the state law. As stated in *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488: "A [state] statute enacted in execution of a reserved power of the state is not to be regarded

as inconsistent with an act of Congress passed in the execution of a clear power under the [Federal] Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Without further discussion, we are satisfied that the power of Congress under the Federal Constitution to raise and support armies and to provide and maintain a navy does not exclude state legislation such as that here involved.

III. It is further urged by counsel for relator that the taxing scheme embodied in the act is unconstitutional. This contention is based upon the idea that the law is in conflict with constitutional provisions respecting special legislation, uniformity, equal distribution of burdens, and equal protection of the law; that the surtax provisions of the act in question, constitute special and class legislation. The material points raised under this head are:

Tax—bonus for soldiers—special legislation.

(a) The law is special and prohibited by § 31, art. 4, of the Constitution and § 1 of article 8, which provides that the rule of taxation shall be uniform.

(b) That the special character and inequality of the act as applied to the different forms of taxation is obnoxious to constitutional provisions, because there is no basis for the inequality of burden.

(c) That the surtax provision of the act constitutes special and class legislation.

(1) That it is imposed upon a selected class of 1918 incomes.

(2) That exemptions are unequal and unreasonable.

(3) The provisions with reference to exemptions of personal property are unequal and unreasonable, this provision is claimed discriminatory, not only as between individuals, but as to corporations.

(4) That there is also a lack of uniformity and equality between railroads and others taxed on ad valorem basis.

No time need be spent in discussing the tax imposed not exceeding 3 mills on the dollar upon the taxable property of the state. This provision is included in an amendment to the statute, and provides for a general tax upon all property to meet the burden imposed by the law not covered by the surtax and is levied for a public purpose. The 3-mill tax, therefore, cannot be open to the objection of inequality of burden, special legislation, or want of equal protection of the law.

The principal attack made by relator, as we understand the argument, is upon the surtax. The surtax provision is in effect an amendment to the Income Tax Law by increasing the tax upon incomes. If the surtax be not open to objection under the law relating to income taxation, it must be held valid. The only uniformity required under the Income Tax Law is uniformity within the class. *Income Tax Cases*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147.

The contention that the law is special and prohibited by § 31, art.

Constitutional  
law—special  
legislation—  
surtax on  
incomes to raise  
bonus for  
soldiers.

4, of the Constitution is without merit. *Income Tax Cases*, supra. Clearly, the objection cannot apply to the

surtax if classification be proper and exemptions reasonable. The argument under this head may be considered under two propositions: (1) Classification; and (2) exemptions. It is said the classification is not valid because imposed upon a selected class of 1918 incomes; hence a closed class, with no opportunity for others to grow into the class. The legislature made no classification. It was confronted with the problem of having to raise a large sum of money for distribution as soon as practicable. To secure such sum it levied the same upon the basis of incomes of 1918, the tax upon which is payable in 1920, and upon the assessed value

of real estate and personal property for the year 1919; the same being the resources of the next tax levy as specified in § 2 of the act. There was no more a classification here than there is in any case where an additional sum is added to the usual tax to be raised for any given years.

Under the decisions of this court since the passage of the Income Tax Law we have in this state two independent systems of taxation, namely, property tax and income tax, and, while the uniformity clause of the Constitution applies to property tax, it has no application to income tax. The amendment to the Constitution which is the basis of the income tax provides: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

Tax-income—  
uniformity.

The proposition which confronted the legislature in the case at bar was to provide for an emergency tax and one which would expire within the time fixed for raising the funds. The legislature, therefore, provided for raising a part of the fund by a surtax or tax added to the normal income tax. So we must test this surtax by the same principles which apply to the original Income Tax Law.

The taxation of persons progressively under the Income Tax Law may be levied by the legislature and reasonable exemptions may be provided. *Income Tax Cases*, 148 Wis. at page 507. As said in that case: "It clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state Constitution; both may be levied . . . because the Constitution says so."

The court further said, at page 504 of 148 Wis.: "With the political or economic policy or expediency of the law we have nothing to do."

As has been repeatedly decided by this court, the legislature has a

very broad discretion under the Income Tax Law, and as regards classification it is enough that there be no discrimination in favor of one as against another of the same class, and that the method of assessment and collection of tax is not inconsistent with natural justice. *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; *Income Tax Cases*, supra; *State ex rel. Bernhard Stern & Sons v. Bodden*, 165 Wis. 75, 160 N. W. 1077; *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission*, 161 Wis. 114, 152 N. W. 848; *Northwestern Mut. L. Ins. Co. v. State*, 163 Wis. 489, 155 N. W. 609, 158 N. W. 328.

It is also insisted by counsel for relator that the exemptions are unequal and discriminatory in many respects, and particularly as between persons and corporations, and also as between corporations. There may have been within the mind of the legislature valid reasons for the exemptions made and which are complained of by the relator, and, unless we can say that the exemptions are manifestly unjust, arbitrary, or whimsical, courts have

Courts—power over Tax Law.

no power to interfere with the legislative enactment merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law. We must presume that in laying the tax under the law in question the legislature surveyed the whole field in determining upon a reasonable apportionment of tax burden. And the legislature had a right to take into account, in levying the burdens, who was best able to pay. *Income Tax Cases*, supra.

In regard to the broad discretion of the legislature we cannot do better than quote from *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, at page 642, 108 N. W. 581: "Under our Constitution, it must be remembered there is the amplest power on the part of the legislature to exempt an entire class of property

from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto of substantially different legislative treatment.

"The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it, other than at the farthest one might go without transcending all reason."

What constitutes proper classification has been repeatedly considered by this court, and further discussion is unnecessary. *State ex rel. Risch v. Policemen's Pension Fund*, 121 Wis. 44, 54, 98 N. W. 954; *Johnson v. Milwaukee*, 88 Wis. 383, 390, 60 N. W. 270; *Wagner v. Milwaukee County*, 112 Wis. 601, 607, 88 N. W. 577; *Bingham v. Milwaukee*, 127 Wis. 344, 347, 106 N. W. 1071; *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394; *Ladd v. Minneapolis, St. P. & S. Ste. M. R. Co.* 142 Wis. 165, 125 N. W. 468; *Maercker v. Milwaukee*, 151 Wis. 324, 328, L.R.A. 1915F, 1196, 139 N. W. 199, Ann. Cas. 1914B, 199. The classification here is in conformity with the rule of the foregoing decisions. *Income Tax Cases*, supra.

There is no discrimination within the class. The exemptions in each class apply to every member of the class, and it is no objection that the exemptions in one class are different from those in another where there is proper classification.

The fact that individuals pay on the first \$4,000 of income, while cor-

—income—  
difference in  
exemptions.

porations, joint stock companies, and associations pay on the first \$1,000, does not make the exemption arbitrary or whimsical, because there may have been good grounds for such difference in the mind of the legislature, after a review of the whole field. The legislature obviously sought to make a fair distribution of burdens between the two classes by providing that corporations, joint stock companies, and associations should be allowed to deduct before the tax is computed, from net income, an amount equal to 6 per cent of its capital stock, surplus, and undivided profits. It is well settled that putting corporations in one class and individuals in another is proper classification. This is decided by this court in *Income Tax Cases*, 148 Wis. 458, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, where it is held that there is a substantial difference in situations between individuals and corporations, which justifies the classification. A corporation is an artificial creation of the state, endowed with franchises and privileges of many kinds which the individual has not. *Northwestern Mut. L. Ins. Co. v. State*, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

—discrimination between corporations and individuals.

Counsel makes the point that since the general law provides that the income taxpayers should be entitled to an offset to the extent of their personal property, and the present act denies the offset against the surtax levied for the particular purpose of the act, the present act is objectionable and discriminatory

—refusal to permit offset of personal property.

and a denial of due process. We do not regard this objection tenable. Such offset was sustained by this court in the *Income Tax Cases*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, and the same objections which are raised here could have been

raised with equal force there. Moreover, what we have heretofore said we think sufficient on this subject.

It is further insisted that the provision allowing corporations to deduct 6 per cent of their capital stock, surplus, and undivided profits, when applied to foreign corporations and companies who derive large incomes from Wisconsin business, though perhaps having but little capital invested in Wisconsin, is discriminatory, because it is applicable without exception or qualification to the income of corporations. A foreign corporation, therefore, although having a comparatively large income from Wisconsin business, with but a small part of its capital invested in Wisconsin, might, by deducting 6 per cent of its entire capital, surplus, and undivided profits, wipe out its entire surtax.

We do not decide whether the section as so construed would be discriminatory or not. We do not think the section should be so construed. Section 7 is in effect an amendment of § 1087m6, Wis. Stat. which is a part of the Income Tax Law. The section, as amended, therefore, must be construed as a part of the Income Tax Act. The following is a part of subdivision 3, § 1087m2: "With respect to other income, persons engaged in business within and without the state shall be taxed only upon such income as is derived from business transacted and property located within the state, which may be determined by an allocation and separate accounting for such income when made in form and manner prescribed by the Tax Commission, but otherwise shall be determined in the manner specified in subd. (e) of subsec. 7 of § 1770b of the statutes, as far as applicable."

Taking the law as a whole, it must be fairly construed to mean that in determining the basis upon which the 6 per cent deduction is to be computed, the capital stock, surplus, and undivided profits must be

allocated upon the same basis as the allocation of the income tax is to be made. So construed, all corporations, foreign and domestic, are treated alike, and there is no discrimination in favor of or against foreign corporations. The taxable income is derived from business and

—deduction of percentage of capital—effect on foreign corporations.

property located within the state, and in computing the deduction the basis of the deduction should be made the property out of which the income is earned. This construction is not only just and reasonable, but carries out the legislative intent and avoids the unreasonable conclusion that the legislature intended to permit foreign corporations in many instances to be wholly exempted from the tax.

Point is also made by relator that there is lack of uniformity and inequality of treatment as between railroads and others taxed on the ad valorem basis. The question discussed under this head refers to detail in the administration of the taxing power, and the points urged do not seem to affect the validity of the act in question. We think this quite clear from the cases cited by relator. *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557, and *Minneapolis, St. P. & S. Ste. M. R. Co. v. Douglas County*, 159 Wis. 408, 150 N. W. 422, Ann. Cas. 1916E, 1199.

What has been said heretofore we think sufficient to show that the question of uniformity and inequality is not involved in the point raised.

It is further urged that the right granted to county boards to elect to issue bonds is an unlawful delegation of legislative power, and violates the constitutional provision that the rule of taxation shall be uniform. We do not think this position well taken. The right to levy the mill tax is not delegated to counties. The levy is a legislative act, and the right granted to the

county to issue bonds is a privilege which it may exercise at its option in making provision for the payment of the tax, and there-

Legislation—delegation of power—authority to issue bonds.

by the amount of the levy may be remitted. There is no delegation of power to the county respecting the levy. The tax under the present act is levied by the legislature, and the bond issue is a mere detail regarding payment. The payment is administrative, not legislative. Under this head counsel for relator relies upon *State ex rel. Carey v. Ballard*, 158 Wis. 251, 148 N. W. 1090, but it will be seen that in that case the legislative power to levy the tax under the act there involved was delegated to a group of freeholders of the county, so there was clearly a delegation of legislative power to levy a tax; hence the case is not in point here. We do not understand that the provision with reference to the issue of bonds was intended to relieve the counties so electing to issue bonds from paying their taxes at the same time and in the same manner as counties that had not issued bonds are required to do, or to spread the period of payment beyond the time for the payment and collection of taxes.

IV. It is further contended by relator that the duties conferred upon the recognition board provided in the act were a delegation of legislative power. We regard this contention untenable. The duties of the recognition board are purely ministerial, and under repeated de-

—conferring ministerial duties on board.

cisions of this court cannot be regarded as a delegation of legislative power. *Re Revisor of Statutes*, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176; *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, 129 N. W. 605; *State ex rel. Buell v. Frear*, 146 Wis. 291, 34 L.R.A. (N.S.) 480, 131 N. W. 832; *Chippewa & F. Improv. Co. v. Railroad Commission*, 164 Wis. 105, 159 N. W. 739; *State v. Lange Canning Co.* 164 Wis. 228, 157 N. W. 777,

(— Wis. —, 175 N. W. 589.)

160 N. W. 57; State ex rel. Owen v. Stevenson, 164 Wis. 569, 161 N. W. 1.

Various provisions of the statute recognize this rule. In Income Tax Cases, 148 Wis. 511, L.R.A.1915B, 569, 184 N. W. 690, Ann. Cas. 1913A, 1147, it is said: "It is not a delegation of legislative power to vest in the state Tax Commission by law the power of appointing assessors of incomes and fixing their salaries."

In the instant case the legislature has determined the rule of law respecting the duties of the recognition board, and the determination of the facts is vested in the board. 1 Cooley, Taxn. 8d ed. 99, 100; Chicago & N. W. R. Co. v. State, 128 Wis. 533, 108 N. W. 557; State ex rel. Carey v. Ballard, 158 Wis. 251, 148 N. W. 1090.

In view of the various statutes of this state touching this subject and the decisions of this court, we regard discussion of the subject unnecessary.

V. It is also insisted that the law in question violates § 2 of article 6 of the Constitution, which provides that the secretary of state shall be ex officio auditor. The contention under this head is, in effect, that the power of audit is taken from the secretary of state and given to the service recognition board. We do not regard this contention tenable. The powers given to the service recognition board are of an administrative character. State ex rel. Rosenheim v. Frear, 138 Wis. 173, 119 N. W. 894.

It is true that the law gives the service recognition board charge and control of the general scheme of payments, and is authorized to adopt rules uniform throughout the state for the distribution of the funds and the ascertainment and selection of proper beneficiaries and the amounts to which beneficiaries are entitled. But in the last analysis the secretary of state shall audit and pass upon all

matters of which, under the Constitution, he is ex officio auditor. We are satisfied that the law does not interfere with the constitutional authority of the secretary of state as auditor. United States v. Sanborn, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812; Rinder v. Madison, 163 Wis. 525, 158 N. W. 302; State ex rel. Langer v. Kositzky, 38 N. D. 616, L.R.A.1918D, 237, 166 N. W. 534.

It is further insisted by relator, but we think not seriously, that the provision of submission to the people of the question involved under the law as to whether the tax should be levied renders the act unconstitutional. This court has held that the legislature may make the taking effect of the law dependent upon a vote of the people. *Legislature—power to refer statute to people.* Smith v. Janesville, 26 Wis. 291; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

In closing this opinion we deem it proper to refer to a misfit of certain administrative details of the act. The proceeds of the property tax will be returned to the state treasurer along with the general property taxes not later than the second Monday of March. The income tax is not required to be returned to the state treasurer until the 1st day of May. Section 1121. The result will be that a portion of the money will be available for the payment of the bonuses at least six weeks before all is available therefor. Either all must wait until the 1st of May, or some will be paid much earlier than others. Either solution may result in an unfortunate misunderstanding, if not dissatisfaction. We see no reason why the legislature could not have required the income tax to be returned with the general property tax, and its failure to do so was no doubt the result of oversight. However, if the various county treasurers co-operate in the spirit prompting the enactment of the law, the administrative

Secretary of state—interference with constitutional powers as auditor.



hitch pointed out may be avoided. While they are not required under the law to make return of the income tax until the 1st day of May, they are not obliged to withhold such tax until that date, but are at liberty to remit the same as soon as it comes into their possession. We have no doubt that the county treasurers will cheerfully co-operate to the end that the money avail-

able for the payment of these bonuses will be seasonably transmitted to the state treasurer, enabling him to make prompt payment, and thus avoid resulting annoyance and misunderstanding.

It follows that the demurrer to the complaint must be sustained.

The demurrer to the complaint is sustained, and the action dismissed.

## ANNOTATION.

### Constitutionality of statutes providing for bounty or pension for soldiers.

#### I. Scope, 1636.

#### II. Bounties offered as an inducement to volunteers:

##### a. In general, 1636.

##### b. Statutes providing for ratification or reimbursement, 1640.

#### III. Bounties and pensions for past services:

##### a. In general; state statutes, 1644.

#### I. Scope.

The present annotation includes, in general, only those cases which present the question of the constitutionality of military pension and bounty laws, and does not include that large class of cases assuming, apparently, the constitutionality of these laws, and involving merely their construction.

The cases cited in the annotation, except those under III. b, *infra*, deal with state statutes, usually with those authorizing counties, towns, or cities to pay bounties. The power of Congress in this regard seems seldom to have been disputed. With a few exceptions, the cases are, of course, those arising out of the Civil War.

#### II. Bounties offered as an inducement to volunteers.

##### a. In general.

With one or two exceptions, the authorities appear to be agreed that the expenditure of money by a state, or municipal corporation, for bounties to induce men to enter the military forces of the nation in time of war, is for a public purpose, and therefore may be authorized by the state legislature; that legislation directed to this end

#### III.—continued.

##### b. Power of Congress, 1651.

#### IV. Reimbursement to drafted men for commutation money or expense of procuring substitute, 1652.

#### V. Delegation of power to counties, towns, etc., 1656.

#### VI. Repeal of bounty or pension laws as affecting vested rights, 1657.

does not unconstitutionally interfere with the war powers of Congress, and, in case the bounty is offered to relieve the community from a pending draft, is not unconstitutional as unjustly taxing those not subject to the draft to discharge the personal obligations of those within the draft, or as unlawfully taxing a nonresident property owner. In addition to the cases cited under II. b, *infra*, which in effect support the same doctrine, but hold, further, that the legislature may ratify or legalize action by towns, counties, etc., in offering bounties to induce enlistments, or may authorize municipalities to reimburse private loans to them for this purpose, the view stated above, sustaining the constitutionality of statutes providing for payment of bounties to induce voluntary enlistment in the military forces of the nation in time of war, is supported by the following authorities:

**Illinois.** — *Taylor v. Thompson* (1866) 42 Ill. 9; *Henderson v. Lagow* (1866) 42 Ill. 360; *Briscoe v. Allison* (1867) 43 Ill. 291; *Misner v. Bullard* (1867) 43 Ill. 470; *Stebbins v. Leaman* (1868) 47 Ill. 352.

**Maine.** — *Winchester v. Corinna* (1866) 55 Me. 9.

**Maryland.**—*State v. Baltimore* (1879) 52 Md. 398.

**Massachusetts.**—*Freeland v. Hastings* (1865) 10 Allen, 570 (approving doctrine); *Mead v. Acton* (1885) 139 Mass. 341, 1 N. E. 413 (recognizing rule).

**Minnesota.**—*Comer v. Folsom* (1868) 13 Minn. 219, Gil. 205; *Wilson v. Buckman* (1868) 13 Minn. 441, Gil. 404.

**New Hampshire.**—*Crowell v. Hopkinton* (1863) 45 N. H. 9 (constitutionality implied); *Shackford v. Newington* (1866) 46 N. H. 415; *Spaulding v. Andover* (1873) 54 N. H. 38. (But see IV. *infra*.)

**New Jersey.**—*State v. Demarest* (1866) 32 N. J. L. 528.

**New York.**—*Powers v. Shepard* (1867) 49 Barb. 418, affirmed in (1872) 48 N. Y. 540 (constitutionality implied); see also *People ex rel. Peake v. Columbia County* (1870) 43 N. Y. 130 (assuming validity).

**Ohio.**—*Cass Twp. v. Dillon* (1864) 16 Ohio St. 38, approved in *State ex rel. Anderson v. Harris* (1867) 17 Ohio St. 608; *State ex rel. Cline v. Wilkesville Twp.* (1870) 20 Ohio St. 288.

**Pennsylvania.**—*Speer v. Blairsville* (1865) 50 Pa. 150, approved in *Weister v. Hade* (1866) 52 Pa. 474; *Ahl v. Gleim* (1866) 52 Pa. 432; *Grim v. Weissenberg School Dist.* (1868) 57 Pa. 433, 98 Am. Dec. 237 (approving rule).

**Vermont.**—*Butler v. Putney* (1871) 43 Vt. 481 (rule conceded).

**West Virginia.**—*Woodall v. Darst* (1912) 71 W. Va. 350, 44 L.R.A. (N.S.) 83, 77 S. E. 264, 80 S. E. 367, Ann. Cas. 1914B, 1278 (recognizing rule).

**Wisconsin.**—*Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711; *Dinehart v. La Fayette* (1865) 19 Wis. 677; *State ex rel. McCurdy v. Tappan* (1872) 29 Wis. 664, 9 Am. Rep. 622 (approving rule).

Regarding the power of the legislature to authorize the raising of funds by taxation to pay bounties, or to reimburse towns or individuals for contributions to a common fund used to pay bounties to volunteers, to relieve communities from an impending

draft, the court, in *Freeland v. Hastings* (1865) 10 Allen (Mass.) 570, said: "It certainly cannot be doubted that the duty of procuring volunteers to enlist in the armies of the United States, under calls from the President, did not rest on any particular class of individuals in the community. It is true that those who were liable to draft, in the event of a deficiency of volunteers, had a more immediate interest in increasing the number of those who should voluntarily enter into the service; but no greater or heavier obligation or duty rested on them to procure volunteers than upon any other class of individuals. The war being waged by the constituted authorities in compliance with the will of the majority of the people, as ascertained and declared according to the forms prescribed in the Constitution, the duty of contributing to its support and of adopting means to supply the requisite number of soldiers to carry it on to a successful issue became obligatory upon all, as well those who from age or other causes were not liable to the personal performance of military duty, as on those who in a certain contingency might, under the laws of Congress, be called upon to do a soldier's duty in the field. Neither the officers of the state nor the citizens thereof could refuse their aid or withhold their support from all legal and constitutional measures deemed to be necessary by the government of the United States for the prosecution of the war. Every member of society became bound to bear, according to his position and means, a fair proportion of the burdens incident to the defense and support of the government. It was on this ground that it has been heretofore held by this court that the legislature of the commonwealth has the constitutional power to levy a tax on all the inhabitants of the commonwealth for the payment of bounties to soldiers, and the reimbursement of towns which had voluntarily advanced such bounties without previous legislative authority."

A statute authorizing towns to levy a tax to pay a bounty to persons who should thereafter enlist was held con-

stitutional in *Taylor v. Thompson* (1866) 42 Ill. 9, as against the objection that the tax was not for "corporate purposes," for which towns were authorized by the Constitution to levy taxes; and this conclusion was held not affected by the fact that some liable to the tax might not be directly benefited thereby, because they were nonresidents, or were exempt from the draft which the statute sought to avoid.

To a similar effect, sustaining the constitutionality of the statute as applied to counties, is *Henderson v. Lagow* (1866) 42 Ill. 360. The validity of the statute is also upheld in *Briscoe v. Allison* (1867) 43 Ill. 291, *Misner v. Bullard* (1867) 43 Ill. 470, and *Stebbins v. Leaman* (1868) 47 Ill. 352.

Regarding the Maryland Bounty Act of 1864, which authorized the governor to offer a bounty of \$300 to every person who should enlist before a certain date, to serve, as part of the quota of the state, in the armies of the United States, the bounty being payable by the state treasurer on lists of volunteers furnished by the county and municipal authorities, the court, in *State v. Baltimore* (1879) 52 Md. 398, said: "It is now too well settled by authority to admit of doubt that the legislature had the power to pass a Bounty Act like this, appropriating money from the treasury, for the purpose of relieving the citizens of the state from the burden of an involuntary draft, and it could have granted permission to the counties and the city of Baltimore to raise money by taxation for that purpose. . . . This law then, in effect, is nothing more than an appropriation of various sums of money for the relief and for the benefit of the people of the several counties and the city of Baltimore, respectively."

And it was held in *State v. Baltimore* (Md.) *supra*, that it was competent for the legislature to impose upon the counties and the city of Baltimore liability to the state for any misapplication of the funds by their officers in the payment of the bounty.

That it is competent for the state to provide for payment of bounties to

encourage enlistments in the military forces of the United States, so as to shield the citizens of the state from the draft, is implied in *Powers v. Shepard* (1867) 49 Barb. (N. Y.) 418, affirmed in (1872) 43 N. Y. 540, which sustained the validity of a provision of a statute forbidding the payment of bounties over a prescribed amount.

A statute authorizing municipal authorities to borrow money and levy taxes to pay bounties to those who would enlist in the Federal army, and thus save the municipality from a draft, was held in *Speer v. Blairsville* (1865) 80 Pa. 150, not obnoxious to the Federal Constitution as infringing on the powers of Congress to raise and support armies.

So also, in *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711, it was held that a statute authorizing cities to levy a tax to pay bounties to volunteers in the Union Army was not subject to the objection that the entire power of raising troops, organizing armies, fixing compensation, etc., resided in Congress, since, if Congress had the power to legislate to the entire exclusion of the state it had not exercised such power.

It was held also in *Brodhead v. Milwaukee* (Wis.) *supra*, that the statute was not subject to the objection that a city ward which had raised, or nearly raised, its quota, would be unjustly taxed to pay bounties to volunteers in other wards of the city which were further in arrears, the legislature not having followed the same system of division as Congress, by which quotas were apportioned to the various wards.

Nor was the statute unconstitutional as requiring payment of a tax by those who had no interest in the question, on the theory that the duty of service in the military forces was personal, and confined to the class named in the conscription. *Ibid*.

So, the levy of a tax by a county on one about forty-five years of age and therefore not subject to draft, to raise money for payment of bounties to volunteers, in order to enable the county to avoid a pending draft, was held constitutional in *State v. Demarest* (1866) 32 N. J. L. 528. In reply to

the objection that the statutes authorizing the county to levy such a tax were unconstitutional, on the ground that they took private property for private use, the court said: "The taxes authorized by the laws in question were to be assessed to fill up the ranks of the Army of the United States. All alike, whether liable to military duty or not, were interested in the maintenance of the government, to support which the armies were raised. The state of New Jersey, as an organized political community, was interested in supporting the government and strengthening its armies, and when she in her sovereign capacity authorized a tax to be assessed to pay men voluntarily to enter those armies, such tax was for a public and not a private purpose. Besides, such tax was for a public purpose, for the very reason that the intent and effect of raising money thereby was to save a general conscription of those liable to military duty. . . . It is sufficient for the court to say that the taxes authorized by the statutes now under consideration were to raise money to be expended for the protection of the person, property, and rights of the prosecutor, and of every other citizen of the state. This was for a public purpose. The legislature had full power and authority under the Constitution to decide that the public good required that a general conscription should be avoided by the raising of moneys to pay bounties to volunteers. A draft, enforced by the officers of the general government, might have been detrimental to all classes and to the best interests of society. A tax upon all, to save a class from a draft, was no more a tax for a private purpose than a tax levied to promote common-school education. School taxes are levied upon all, for the benefit, in one sense, of a class. But all the citizens are interested in having an intelligent rather than an ignorant population."

The distinction, as regards the constitutionality of statutes providing for bounties to soldiers, between those cases where the bounty was provided to encourage enlistments, and where

it was provided for those who had already enlisted, is recognized in *Woodall v. Darst* (1912) 71 W. Va. 350, 44 L.R.A.(N.S.) 83, 77 S. E. 264, Ann. Cas. 1914B, 1278, in which the court said: "During the Civil War, the legislatures of a number of the Northern states passed acts authorizing towns to raise funds by taxation, for the payment of bounties to volunteers. If those acts encouraged enlistment, and thus relieved the town from an impending draft, they were held to be constitutional, as being for a public purpose. . . . But when the acts authorized the raising of a fund by taxation to pay bounties to soldiers who had previously volunteered, or to repay money to persons who had hired substitutes, they were held by the courts to be unconstitutional, on the grounds that they amounted to an appropriation of public funds to a purpose that was purely private, and that the legislature was without power to make private donations out of the public funds."

However, in *Ferguson v. Landram* (1867) 1 Bush (Ky.) 548, later appeal (1868) 5 Bush, 230, 96 Am. Dec. 350, statutes authorizing counties to raise funds by taxation, to avoid the Federal draft for soldiers in the Civil War, were held unconstitutional as in violation of the war powers of Congress, and as class legislation. It will be observed that the statutes were enacted for the purpose of raising funds to reimburse loans which had been made, in one instance to avoid the draft, and in another instance, where the draft had taken place, to pay those drafted a certain sum. The decision, however, is placed on the broad grounds above indicated, the court discussing and refusing to follow the decisions in Illinois, Pennsylvania, and Connecticut, which had sustained the constitutionality of bounty statutes. On the later appeal, the court referred to the first appeal as deciding that, "the Federal government having gone directly to the people as a government, and not calling on the different states, as it might have done, to furnish their proper quota, that the state had no constitutional power to levy an in-

voluntary tax on the citizens of the various counties to give to the Federal soldier an additional compensation, nor had it the power to levy an involuntary tax on those not subject to military duty, to aid those who were to escape their responsibility, by way of inducing volunteers for such additional compensation."

*b. Statutes providing for ratification or reimbursement.*

Statutes authorizing counties, towns, etc., to raise money to reimburse those who, on the faith of the public credit, and with expectation of repayment, advanced money toward a public fund with which to procure enlistments, have been sustained on the ground that there was a moral obligation for reimbursement, that the money was expended in the first instance for a public purpose, and that the legislature might ratify action or provide for reimbursement where it could originally have authorized the expenditure. However, if the money was contributed purely as a gift, without expectation of reimbursement, a statute providing for repayment has been held invalid, since it did not authorize an expenditure for a public purpose. And it has been held, also, that the legislature cannot declare the debt and compel a town or township to pay it.

If it is competent for the legislature to confer authority on the local subdivisions of the state for the payment of bounties to obtain volunteers for military service, it is equally competent for it to legalize what might have been done and to authorize the reimbursement of money already paid or pledged for bounties to volunteers. *Cass Twp. v. Dillon* (1864) 16 Ohio St. 38.

There is no difference in principle between the precedent authority by the legislature to local authorities for payment of funds raised by taxation for a public purpose, as for bounties to volunteers, and a subsequent authorization of reimbursement for the same thing. *Hilbish v. Catherman* (1870) 64 Pa. 154.

And in *Wilson v. Buckman* (1868) 13 Minn. 441, Gil. 404, it was held that,

the legislature having power to authorize the levy and collection of a tax by a town to pay bounties to those who would volunteer, if the tax were levied without legal authority, it was in the power of the legislature to ratify and legalize it.

The legislature may legalize acts of county authorities by which bounties were paid to obtain volunteers. *Vermillion County v. Hammond* (1882) 83 Ind. 453; *Sithin v. Shelby County* (1879) 66 Ind. 109.

The legislature may ratify and confirm the action of county authorities who, without express authority of law, have incurred an indebtedness to pay bounties to volunteers, to relieve the county from a pending draft, and may authorize the issuance of bonds and levy of taxes by the county to pay such indebtedness. *State v. Demarest* (1866) 32 N. J. L. 528.

It was held in *Winchester v. Corinna* (1866) 55 Me. 9, that the legislature might legalize action of town authorities in voting bounties to those who would volunteer, although at the time of such action the town not only did not have power to vote such a bounty, but was expressly prohibited by statute from doing so. The court said: "We cannot doubt that where, as in this case, the action of the town was in relation entirely to public matters of high national concern, and did not in any way touch or affect vested rights or private interests, as distinct from public exigencies, the legislature might ratify and make valid whatever it might constitutionally authorize before action."

The legislature has power to ratify and legalize a bond issued by local authorities to secure a voluntary enlistment. *Glenn v. Ayr Twp.* (1874) 31 Phila. Leg. Int. (Pa.) 316.

And where towns were, by law, allowed to pay a bounty to soldiers, but were not authorized to bind themselves by the issuance of bonds to procure enlistments, it was held in *Kunkle v. Franklin* (1868) 18 Minn. 127, Gil. 119, 97 Am. Dec. 226, that the legislature might legalize the issuance by towns of bonds given to procure enlistments during the Civil War. To the same

effect is *Comer v. Folsom* (1868) 13 Minn. 219, Gil. 205.

It was held in *Freeland v. Hastings* (1865) 10 Allen (Mass.) 570, that it was competent for the legislature to authorize towns to raise money by taxation to reimburse individuals who had contributed to a common fund, raised by the towns to fill their quotas under the call of the Federal authorities, and so relieve them from a threatened draft.

The doctrine that the legislature may constitutionally authorize the raising of money by taxation to reimburse towns or individuals who have contributed to a public fund, which is used to induce enlistments in the Army under a call of the Federal authorities, is recognized also in *Mead v. Acton* (1885) 139 Mass. 341, 1 N. E. 413, since the money so raised is for a public purpose.

The Massachusetts statute to equalize bounties, enacted in 1863, directing an apportionment and assessment of a tax among the several cities and counties of the state to reimburse them for bounties paid to volunteers, was held constitutional in *Lowell v. Oliver* (1864) 8 Allen (Mass.) 247, as against the objection that the tax was not equal, just, and proportional, in that the disbursement of the funds raised thereunder was not according to the valuation of the property or population of the several towns, but according to the number of soldiers enlisted as volunteers from each town, and that the several towns did not receive the same sum for each enrolled soldier furnished by them, but only the amount of bounty actually paid each soldier, not exceeding \$100. The court said that, conceding this to be a true statement of the mode of distribution of the proceeds of the tax, "we are at a loss to see in what way this alleged inequality of distribution affects the validity of the tax itself. We know of no provision, either in the Constitution or laws, which requires payments to be made from the public treasury according to any principle of apportionment or equality. If the tax is duly apportioned and levied, and the purpose for which the money is raised is

within the purview of the objects enumerated in the Constitution, for which the funds in the treasury may be drawn out and expended, there is certainly no violation of any restriction, either express or implied, on the power of the legislature."

It was held also that the statute authorized a disposition of money for a public service, within the meaning of a provision of the Constitution authorizing the expenditure of money raised by taxes "for the public service, in the necessary defense and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof." This constitutional provision was held to relate not merely to the reciprocal duties between the state government and the citizens of the state, but to have reference also to the allegiance owed by the citizens of the state to the Federal government. *Ibid.*

Regarding the point that the statute was unlawful because it authorized reimbursement of bounties paid, and did not relate to prospective payments of bounties, the court, in *Lowell v. Oliver* (Mass.) *supra*, said: "Nor do we see any force in the suggestion that the appropriation of the money raised by the tax in question was unlawful or unauthorized because it was designed to reimburse payments already made by towns and cities, and not for the purpose of meeting present exigencies or discharging prospective liabilities of the commonwealth. If the object of the appropriation is a legitimate one, it is quite immaterial whether the money has been actually expended and the tax is laid to pay a debt previously incurred, or for the reimbursement of sums advanced by third persons for a public object, or whether it is to anticipate expenditures which the future requirements of the public service may render expedient or necessary. We can see no valid distinction in principle between a right to raise money for a specific object yet to be accomplished, and a right to raise it to defray the expense of the same object after it has been attained."

Where the limit authorized by law

for the payment of bounties to obtain volunteers was \$400, but volunteers could not be obtained for less than \$550, and the excess was raised by private subscription, with the general approbation of the citizens of the township, expressed at public meetings, and in concurrence with the action of the township authorities to the limit of the powers conferred on them by law, it was held that the legislature might direct the levy of a tax by the township to reimburse those who subscribed, although the subscription was without any agreement or understanding, or even without a general expectation, that a law would be procured for repayment of the subscriptions. *Hilbish v. Catherman* (1870) 64 Pa. 154. The court distinguished prior decisions in that state to the effect that advances for bounties could only be refunded where they were made on the faith of the public credit under contract relations, on the ground that the general bounty system of the state required such previous consent or agreement by the local authorities, whereas the particular act in question did not make such requirement. The court said: "We have not decided in any case that an advance of money, made for the actual benefit of the public, cannot be compensated, though made at the time without legal authority, or an expectation of its being repaid. It is not the hope or expectation of repayment which constitutes the ground of authority to refund; but the public benefit received. That it is which creates the moral obligation—that imperfect but conscientious duty, which constitutes a sufficient consideration either for the public or a private agreement to pay for the benefit conferred."

The legislature has power to authorize taxation by a town to refund money advanced by individuals to obtain volunteers, and thus relieve the town from a draft, where the advance is made on the faith that the money will be refunded. *Johnson v. Campbell* (1868) 49 Ill. 316. To a similar effect, see *State v. Sullivan* (1867) 43 Ill. 412.

The Ohio Statute of 1866, authorizing county commissioners to levy a

tax to raise money for the payment of bounties pledged to volunteers at the time of their enlistment, was held in *State ex rel. Anderson v. Harris* (1867) 17 Ohio St. 608, not in conflict with a constitutional provision that the legislature should have no power to pass retroactive laws.

A statute legalizing previous payments, by counties and municipal authorities, of bounties to volunteers in the Army or Navy of the United States, was held in *Coffman v. Keightley* (1865) 24 Ind. 509, not unconstitutional as in conflict with the war powers of Congress. To a similar effect is *Miami County v. Bearss* (1865) 25 Ind. 110.

In the absence of a constitutional provision forbidding retroactive laws, it was held in *Grim v. Weissenberg School Dist.* (1868) 57 Pa. 433, 98 Am. Dec. 237, that a statute legalizing the imposition of taxes by a township to pay bounties was not subject to the objection that it unconstitutionally impaired a taxpayer's vested right to recover money which he had been compelled to pay without authority of law.

The constitutionality of a statute authorizing the school directors of a township to levy a tax to reimburse those who had made advances to relieve the township from a draft, with the understanding that the money paid would be refunded, is recognized in *Heiser v. Casselberry* (1866) 6 Phila. (Pa.) 194, although it was held that the facts alleged did not bring the case within the statute.

The doctrine that the legislature may constitutionally authorize or ratify acts of local municipal authorities for the raising of funds to reimburse those who advanced bounty money to procure volunteers, with the understanding that such money should be refunded, is supported also by *Micheltree v. Sweezy* (1871) 70 Pa. 278; *Weister v. Hade* (1866) 52 Pa. 474, and *Felty v. Uhler* (1873) 10 Phila. (Pa.) 512.

The understanding or agreement must, however, be with the local authorities, and not merely among the parties themselves. *West Donegal Twp. v. Oldweiler* (1867) 55 Pa. 257.

In *Washington County v. Berwick* (1867) 56 Pa. 466, and *Brecknock School Dist. v. Frankhouser* (1868) 58 Pa. 380, the Pennsylvania Statute of 1866, directing payment of bounties to re-enlisted veterans by the local authorities of such counties, cities, and townships as received credit for the re-enlistments, was construed as applying only to those veterans who were induced to re-enlist on the faith of the offer of a bounty. And the court, in the former case was of the opinion that any other interpretation of the statute would render it unconstitutional.

The legislature cannot constitutionally authorize the levy of a tax to raise money to reimburse an association for funds paid voluntarily by it to aid its own members to avoid a draft. *Tyson v. School Directors* (1865) 51 Pa. 9. It is, however, implied that the legislature may authorize reimbursement of an association for advances to a township to aid the township in enabling its people to avoid a draft, with the understanding that the sums advanced would be repaid.

Although holding that the action of a town in voting to reimburse individuals who had subscribed to raise money for volunteers not as a loan, but as a gift, without expectation of repayment, was without legislative sanction or confirmation, the court in *Perkins v. Milford* (1871) 59 Me. 315, held also that, even if by a forced construction of any of the confirmation statutes the case could be brought within them, the payment would be for a private purpose and in violation of the Constitution.

And a statute directing the levy of a tax by township supervisors to pay a note which the statute declared a legal debt against the township, and which had been given to raise funds for bounties to enable a town to meet its quota of soldiers, with the expectation that the town would assume the obligation, was held in *People ex rel. Gale v. Onondaga* (1867) 16 Mich. 254, to violate a constitutional provision

prohibiting the legislature from auditing or allowing private claims.

It was held also in *State ex rel. McCurdy v. Tappan* (1872) 29 Wis. 664, 9 Am. Rep. 622, that a statute was unconstitutional which made it the duty of a town to levy taxes to reimburse the treasurer of a city the amount paid by the latter to a volunteer as bounty, and for expenses and costs incurred in an unsuccessful attempt by such treasurer to collect the same from the town by litigation. After the payment of the bounty by the treasurer of the city he ascertained, so it was contended, that the volunteer was credited on the quota of the town, which had the same name as the city. The amount which the statute directed the town to raise by taxation was to be determined by a certain court. But it was held that the latter acted as a mere referee, and that the statute was invalid as an attempt by the legislature to exercise judicial powers, and as in violation of constitutional provisions that the rule of taxation should be uniform and that the legislature should establish but one system of town and county government which should be as nearly uniform as practicable. The court said that no extended argument was necessary to show that this statute, which singled out this particular town from all the towns of the state, and compelled it, without its consent, to raise money by taxation for purposes not municipal in their character, and for which no other town in the state had ever been arbitrarily compelled to tax its citizens, entirely disregarded the constitutional mandate that taxes must be imposed by a uniform rule.

In *Ferguson v. Landram* (1867) 1 Bush (Ky.) 548, later appeal in (1868) 5 Bush, 230, 96 Am. Dec. 350, cited under II. a, *supra*, a statute was held unconstitutional which provided for reimbursement of loans made to procure volunteers to avoid a draft, on grounds which apparently would deny the right of the legislature to authorize the payment of bounties to induce voluntary enlistments.



### III. Bounties and pensions for past services.

#### a. In general; state statutes.

It seems impossible to harmonize the authorities on the question of the power of a state to pay a bounty for past military service, where it is not given as a pension to the indigent or disabled, but rather as a gratuity in recognition of the sacrifice made by the soldier in a patriotic cause during war.

It is said in 26 R. C. L. § 44, that "it is well settled that the public money cannot be used to pay a gratuity to an individual, when he has no legal and moral claim to the money, and when it cannot fairly be said that the public good will be served by such payment."

The answer to the question whether the state may authorize payment of a bounty to a soldier for past services depends, therefore, it would seem, on the view taken as regards the question whether the soldier has a moral claim thereto, or whether the payment will serve the public good. Perhaps, if any, to extra compensation exists primarily against the national government, which called the soldier into service and paid him his compensation while in that service. Yet since the discharge of military duty is clearly also for the benefit of the states as well as of the national government, it is not clear that the states should not be permitted to assume the obligation, if it be conceded that there is a moral duty to pay a bounty on the part of either the state or Federal government. As regards the public good which may result from payment of bounties as gratuities, there seems abundant ground for differences of opinion, and it seems sufficient to say that in such a case the legislature, and not the courts, should be the judge.

Apart from cases involving statutes giving a pension to a disabled or indigent soldier or his family, attention is called to the following cases which sustain the validity of state statutes providing for a bounty for prior enlistment or service in the national military forces. *Franklin v. State Examiners* (1863) 23 Cal. 173; *Leon-*

*ard v. Wiseman* (1869) 31 Md. 201; *Opinion of Justices* (1912) 211 Mass. 608, 98 N. E. 338; *Gustafson v. Rhinow* (1920) — Minn. —, 175 N. W. 903; *State ex rel. Bates v. Richmond Twp.* (1870) 20 Ohio St. 362; *State ex rel. Snyder v. Abbey* (1911) 15 Ohio C. C. N. S. 261; *State ex rel. Morris v. Handlin* (1917) 38 S. D. 550, 162 N. W. 379; *Butler v. Putney* (1871) 43 Vt. 481; *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711; *STATE EX REL. ATWOOD v. JOHNSON* (reported herewith) ante, 1617; *State ex rel. Atwood v. Johnson* (1920) — Wis. —, 176 N. W. 224.

But in other cases the view has been taken that state statutes providing for bounties for past military enlistment or service, where at the time of entering the service there was no offer or promise of a bounty, are unconstitutional generally, as authorizing an expenditure of public money for a private and not for a public purpose. *Beach v. Bradstreet* (1912) 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; *Mead v. Acton* (1885) 139 Mass. 341, 1 N. E. 413; *Opinion of Justices* (1905) 186 Mass. 603, 72 N. E. 95; *Opinion of Justices* (1906) 190 Mass. 611, 77 N. E. 820; *Bush v. Orange County* (1899) 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121; *Washington County v. Berwick* (1867) 56 Pa. 466.

In *STATE EX REL. ATWOOD v. JOHNSON* (reported herewith) ante, 1617, the court sustained the validity of the Wisconsin statute providing for bounties to soldiers, sailors, and nurses who served in the recent war against Germany, and who at the time of their induction into service were residents of the state, the bounties provided being a sum not exceeding \$10 for each month of service, with a minimum of \$50, "as a token of appreciation of the character and spirit of their patriotic service, and to perpetuate such appreciation as a part of the history of Wisconsin." It was held that the tax provided for by the statute was for a public purpose, and that the statute did not conflict with the powers of Congress or with Federal legislation.

The same court in the recent case of

State ex rel. Atwood v. Johnson (1920) — Wis. —, 176 N. W. 224, sustained the validity of the Wisconsin Educational Bonus Law, entitling discharged soldiers, sailors, and nurses in the late war with Germany, who were residents of the state at the time of entering the service, to receive \$30 per month while in regular attendance at an educational institution in the state not conducted for profit. Unlike the Cash Bonus Law involved in the preceding case, this statute did not expressly declare the purpose of the bonus, but the court held that the main purpose, as gathered from the statute itself, was to stimulate patriotism, and was therefore public. The court said: "If, as held in the cash bonus case, the giving of money to soldiers which they may spend as they choose is a public purpose, much more so must be the giving to them of an education. . . . It is also contended that the beneficiaries of the act were in the service of the United States, and not in the service of Wisconsin, and therefore our state cannot lawfully spend money in gratuities to agents of another government. The Federal government is our government none the less because we have a subordinate independent government of our own within it. The Federal government in time of war must call upon the citizenry of the states for troops; it has none others. We are an integral part of the nation; hence, a defense of the nation is a defense of us. In furnishing troops to the Federal government we are in reality furnishing them to ourselves, because they are to be used for our benefit. And, since the recipients of the act must be residents of the state, we are limiting the bonus to the military servants furnished by our own state. Whether or not we could lawfully extend it to others it is not necessary to decide." And the court called attention to the fact that, although our country did not enter the late war until in 1917, thirty-eight states besides Wisconsin have enacted over a hundred and twenty laws appropriating money for expenditures incident to the enlistment and service of its soldiers therein, these laws rang-

ing in content from cash bonus, land settlements, extra compensation, memorial funds, exemption from certain public burdens, educational benefits, care for returning soldiers and aid to dependents of soldiers, to the appropriation of money for medals, certificates, etc.; and this legislative construction of the validity of such statutes, the court stated, was very persuasive and would control in the absence of specific, express, or implied constitutional language to the contrary.

It was held that the statute last referred to did not conflict with a provision of the state Constitution prohibiting the extension of the credit of the state to individuals, since the law did not create a debt and established no contract relation; but the tax was levied for the purpose of making a gift or gratuity, revocable at will. *Ibid.*

The objection that financial benefits accrued to religious schools from the statute was held untenable in view of the provision therein that only actual increased cost to such schools, occasioned by the attendance of beneficiaries, should be reimbursed. *Ibid.*

An important recent case on the question of the validity of payments by the state of a bonus to soldiers for past services is *Gustafson v. Rhinow* (1920) — Minn. —, 175 N. W. 903, which sustained the validity of the Minnesota Statute of 1919, providing for payment of a bonus of \$15 for each month of service to officers, soldiers, sailors, marines, and nurses, in the military or naval forces of the United States in the late war with Germany, who were residents of the state at the time they entered the service, and were honorably discharged. It was held that the tax authorized by the statute was for a public purpose, and that there was no limitation under the state Constitution to the indebtedness which the state might create for such purpose. The state Constitution provided that a public debt might be contracted for payment of extraordinary expenditures, but limited the aggregate of such debts to the sum of \$250,000, and required that the debts so authorized

should be contracted by a loan on state bonds. Another provision of the state Constitution declared that "the state shall never contract any public debt, unless in time of war, to repel invasion or suppress insurrection," except in the manner above authorized. This provision, the court held, did not refer simply to an emergency, in time of war, which made necessary the repelling of actual invasion or the suppressing of an insurrection.

It was contended in *Gustafson v. Rhinow* (Minn.) *supra*, that the legislation was not within constitutional powers, because the beneficiaries were soldiers of the United States, and that the state was not under such legal or moral obligation to them as would support the taxation provided for in the statute. In reply the court said: "With this construction we do not agree. It is true that the Federal government alone has power to declare war, but, having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization. . . . If Minnesota may properly give the lives of her sons in support of the nation, the withholding of the money of her people from such support would seem to be justifiable only by the clearest constitutional inhibition."

With reference to the public purpose of the taxation authorized by the statute, the court, in *Gustafson v. Rhinow* (Minn.) *supra*, stated that any doubt as to whether the purpose is public or private must be resolved in favor of the constitutionality of the law, and that to justify a court in declaring a tax invalid, on the ground that it is not imposed for the public benefit, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind.

The validity of a state statute, providing for payment of a bounty of \$5 per month to enlisted men of the Cali-

fornia Volunteers in the service of the United States during the Civil War, was sustained in *Franklin v. State Examiners* (1863) 23 Cal. 173, as applied to one who had enlisted prior to the enactment of the statute. The question considered was whether the statute created an indebtedness above the constitutional limit, under a provision of the state Constitution that the legislature should not create a debt exceeding the sum of \$300,000, "except in case of war, to repel invasion or suppress insurrection." The act in question provided for the creation of a debt which might amount to \$600,000. But the court held that the legislative declaration that an emergency had arisen, demanding the exercise of the power referred to in the exception above quoted, should not be reviewed or set aside by the court.

It was held in *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711, that the legislature might constitutionally authorize the levy of a tax by a city to pay bounties to volunteers who had previously enlisted, as well as to those who might thereafter enlist, since money expended for such purpose in gratitude to those who assumed a special share of the general public burden and thus relieved the community to that extent from a draft, was for a public purpose. The court said: "The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush. In addition to these, I understand that it is not denied that claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities. I think the consideration of gratitude, alone, to the soldier for his services, be he volunteer, substitute, or drafted man, will sustain

a tax for bounty money to be paid to him or his family. Certainly no stronger consideration of gratitude can possibly exist than that which arises from the hardships, privations, and dangers which attend the citizen in the military service of his country; and all nations have ever so regarded it. Who will say that the legislature may not, in consideration of such services, either directly or indirectly, or through the agency of the municipality or district to which he is credited, give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired? I certainly cannot. It is a matter which intimately concerns the public welfare; and that nation will live longest in fact, as well as in history, and be most prosperous, whose people are most sure and prompt in the reasonable and proper acknowledgment of such obligations."

And in *Butler v. Putney* (1871) 43 Vt. 481, in holding that it was competent for the legislature to authorize towns to vote money to those persons who had volunteered from the towns to serve in the Union Army, as well as to vote money to those who should thereafter volunteer for such service, the court said: "It is conceded that this act is constitutional so far as it authorizes the town to vote bounties to such volunteers as would enlist, but in conferring the power to vote bounties to those who had enlisted, and were in the service, the legislature exceeded its power under the Constitution. The legislature, by the act referred to, intended to give to towns the power over, and the control of, a subject that before the act was not within the authority conferred upon them. It simply gives the towns authority to vote money for a specific purpose, and leaves it to them to say whether they will exercise the power or not. Suppose the legislature should enact a law declaring that any express promise thereafter made, to pay for services voluntarily rendered, either before or after the act, for the party making the promise, shall be binding upon the promisor, and may be enforced in a court of law, can any-

one claim that such an act would be unconstitutional? Such an act would go further than the present."

So, a statute directing county commissioners, township trustees, and city councils to issue to each re-enlisted veteran volunteer, credited on the quota of the county, township, or city, under a call of the President for volunteers during the Civil War, who had not received a local bounty for such re-enlistment, a bond for \$100, was held in *State ex rel. Bates v. Richland Twp.* (1870) 20 Ohio St. 362, not to violate a provision of the Constitution that the legislature should have no power to pass retroactive laws. The court took the view that the tax was for a public purpose, even though the payment was to be made without respect to whether the re-enlistment had been on an assurance or pledge of a bounty.

See also, as implying the validity of the statute, *State ex rel. Shafer v. Washington Twp.* (1874) 24 Ohio St. 608, which involves the question whether by its repeal the right was subsequently taken away.

The constitutionality of the Ohio statute, directing local authorities to issue to re-enlisted veteran volunteers who had not previously received a bounty, a bond or warrant for the sum of \$100, is sustained also in *State ex rel. Snyder v. Abbey* (1911) 15 Ohio C. C. N. S. 261.

The constitutionality of a statute enacted in 1867, which extended statutory provisions for bounties to soldiers, so as to include those who enlisted during a certain period in 1864, who were not within previous bounty laws, is implied in *Leonard v. Wiseman* (1869) 31 Md. 201, where the court, in construing the statute, stated that where the law is plain and unambiguous, and free from objection on constitutional grounds, passed upon a subject clearly within the province of the legislature, courts have no power to set it aside or evade its operation by forced and unreasonable construction. The unconstitutionality of the statute is asserted in a dissenting opinion.

The validity of the South Dakota

Statute of 1917, providing that every enlisted man in a certain infantry in that state, which had been drafted into the Federal service and had served on the Mexican border, should be paid at the time of his return from the Federal service the sum of \$75, and making an appropriation therefor, was sustained in *State ex rel. Morris v. Handlin* (1917) 38 S. D. 550, 162 N. W. 379. The statute declared that the payment was for the "purpose of encouraging military training, the payment for services of the members of said regiment for Federal services upon the Mexican border, and for continued service in the National Guard Reserve of the United States." The court said it was clear that the appropriation was made for a public purpose advantageous to the welfare of the state; that it was not made as a gift, nor from motives of charity. And it was held that the statute did not violate provisions of the state Constitution that "no indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer except in pursuance of an appropriation for the specific purpose first made;" that the legislature should not grant any extra compensation to any public officer, employee, or agent after the service shall have been rendered or the contracts made, nor authorize the payment of any claims created against the state under any agreement or contract made without express authority of law, except that the legislature might make appropriations for expenditures incurred in suppressing insurrection or repelling invasion; and that the legislature should not make donations to individuals, associations, or corporations. See quotation from this case in *STATE EX REL. ATWOOD v. JOHNSON* (reported herewith) ante, 1617.

But it was held in *Bush v. Orange County* (1899) 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121, that the New York Statute of 1892, which directed county supervisors, on petition of a majority of the taxpayers, to raise by taxation money to be paid to drafted men, or their heirs, on account of services in the Civil War or

the payment of commutation money in lieu thereof, was unconstitutional as taking private property for a private and not for a public use, and as in violation of a constitutional provision prohibiting gifts by counties or municipalities of any money or property to or in aid of any individual, and prohibiting also any county or municipality from incurring an indebtedness except for county or town purposes. See in this connection, IV. *infra*.

And it was held in *Beach v. Bradstreet* (1912) 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946, that the expenditure of public funds was unconstitutional authorized for a private purpose by a statute providing for the giving, as state aid, of the sum of \$30 annually to every resident of the state, or his widow or parents, who had served in the Army or Navy of the United States during the Civil War and been honorably discharged, without limitation or exclusion as to soldiers and sailors who served to the credit of other states, and without regard to disability or indigence. The court said: "A state's bounty must be limited to her own soldiers and sailors. Service to the credit of other states is not service for her. . . . States have granted pensions to the disabled or indigent soldiers and sailors; but, so far as we have discovered, no state has granted a pension to soldiers and sailors, who have served in, and been honorably discharged from, the United States service, without regard to disability or indigence. . . . We believe no act of so sweeping a character can be found. We think an act which taxes the citizens of our state for the benefit of persons whose only claim to a gratuity is in service long since past, rendered some other state, is a dangerous innovation in legislation and, beyond all doubt, contrary to the fundamental law. If an annual gratuity of \$30 for such a purpose as this is lawful, a larger one will be lawful. Its size will be the will of the general assembly. If public funds may be used to benefit resident soldiers and sailors for past services, rendered other states, the principle will permit gratuities to be given

all classes of citizens whose past public services entitle them to public gratitude."

In *Washington County v. Berwick* (1867) 56 Pa. 466, the court, in construing a statute directing payment of bounties to re-enlisted veterans by local authorities as applying only to veterans who were induced to re-enlist on the faith of the offer of local bounties, stated that any other interpretation of the statute would render it obnoxious to the charge of its being a mere legislative rescript for the payment of money by the people of a given district to one to whom they owed no debt and no duty.

A statute of 1882 authorizing a certain town to raise money by taxation to pay a bounty to soldiers who re-enlisted in a specified regiment in 1864, and were credited to the town, was held unconstitutional in *Mead v. Acton* (1885) 139 Mass. 341, 1 N. E. 413, as authorizing the raising of money by taxation for a private purpose. The court said: "It is not contended that there was any promise by the town, or by anyone acting on behalf of the town, to pay any bounty to these soldiers at or before their re-enlistment.

. . . The cases where the legislature has authorized towns to raise money by taxation, for the repayment of money advanced by towns or individuals, have all been cases where the money has been advanced to pay bounties to soldiers as an inducement to them to enlist; in other words, where the money has in fact been expended for the public service. . . . In the case at bar it seems to us clear that the object for which the town of Acton has raised this money is private, and not public. The town has made no promise to these soldiers, and is not under any obligation to pay them any bounties. The purpose is not to repay any sums advanced them as an inducement to enlist. The bounty to be paid cannot be regarded in the light of compensation for services rendered; for their services as soldiers were not rendered to the town, and the town had nothing to do with their compensation. The war has been over for many years, and the payment of these

bounties cannot encourage enlistments, or in any way affect the public service or promote the public welfare. The direct primary object is to benefit individuals, and not the public. In any view we can take of the statute, the payments it contemplates are mere gratuities or gifts to individuals. The principle would be the same if a town should vote a gratuity or a pension to one who had rendered services as an officer, or was in any way entitled to its gratitude. This a town has not the power to do, even with the sanction of the legislature. A statute conferring such power is unconstitutional, because it authorizes raising money by taxation for the exclusive benefit of particular individuals, and appropriates money for a private purpose which can only be raised and used for public objects."

And on the authority of *Mead v. Acton* (Mass.) *supra*, the Massachusetts Statute of 1894, directing the payment from the state treasury of a bounty to veterans of the Civil War who served in the Federal Army to the credit of the state, and had not previously received a bounty, was held unconstitutional in *Opinion of Justices* (1905) 186 Mass. 608, 72 N. E. 95, as authorizing the expenditure of public money for a private purpose.

And it was held in *Opinion of Justices* (1906) 190 Mass. 611, 77 N. E. 820, that a statute to equalize bounties among the soldiers of the state who served in the Civil War, by payments to certain soldiers, to make the results of their contracts of enlistment more favorable, because the contracts of other soldiers were made on better terms as to bounties, would be unconstitutional, even though it contained a recital that the payments would be made in recognition of valuable services, with a view to the promotion of loyalty and patriotism. The court took the view that such payments would be mere gratuities, and taxation therefore would not be for a public purpose.

But it was held that the statute, in so far as it provided for the reward of services of soldiers deserving special recognition, by payment of sums

of money, the erection of statues, bestowal of medals, etc., would be constitutional, where the benefit conferred was an appropriate recognition of such service, calculated to enhance loyalty and patriotism. *Ibid*.

The Massachusetts court, however, in a later decision, seems, in view of the express legislative declaration in the statute of its enactment for a public purpose, to have departed somewhat from the doctrine of these earlier cases. Thus, it was held in *Opinion of Justices* (1912) 211 *Mass.* 608, 98 *N. E.* 338, that a statute would be constitutional which provided for payment of gratuities of \$125 each to veteran soldiers and sailors still living, who volunteered in the Civil War and served to the credit of the state, were honorably discharged, and received no bounty, the gratuity being given for the purpose, as declared in the statute, of promoting the spirit of loyalty and patriotism, and in recognition of the sacrifice made by the soldier for the state and the United States, and for the purpose of promoting the public welfare by giving visible evidence that if danger again threatened the nation and the call should come for men, the state would not forget the great service of those who volunteered. The act also expressly provided that the "gift shall not be a bounty, nor a payment in equalization of bounties, . . . but a testimonial for meritorious service." The court said that the act applied only to those cases where the soldier voluntarily enlisted from purely patriotic motives; that it could not be said that a gratuity given, as the statute declared, as a "testimonial for meritorious service," and in recognition of services rendered and sacrifices made, and not as a bounty, must nevertheless be regarded as a bounty; and that from the fact that one of the conditions was that the gratuity should not be paid to one who had received a bounty, the inference could not be drawn that it was intended as a bounty or a payment in equalization of bounties. The view of the court was that the legislative declaration to the effect that the act would pro-

mote loyalty and patriotism and serve the public welfare was not necessarily contradicted by the substance of the act, and that the constitutionality of the statute should be affirmed on the decision in *Opinion of Justices (Mass.) supra*, to the effect that the legislature might appropriate money in recognition of valuable services performed by the soldiers of the state in the Civil War, if, in the opinion of the legislature, the public good would be served and loyalty and patriotism promoted. There is a dissenting opinion, however, affirming the unconstitutionality of the statute under the former decisions of the state.

Several cases sustain the validity of statutes giving a bounty or pension to the families of soldiers, or to indigent or disabled soldiers.

It was said in *Angle v. Runyon* (1876) 38 *N. J. L.* 403, that the power of the legislature to pass the Statute of 1861, giving a bounty to the families of soldiers who enlisted in the service of the United States from that state, was unquestioned and unquestionable. See also *State, Brown, Prosecutor, v. Newark* (1861) 29 *N. J. L.* 232, where an ordinance which was enacted pursuant to the statute and authorized the payment of \$6 per month to the families of such persons of the state militia, and the widowed mothers of such persons without families, as had been or should be mustered into the service of the state or of the United States, was held valid in so far as it authorized such payment to families and widowed mothers resident in the state, but void so far as it authorized payment to be made to families or mothers having their permanent residence in other states at the time of the enlistment.

And the power of the New Jersey legislature to enact a statute providing for payment to one who had enlisted from that state, but, because he was placed in a Pennsylvania regiment, had been refused the monthly allowance for the relief of his family to which they were entitled under the laws of New Jersey, was conceded in *Angle v. Runyon (N. J.) supra*.

And the court was of the opinion that the power was unquestionable.

The validity of a statute providing a pension to indigent, disabled Confederate soldiers was sustained in *Bosworth v. Harp* (1913) 154 Ky. 559, 45 L.R.A.(N.S.) 692, 157 S. W. 1084, Ann. Cas. 1915C, 277, it being held that services rendered by such soldiers to their states were public within the meaning of a constitutional provision forbidding the granting of separate public emoluments except as consideration for public services, and that the statute was not a special law, within the meaning of a constitutional provision that where a general law may be made applicable no special law shall be enacted.

It was contended in *Bosworth v. Harp* (Ky.) *supra*, that statutes granting a pension to indigent soldiers violated a constitutional provision that no money should be drawn from the state treasury except in pursuance of appropriations made by law. But the court held that an appropriation within the meaning of the constitutional provision was made by the statute, which directed that the vouchers issued to pensioners should be paid out of the treasury upon the warrant of the auditor, who was directed to issue his warrant to each person for the amount of his claim.

And in *Board of Education v. Bladen* (1893) 113 N. C. 379, 18 S. E. 661, it was held that a statute providing for pensions for Confederate soldiers who were disabled during the war, and for their widows, is constitutional. The decision is based on the ground that the state must take care of its indigent and helpless citizens, and that the legislature has the power to authorize counties to care for one class of dependents, and the state to care for another class directly, when, in the judgment of the legislature, the amount of the allowance can in that way be better adjusted to suit the needs of the indigent classes.

It appears in *State ex rel. Walker v. Derham* (1901) 61 S. C. 259, 39 S. E. 379, that since 1887 it has been the legislative policy of South Carolina to provide pensions for soldiers and

sailors, residents of the state who were in the service of the state or of the Confederate states in the Civil War; and it was indirectly held in that case that the state Constitution of 1895 specifically authorizes the legislature so to provide.

A statute providing for the levying of a special county tax for the purpose of raising a fund to help support maimed and indigent Confederate soldiers was held, in *Elder v. Collier* (1897) 100 Ga. 342, 28 S. E. 116, repugnant to and abrogated by a provision of the state Constitution subsequently adopted, providing that the legislature should not have power to delegate to any county the right to levy taxes for any except certain specified purposes, as education, the building and repair of public buildings and bridges, and support of prisoners and paupers. According to the opinion in this case, it is the settled policy of the state to provide pensions for Confederate soldiers exclusively by state taxation.

And in *Verdery v. Walton* (1911) 137 Ga. 213, 73 S. E. 390, the court, citing *Elder v. Collier* (Ga.) *supra*, said that "the general assembly has and exercises the power of providing by state taxation for the payment of pensions to Confederate soldiers, and can confer no authority for paying pensions to soldiers and their widows out of the funds to be raised by county taxation."

It was held in *Woodall v. Darst* (1912) 71 W. Va. 350, 44 L.R.A.(N.S.) 83, 77 S. E. 264, 80 S. E. 867, Ann. Cas. 1914B, 1278, that the legislature had power to provide compensation to members of the National Guard, who might be injured while performing any duty lawfully ordered by their superior officer. Such an enactment was an inducement for enlistments in the military service of the state, and money appropriated therefor was for a public purpose.

#### *b. Power of Congress.*

The power of Congress to grant pensions to those who have served in the military forces of the nation seems seldom to have been questioned in the courts. This power would appear un-



questionable, in view of the fact, as is stated in *United States v. Hall* (1879) 98 U. S. 343, 25 L. ed. 180, that the Federal pension system had its origin in the Revolution, and beyond question was sanctioned by the framers of the Constitution, who were members of the first Congress and enacted the laws for putting the new government into operation.

It is said also in *Manning v. Spry* (1903) 121 Iowa, 191, 96 N. W. 873, that the policy of granting pensions has prevailed from a very early period; that the first Continental Congress, in 1776, provided for pensions for soldiers and sailors of the Revolutionary War; and that one of the earliest acts of the Congress was a pension bill, passed in September, 1789.

The power of Congress to grant pensions and bounties to soldiers in the Federal service is implied under the constitutional authority to raise and support armies. *United States v. Fairchilds* (1857) 1 Abb. 74, Fed. Cas. No. 15,067. See also *United States v. Marks* (1869) 2 Abb. 531, Fed. Cas. No. 15,721.

*IV. Reimbursement to drafted men for commutation money or expense of procuring substitute.*

The courts have generally held unconstitutional statutes authorizing the payment of money to drafted men who paid the commutation allowed by the Federal law during the Civil War, or procured a substitute, the view generally being taken that such payment is for a private and not for a public purpose. But there is also authority to the contrary.

A statute requiring school directors of a township to levy a tax to reimburse one who had been drafted and who had paid a commutation for exemption from service, under Federal law, was held unconstitutional in *Kelly v. Marshall* (1871) 69 Pa. 319, as authorizing the raising of money by taxation for a private purpose.

And a statute authorizing towns to raise and appropriate money to reimburse persons who, during the Civil War, furnished substitutes or paid commutation money, instead of rendering

military service as part of the quota of the town, was held unconstitutional in *Bowles v. Landaff* (1879) 59 N. H. 164, as authorizing unequal taxation for an expense not of a local, municipal character. The court said that the legislature cannot give towns an option of taxation for a purpose not local; that whether all conscripts who performed their several duties by personal service, by furnishing a substitute, or by paying the commutation should be reimbursed for performance of their duties was not a local municipal question; that the expense of paying for the performance of that duty could not be unequally divided among the towns of the state, either by the legislature or by a municipal exercise of delegated legislative power; that "whatever the state can or cannot do towards an equalization of burdens, and whatever it can or cannot do towards the reward of persons who, by service or payment, perform their military or civil duty to the state or the Union, neither the power of taxation, nor any other constitutional power can, in some towns, leave upon the national forces the national duty to which they were called in September, 1863, and in other towns transfer that duty to the taxpayers." To the same effect is *Gould v. Raymond* (1879) 59 N. H. 260.

*Bowles v. Landaff* (N. H.) supra, was regarded apparently in *Willoughby v. Holderness* (1882) 62 N. H. 227, as overruling the earlier decisions in that state cited under II. a, supra, which sustained the constitutionality of statutes providing for bounties to soldiers.

The doctrine was recognized in *Heiser v. Casselberry* (1866) 6 Phila. (Pa.) 194, that a statute authorizing taxation to repay one subject to a draft the amount he had expended to procure a substitute would be unconstitutional.

It was held also in *Freeland v. Hastings* (1865) 10 Allen (Mass.) 570, that the legislature could not constitutionally authorize towns to raise money by taxation to reimburse individuals for sums paid by them to obtain substitutes, under the act of Congress

providing that if any person enrolled should furnish, previous to a draft, an acceptable substitute, he should be exempt from the draft during the term for which the substitute had been accepted; since money so paid was not for a public purpose.

And in *Bush v. Orange County* (1899) 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 58 N. E. 1121, it was held that the New York Statute of 1892 which directed county supervisors to raise by taxation money to be paid to drafted men or their heirs, on account of services in the Civil War or the payment of commutation in lieu thereof, was unconstitutional, as taking private property for a private and not for a public use.

A statute authorizing a township to raise money by taxation to pay the commutation money for the exemption from draft of such persons as should be drafted and accepted for the township, pursuant to the act of Congress providing that any person drafted might furnish a substitute, or might pay to the government \$300 for the procuring of such substitute, was held invalid in *State, Wagner, Prosecutor, v. Jackson* (1866) 83 N. J. L. 450, reversing (1865) 31 N. J. L. 189, since, by providing for payment through general taxation of money for those only who refused to serve or provide a substitute, it removed the inducement for those drafted to enter the service, and therefore was in conflict with the Federal statute, the object of which was to procure men for the Army. Five of the eleven judges, however, dissented, on the ground that the act of Congress, in authorizing payment of the \$300 commutation money, contemplated the procuring of substitutes with such money by the Federal government, and that the purpose of the act of Congress was therefore not nullified by the statute in question, even though the substitutes were not procured by the drafted man himself or by the local municipal authorities.

It was held also in *Thompson v. Pittston* (1871) 59 Me. 545, that the legislature could not constitutionally ratify action of a town in voting to

pay the commutation of drafted men, since public money would thereby be expended for a private and not for a public purpose. The court said: "We start, then, with the proposition which we think no one will gainsay, that if the grant made by vote of the town is purely a gratuity to an individual, and it is impossible to believe or imagine that the public can gain anything thereby, or that the public welfare can be thereby in any manner subserved, the grant is not lawful, and no legislation can make it so. We think it susceptible of positive demonstration that the public or the general government, which in this matter represented the public, could by no possibility gain anything by the action of certain towns in voting to drafted men sums required to pay commutation, or to reimburse the drafted men for moneys paid for that purpose. . . . In the law regulating the draft, a certain sum was fixed and designated, the payment of which by the drafted man should be deemed an equivalent to the rendering of personal service or the sending of a substitute. The payment of \$300 constituted that equivalent. But when an able-bodied man was drafted and accepted, the government held him for the performance of one of the three alternatives. He must either go himself, or send a substitute, or pay the \$300. To do one of these three things was a duty which he, as an individual, owed to the country, and his own proper person was pledged for the performance of one of them. If he declined to go or send a substitute, before he could be relieved, he must pay the \$300. It was his individual debt. By the draft and acceptance the public had secured the performance by him of one of the three alternatives. It is as plain as anything in arithmetic that by no possibility could the public gain anything by having his town take his place in the payment of the money. . . . In the case of the payment of bounties to those actually entering the service, the public had the benefit of both the service and the money granted, so far as the latter might be supposed to operate as a

stimulus to greater exertion on the part of the soldier. But in the case of money voted for commutation, the town's money only goes instead of an equal sum which the drafted man must pay, if he would avoid rendering, either personally or by substitute, the service for which the law deems the money simply an equivalent. The public does not get from any quarter both the service and the money, as it does in the case of money paid for bounties to those actually entering the service. As we have just seen, the drafted man alone can, by any possibility, derive any benefit from the payment." This case was approved and followed in *Moulton v. Raymond* (1872) 60 Me. 121.

In *Ferguson v. Landram* (1867) 1 Bush (Ky.) 548, later appeal in (1868) 5 Bush, 230, 96 Am. Dec. 350, cited under II. a, *supra*, a statute was held unconstitutional which provided for payment of a bounty to drafted men, but the decision is placed on broad grounds, which apparently deny the right of the legislature to provide bounties even to induce voluntary enlistments.

On the other hand, the court in *Bartholomew v. Harwinton* (1866) 38 Conn. 408, sustained the constitutionality of a statute providing that if any town had appropriated money for assisting persons drafted, who personally or by substitute entered the service of the United States to fill its quota, the action of such town was by the statute ratified and confirmed, and declared to be legal and binding upon the town. The court said that the law was unquestionably retroactive and absolute, but was not contrary to constitutional prohibition, nor so unjust as to violate the principles of the social compact. This case was followed in *Potter v. Canaan* (1870) 37 Conn. 223.

And the constitutionality of a statute authorizing towns to vote money to drafted men who had personally entered the service of the Union Army, or who had furnished a substitute, was sustained in *Laughton v. Putney* (1871) 43 Vt. 485, as applied to one who, before the passage of the stat-

ute, had been drafted and had furnished a substitute. The court said: "It is said by the defendant's counsel that said act does not profess to have for its object 'the encouragement of volunteering,' but was for the 'aid of drafted soldiers.' From this the counsel argue that the object of that act is private instead of public." But the court took the view that the services rendered by the drafted man were for the public benefit, as were those of the volunteers; that the statute authorizing towns to vote money to volunteers, and the similar act relating to drafted men, were both enacted in view of the large number who would not be required to enter the service, the belief that those who did enter it should receive additional compensation or bounty, which should be paid by all the people; that by the provisions of the statute, the inhabitants of each town could exercise their discretion whether they would grant money to volunteers or drafted men; but that "when any town has, by its vote at a regular meeting, promised to pay such bounty, it is a binding obligation. The consideration upon which money is voted under the Act of 1863, to be paid to a drafted man, whether such consideration be executed or executory, is sufficient. It does not differ in its legal effect from the consideration of a promise, under the Act of 1862, granting money to be paid to volunteers. The benefit a town would derive from the credit of a soldier upon its quota has been held a sufficient consideration to support such express promise. *Cox v. Mt. Tabor* (1868) 41 Vt. 28. But service rendered by the soldier in the Army, or his promise or obligation to render such service, is the chief consideration of the promise to pay him a bounty. Money thus paid or promised by the town is a consideration for service rendered or to be rendered by the soldier, for the benefit of the public. The service of the soldier is no less valuable because it was rendered before the vote to pay a bounty, or even before the passage of the act authorizing such vote. Such consideration, even though executed, being suf-

ficient to support an express promise if the town had been authorized to make it at the time the consideration was received, is sufficient to support an express promise made after the passage of the act authorizing such promise to be made. We think the law authorizing towns in their discretion to grant and vote money to be paid to drafted men is open to no valid constitutional objection."

It was held also in *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711, that a statute was constitutional which authorized the payment by a city of bounties to persons who should procure substitutes for themselves before being drafted, and have such substitutes credited on the quota of the city. The statute did not provide for a payment of bounties to those who in the past had furnished substitutes, although the court intimated that the public gratitude, even to such persons, would support a levy of a tax to pay bounties as for a public purpose. The court said that the procuring of substitutes was not only proper, but in many cases commendable, and that persons procuring them performed their whole duty under the law, relieving the communities in which they resided the same as if they had themselves enlisted; and that so far as the public interest was concerned, in being relieved from the draft, it could see no distinction between paying bounties to those who furnished substitutes and to those who volunteered.

And the granting by the legislature of a state of bounties to men who should be drafted under Federal law was held in *Booth v. Woodbury* (1864) 32 Conn. 118, not invalid as contravening principles of natural justice, or a provision of the Bill of Rights prohibiting the taking of private property for public use without just compensation. It was held accordingly that the legislature might authorize towns to confirm or ratify previous action, taken without authority, attempting to grant a bounty to drafted men or their substitutes. The court said: "The first question, therefore, may be further narrowed to the inquiry, whether it

is contrary to natural justice that A. and B., and the rest of the inhabitants of the state, should be taxed for gratuities to C. and D., when C. and D. are called upon to render military service to the general government. It should be observed that the bounty contemplated in the case put, as in this, differs from the bounty given by the United States, for that is in part payment for the service. It differs also from any bounty given to the militia in case they are turned over and mustered into the service of the United States, for the organization and support of the militia is the concurrent duty of both governments. . . . Every citizen is bound to take up arms when necessary, in defense of his government, not as a matter of strict law, but as an incident of citizenship; and the selection of a class only, of a certain age, of whom that service is to be immediately demanded in a particular case, although wise, is arbitrary, not based on any peculiar or special obligation resting upon the class, or on their ability alone to render the service, or to render it with less pecuniary or social sacrifice, but on the wants of the government and the supposed fitness of the class to subserve the purposes of the government with more efficiency than others. But if all owe the service, and it is for the common good, and there is the usual provision that it may be rendered by substitute or commutation, it is not easy to see why men above forty-five years of age, if able-bodied, may not be called upon as well as those of less age. . . . It is clearly equitable and just that they equalize the burden by bounties to those who are drafted and serve, or by making provision for the support of their families. On this obvious equity rests the general law making provision for the families of all drafted men and their substitutes."

The provision of the Bill of Rights forbidding the taking of private property for public use without just compensation, was held in *Booth v. Woodbury* (Conn.) *supra*, to have no bearing on the case, since it did not apply to taxation by which individuals were

compelled to bear their share of the general public burden.

*V. Delegation of power to counties, towns, etc.*

It seems generally to be assumed in the cases that if the state may pay bounties to soldiers it may authorize counties, cities, or towns to do so. Most of the cases cited in the annotation are those in which there was this authorization, rather than a direct bounty from the state. So, without citing in this connection all the cases which in effect support the doctrine that if the state may pay a bounty to soldiers it may authorize local municipal authorities to do so, attention is called here to those cases in which the point was directly passed upon or was apparently before the mind of the court in rendering its decision.

If the legislature can raise money for bounties to soldiers, there seems to be no good reason why it cannot delegate that authority to the several towns, within their respective limits. *Butler v. Putney* (1871) 43 Vt. 481.

Instead of exercising the power directly to levy a tax to pay bounties, by a general law, on all the property of the state, with payments directly from the state treasury, the legislature may impose a duty on the several municipal subdivisions of the state to pay bounties to volunteers credited to their respective localities. *State ex rel. Bates v. Richland* (1870) 20 Ohio St. 362.

It is competent for the legislature to delegate to the several towns or counties of the state power to give gratuities to those who should be drafted into or voluntarily enter the military service of the United States, or to their families, and to tax the citizens generally therefor. *Comer v. Folsom* (1868) 18 Minn. 219, Gil. 205; *Wilson v. Buckman* (1868) 13 Minn. 441, Gil. 404.

Legislative power, it was held in *Brodhead v. Milwaukee* (1865) 19 Wis. 624, 88 Am. Dec. 711, was not unconstitutionally delegated by a statute authorizing cities to levy a tax for the purpose of paying bounties to volunteers under the call of the President in the Civil War.

And it was held in *Cass Twp. v. Dillon* (1864) 16 Ohio St. 38, that the legislature might authorize counties, townships, and cities, to levy a tax for payment of bounties to volunteers, as well as authorize the payment of such bounties by the levy of a general state tax. That this power would be within the general grant of legislative authority, if not reserved by other provisions of the state Constitution, the court said, did not admit of controversy. But it was contended that such reservation arose by reason of a provision of the state Constitution that commissioners of counties, trustees of townships, and similar boards should have power of local taxation for "police purposes," as might be prescribed by law. It was held that the implied reservation from this provision was repelled, as regards the special object of repelling invasion, suppressing insurrection, and defending the state in time of war, by another provision of the state Constitution that the state should never assume the debts of any county, city, town, or township, unless such debts were created to repel invasion, suppress insurrection, or defend the state in war; since the latter provisions clearly implied that counties, etc., might be authorized to create debts for these objects.

Other cases to the effect that the state may authorize towns or other municipal subdivisions to pay bounties to volunteers, as well as provide for such payment by the state itself, are *Winchester v. Corinna* (1866) 55 Me. 9, and *Shackford v. Newington* (1866) 46 N. H. 415. But later decisions in New Hampshire have denied the right of the legislature to delegate to local authorities the power to raise money by taxation for payment of bounties to soldiers in the Federal Army. See *Bowles v. Landaff* (1879) 59 N. H. 164, cited under III. *supra*, and *Wilmington v. Holderness* (1882) 62 N. H. 227, cited under VI. *infra*.

In *Speer v. Blairsville* (1865) 50 Pa. 150, the constitutionality of a statute which authorized municipal authorities to borrow money and to levy a tax to pay bounties to volunteers, so as to relieve the municipality from an

impending draft, was sustained, without the discussion of the question of delegation of power, except that a provision of the state Constitution, forbidding the state to assume any debt of any county, city, borough, or township, unless the debt was contracted to enable the state to repel invasion, suppress domestic insurrection, or defend itself in time of war, was said to imply that a municipality might be authorized to contract a debt for defense in time of war. And the bounty paid to prospective volunteers in the Federal Army was held to be contracted for that purpose.

*VI. Repeal of bounty or pension laws as affecting vested rights.*

No pensioner has a vested legal right to his pension; pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *United States v. Teller* (1882) 107 U. S. 64, 27 L. ed. 352, 2 Sup. Ct. Rep. 39, citing *Walton v. Cotton* (1856) 19 How. (U. S.) 355, 15 L. ed. 658.

The above rule is quoted with approval, on facts not within the scope of the present annotation, in *Frisbie v. United States* (1894) 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.

It is competent for the legislature to repeal a statute bestowing a pension on a war veteran, since the recipient has no vested right in the bounty of the state. *Chalk v. Darden* (1877) 47 Tex. 438.

And it was said (arguendo) in *Eddy v. Morgan* (1905) 216 Ill. 437, 75 N. E. 174, that "a pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease."

The legislature may repeal a statute settling an annuity on one to re-

munerate him for his losses actually sustained, and for his distinguished services in time of war, since no vested contract rights are created thereby before payment of the annuity. *Dale v. Governor* (1831) 3 Stew. (Ala.) 387.

But a bounty earned by a soldier, under a statute providing for payment of bounties by the state to persons thereafter enlisting, is a vested right of which he cannot be deprived by the legislature. *Smith v. Aplin* (1890) 80 Mich. 205, 45 N. W. 136.

Also *Opinion of Justices* (1864) 45 N. H. 593, is to the effect that the legislature cannot repeal a statute authorizing the granting of bounties to volunteers, so as to affect those who have already acquired a vested right to the bounty.

And in *Baird v. United States*, Dev. Ct. Cl. (Fed.) 88, it was held that a commissioned surgeon who rendered medical services to the United States during the Revolutionary War, before and after a resolution of Congress which provided that all officers on the medical staff who should continue in the service to the end of the war, or be reduced before that time as supernumeraries, should be entitled to receive during life certain allowances, was entitled to the allowance for life, as a right founded upon a contract with Congress, which no subsequent legislation by Congress could take away.

Although not strictly in point on the subject of the present annotation, attention is called to *Willoughby v. Holderness* (1882) 62 N. H. 227, holding that where one enlisted on the faith of a bounty offered by a town, at a time when the contract was valid under the law as then construed, a subsequent change of construction to the effect that towns could not constitutionally be delegated the power of taxation to pay bounties, since this would result in unequal taxation, not for local purposes, did not invalidate the contract.

R. E. H.

S. C. DAWSEY et al., Appts.,

v.

MIRIAM W. KIRVEN.

*Alabama Supreme Court—June 12, 1919.*

(— Ala. —, 83 So. 338.)

**Seal — necessity of referring to it.**

1. Merely suffixing a clause containing the word "seal" or the letters "L. S." after the name of a subscriber to the instrument does not constitute a seal, unless the intention to seal is declared in the body of the instrument.

[See note on this question beginning on page 1663.]

**Evidence — sufficiency of proof to overcome denial of ownership.**

2. The payment of value for a note indorsed in blank by the payee is sufficient to overcome a sworn plea denying plaintiff's ownership in an action to enforce payment of promissory notes. — **evidence of ownership.**

3. Possession of a note indorsed in blank by the payee is prima facie evidence of ownership.

[See 3 R. C. L. 980.]

**Party — enforcement of note.**

4. The holder of the legal title, and not the beneficial owner, is the proper party plaintiff in an action to enforce payment of a negotiable promissory note.

[See 8 R. C. L. 991.]

**Bills and notes — holder not entitled to proceeds — effect.**

5. That the holder of the legal title to negotiable paper is not entitled to the proceeds of the judgment is no defense to an action by the holder upon the note.

[See 3 R. C. L. 990.]

**Judgment — on note — bar to further action.**

6. A judgment in favor of the holder of notes indorsed in blank is a bar to further action on the notes whether plaintiff paid value for them or not.

**Bills and notes — right to fill blanks in indorsements.**

7. The holder of negotiable paper indorsed in blank may fill in the indorsement so as to vest himself with the legal title.

[See 3 R. C. L. 982.]

— **effect of blank indorsement.**

8. A blank indorsement vests title in the holder of a note as completely as any other mode, and it need not be

filled up before going to a jury to recover upon it.

[See 3 R. C. L. 970, 983.]

**Trover — for note — indorsement in blank.**

9. A delivery and transfer of a note indorsed in blank passes such title as will support trover against a person who purchases the note from the transferrer.

**On Rehearing.**

**Statutes — readoption after construction — effect.**

10. A construction of a statute which was readopted by the legislature after such construction was given will be followed by the courts in subsequent cases.

[See 25 R. C. L. 1075.]

**Bills and notes — right to sue on non-negotiable paper.**

11. The rules applicable to suits on commercial paper, with respect to the right of one holding under a blank indorsement to sue, do not apply to non-negotiable paper.

[See 3 R. C. L. 989.]

**Acknowledgment — notice of reference to seal.**

12. A power of attorney executed in a foreign state and acknowledged before a notary who does not refer to his seal, but merely states that it is under his hand, is not self-proving, although the jurat purports to have a seal attached.

— **necessity of seal.**

13. A notarial seal is not necessary, in Alabama, to authenticate the certificate of acknowledgment of an Alabama notary.

[See 1 R. C. L. 279.]

**Notary public — necessity of seal.**

14. The official seal is necessary to

authenticate the official acts of a notary public at common law.

[See 20 R. C. L. 328.]

Seal — necessity of.

15. An instrument which on its face purports to be under seal will be so considered, though there is no scroll opposite the signature.

— when sufficient.

16. An instrument signed between

several parties, preceded by the words, "Given under our hands and seals," followed by the seal after name of party, is a sealed instrument.

[See 24 R. C. L. 692.]

— assumption as to authenticity.

17. A court cannot act upon the assumption that a seal to a notarial certificate is that of the notary, unless it is referred to in the certificate.

[See 1 R. C. L. 280.]

APPEAL by defendants from a judgment of the Circuit Court for Montgomery County (McCord, J.) in favor of plaintiff in an action brought to enforce payment of certain promissory notes. *Reversed on rehearing.*

The facts are stated in the opinion of the court.

Mr. William F. Thetford, Jr., for appellants:

The certificate of a foreign notary must be authenticated by his seal.

Alabama Nat. Bank v. Chattanooga Door & Sash Co. 106 Ala. 663, 18 So. 74.

Such a certificate must recite the seal.

Wetmore v. Laird, 5 Biss. 160, Fed. Cas. No. 17,467; Lee v. Adkins, Minor (Ala.) 187; Carter v. Penn, 4 Ala. 140; Moore v. Lesseur, 18 Ala. 606; Blackwell v. Hamilton, 47 Ala. 470; Breitling v. Marx, 123 Ala. 222, 26 So. 203; Ingram v. Hall, 2 N. C. (1 Hayw.) 193; Baird v. Blagrace, 1 Wash. (Va.) 170; Austin v. Whitlock, 1 Munf. 487, 4 Am. Dec. 550; Bradely Salt Co. v. Norfolk Import. & Export. Co. 95 Va. 461, 28 S. E. 567.

Powers of attorney are construed strictly.

Brantley v. Southern L. Ins. Co. 53 Ala. 554.

The maker of a note can question the validity of an alleged transfer of the note.

Walker v. Winn, 142 Ala. 560, 110 Am. St. Rep. 50, 39 So. 12, 4 Ann. Cas. 537.

Messrs. Ball & Beckwith, for appellee:

The forms for acknowledgments as set out in the Code do not call for any recital of a seal.

Dunn v. Adams, 1 Ala. 527, 35 Am. Dec. 42; St. John v. Redman, 9 Port. (Ala.) 428; Hart v. Ross, 57 Ala. 518; Bradley v. Northern Bank, 60 Ala. 252; Goree v. Wadsworth, 91 Ala. 416, 8 So. 712; Alabama Nat. Bank v. Chattanooga Door & Sash Co. 106 Ala. 663, 18 So. 74; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. 175; Hayes v. Banks, 132

Ala. 354, 81 So. 464; Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418; 2 Elliott, Ev. §§ 54, 1376, 1383; Harrington v. Fish, 10 Mich. 415; Dale v. Wright, 57 Mo. 110; Webb v. Huff, 61 Tex. 677; 1 Cyc. 575; 29 Cyc. 1096.

The purpose of the power of attorney was to make Kirven general attorney in lending money for Mrs. Clements, and to do everything necessary in his judgment to collect it.

State v. McLearn, 1 Aik. (Vt.) 311; Buckner v. Real Estate Bank, 5 Ark. 536, 41 Am. Dec. 105; Smoot v. McGraw, 48 W. Va. 144, 35 S. E. 914; Clark v. Sigourney, 17 Conn. 511; Holt v. Sweetzer, 23 Ind. App. 237, 55 N. E. 254; Phillips v. Hornsby, 70 Ala. 414; 31 Cyc. 1369 et seq.

Mayfield, J., delivered the opinion of the court:

This is an action by appellee, the holder of negotiable promissory notes, against appellants, the makers thereof.

Defendants pleaded the general issue and a special sworn plea denying plaintiff's ownership of the notes. The case was tried by the court without a jury, and resulted in judgment for the plaintiff, from which judgment defendants prosecute this appeal.

The error assigned and most earnestly insisted upon to reverse the judgment is the admission in evidence of a power of attorney purporting to have been executed by one Mrs. M. F. Clements to one F. D. Kirven, the husband of plaintiff, authorizing him, as her agent and



attorney, to make loans, collect moneys, satisfy mortgages of record, to assign and indorse notes, mortgages, etc. The main ground of the objection to the introduction of the power of attorney in evidence is that the notary's certificate of acknowledgment of the execution of the power of attorney was not authenticated by the notarial seal of the officer, he being an officer of another state, to wit, Georgia, and the acknowledgment and certificate being made in that state.

The view we take of the case renders it wholly unnecessary for us to decide this question, which is not free from doubt, as is shown by the argument and able briefs of counsel. The question evokes some ancient and technical learning on the subject of the object, purpose, effect, and requisites of private and public seals, scrolls, etc. It is unnecessary to decide whether or not there was error in the admission of this power of attorney, bills of sale, and acts of the attorney thereunder, for the reason, if error, it affirmatively appears that it was without possible injury to the appellants.

The notes sued on were on their face negotiable paper, and were indorsed in blank by the payee, and plaintiff was shown by indisputable evidence to be the holder thereof for value. This, under a long line of decisions of this court, was sufficient to overcome the burden placed on

**Evidence—**  
sufficiency of  
proof to over-  
come denial of  
ownership.

the plaintiff by the sworn plea denying plaintiff's ownership thereof. So, if the power of attorney and all acts of the agent or attorney purporting to be done thereunder were excluded, the plaintiff would undoubtedly have been entitled to recover.

It has been held by this court since the case of *Riggs v. Andrews*, 8 Ala. 628, and probably before that, that a blank indorsement of a note prima facie vests the title in the holder thereof as completely as can be done by another mode. The possession

of the note by plaintiff and its production at the trial, it being indorsed in blank by the payee, is prima facie evidence of ownership. *Sawyer v. Patterson*, 11 Ala. 523; *Lake-side Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Berney v. Steiner Bros.* 108 Ala. 111, 54 Am. St. Rep. 144, 19 So. 806.

The notes being negotiable paper, the legal title thereto, and not the beneficial interest therein, controls as to proper parties

**—evidence of  
ownership.**

**Party—  
enforcement  
of note.**

plaintiff in suits for the collection of the notes. The fact, if it was made to appear (which is not done here), that the holder of the legal title is not entitled to the proceeds of the judgment, is no defense to the makers in an action by the holder

**Bills and notes—  
holder not  
entitled to  
proceeds—effect.**

against them. *Hanna v. Ingram*, 93 Ala. 483, 9 So. 621; *Berney v. Steiner Bros.* 108 Ala. 116, 54 Am. St. Rep. 144, 19 So. 806.

The plaintiff being the proper party to bring the action, and being prima facie the owner thereof, it is no concern of the defendants as to who is entitled to the proceeds of these notes when collected. Defendants would have been protected if they had voluntarily paid the amount to the plaintiff, she being the holder of the notes, and they being indorsed in blank by the payee, and, of course, this judgment is and will be a complete bar to any other action by any other party or parties on these notes; and hence the questions as to whether plaintiff paid full value therefor or nothing, so far as any defense was attempted here to be set up to the notes, are of no concern to these defendants.

**Judgment—  
on note—bar to  
further action.**

Notes like the ones here sued on may be and are often indorsed to banks, or other agents or agencies, merely for the purpose of collection, and in such cases, and those like the one now under consideration, it is of no concern to the defendants, or

makers, to whom the proceeds will ultimately be paid.

Aside from evidence to which any objection was interposed, the plaintiff was indubitably entitled to recover. The following propositions are well settled, and control the decision as to plaintiff's ownership of the notes sued on: The holder of paper indorsed in blank may fill in the indorsement so as to vest himself with the legal title, but not so as to change liability of indorser. Hood v. Robbins, 98 Ala. 487, 13 So. 574; Lake-side Land Co. v. Dromgoole, 89 Ala. 505, 7 So. 444. A blank indorsement vests title in the holder of a note as completely as any other mode, and it need not be filled up before going to the jury. Riggs v. Andrews, 8 Ala. 628; Sawyer v. Patterson, 11 Ala. 523; Berney v. Steiner Bros. supra. A delivery and transfer of a note transferred in blank passes such title as will support trover against a party who purchases the note from the transferrer. Carter v. Lehman, 90 Ala. 126, 7 So. 735.

**Bills and notes—right to fill blanks in indorsements.**

**—effect of blank indorsements.**

**Trover—for note—indorsement in blank.**

It results that the judgment of the court below will be affirmed.

Affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

A petition for rehearing having been granted, Mayfield, J., on October 30, 1919, handed down the following additional opinion:

On this hearing we have reached the conclusion that we were in error on the original hearing in holding that it was error without injury in admitting the power of attorney in evidence, for the reason that the ownership of the note was proven without dispute by other evidence. We are led to the present conclusion by the opinion and decision in the case of Bank of Piedmont v. Smith, 119 Ala. 57, 24 So. 589.

The record and questions in that

case were very similar to the record and questions in this case. They are as near alike as you would expect to find records and questions in different cases; and we feel constrained to hold as was held in that case. In fact, that case, in a sense, construed statutes of this state as to pleadings and practice in such cases, and those statutes have been readopted with that construction on them, and we do not feel at liberty to depart therefrom.

**Statutes—readoption after construction—effect.**

The fault of our original holding was that the pleadings did not raise the question as to legal title of the negotiable notes in question, but only the question as to the plaintiff's ownership. While the paper was negotiable and was indorsed in blank, it was not sued on as such. The record shows that the trial was had as if it had been an action on non-negotiable, and not commercial, paper, and hence the rules we announced should not be applied to the case under the issues on which the trial was had. A failure to observe this led the writer of the opinion into the error. He desires to say, however, the fault was his, and not that of the attorneys or other justices concurring.

**Bills and notes—right to sue on non-negotiable paper.**

It results, therefore, that the power of attorney was competent and important evidence under the issues on which the case was tried; and, if error to admit it in evidence, the error must work a reversal.

It is insisted that, the power of attorney being executed in the state of Georgia, it was not self-proving. The execution of the power of attorney purports to be under the seal of the grantor, and purports to be acknowledged before a notary in the state of Georgia; and a notarial seal or scroll appears on the instrument. But the acknowledgment of the notary does not refer to the seal, nor does he certify that it was given "under his seal," official or other-

wise, but only that it was given under "his hand." The question therefore is presented: Was the execution of the instrument sufficiently proven by the acknowledgment of a foreign notary under his official seal? In other words, was the acknowledgment before a notary properly and legally authenticated by his official seal? While there is on the instrument what purports to be a seal, the notary does not certify that it is his official seal, and makes no reference whatever to it either in the body of the certificate or in the jurat thereof, but the certificate purports to be under "his hand" only, but not under "his seal."

Under our decisions we feel compelled to hold that the power of attorney was not self-proving. The

Acknowledgment—notice of reference to seal.

notary's certificate was not attested by his official seal.

While this court has repeatedly held that instruments the execution of which was acknowledged before foreign notaries, whose certificates of acknowledgment were attested by official seals, were self-proving, yet we have never held that affixing a mere scroll or wafer, purporting to be a seal, without any reference thereto by the officer in the body of his certificate, or in the jurat thereof, was sufficient authentication to make it self-proving. See *Hart v. Ross*, 57 Ala. 520; *Alabama Nat. Co. v. Chattanooga Door & Sash Co.* 106 Ala. 663, 18 So. 74; *Goree v. Wadsworth*, 91 Ala. 416, 8 So. 712; *Hill v. Norris*, 2 Ala. 640; *Toulmin v. Austin*, 5 Stew. & P. (Ala.) 410.

The case of *Wetmore v. Laird*, 5 Biss. 160, Fed. Cas. No. 17,467, is in point, and supports our holding, and we believe the reasoning thereof to be sound. We have a line of cases somewhat similar as to what is sufficient to make the execution of a given instrument under seal or not under seal. The following is a synopsis of the holdings of this court as to private seals and what is necessary to make the instrument a sealed

or unsealed one: A notarial seal is not necessary to authenticate the certificate of acknowledgment of an Alabama notary. *Harrison v. Simons*, 55 Ala. 510.

—necessity of seal.

But at common law a notary was simply a commercial officer, and his official acts were known only by his official seals. *Dunn v. Adams*, 1 Ala. 527, 35 Am. Dec. 42; *St. John v. Redmond*, 9 Port. (Ala.) 428. An instrument which on its face purports to be under seal will be so considered though there is no scroll opposite the signature. *Shelton v. Armor*, 13 Ala. 647.

Notary public—necessity of seal.

An instrument signed between several parties, preceded by the words, "Given under our hands and seals," followed by the seal after name of party, is a sealed instrument. *Hatch v. Crawford*, 2 Port. (Ala.) 54. Merely suffixing a clause containing the word "Seal" or the letters "L. S." after the name of a subscriber to the instrument does not constitute a seal; the purpose to seal it should be declared in the body of the instrument. *Breitling v. Marx*, 123 Ala. 222, 26 So. 203. The mere suffixing a scroll containing the word "Seal" or the letters "L. S." to the name of the subscriber does not make it a writing under seal. *Carter v. Penn*, 4 Ala. 140; *Blackwell v. Hamilton*, 47 Ala. 470.

Seal—necessity of.

—when sufficient.

—necessity of referring to it.

We therefore hold that the purpose of the notary to affix his seal must appear in his certificate; otherwise the scroll or impression purporting to be a seal may have been placed on the document by another, and without the knowledge or official act of the notary. In other words, we, or the trial court, are not authoritatively informed that the certificate of acknowledgment of the foreign notary was by him authenticated by his official seal. There is no certificate that

—assumption as to authenticity.

the scroll or impression is or was his official seal, or that it was so affixed or made by him as such notary.

It therefore results that it was error to admit the power of attorney in evidence, and the judgment

below should be reversed. The application for rehearing is therefore granted, the judgment of affirmance set aside, and one of reversal rendered.

Application granted. Reversed and remanded.

## ANNOTATION.

### What amounts to notary's seal.

#### I. Introduction and scope, 1663.

#### II. Substances or instruments used in affixing seal, 1668.

#### III. Inscription on seal:

##### a. In general, 1665.

##### b. Name of notary, 1667.

##### c. County and state, 1668.

#### I. Introduction and scope.

The present annotation presupposes that a notary's seal of some kind was required. Otherwise no question as to what would constitute a sufficient seal would have arisen. This limitation, of course, excludes all cases where the question was merely whether or not a seal must be affixed, as well as that large class of cases where in it is conceded that no seal was necessary.

#### II. Substances or instruments used in affixing seal.

It has been seriously maintained that at common law a notarial seal must be impressed upon wax, wafer, or other tenacious substance, so that a mere stamp upon paper itself was insufficient. See *Bank of Rochester v. Gray* (1842) 2 Hill (N. Y.) 227.

But the modern rule, generally accepted, is that the use of wax or other adhesive or tenacious substance upon which the seal of a notary may be impressed is no longer necessary, the use of such a substance having long since ceased to be regarded as important or necessary. *Pierce v. Indseth* (1882) 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418; *Orr v. Lacy* (1847) 4 McLean, 243, Fed. Cas. No. 10,589; *Re Nebe* (1875) 11 Nat. Bankr. Reg. 289, Fed. Cas. No. 10,073; *Bradley v. Northern Bank* (1877) 60 Ala. 252; *Connolly v. Goodwin* (1855) 5 Cal. 220; *Mason v. Brock* (1850) 12

#### III.—continued.

##### d. Official and private seals, 1668.

##### e. Conformity of recitals on seal with recitals in instrument sealed, 1669.

#### IV. Relation of seal to instrument, 1669.

##### V. Place on paper, 1670.

*Ill.* 273, 52 Am. Dec. 490; *Meyers v. Russell* (1873) 52 Mo. 26; *Carter v. Burley* (1838) 9 N. H. 558; *Bank of Rochester v. Gray* (N. Y.) supra; *Bank of Manchester v. Slason* (1841) 13 Vt. 334. In *Connolly v. Goodwin* (1855) 5 Cal. 220, the court discussed this question as follows: "The next point on appeal relies upon the fact that the seal of the notary is made by an impression on the paper only, and not upon wax, as it is insisted it ought to be. This position, it is urged, must be right, because by all the old common-law writers a seal is defined to be an impression made on wax, or wax with an impression, and some of the later authorities, without regarding the reason of the rule, have decided that it should be made in no other way. It is very obvious that at the origin of the doctrine in regard to seals, there existed no other convenient commodity upon which a distinct impression could easily be made. Now, the inventions, discoveries, and improvements of modern days have supplied so much better materials and means that it is highly probable that wax is the most inferior and inconvenient substance which can be resorted to for the purpose under consideration. The object of the law was to have a seal, and this was simply a distinct impression. It was the impression or stamp, and not the wax, which gave character to the instrument, and enabled it to be distinguished or recog-

nized. That the constant use of wax for the purpose, through several centuries, when no better substance was offered, had identified it as a necessary part of the ceremony, and made it to be mentioned as a part of the rule at common law, is perfectly natural, and not at all surprising. But it must be remembered that there is another rule of the common law which must be given full effect. 'Cessante ratione cessat ipsa lex' was not declared in vain, and can never become obsolete; and if ever there was a question to which this wise rule can and ought to be satisfactorily invoked, that under consideration is surely one, as the design, the intent, the object of the law, is better carried out and more effectively secured." And in *Pierce v. Indseth* (1882) 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418, *supra*, the court quoted as applicable in the case under consideration the following statement by Mr. Justice Grier in *Pillow v. Roberts* (1851) 13 How. (U. S.) 472, 14 L. ed. 228: "Formerly, wax was the most convenient and the only material used to receive and retain the impression of the seal. Hence it was said: 'Sigillum est cera impressa; quia cera, sine impressione non est sigillum.' But this is not an allegation that an impression without wax is not a seal, and for this reason courts have held that an impression made on wafers or other adhesive substances capable of receiving an impression will come within the definition of 'cera impressa.' If, then, wax be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is im-

pressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it." And in *Carter v. Burley* (1838) 9 N. H. 558, where the seal was by distinct impression on the paper itself, the court, in rejecting the contention that such a seal was not good because no wafer or wax was used, said: "Nothing would have been added to its character by wafer or wax; and as this is not an uncommon mode of affixing official seals, we are of opinion that it is sufficient." So in *Bank of Manchester v. Slason* (1841) 18 Vt. 334, the court said: "The objection that the seal of the notary was not impressed upon wax or wafer is one which cannot avail. It has too long been settled that public seals do not require water or wax to their validity, to be now brought in question. It is now the more common and more convenient mode to impress such seals upon the paper itself."

An impression upon the paper or parchment itself with an intent to make a seal is as good as upon wax or any other tenacious substance. *Orr v. Lacy* (1847) 4 McLean, 243, Fed. Cas. No. 10,589. In fact, as appears in the quotation above made from *Pierce v. Indseth* (U. S.) and *Connolly v. Goodwin* (Cal.) *supra*, it has been declared with much show of reason that an impression on paper is better than wax.

However, in this connection it also has been said that while an impression in the paper is sufficient, "no adhesive substance is probably so good as wax to receive, retain, and distinctly exhibit the figures and legend or other devices upon a notarial seal," and that after a long time an impression in the paper alone "is apt to grow less distinct, especially if the paper be not of a quality good for retaining it." *Bradley v. Northern Bank* (1877) 60 Ala. 252.

Regardless, however, of which method is better, it is now almost universally conceded that it is enough, at least in the absence of positive law prescribing otherwise, that the impress of the seal is made upon the paper only.

**United States.** — *Pierce v. Indseth* (1882) 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418; *Orr v. Lacy* (1847) 4 McLean, 243, Fed. Cas. No. 10,589.

**Alabama.** — *Bradley v. Northern Bank* (1877) 60 Ala. 252.

**California.** — *Connolly v. Goodwin* (1855) 5 Cal. 220.

**Illinois.** — *Mason v. Brock* (1850) 12 Ill. 273, 52 Am. Dec. 490.

**Iowa.** — *Gage v. Dubuque & P. R. Co.* (1860) 11 Iowa, 310, 77 Am. Dec. 145; *Stephens v. Williams* (1877) 46 Iowa, 540.

**Missouri.** — *Meyers v. Russell* (1873) 52 Mo. 26.

**New Hampshire.** — *Carter v. Burley* (1838) 9 N. H. 558.

**New York.** — *Bank of Rochester v. Gray* (1842) 2 Hill, 227 (statutory rule).

**Texas.** — *Stooksberry v. Swan* (1893) — Tex. Civ. App. —, 21 S. W. 694.

**Vermont.** — *Bank of Manchester v. Slason* (1841) 13 Vt. 334 (statutory rule).

Under this rule the seal must be legible. *Pierce v. Indseth* (U. S.) and *Bradley v. Northern Bank* (Ala.) supra; *Stearns v. Chenault* (1893) 15 Ky. L. Rep. 347, 23 S. W. 351. For instance in *Pierce v. Indseth* (U. S.) supra, it has been held that the impress must be readily identified upon inspection. And see *Donegan v. Wood* (1873) 49 Ala. 242, 20 Am. Rep. 275. And under the rule that a proper impression in the paper is sufficient, it was held in *Bradley v. Northern Bank* (Ala.) supra, that where the paper in question seventeen years after execution is found to have "a distinct circular outline impression of a seal with an indented inner edge, or rim, and within this a number of stars in a circular row, and between them and the edge the legend 'Notary Public, New Orleans, La.,'" it was sufficient, at least in the absence of any evidence creating a suspicion as to genuineness. And in Kentucky it has been held (*Stearns v. Chenault* (1893) 15 Ky. L. Rep. 347, 23 S. W. 351) that the impression of a notarial seal was sufficient although it was so dim that it was scarcely perceptible with the naked eye, the required inscriptions,

etc., being discernible when a magnifying glass was used.

However, in the absence of statute so providing, an impression on paper is not the exclusive method, and wax or other adhesive substance capable of taking an impression may be used. It was so held in *Stooksberry v. Swan* (Tex.) supra, wherein it appeared that on the instrument in question was a circle defined by a discoloration of the paper and edged by small particles of red sealing wax, and in which it was ruled that, upon proof of the notary's signature and that he generally used a seal and molten wax, it was for the jury to say whether the notary had used a seal such as was required by statute.

And a notary's seal impressed directly upon paper by a die with which ink was used was held sufficient in *Pierce v. Indseth* (U. S.) supra. So, a notarial seal consisting of an impression in ink in the form of such a seal stamped upon the paper has been held to constitute a seal. *The Gallego* (1887) 30 Fed. 271.

On the other hand, in *Stephens v. Williams* (1877) 46 Iowa, 540, where the statutes required a seal with specified words "engraved" thereon and a "distinct impression" thereof filed, it was held that a wafer with the required words written upon it with a pen, but without any impression, was insufficient as a notarial seal.

### III. Inscription on seal.

#### a. In general.

In the absence of regulating statute notaries public are authorized to provide their own seals with such inscription as their individual fancy or judgment may dictate. *Kirksey v. Bates* (1838) 7 Port. (Ala.) 529, 31 Am. Dec. 722; *Mason v. Brock* (1850) 12 Ill. 273, 52 Am. Dec. 490; *Flemming v. Richardson* (1853) 13 La. Ann. 414. And see *Davis v. Roosevelt* (1880) 53 Tex. 305. In fact it has been said that since it is the seal, and not its composition or character of words or devices, which raises the presumption of official character, any impression made upon wax or a wafer adhering to the paper, "without any device or words

indicative of the particular official," is entitled to judicial sanction as evidence of the notarial character of the individual signing his name as such. *Re Phillips* (1876) 14 Nat. Bankr. Reg. 219, Fed. Cas. No. 11,098. And in holding that where the law does not specify what shall appear on the face of a seal, a notary may validly use a notarial seal not his own, although it differs somewhat in design from the one ordinarily used by him, the court in *Muncie Nat. Bank v. Brown* (1887) 112 Ind. 474, 14 N. E. 858, said: "The utmost that can be asserted is, that the notary public did not do his duty as the law requires, by attaching the seal he was accustomed to use. He did, in fact, take the acknowledgment of the mortgagor; he did execute and sign the proper certificate, and he did affix a seal to the certificate. If the acknowledgment must be condemned, it is because the officer did wrong in using a seal not his own. No one can perceive how this breach of duty could have worked injury to any person in the world. Whether the one seal or the other was used did not add to or take from the certificate any real efficacy. If the notary, two hours before the acknowledgment, had thrown away his old seal and adopted another, certainly no real harm to any person could have been done. Nor is it easy to see how the mere use of one seal instead of another, where both are mere general seals, without any peculiar marks or names, could do anybody any harm. Courts ought not, as it seems to us, to strike down a mortgage for such a breach of duty unless the law imperatively requires it. We cannot believe that the law requires such a result in a case where, as here, a notarial seal is used, although not the one the notary kept for use."

Under statutes which prescribe what inscription, emblems, etc., shall appear upon the face of notarial seals, there seems to be a difference of judicial opinion, some of the courts requiring a much stricter compliance with the statutory provisions than do others.

Thus, in Iowa and Texas, where the statutes expressly provide what must

appear upon the face of a notarial seal, it has been held that such provisions must be, at least, substantially complied with. *Gage v. Dubuque & P. R. Co.* (1860) 11 Iowa, 310, 77 Am. Dec. 145; *Neese v. Farmers' Ins. Co.* (1881) 55 Iowa, 604, 8 N. W. 450; *Hewitt v. Morgan* (1893) 88 Iowa, 468, 55 N. W. 478; *McKellar v. Peck* (1878) 39 Tex. 381; *Stringfellow v. Thomson* (1880) 1 Tex. App. Civ. Cas. (White & W.) 565. For instance, in Iowa it has been held that a statutory requirement that the seal show the name of the officer must be complied with, and that a seal which omits to do so is insufficient. *Neese v. Farmers' Ins. Co.* (1881) 55 Iowa, 604, 8 N. W. 450, *supra*; *Hewitt v. Morgan* (1893) 88 Iowa, 468, 55 N. W. 478, *supra*. And that the same is true as to the name of the state, see *Hewitt v. Morgan* (Iowa) *supra*.

And where the statutes provide that notaries shall verify under their "seal of office," a notary's official seal must be used. *McKellar v. Peck* (1878) 39 Tex. 381, holding that an acknowledgment sealed by a notary with the seal of the county court instead of his own was a nullity, although it was probably the result of a mistake.

On the other hand, some of the courts have adopted a more liberal policy and have regarded statutes of the character under consideration as directory rather than mandatory. *Sonfield v. Thompson* (1883) 42 Ark. 46, 48 Am. Rep. 49; *Weeping Water v. Reed* (1887) 21 Neb. 261, 31 N. W. 797; *Stringfellow v. Thomson* (1880) 1 Tex. App. Civ. Cas. (White & W.) 565. And see *Stearns v. Chenault* (1893) 15 Ky. L. Rep. 347, 23 S. W. 351. Thus, proceeding upon the theory that a statute prescribing the emblems, devices, and legends which the impression of a notary's seal should present, is directory, and not mandatory, with respect to such provisions, it has been held that the Arkansas legislature, in enacting a statute providing that notary's seals by their impression "shall" present, among other things, "the emblems and devices presented by the great seal of the state," meant "to direct the use of the state emblems as the best for uni-

formity," but "did not intend that an instrument should be void without those particular impressions upon the seal, provided the notary should actually use the seal with which he was used to authenticate his official acts." *Sonfield v. Thompson* (Ark.) *supra*. And in *Weeping Water v. Reed* (1887) 21 Neb. 261, 31 N. W. 797, in construing a statute providing that each notary must "provide himself with an official seal on which shall be engraved the words 'Notarial seal,' the name of the county," and "the word 'Nebraska,'" and in addition, at his option, his name or the initial letters of his name," it was held that the words of the statute were permissive only, the court adopting the contention that the proper construction of the section was "that the seal must contain the words provided for, and if the notary so desire, he may add his name or the initials thereof; that he may exercise his option as to either, and that the seal is as good without either as with." And in Texas it has been held that a notarial seal which, instead of having the letters TEXAS around the extreme margin of the seal, had them placed between the several points of the star, was a substantial compliance with a statute directing that they be placed around the outer edge of the seal. *Stringfellow v. Thomson* (Tex.) *supra*.

And in Alabama it has been held that the statutory rule is not absolute. Thus, in *Kirksey v. Bates* (1838) 7 Port. (Ala.) 529, 31 Am. Dec. 722, where the statute provided that every notary must provide a public notarial seal "on which shall be engraved the arms of this territory, and shall have for legend, the name," office, and residence of the notary using the same, it was held that since the territory had no "arms" it was impossible to use the seal required, and consequently that a seal without a territorial coat of arms was sufficient.

And the seal of a notary public of one state is not rendered insufficient in another state simply because it does not contain the inscriptions required by the statutes of the latter state, at least where the laws of the notary's own state do not require him

to have a seal of the peculiar design required in the other state. *Crowley v. Barry* (1846) 4 Gill (Md.) 194.

*b. Name of notary.*

In the absence of statutory requirement, the seal of a notary public need not contain the name of the official. *Re Phillips* (1876) 14 Nat. Bankr. Reg. 219, Fed. Cas. No. 11,098; *Deans v. Pate* (1894) 114 N. C. 194, 19 S. E. 146. And for a statute which makes the placing of the notary's name on his seal optional, see *Weeping Water v. Reed* (1887) 21 Neb. 261, 31 N. W. 797, as set out *supra*, III. a.

With respect to the contention that a notarial seal must bear the name of the official, the court in *Re Phillips* (Fed.) *supra*, said: "Where has it ever been held in common-law courts that an official's seal must contain his name? We fail to find one in the absence of express legislation. An official seal, then, is the impression on the paper directly or on wax or wafer attached thereto, made by the official as and for his seal. But how are courts to know that it is his seal unless it contains his name, not written, but impressed on the document? The seal of a notary public is taken judicial notice of, the world over. We venture to affirm that the presumption in favor of an official seal does not arise from the name impressed on the paper; on the contrary, it is the seal which authenticates, not the particular name, word, or device on it. This is in harmony with the common-law idea of a seal, viz., the impression, and had its origin in those days when the great men and official dignitaries of earth could not write their names, and so had to sign by the signet, ring, cross, etc. Hence the seal impression placed upon a document by a notary public signifies authentication of his official character. It is the seal, and not its composition or character of words and devices, which raises the presumption of official character, of which courts take judicial notice."

And where the statute does not require the name of the notary to appear on his seal, it has been held that the mere fact that the instrument is signed "Geo. Theo. Sommer," and that the



seal bears the name "Theo. Sommer," does not render the seal insufficient. *Deans v. Pate* (1894) 114 N. C. 194, 19 S. E. 146.

However, it has been said that the seal of a notary public must bear the name of the notary who uses it. *Re Nebe* (1875) 11 Nat. Bankr. Reg. 289, Fed. Cas. No. 10,073 (expressly disapproved in *Re Phillips* (Fed.) supra, which is set out and quoted supra this subdivision). And that this is the rule under a statute expressly requiring that the name of the notary appear on his seal, see *Neese v. Farmers' Ins. Co.* (1881) 55 Iowa, 604, 8 N. W. 450; and *Hewitt v. Morgan* (1893) 88 Iowa, 468, 55 N. W. 478, as set out supra, III. a. In *Re Nebe* (Fed.) supra, the court, in discussing the rule that a notary's seal must bear the name of the person employing it, said: "Public seals—and a notary's seal is a public seal—are held to prove themselves. Is any stamp which a notary chooses to affix to his signature entitled to recognition as his official seal? Such a construction strikes me as a burlesque upon the provisions of the act of Congress, which makes both signature and seal necessary to the authentication of the notary's act. And if as a public seal it proves itself, must it not show on its face what it is that it proves; not only that it is a seal, but that it is the seal of a notary public; and in order to show that it is the seal of the notary who employs it, that it must bear his name? If it be admitted that the seal in this case is the seal of a notary public, it is just as clearly the seal of every other of the notaries public, in number about one thousand, who hold office in the county of Wayne; and what then becomes of the provisions of the law which require the notary's act to be attested by 'his official seal?'"

A seal containing the words "notary public," and bearing the name of the officer who signed the instrument, sufficiently sets forth such officer's official character. *Goodyear v. Hullihen* (1867) 2 Hughes, 492, Fed. Cas. No. 5,573.

#### c. County and state.

Where the statutes do not require

that the seal of a notary public shall state the name of the county in which the notary resides or for which he was appointed, a seal is sufficient although no county is named on the face thereof. *Lange v. State* (1884) 95 Ind. 114.

Likewise, if the statutes do not require the name of the state to appear on the seal, a seal is not rendered insufficient by an omission thereof. *Goodnow v. Litchfield* (1885) 67 Iowa, 691, 25 N. W. 882, affirmed in (1887) 123 U. S. 527, 81 L. ed. 194, 8 Sup. Ct. Rep. 203 (holding that under the facts it would be presumed that it was shown in the trial court that the laws of New York did not require the name of the state to appear on the seal of a notary public thereof).

But that where the statutory provision expressly requires that the "state" and "county" must appear, such provision should be complied with, see *Weeping Water v. Reed* (1887) 21 Neb. 261, 31 N. W. 797, as set out supra, III. b.

In *Stearns v. Chenault* (1893) 15 Ky. L. Rep. 347, 23 S. W. 351, it was held that a notarial seal in which the letter "O" appeared instead of the word "Ohio," this being the only departure from the statutory form, was not rendered defective thereby.

And that in Texas under a statute requiring the name of the state to be placed around the margin of the seal, a substantial compliance is sufficient, see *Stringfellow v. Thomson* (1880) 1 Tex. App. Civ. Cas. (White & W.) 565, as set out supra, III. a.

#### d. Official and private seals.

Where the statutes expressly require that a notary use an official seal, a scrawl or private seal is insufficient. *Mason v. Brock* (1850) 12 Ill. 273, 52 Am. Dec. 490; *Moore v. Titman* (1864) 33 Ill. 358. And see *Dumont v. M'Cracken* (1842) 6 Blackf. (Ind.) 355. And this although the statute is silent as to the form and character of the seal, and the notary is free to adopt a seal with such an inscription as he may choose. *Mason v. Brock* (1850) 12 Ill. 273, 52 Am. Dec. 490. In such a case the seal adopted must be capable of "making a definite and uniform impression on the paper

. . . or on some tenacious substance attached thereto, so that when a question arises as to the genuineness of an authentication, it may be determined by reference to the seal in the possession of the officer." *Ibid.*

And under statutes which provide that the certificate of a notary shall be attested by "his official seal" and that "each notary public shall procure a seal which shall be called the seal of the notary public," it has been held that an official seal is essential, and that the substitution of a scrawl therefor is not warranted. *Hinckley v. O'Farrel* (1836) 4 Blackf. (Ind.) 185.

But under statutes expressly authorizing a notary to use his private seal until he obtains an official one, an impression by private seal is sufficient provided an official seal has not been obtained. *Stark v. Barrett* (1860) 15 Cal. 361, holding such to be the law under California Laws 1850, chap. 41. Especially where the certificate expressly acknowledges that the notary has not obtained an official seal. *Fogarty v. Sawyer* (1863) 23 Cal. 570. And the court in *Morgan v. Cox* (1886) 27 Fed. 36, seems to have been of the opinion that a notary public, in acknowledging a deed, may use a private seal, where he recites that he has no public seal (but this was without reference to any statutory provision).

And where there is no law requiring a notary public to have a particular style of seal, and it does not appear that such an officer has any other seal, it has been held that a "private scrawl in place of a seal" is sufficient. *Flemming v. Richardson* (1858) 13 La. Ann. 414. And in the Canadian case of *Commercial Bank v. Brega* (1867) 17 U. C. C. P. 473, it was held that any seal which a notary public declares to be his official seal is sufficient as an "official seal" under the statutes.

*e. Conformity of recitals on seal with recitals in instrument sealed.*

The inscription on the seal must not contradict the recitals in instrument to which it is attached. Thus, in *Barber v. De Ford* (1915) 169 Iowa, 692, 150 N. W. 86, where the affidavit under consideration recited that it was made before a notary public in and for Polk

county, Iowa, but the seal showed him to be a notary public for St. Johns county, Florida, it was held that the affidavit was a nullity. And a similar conclusion was reached in *Byrd v. Cochran* (1894) 89 Neb. 109, 58 N. W. 127, where the paper itself showed upon its face that it was not executed within the jurisdiction of the notary sealing it.

*IV. Relation of seal to instrument.*

Where the statutory laws expressly provide that a notary public must authenticate by his notarial seal, the mere affixing or imprinting of a notarial seal to a paper is insufficient unless it expressly appears in the instrument that the notary has so authenticated it by his seal. In other words, it has been held that in such a case the affixing of a notarial seal to an official instrument requiring a seal is insufficient unless it expressly appears in the instrument that the seal has been so attached for the purpose of authentication. Thus, in *Wetmore v. Laird* (1870) 5 Biss. 160, Fed. Cas. No. 17,467, the use of the expression, "Witness my hand and seal," was held to be insufficient. So it has been said that even though there is on the paper what purports to be a seal, it is not sufficient unless the notary certifies that it is his official seal or makes some direct reference to it either in the body of the instrument or in the jurat thereof. *DAWSEY v. KIRVEN* (reported herewith) ante, 1658 (holding that a certificate was insufficiently sealed where it merely purported to be under "his hand" without reference to the attached seal). But applying the same rule, it has also been held that the certificate of a notary public which recited, "Witness my hand and seal," instead of "official seal," was sufficient where the statute provided that he must attach "his seal of office," it appearing that the notarial seal was impressed and that the certificate purported to be a notarial act. *Monroe v. Arledge* (1859) 23 Tex. 478. The court said that under such circumstances there could be no pretense that the seal used was a private seal.

However, in Missouri and Texas it has been held that where an actual

seal of office is affixed to a notary's certificate, it is not rendered invalid by the failure of the notary to declare in the certificate itself that the official seal was so affixed. *Clark v. Rynex* (1873) 53 Mo. 380; *Dale v. Wright* (1874) 57 Mo. 110; *Webb v. Huff* (1884) 61 Tex. 677. In the *Clark Case* the court said: "The point taken is, that the certificate itself must state that the official seal was affixed. This is the usual form; but where the official seal is in fact affixed, that is sufficient without referring to it in the testimonium or body of the instrument. When a scrawl is used in place of a seal, the statute requires that the instrument must on its face express to be sealed. But where an actual seal is used, it need not be referred to in the instrument." These Missouri holdings undoubtedly were influenced by the fact that the statute provided that if a mere scrawl was used in place of a seal, the instrument must recite its sealing. But in *Webb v. Huff* (Tex.) *supra*, it was squarely held that it was not absolutely necessary to add the words, "Given under my hand and seal of office," etc., the court saying: "It is objected that the notary did not add the words, 'Given under my hand and seal of office,' etc. These venerable words ought, no doubt, to be used by all notaries, especially as they have been adopted into the form given by the statute (Rev. Stat. 4812); but we do not think that their presence or their absence will affect the validity of the instrument. When the notary has appended his official signature and seal to the certificate, the seal gives authority to the document as well as to the signature. And it will add no weight whatever for him to append the words, 'this is my seal,' 'this is my signature,' or any equivalent words."

#### V. Place on paper.

It has been held that the fact that a seal is placed upon one part of the paper rather than another is unim-

portant and does not affect the sufficiency of the seal.

It was so held in *Bernheim v. Heyman* (1907) 31 Ky. L. Rep. 984, 104 S. W. 388, where the certificate was written in three parts, but the seal was placed between the first and second parts.

And in *Osgood v. Sutherland* (1886) 36 Minn. 243, 31 N. W. 211, in holding that a notarial seal placed on the right-hand side of the paper immediately below the jurat and above the certificate, which certificate showed that it was intended to be under seal, whereas no jurat was necessary and did not refer to the seal, was sufficient, the court said: "Of course, it is of no importance where a seal is affixed,—whether at the beginning, end, or margin. Assuming that a seal was necessary, we would, upon this state of facts, consider this seal as attached to the certificate. We feel warranted in doing so, inasmuch as the objection is merely formal. The chief object of a seal is as evidence of the official character of the notary, and this purpose is as fully served by this seal as if it were at the end of the certificate, or another one attached there."

So it has been held that where there is but one certificate to which a plainly visible notarial seal could be made applicable, such a seal is sufficient, although on the opposite side and end of the paper from the certificate. *Evans v. Smith* (1890) 43 Minn. 59, 44 N. W. 880.

Under a statute providing that a certificate shall be "in the form or to the purport hereinafter following," and prescribing a form which places the seal before and to the left of the name of the officer, it has been held that a seal is sufficient, although the seal was at the right instead of the left of the officer's name. *Vinson v. Nicholas* (1887) 23 S. C. 198, 5 S. E. 357.

G. J. C.

IDA CLOUD  
v.  
KANSAS-OKLAHOMA TRACTION COMPANY, Appt.

*Kansas Supreme Court — June 8, 1918.*

(103 Kan. 249, 173 Pac. 338.)

**Carrier — defect in floor — injury to passenger — res ipsa loquitur.**

1. The doctrine of *res ipsa loquitur* is properly applied in case of injuries to a passenger caused by a derailment, the collision with another train, the breaking of a rail, or by some defect in the equipment of the train which the passenger is presumed to know nothing about, for the reason that he has no way of anticipating or ascertaining, either before or after the accident, what occasioned it. It has no application to a case where a passenger is injured by some defect in the floor of the car which is visible to the passenger, and which causes the passenger to fall while attempting to alight from the train at a station.

[See note on this question beginning on page 1675.]

— care required.

2. "A carrier is bound to exercise the highest degree of care that is reasonably practical in safely carrying passengers and setting them down safely at their destinations."

[See 4 R. C. L. 1082.]

— how far insurer.

3. But the carrier is not an insurer of the safety of passengers, and an instruction which charged that it is the duty of the carrier to provide for the safe entry and exit of its patrons to and from its cars is subject to criticism, because it makes the carrier the insurer of the safety of the passenger.

[See 4 R. C. L. 1136.]

**Trial — instruction — injury as evidence of negligence:**

4. In an action by a passenger of an

interurban railway to recover damages alleged to have been caused by a defect in the floor of the vestibule of the car in which her foot caught while she was in the act of alighting at a station, it is error to charge that the happening of an accident resulting in injury to a passenger is *prima facie* evidence of negligence on the part of the carrier, and that "it will be incumbent upon the company or carrier to produce evidence which will excuse the *prima facie* failure to do its duty, or, in other words, it has the burden of proof, in order to rebut the presumption of negligence under the circumstances, that the accident could not have been avoided by the exercise of the highest practicable care and diligence."

[See 5 R. C. L. 84.]

Headnotes by PORTER, J.

**APPEAL** by defendant from a judgment of the District Court for Montgomery County (Holdren, J.) in favor of plaintiff, and from an order overruling a motion for new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John J. Jones and Chester Stevens, for appellant:

The evidence must be confined to the issues as shown by the pleadings.

Western Home Ins. Co. v. Thorp, 48 Kan. 289, 28 Pac. 991; Dodge City v. Wright, 48 Kan. 667, 29 Pac. 1086;

Frazier v. Ebenezer Baptist Church, 60 Kan. 404, 56 Pac. 752.

The carrier is not an insurer, and especially is this true of persons boarding or alighting from the carrier's trains or vehicles of transportation.

Lynch v. Missouri P. R. Co. 92 Kan. 735, 142 Pac. 938; 3 Thomp. Neg. § 2763; Le Barron v. East Boston Ferry Co. 11 Allen, 312, 87 Am. Dec. 717, 3 Am. Neg. Cas. 760, 5 R. C. L. § 712; 4 R. C. L. § 653.

The instructions given to the jury as to the care required of the carrier were contrary to law.

Elliott, Railroads, 2d ed. § 1585.

The verdict of the jury is excessive and is unwarranted by the evidence.

Tefft v. Wilcox, 6 Kan. 46.

Messrs. Walter S. Keith and S. H. Piper, for appellee:

There is no showing made that the defendant was in any way misled, and any variance there may have been between allegations and proof would not justify the court in reversing the case.

Hutchinson Lumber & Planing Mill Co. v. Baker, 74 Kan. 120, 86 Pac. 1016; Tipton v. Warner, 47 Kan. 610, 28 Pac. 712; Roberts v. Southern Surety Co. 101 Kan. 375, 166 Pac. 498.

Where the evidence shows that the injury resulted directly from the defect in the floor of the vestibule of the car, the doctrine of *res ipsa loquitur* applies with all its force and vigor.

Topeka City R. Co. v. Higga, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695; Elliott, Railroads, 2d ed. § 1587; Ohio & M. R. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218, 3 Am. Neg. Cas. 74; Lindsey v. Albany Coast Line R. Co. 173 N. C. 390, 92 S. E. 166; Schonleben v. Interborough Rapid Transit Co. 160 App. Div. 790, 145 N. Y. Supp. 682; Gleeson v. Virginia Midland R. Co. 140 U. S. 443, 35 L. ed. 463, 11 Sup. Ct. Rep. 862; Southern Kansas R. Co. v. Walsh, 45 Kan. 659, 26 Pac. 45; Blackwell v. Metropolitan Street R. Co. 137 Mo. App. 654, 119 S. W. 456; Fern v. Pennsylvania R. Co. 250 Pa. 487, 95 Atl. 590; May v. Charleston Interurban R. Co. 75 W. Va. 797, 84 S. E. 893, 9 N. C. C. A. 25; Union P. R. Co. v. Hand, 7 Kan. 391.

A passenger, by undertaking to prove some specific cause of accident, does not waive the presumption of negligence arising from the injury to him.

Cassady v. Old Colony Street R. Co. 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10, 14 Am. Neg. Rep. 559; Price v. Metropolitan Street R. Co. 220 Mo. 435, 182 Am. St. Rep. 588, 119 S. W. 982; McDonough v. Boston Elev. R. Co. 308 Mass. 436, 94 N. E. 809; Colorado Springs & I. R. Co. v. Reese, — Colo.

—, 169 Pac. 574; 6 Thomp. Neg. § 67; Southern R. Co. v. Adams, 52 Ind. App. 322, 100 N. E. 773.

It is the duty of a carrier of passengers, not only to furnish a safe means of conveyance, but also proper and safe means of ingress to and egress from its trains and cars.

Tipton v. Topeka R. Co. 89 Kan. 451, 182 Pac. 189; Mack v. Pittsburgh R. Co. 247 Pa. 598, 93 Atl. 618; Leveret v. Shreveport Belt R. Co. 110 La. 399, 34 So. 579; Brassell v. New York C. & H. R. R. Co. 84 N. Y. 241, 5 Am. Neg. Cas. 231.

A railroad company is bound to exercise the highest practicable care for the safety of its passengers, in keeping its equipment in safe condition.

Terre Haute & I. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434.

When plaintiff made it to appear that she was a passenger upon defendant's train, and, while being carried as such, the car in which she was seated left the track and she suffered injuries thereby, she had shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negated and overthrown.

Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 479; Chicago, R. I. & P. R. Co. v. Brandon, 77 Kan. 614, 95 Pac. 573.

The court will not reverse a case and send it back for another trial unless there has been prejudicial error committed.

Hamilton v. Atchison, T. & S. F. R. Co. 95 Kan. 359, 148 Pac. 648; Capital City Vitriified Brick & Paving Co. v. Concordia Lumber Co. 97 Kan. 294, 155 Pac. 38; Culbertson v. Sheridan, 93 Kan. 272, 144 Pac. 268; Cox v. Chase, 99 Kan. 740, 163 Pac. 184.

Porter, J., delivered the opinion of the court:

The plaintiff was a passenger on an electric interurban car of the defendant. In attempting to alight from the car at Coffeyville her foot caught in some manner, and she fell from the platform and sustained serious injuries. She brought suit and charged the defendant with negligence in permitting the floor of the vestibule of the car to be in a defective condition, and alleged that

the boards in the floor were old, rotten, worn, and decayed to such an extent that a large opening, the exact dimensions of which she was unable to state, was in the floor, which condition had existed for a long time, making the place unsafe and insecure for passengers attempting to alight from the car. She alleged that while in the act of stepping from the vestibule with her left foot the shoe on her right foot caught and fastened itself in the floor of the vestibule, causing her to be thrown forward and downward upon the pavement. The answer, besides a general denial, alleged that whatever injuries the plaintiff sustained were caused, not from any negligence of the defendant, but resulted through her own negligence and want of care in attempting to alight from the car, and the further defense that her injuries were the result of an unavoidable accident for which the defendant was not liable. The jury returned a verdict in plaintiff's favor in the sum of \$3,500. The court overruled a motion for a new trial, and the defendant appeals.

There is a contention that the plaintiff was allowed to recover upon a ground of negligence not alleged in her petition, but we think this complaint is somewhat technical. While there was no positive proof that the boards in the platform were rotten, or decayed, there was evidence that there was an opening or crack in the floor in which the heel of the plaintiff's shoe caught, with the result that she was thrown from the car and injured, and some evidence that the crack in the floor was worn. It is true there was a conflict in the testimony in regard to the condition of the floor, but there was no error in overruling the demurrer to the evidence. The testimony of the defendant's witnesses showed that the floor of the vestibule was constructed with a trapdoor which covers the steps when the car is in motion, but is raised up to permit passengers to alight, and that the edge of the flooring is beveled off so as to permit the

door to be lifted, and that the crack was necessary to make the door work, and that it had always been there. Defendant's witnesses also testified that no part of the flooring was split off or missing. On the other hand, the testimony introduced by the plaintiff's witnesses tended to show that there were slivers in the crack, and that the opening was wide enough at one place to catch the heel of plaintiff's shoe, and that this condition caused her to fall.

The defendant requested an instruction as follows: "Negligence is not to be presumed in this case; it is a fact to be proved by the plaintiff as she has alleged it."

The first part of the instruction would have been proper, but there was no error in refusing to give the instruction as requested, because the second clause would have held the plaintiff to the literal proof of every act of negligence alleged in the petition. It was not necessary that she establish the fact that the crack in the boards was occasioned by their being allowed to become old or rotten. There is a complaint that in the instructions given the court assumed some of the facts as alleged in the petition, but we think the jury were not misled by the language used. There is some room for complaint of the trial court's instructions on the ground that they state too strongly the duties and obligations imposed upon a carrier of passengers, and emphasize that feature more than was necessary. Some of the instructions were admirably drawn and state the rule of law correctly. In other instructions upon this branch of the case we think the court committed reversible error. In instruction No. 7 the jury were charged that it is the duty of the carrier to provide for the safe entry and exit of its patrons to and from its cars. The instruction is open to the objection that it makes the carrier the insurer of the safety of the passenger, and this is not the law.

Carrier—how  
far insurer.

While carriers are the insurers of freight, they are not insurers of the safety of passengers. The court in instruction No. 6 properly charged that it is the duty of the carrier to use the highest degree of care consistent with the practical operation of the road to conserve the safety and security of its passengers, and that such duty continues until the passenger reaches his destination, and repeated the same rule in instruction No. 8. The well-recognized rule as to the duty owed to passengers is stated in the recent case of *Lynch v. Missouri P. R. Co.* 92 Kan. 735, 142 Pac. 938, as follows: "A carrier is bound to exercise the highest degree of care that

is reasonably practical in safely carrying passengers and setting them down safely at their destinations." Syllabus 1.

The most serious complaint of the instruction is that the court applied the doctrine of *res ipsa loquitur*. In the eighth instruction it was charged that the mere happening of an accident resulting in injury to a passenger, due to defect in equipment of a car, is *prima facie* evidence of negligence. Again, in instruction No. 9, the jury were charged that the happening of an accident resulting in injury to a passenger is *prima facie* evidence of negligence on the part of the carrier, "and it will be incumbent upon the company or carrier to produce evidence which will excuse the *prima facie* failure to do its duty; or, in other words, it has the burden of proof, in order to rebut the presumption of negligence under the circumstances, that the accident could not have been avoided by the exercise of the highest practicable care and diligence."

Again, the doctrine was applied even more strongly in instruction No. 15, which reads: "You are further instructed that, it being admitted that plaintiff was a passenger on defendant's car, and, when it is made to appear that, while attempting to alight therefrom in the manner and form alleged by her, she

suffered injuries, she had then shown a state of things upon which a presumption of negligence arises against the defendant company which will stand with the force and efficiency of actual proof of the fact, and is available for her benefit until negated and overthrown, and such presumption of negligence on the part of the defendant can only be overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practicably applied to careful railroad management, could provide."

These instructions should not have been given. The doctrine of *res ipsa loquitur* in cases of injuries to a passenger is properly applied in case

*Trial-instruction-injury as evidence of negligence.*

of a derailment, or the collision with another train, the breaking of a rail, or by some defect in the equipment of the train which the passenger is presumed to know nothing about, for

*Carrier-defect in floor-injury to passenger-res ipsa loquitur.*

the reason that he has no way of anticipating or ascertaining, either before or after the accident, what occasioned it. To hold that it applies to a case where the passenger is alighting from a train and is injured in the manner charged in the plaintiff's petition would be to hold that the passenger, in alighting from the train, is not bound to exercise some degree of care. The carrier is bound to provide reasonably safe conditions and appliances to enable passengers to board and alight from its cars. 4 R. C. L. § 653. Some of the exceptions to the application of the doctrine of *res ipsa loquitur* are those stated in Thompson's Commentaries on Negligence, vol. 3, § 2763, as follows: "It does not apply where the defect, deficiency, or peculiarity in the carrier's means of transportation or accommodation, which was the occasion of the accident, was visible to, seen by, or known to the passenger, as well as to the carrier, and

where the accident took place either before the actual commencement of the transit or after its termination, and while the passenger was in the affirmative act of boarding the carrier's vehicle, or alighting therefrom, or coming upon or passing from the grounds of the carrier,—in all of which cases the carrier is not the exclusive bailee of the passenger, but the passenger is required, under the principles of the law, to take reasonable care for his own safety."

The principal cases cited by the plaintiff do not sustain her contention. Thus, in the case of *Southern Kansas R. Co. v. Walsh*, 45 Kan. 659, 26 Pac. 47, where it was held that proof of the accident and extent of passenger's injury will make a *prima facie* case in his favor, the passenger was injured by the derailment of the train on which he was riding. It was held in that case that the passenger had made a *prima facie* case by showing the occurrence of the accident and the extent of his injuries. In the opinion it was said: "It is well settled by the authorities that in such cases a *prima facie* presumption of negligence on the part of the railroad company arises, which throws the onus upon the company of disproving a want of care on its part." (p. 659.)

Another case relied upon by the plaintiff is *Schonleben v. Interborough Rapid Transit Co.* 160 App. Div. 790, 145 N. Y. Supp. 682, where the facts were very similar to those in the present case. The floor of the car was covered with wooden slats about one inch apart, fastened by metal screws. One of these projected above the slats, and the plaintiff's shoe was caught, and he

was thrown down and injured. The plaintiff had no knowledge of the existence of the screw until he was thrown down, and was not guilty of any contributory negligence. It was held that the mere happening of the accident under the circumstances described imposed upon the defendant the duty of an explanation. The instructions complained of in the present case state the law to be that the mere happening of the accident (without reference to any knowledge the plaintiff might have had of the condition of the floor, or her duty to exercise reasonable care in alighting from the car) makes the rule of *res ipsa loquitur* apply the same as if the accident had been caused by a derailment or a collision, or something the plaintiff could not know about. Another case cited by the plaintiff is *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 448, 35 L. ed. 458, 463, 11 Sup. Ct. Rep. 862, where it was said that "it has been settled law in this court that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight." (p. 443.)

The instructions we have quoted from stated the rule too broadly, and left out any consideration of plaintiff's duty to exercise due care. The doctrine of *res ipsa loquitur* has no application to the present case, and because of the errors in the instructions the judgment will be reversed, and the cause remanded for another trial.

### ANNOTATION.

**Application of *res ipsa loquitur* doctrine to injury to passenger from defective or dangerous condition of floor of car.**

While the authorities are not agreed in their ultimate holdings as to the applicability of the *res ipsa loquitur*

doctrine to an injury to a passenger resulting from a defective or dangerous condition of the floor of the car



in which he is riding, the decisions of the respective courts are not necessarily inconsistent. The question seems to be one of fact rather than of law, the determining factor in each case apparently being the nature of the defect or obstruction which causes the injury. Thus, where the cause of injury is a defective condition which is due to the failure to repair or to keep the appliances of transportation in good working order, and is not visible to or known to the injured person, the *res ipsa loquitur* doctrine is held to apply. *Jorden v. St. Louis & M. River R. Co.* (1907) 122 Mo. App. 330, 99 S. W. 492; *McRae v. Metropolitan Street R. Co.* (1907) 125 Mo. App. 562, 102 S. W. 1082; *Schonleben v. Interborough Rapid Transit Co.* (1914) 160 App. Div. 790, 145 N. Y. Supp. 682; *Baum v. New York & Q. C. R. Co.* (1908) 124 App. Div. 12, 108 N. Y. Supp. 265; *Powell v. Hudson Valley R. Co.* (1903) 88 App. Div. 133, 84 N. Y. Supp. 337.

Thus, in *Jorden v. St. Louis & M. River R. Co.* (1907) 122 Mo. App. 330, 99 S. W. 492, *supra*, wherein it appeared that a trapdoor in the floor of a car collapsed under the weight of the plaintiff, causing her serious and permanent injuries, the court held that such an accident was of itself sufficient evidence of negligence on the part of the company within the doctrine of *res ipsa loquitur*. The court said: "It is a mishap of an extraordinary character, to an appliance within the exclusive control of the railroad company, and one that is not likely to happen in the absence of negligence on the part of the company's employees. . . . We consider this one of the clearest cases imaginable for the application of the maxim. The giving way of the floor of a car under a passenger's ordinary tread is more cogent evidence of bad management than the collision of two cars, which is held to bespeak negligence."

Likewise, in *Baum v. New York & Q. C. R. Co.* (1908) 124 App. Div. 12, 108 N. Y. Supp. 265, wherein it appeared that the plaintiff was injured in consequence of the flying up of a trapdoor in the floor of a car, the court

held that the doctrine of *res ipsa loquitur* applied, and that it required evidence from the defendant to explain the cause of the occurrence.

In *Schonleben v. Interborough Rapid Transit Co.* (1914) 160 App. Div. 790, 145 N. Y. Supp. 682, it appeared that the floor of a car was covered with wooden slats fastened thereto by metal screws. One of these screws in the aisle between the seats projected above the slats from one half to three quarters of an inch. The plaintiff, on leaving the car, caught his shoe on this screw and was thrown down and injured. The court held that the mere happening of the accident under the circumstances described made out a *prima facie* case for the plaintiff under the doctrine of *res ipsa loquitur*.

In *McRae v. Metropolitan Street R. Co.* (1907) 125 Mo. App. 562, 102 S. W. 1082, wherein it appeared that the plaintiff was seriously injured as a result of stepping on a highly electrified metal plate in the floor of the car, the court held that there was no error in an instruction given on behalf of the plaintiff which in effect charged that the injuries sustained raised a presumption of negligence on the part of the company. The court said: "The carrier is not an insurer of the safety of the passenger, and is liable only for injuries inflicted by its negligence, and the burden of proof always is on the passenger to establish the fact of the carrier's negligence by evidence. But, where the passenger shows that his injury was caused by some breaking of machinery, a collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation, he need go no further, since from any such happening a presumption of negligence on the part of the carrier arises. . . . The conceded facts demonstrate that the shock was caused by a defective condition of one of the appliances of transportation. The existence of a highly electrified metal plate in the passageway for passengers constituted such a defect, and the burden was cast on defendant to show that its presence could not have been

detected and prevented by the exercise of the highest degree of care."

In *Powell v. Hudson Valley R. Co.* (1903) 88 App. Div. 133, 84 N. Y. Supp. 337, it appeared that the plaintiff was a passenger in one of the defendant's electric cars, and, there being no seat for her to occupy, was compelled to stand on a plate in the floor directly over one of the wheels. By reason of the overcrowded condition of the car, the plate was pressed down on the wheel and the friction caused by the contact heated the plate to such an extent that the plaintiff was burned. It was held that the heating of the plate raised a presumption of failure on the part of the defendant to exercise due care to protect its passengers.

On the other hand, where the injury results from some defect or from some peculiarity in the construction of the car which is visible to the passenger, the *res ipsa loquitur* doctrine is held not to apply. *Perkins v. Bay State Street R. Co.* (1916) 223 Mass. 235, 111 N. E. 717; *Farley v. Philadelphia Traction Co.* (1890) 132 Pa. 58, 18 Atl. 1090. And see the reported case (*CLOUD v. KANSAS-OKLAHOMA TRACTION Co. ante*, 1671).

Thus, in *Farley v. Philadelphia Traction Co.* (Pa.) *supra*, it appeared that the plaintiff, a passenger on an open street railway car, arose to signal the conductor, and while in this position tripped on a sheathing over a wheel of the car, fell off the car, and was injured. The court held that the happening of the accident raised no presumption of negligence on the part of the company, since the car was not defective in any respect, the obstruction complained of being a conspicuous part of the car, and the manner of construction being the usual manner of construction of summer cars on street railways.

So, in *Perkins v. Bay State Street R. Co.* (Mass.) *supra*, it appeared that the plaintiff, while leaving a street car, caught the heel of her shoe

in the cleats or guides at the iron threshold of the door, causing her to be thrown into the vestibule and severely injured. The car was new and no claim was made that it was defective or out of repair, but the plaintiff contended that the construction and arrangement of the threshold were faulty and unsafe. The court held that since no part of the car gave way, the mere happening of the accident afforded no presumption of negligence on the part of the company, and the burden was on the plaintiff to show that the company had failed to use due care in the equipment of its railroad.

In the reported case (*CLOUD v. KANSAS-OKLAHOMA TRACTION Co. ante*, 1671) the court holds that no presumption of negligence arises where a passenger, in attempting to alight, is injured in consequence of catching her foot in a defect in the floor of the car, visible to her. It is said that to hold otherwise would be to hold that a passenger, in alighting, is not bound to exercise some degree of care.

It seems that the doctrine of *res ipsa loquitur* will not be applied where the exact cause of the injury does not clearly appear. Thus, in *Gulf, C. & S. F. R. Co. v. Davis* (1918) — Tex. Civ. App. —, 161 S. W. 932, the plaintiff alleged that while she was attempting to alight from a train, the lower part of her dress caught on a bolt, nail, screw, or other projection protruding from the platform of the car, as a result of which she was thrown to the ground and injured. It was held that the doctrine of *res ipsa loquitur* had no proper application, the ground of the decision being the failure of the plaintiff's evidence to show the cause of the fall with any degree of certainty. The court said that the existence of a loose screw or other projection on the platform of the car was a mere inference from the fact that the plaintiff's dress caught.

W. J. M.

STATE OF MONTANA EX REL. WILLIAM CUTTS, Member of the  
House of Representatives, Reapt.,  
v.

H. L. HART, State Treasurer, Appt.

*Montana Supreme Court — December 10, 1919.*

(— Mont. —, 185 Pac. 769.)

**Officer — members of legislature appointed without authority.**

1. One appointed by the governor without authority to fill a vacancy caused by the death of a member of the state legislature cannot compel payment to him of the salary annexed to such office.

[See note on this question beginning on page 1682.]

**Legislature — appointment of members — constitutional power.**

2. Under a constitutional provision that when vacancies occur in either house of the legislature, the governor shall issue writs of election to fill the same, the legislature cannot, where the Constitution also provides that its provisions are mandatory and prohibitory, authorize the governor to fill a vacancy by appointment, although there is not sufficient time for an election before termination of the session.

**Definition — de facto officer.**

3. An officer de facto is one in possession of an office and discharging its functions under color of authority or title derived from irregular, informal or defective appointment or election.

[See 22 R. C. L. 588, 594.]

**Officer — right of de facto officer to salary.**

4. A de facto officer cannot recover the compensation annexed to the office.

[See 22 R. C. L. 599.]

**Legislature — effect of admitting illegally elected member.**

5. Although the Constitution makes each house of the legislature judge of the qualifications, election, and return of its membership, one admitted to a seat after selection in a manner forbidden by the Constitution cannot secure the aid of the courts to compel payment of his compensation.

**Mandamus — to compel payment of salary to officer illegally elected.**

6. Mandamus does not lie to compel payment of salary to an officer whose petition shows on its face that he acquired the office in a manner not authorized by the Constitution.

[See 18 R. C. L. 260.]

APPEAL by defendant from a judgment of the District Court for Lewis and Clark County (Poorman, J.) in favor of relator in a mandamus proceeding to compel payment of a warrant issued to him for salary as member of the House of Representatives. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. S. C. Ford and Frank Woody for appellant.

Messrs. Galen & Mettler and E. G. Toomey, for respondent:

The governor, in making the appointment of the relator to fill the vacancy caused by the death of Jerry J. Flannigan, only acted within his right, and simply performed his duty as the chief executive of the state under the Constitution and statutes of Montana.

State ex rel. Chenoweth v. Acton, 31 Mont. 37, 77 Pac. 299; Collins v. State, 8 Ind. 344.

Hurly, J., delivered the opinion of the court:

Relator instituted mandamus proceedings against H. L. Hart, state treasurer, to enforce payment of a warrant issued to relator as and for salary as a member of the house of representatives of the fifteenth session. On or about February 7, 1917, Jerry J. Flannigan, a member of the house elected from Silver Bow county, died, and thereupon the governor issued to relator a com-

mission to fill the vacancy caused by the death of Flannigan, no election having been had to fill the vacancy, and on such date relator was seated as a member of such house, and continued as a member thereof. At the close of the session there was issued to him a warrant in payment of his per diem and mileage, pursuant to a resolution of the house, payment of which was refused by the state treasurer, defendant herein. The facts are uncontroverted by the defendant. Judgment was granted in favor of relator in the district court.

Section 9, article 5, of our Constitution provides:

"... Each house . . . shall judge of the elections, returns, and qualifications of its members."

"Sec. 45. When vacancies occur in either house the governor or the person exercising the functions of the governor shall issue writs of election to fill the same."

Section 420 of the Revised Codes provides:

"An office becomes vacant on the . . . death of the incumbent."

"Sec. 422. Whenever a vacancy . . . occurs in either house of the legislative assembly, the governor must at once issue a writ of election to fill such vacancy."

"Sec. 423. When any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by granting a commission to expire at the end of the next legislative assembly or at the next election by the people."

It is contended by respondent that, Flannigan having died during a session of the legislature and there being no mode provided by the Code for filling the vacancy during the time which would elapse before the election could be had, these sections, and particularly § 423, authorized an appointment by the governor, which view was adopted by the house.

Section 29, article 3, of the Constitution provides: "The provisions of this Constitution are mandatory and prohibitory unless by ex-

press words they are declared to be otherwise."

In our view, the Constitution (art. 5, § 45, supra) provides the only means for filling a vacancy occurring by death or resignation of a member.

Legislature—  
appointment of  
members—  
constitutional  
power.

The Constitution being mandatory as to the subjects on which it speaks (§ 29, supra), and having provided that when vacancies occur in either house the governor shall issue writs of election to fill the same, the people retained in themselves, and in themselves alone, the power to fill vacancies in the legislative bodies. There being, by the terms of the constitutional provision above referred to, a "mode . . . provided by law for filling such vacancy," the provisions of the statute (§ 423) do not apply here; and relator's appointment having been made contrary to the provisions of the Constitution, he was at most a de facto officer.

The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incidental to the right to hold office. *McGillic v. Corby*, 37 Mont. 249, 17 L.R.A. (N.S.) 1263, 95 Pac. 1063; 22 R. C. L. pp. 525 et seq. An officer de facto has been said to be one in possession of an office and discharging its functions under color of authority or of title derived from irregular, informal, or defective appointment or election. 22 R. C. L. p. 523, and cases cited.

Definition—  
de facto officer.

It is a generally recognized rule that a de facto officer cannot recover the compensation annexed to the office, and that, while the acts of such officer are valid so far as they concern the public or the rights of third persons, when he sues in his own right to recover fees or salary due him by virtue of the office, he must show that he is an officer de jure. *People v. Hopson*, 1 Denio, 574; *People ex rel. Corrad-*

Officer—right of  
de facto officer  
to salary.

den v. Howe, 177 N. Y. 499, 66 L.R.A. 664, 69 N. E. 1114; People v. Potter, 63 Cal. 127; Christian v. Gibbs, 53 Miss. 314; Vicksburg v. Groome, — Miss. —, 24 So. 306; McCue v. Wapello County, 56 Iowa, 698, 41 Am. Rep. 184, 10 N. W. 248; Samis v. King, 40 Conn. 298; Meagher v. Storey County, 5 Nev. 244; Dillon v. Myers, Brightly (Pa.) 426; Cobb v. Hammock, 82 Ark. 584, 102 S. W. 382; Eubank v. Montgomery County, 127 Ky. 261, 128 Am. St. Rep. 340, 105 S. W. 418, 16 Ann. Cas. 483; Yorks v. St. Paul, 62 Minn. 250, 64 N. W. 565. In *State ex rel. Boulware v. Porter*, 55 Mont. 471, 178 Pac. 882, this court said: "It is nevertheless the contention that, when he [a public officer] comes into court to enforce the payment of compensation on account of his services, he must assume the burden of showing that he is in right as well as in fact a member of the house. We agree with this contention, for it is the general rule that the emoluments follow the legal title to the office."

While there are exceptions to these rules, this case is not within any of them. On the general subject of actions brought by a de facto officer to recover the salary annexed to the office, see *Constantineau, De Facto Doctrine*, §§ 236 and 237, and cases cited; *Thropp, Pub. Off.* § 510; *Mechem, Pub. Off.* § 331; 22 R. C. L. pp. 321 et seq. As indicating some of the points directly passed upon in the cited cases, the following brief references are given:

One who has occupied an office to which he is ineligible is not entitled to maintain an action for the salary thereof. *Vicksburg v. Groome*, — Miss. —, 24 So. 306.

When a statute provides that an officer shall be appointed in a certain way, if he be appointed in a manner different from that provided by statute, held, he cannot recover as a de facto officer. *Phelon v.*

*Granville*, 140 Mass. 386, 5 N. E. 269.

In *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480, the facts were very similar to those here involved. One Vogel was elected as a member of the house of delegates of the city of St. Louis, defeating Sheridan, the plaintiff above named. When the house organized, a contest was initiated against Vogel on the ground that he had been convicted of crime, and hence was ineligible. Upon these charges he was unseated, and Sheridan, having received the next highest number of votes, was declared entitled to the seat by a vote of the house, and during the session the auditor was directed to draw him a warrant for the salary, amounting to \$600. After holding that, under the statute of Missouri, Sheridan was not duly elected, notwithstanding the provision of the city charter as follows: "Each house . . . shall be the sole judge of the qualification, election and returns of its own members," etc.—the court held that, it appearing that Sheridan had been declared elected contrary to the provisions of law, his suit for salary could not be maintained, regardless of the action of the house in seating him and authorizing payment of his salary. See also *Dill. Mun. Corp.* 5th ed. § 381, and note thereto.

Suppose that one, not an American citizen and who has not even declared his intention to become one, should be a successful candidate at the polls for a seat in the legislative assembly, and seated despite his noncitizenship; what right could be shown in his favor, should he bring mandamus to recover his salary, if his petition disclosed on its face that he was not a citizen? Or suppose that upon the candidacy of such person, proceedings should be brought to prevent his name being placed upon the election ballots; can it be doubted that the court could restrain the placing of the same thereon, when his ineligibility was made to appear, even though, if

elected, the legislature might possibly seat him as a member?

People ex rel. Sherwood v. State Canvassers, 129 N. Y. 360, 14 L.R.A. 646, 29 N. E. 345, involved the question whether one who was ineligible under the Constitution of New York to a seat in the legislative assembly, and who had received a majority or plurality in his candidacy for election to the assembly, could compel the state board of canvassers by mandamus to issue to him a certificate of election. The court said: "But it is claimed that we have no jurisdiction to determine that the relator was ineligible to the office of senator, because the Constitution, in § 10 of article 3, provides that each house of the legislature 'shall be the judge of the elections, returns, and qualifications of its own members.' The courts cannot interfere with this jurisdiction of the senate. Whatever may be determined here or elsewhere as to the election or qualification of the relator, or the result of the election in the twenty-seventh senatorial district, when the senate convenes, and not until then, it will have absolute jurisdiction of the whole subject, and may determine which of the two persons claiming seats therein was duly elected and qualified to sit therein; and it may determine that one was ineligible and that the other was not elected, and that thus there is a vacancy in that district calling for a new election. It is undoubtedly true that the courts cannot, by quo warranto, try the title to a legislative office; but this is not such a case. Here the relator comes into court and asks its aid to clothe him with apparent title to an office, and by its affirmative action to remove obstacles which stand in his pathway in his proposed intrusion into the office; and upon the undisputed facts the court is able to see that he is ineligible, and it simply determines that it will not aid him, and in making such determination it in

no way infringes upon the jurisdiction confided to the senate. It simply exercises a jurisdiction which he has invoked."

There can, of course, be no question that under the Constitution plenary power is lodged in each house to judge of the qualifications, elections, and returns of its membership; nevertheless, when it appears that such body has proceeded in an unconstitutional manner, the courts are not required to lend their assistance in aid of one who sues for his emoluments, basing his rights upon such action.

Legislature—  
effect of admitting illegally  
elected member.

We are not concerned here with the right of a de facto officer to sue upon quantum meruit for the value of services rendered. In this proceeding, relator desires the court by mandamus to compel the state treasurer to pay him the compensation which he alleges is due him by reason of his appointment and services. To obtain the aid of a court by mandamus, a party must establish a clear legal right in himself to the relief prayed for, and a violation of duty upon the part of the person or officer, sought to be coerced. Rev. Codes, § 7214; State ex rel. Beach v. District Ct. 29 Mont. 265, 74 Pac. 498; State ex rel. Donlan v. Sanders County, 49 Mont. 517, 143 Pac. 984.

Relator having acquired his membership in the house of representatives in a manner not provided for by the Constitution, and his petition disclosing this fact on its face, he does not bring himself within any rule entitling him to the aid of a writ of mandamus. The judgment appealed from is reversed, with directions to the District Court to dismiss the proceeding.

Mandamus—to  
compel payment  
of salary to  
officer illegally  
elected.

Brantly, Ch. J., and Holloway, Matthews, and Cooper, JJ. concur.

## ANNOTATION.

**Right to salary of one illegally elected or appointed to legislature.**

Although the right of a *de facto* officer to receive the salary or emoluments connected with the office has often been discussed by the courts, the reported case (*STATE EX REL. CUTTS v. HART*, ante, 1678) is apparently the only case wherein the proposition has been considered in connection with a member of a state legislature. It is therein held that one who is appointed by the governor to fill a vacancy in one of the branches of the legislature, when the method provided by the Constitution for filling the vacancy is by election, is a *de facto* officer, and as such is not entitled to the compensation annexed to the office.

A few cases have been found wherein the facts were somewhat similar to those in the reported case, although the precise question therein discussed did not arise. Thus, in *State ex rel. Boulware v. Porter* (1918) 55 Mont. 471, 178 Pac. 832, while it was held that the relator in that case was a *de jure* member of the assembly, and was entitled to the salary attached to the office, the court said: "Conceding for present purposes that relator is entitled to the privileges and immunities of a member and that he may vote upon pending measures, it is nevertheless the contention that when he comes into court to enforce the payment of compensation on account of his services, he must assume the burden of showing that he is, in right as well as in fact, a member of the house. We agree with this contention, for it is the general rule that the emoluments follow the legal title to the office."

So, in *Sheridan v. St. Louis* (1904) 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480, it appeared that the plaintiff was defeated for election as member of the house of delegates of the city of St. Louis. His successful opponent was afterwards unseated on the ground that he had been convicted of a crime, and hence was ineligible, and the plaintiff, having received the next highest number of votes, was declared by the house to be entitled to the seat, and during the session the auditor was instructed to draw him a warrant for the salary, amounting to \$600. The court held that under the statute of Missouri the plaintiff was not duly elected, and, as he was not a *de jure* member of the house, his suit for salary could not be maintained, regardless of the action of the house in seating him and authorizing payment of his salary.

In *State ex rel. Thompson v. Kenney* (1890) 9 Mont. 223, 23 Pac. 733, an action brought by a member of the legislature to compel the state auditor to settle the relator's claim against the state for his compensation and mileage as a member of the house of representatives, the respondent alleged that another person held a certificate of election to the office which the relator claimed to be occupying, but it did not appear that a contest of election was pending in the house of representatives. It was held that on sufficient *prima facie* evidence of the relator's membership in the house of representatives, he would be entitled to the relief sought. W. F. F.

COLE-McINTYRE-NORFLEET COMPANY

v.

A. S. HOLLOWAY.

*Tennessee Supreme Court — June 12, 1910.*

(141 Tenn. 679, 214 S. W. 817.)

**Sale — orders taken by salesman — duty to notify of rejection.**

1. A delay of a jobber for an unreasonable time to notify a customer of rejection of an order taken by the jobber's traveling salesman amounts to an acceptance of it.

[See note on this question beginning on page 1686.]

**Custom — what constitutes.**

2. That some jobbers uniformly filled orders taken by the traveling salesmen unless the purchasers were notified to the contrary does not establish liability of a particular jobber to do so, since it does not amount to a custom.

[See 23 R. C. L. 1404, 1405.]

**On Petition to Rehear.**

**Contract — appeal — inference.**

3. Assent to a contract may be evidenced by circumstances from which it may be inferred.

[See 6 R. C. L. 605.]

PETITION for a writ of certiorari to review a judgment of the court of Civil Appeals affirming a judgment of the Circuit Court for Shelby County (Young, J.) in favor of plaintiff, in an action brought to recover damages for alleged breach of a contract to deliver meal. *Writ denied.*

The facts are stated in the opinion of the court.

Mr. D. B. Sweeney, for defendant:

There was no contract between the parties.

Durlacher v. Frazer, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306; Haney v. Caldwell, 43 Ark. 184; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113; Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 52; Coleman v. Roberts, 1 Mo. 97; Travis v. Nederland L. Ins. Co. 43 C. C. A. 658, 104 Fed. 486; Gallagher v. White, 81 Barb. 92; Cochrane v. Justice Min. Co. 16 Colo. 415, 26 Pac. 780; Blum v. Daly, 22 Misc. 342, 49 N. Y. Supp. 136; Taylor v. Von Schrader, 107 Mo. 206, 16 S. W. 675; Scott v. Davis, 141 Mo. 213, 42 S. W. 714; Bowen v. Hart, 41 C. C. A. 390, 101 Fed. 876; McCormick v. Bonfils, 9 Okla. 605, 60 Pac. 296; Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; Dixon v. Ahern, 19 Nev. 422, 14 Pac. 598; Pettibone v. Moore, 75 Hun, 461, 27 N. Y. Supp. 455; Prescott v. Jones, 69 N. H. 305, 41 Atl. 352.

An order for goods is a mere offer, and is not binding upon the offerer until accepted.

McCormick Harvester Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Bronson v. Herbert, 95 Mich. 478, 55 N. W. 359; Goodspeed v. Wiard Plow Co. 45 Mich. 322, 7 N. W. 902; Reid v. Northwestern Implement & Wagon Co. 79 Minn. 369, 82 N. W. 672; Bement v. Rockwell, 92 App. Div. 44, 86 N. Y. Supp. 876; 85 Cyc. 52.

Where an agent merely solicits orders for goods, and sends them to his principal to be filled, the taking of such an order by the agent does not constitute a sale, either absolute or conditional, of the goods ordered, but it is a mere proposal, to be accepted or not as the principal may see fit.

McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 18 N. W. 485; Waco Mill & Elevator Co. v. Allis-Chalmers, 49 Tex. Civ. App. 426, 109 S. W. 224.

Messrs. P. J. Lyons and John E. Bell for plaintiff.

Lansden, Ch. J., delivered the opinion of the court:

This case presents a question of law, which, so far as we are ad-



vised, has not been decided by this court in its exact phases. March 26, 1917, a traveling salesman of plaintiff in error solicited and received from defendant in error, at his country store in Shelby county, Tennessee, an order for certain goods, which he was authorized to sell. Among these goods were fifty barrels of meal. The meal was to be ordered out by defendant by the 31st day of July, and afterwards 5 cents per barrel per month was to be charged him for storage.

After the order was given, the defendant heard nothing from it until the 26th of May, 1917, when he was in the place of business of plaintiff in error, and told it to begin shipment of the meal on his contract. He was informed by plaintiff in error that it did not accept the order of March 26th, and for that reason the defendant had no contract for meal.

The defendant in error never received confirmation or rejection from plaintiff in error, or other refusal to fill the order. The same traveling salesman of plaintiff in error called on defendant as often as once each week, and this order was not mentioned to defendant, either by him or by his principals, in any way. Between the day of the order and the 26th of May, the day of its alleged rejection, prices on all of the articles in the contract greatly advanced. All of the goods advanced about 50 per cent in value.

Some jobbers at Memphis received orders from their drummers, and filled the orders or notified the purchaser that the orders were rejected; but this method was not followed by plaintiff in error.

The contract provided that it was not binding until accepted by the seller at its office in Memphis, and that the salesman had no authority to sign the contract for either the seller or buyer. It was further stipulated that the order should not be subject to countermand.

It will be observed that plaintiff in error was silent upon both the

acceptance and rejection of the contract. It sent forth its salesman to solicit this and other orders. The defendant in error did not have the right to countermand orders and the contract was closed if and when it was accepted by plaintiff in error. The proof that some jobbers in Memphis uniformly filled such orders unless the purchaser was notified to the contrary is of no value because it does not amount to a custom.

Custom—what constitutes.

The case, therefore, must be decided upon its facts. The circuit court and the court of civil appeals were both of opinion that the contract was completed because of the lapse of time before plaintiff in error rejected it. The time intervening between the giving of the order by defendant and its alleged repudiation by plaintiff in error was about sixty days. Weekly opportunities were afforded the salesman of plaintiff in error to notify the defendant in error of the rejection of the contract, and, of course, daily occasions were afforded plaintiff in error to notify him by mail or wire. The defendant believed the contract was in force on the 26th of May, because he directed plaintiff in error to begin shipment of the meal on that day. Such shipments were to have been completed by July 31st, or defendant to pay storage charges. From this evidence the circuit court found as an inference of fact that plaintiff in error had not acted within a reasonable time, and therefore its silence would be construed as an acceptance of the contract. The question of whether the delay of plaintiff in error was reasonable or unreasonable was one of fact, and the circuit court was justified from the evidence in finding that the delay was unreasonable. Hence the case, as it comes to us, is whether delay upon the part of plaintiff in error for an unreasonable time in notifying the defendant in error of its action upon the contract is an acceptance of its terms.

Sale-orders  
taken by sales-  
man-duty to  
notify of  
rejection.

We think such delay was unreasonable, and effected an acceptance of the contract. It should not be forgotten that this is not the case of an agent exceeding his authority, or acting without authority. Even in such cases the principal must accept or reject the benefits of the contract promptly and within a reasonable time. Williams v. Storm, 6 Coldw. 207.

Plaintiff's agent in this case was authorized to do precisely that which he did do, both as to time and substance. The only thing which was left open by the contract was the acceptance or rejection of its terms by plaintiff in error. It will not do to say that a seller of goods like these could wait indefinitely to decide whether or not he will accept the offer of the proposed buyer. This was all done in the usual course of business, and the articles embraced within the contract were consumable in the use, and some of them would become unfitted for the market within a short time.

It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other party. The acceptance, however, of such an offer, may be communicated by the other party either by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself. When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketable by delay, delay in notifying the other party of his decision will amount to an acceptance by the offerer. Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves time to himself to see if the contract will be profitable.

Writ denied.

A petition for rehearing having been filed, the following response was handed down on September 20, 1919:

An earnest petition to rehear has been filed, and we have re-examined the question with great care. The petition quotes the text of 18 C. J. p. 276, as follows: "An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection, so as to turn silence on the part of the offeree into acceptance."

And further: "In like manner mere delay in accepting or rejecting an offer cannot make an agreement."

It is also said that diligent search reveals only one case holding in accord with the court's decision of this case, and that case is Blue Grass Cordage Co. v. Luthy & Co. 98 Ky. 583, 33 S. W. 835, and it is said this case was overruled by the later case of L. A. Becker Co. v. Alvey, 27 Ky. L. Rep. 832, 86 S. W. 974. We have examined both of those cases, and we do not think either is authority on the question at issue. In the first case the contract was admittedly executed, and the suit was for damages for its breach. The second case does not refer to the first, and is upon another branch of contracts. The quotation from C. J. contemplates the case of an original offer, unaccompanied by other circumstances, and does not apply to this case, where the parties had been dealing with each other before the contract, and were dealing in due course at the time.

It is a general principle of the law of contracts that, while an assent to an offer is requisite to the formation of an agreement, yet such assent is a condition of the mind, and may be either expressed or evidenced by circumstances from which the assent may be in-

Contract-  
appeal-  
inference.

ferred. *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; 6 R. C. L. 605; 13 C. J. 276; 9 Cyc. 258. And see the cases cited in the notes of these authorities. They all agree that acceptance of an offer may be inferred from silence. This is only where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence. There must be the right and the duty to speak, before the failure to do so can prevent a person from afterwards setting up the truth. We think it is

the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an unreasonable length of time will amount to an acceptance, if the offerer is relying upon him for the goods.

The petition to rehear is denied.

### ANNOTATION.

#### Effect of delay of principal in disapproving or rejecting orders for goods taken by agent subject to approval.

The reported case (*COLE-McINTYRE-NORFLEET CO. v. HOLLOWAY*, ante, 1683) lays down the rule that where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence, acceptance of an offer may be inferred from silence, and applying it holds that a wholesale merchant who sends out drummers or agents to solicit orders for perishable articles and articles consumable in the use is in duty bound, if he does not wish to accept and fill the orders, to so notify his customers, and that if he fails to do so, silence for an unreasonable length of time will amount to an acceptance if the offerer is relying upon him for the goods. However, the court was careful to point out that the case was neither one where the agent was exceeding his authority nor one of an original offer unaccompanied by other circumstances, but on the other hand was one where the parties had been dealing with each other before and were dealing in due course at the time.

And in *Peterson v. Graham-Brown Shoe Co.* (1919) — *Tex. Civ. App.* —, 210 S. W. 737, the rule that for a seller to repudiate an order obtained by his salesman, he must notify the giver of the order within a reasonable time, was again applied, and it was held that where no notice was given a buyer that his order for shoes would not be

filled, silence for an unreasonable time amounted to an acceptance.

And see *Blue Grass Cordage Co. v. Luthy & Co.* (1896) 98 Ky. 583, 33 S. W. 835, wherein the court seems to have regarded a failure for twelve days to repudiate an order for binding twine, taken by an agent, as an acceptance of the order.

However, the rule that a principal is under a duty to repudiate orders taken by his traveling salesmen so as to prevent an acceptance by silence apparently is not universally recognized.

Thus, in *Metzler v. Harry Kaufman Co.* (1909) 32 App. D. C. 484, where a shoe salesman took an order for goods subject to acceptance by his principal, and the question was whether or not acceptance could be inferred from a delay of several months in notifying the purchaser of the rejection of the order, it was held that acceptance of the offer could not be inferred from the silence of the principal during the time which elapsed between the receipt of the offer and the actual rejection thereof,—and this, although there was evidence tending to show that the delay was such as to prevent the offerer from obtaining the goods elsewhere. *Shepard, Ch. J.*, in delivering the opinion of the court, said: "Silence does not amount to acceptance. 'Mental assent,' as it has been

termed,—that is to say, coming to a determination in one's mind to accept,—without communicating that assent, is insufficient." In other words, it was held that where an agent solicits orders subject to acceptance by his principal, the same are not binding until accepted, and that such acceptance must be by affirmative act, and cannot be inferred from the silence of the principal or omission to notify the offerer of the rejection of the offer.

So, in *Senner & K. Co. v. Gera Mills* (1918) 185 App. Div. 562, 173 N. Y. Supp. 265, proceeding upon the theory that until orders taken by a traveling salesman are accepted by his principal no obligation arises, and that no burden rests upon the principal to repudiate the order at any time, it was held that no presumption of acceptance arises because of a failure to notify the purchaser within a reasonable time after receipt of the order of nonacceptance. The court said: "I know of no presumption in law that when a salesman offers goods to a prospective purchaser, and the purchaser agrees to take the same upon the terms and conditions offered, that the order will be filled by the principal whom the salesman represents. The court correctly charged the jury that a firm dealing with a buyer through its salesman is not in law bound to accept the order which the salesman has taken; but the court incorrectly charged that a duty rested upon the seller, on receiving the order, to notify the buyer within a reasonable time that it would not accept the same, and that in the failure of the firm to so notify the buyer of its refusal it would be deemed to have accepted the order. I know of no such rule of law. The traveling salesman is, at most, a solicitor of orders, and the prospective purchaser dealing with him understands quite clearly that he is not dealing with the principal, but with an agent whose acts must be accepted and ratified by the principal before they become effective. No

burden rested upon the defendant to repudiate the order at any time, and no presumption of acceptance arises because of the seller's failure to notify the purchaser of nonacceptance. . . . The law is well settled that, where one deals with a person known to be an agent, he is bound to recognize the agent's status, and that he is merely representing another, who must ratify his acts before a liability is created. The relation of a traveling salesman to a principal is well understood in the commercial world. His function is to solicit orders, which in turn are transmitted to his principal, and by him accepted or rejected. Until the orders which have been transmitted are accepted, no contract obligation on the part of the principal can be said to exist."

And in *Gould v. Cates Chair Co.* (1906) 147 Ala. 629, 41 So. 675, where a furniture dealer gave a traveling salesman an order for chairs, which was subject to the principal's approval, it was held that the fact that the principal had accepted and filled a previous order, and had held the order in suit from early in September until November 12, did not amount to an acceptance or estop him from urging nonacceptance. This was upon the theory that being only an order which required acceptance to give it the force of a contract, it could have been withdrawn at any time before acceptance, and that the principal was entitled to equal rights as regards rejection. The court said: "There is no time, from the time such an order is received until it is accepted, that the person giving the order cannot countermand it. It is plain that mere silence on the part of the plaintiff [principal] after receiving the order, without any act tending to show an acceptance, would not cut off the right of defendant [giver of the order] to countermand. If not, then it cannot, with show of reason, be insisted that silence alone should constitute an acceptance of the order on the part of the plaintiff." G. J. C.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF  
MISSOURI, etc., et al., Appts.,

v.

SAMUEL R. MCKELVIE, Governor, et al.

*Nebraska Supreme Court — December 26, 1919.*

(— Neb. —, 175 N. W. 531.)

**School — foreign language — discrimination.**

1. If the law should be construed to mean that parents or private tutors might teach a foreign language, but that others could not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative, and void; there being no reasonable basis of classification.

[See note on this question beginning on page 1695.]

**Statutes — construction — pari materia.**

2. Statutes pertaining to the same subject-matter should be construed together, and this is particularly true if the statutes were passed at the same session of the legislature.

[See 25 R. C. L. 1060-1062.]

**— pre-existing law.**

3. The legislature must be presumed to have had in mind all previous legislation upon the subject; so that in the construction of a statute we must consider the pre-existing law and any other acts relating to the same subject.

[See 25 R. C. L. 1063.]

**— consideration of historical facts.**

4. Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions.

[See 25 R. C. L. 1035.]

**— construction to uphold validity.**

5. Since it ought never to be presumed that the legislature intended to violate the Constitution, a doubtful or ambiguous statute should be so construed as to uphold its validity.

[See 25 R. C. L. 999-1003.]

**Evidence — judicial notice — illiteracy.**

6. The court is entitled to take judicial notice of the facts disclosed by the operation of the Federal Selective Draft Law with reference to the inability

of thousands of men born in this country to speak the language of their country, or understand words of command given in English.

**Definition — school.**

7. The word "school," as used in chapter 249, Laws 1919, refers to and means a school which presents a course of study such as that prescribed in the Compulsory Education Act, and attendance upon which would satisfy the requirements of that act.

[See 24 R. C. L. 556.]

**School — forbidding foreign language.**

8. Chapter 249, Laws 1919, does not prohibit the teaching of a foreign language if taught in addition to the regular course of study in the elementary schools, so as not to interfere with the elementary education required by law, and outside of regular school hours during the required period of instruction.

**Constitutional law — forbidding foreign language in school — validity.**

9. The act in question is not strictly a penal statute, but is mostly remedial in its nature. It is not broader than its title, and not an unreasonable interference with the liberty or property of the plaintiffs and interveners.

**Pleading — demurrer — admission of conclusions.**

10. A demurrer does not admit conclusions drawn from the facts stated.

[See 21 R. C. L. 506.]

**Statute — sufficiency of title.**

11. A title, "An Act Relating to the Teaching of Foreign Languages in the

(— Neb. —, 175 N. W. 531.)

State," covers a provision forbidding the teaching of any subject to any person in a school in any language other than the English.

[See 25 R. C. L. 847, 853.]

Constitutional law — unreasonable-ness of statute — effect.

12. An unreasonable law is not necessarily unconstitutional.

[See 6 R. C. L. 106.]

(Cornish, J., dissents.)

**APPEAL** by plaintiffs and interveners from an order of the District Court for Douglas County (Wakeley, J.) sustaining a demurrer to and dismissing an action brought to restrain the enforcement of an act relating to the teaching of foreign languages in the state. *Affirmed.*

The facts are stated in the opinion of the court.

**Mr. Arthur F. Mullen**, for appellant Siedlik:

The parent has the right to maintain a private school in which to educate his children in such subjects as he thinks proper, and the right to exercise discretion in the subjects the child shall study in the public schools.

*State ex rel. Sheibley v. School Dist.* 31 Neb. 552, 48 N. W. 393; *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 50 L.R.A.(N.S.) 266, 144 N. W. 1039.

The lawmaking power has no right or power to arbitrarily pick out and place particular persons in a class.

*Allan v. Kennard*, 81 Neb. 289, 116 N. W. 63; *State v. Scott*, 70 Neb. 685, 97 N. W. 1021, 100 N. W. 812; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318.

The act in question is clearly in conflict with the provisions of the 14th Amendment.

*Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522; *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

Courts of equity have full authority and power to restrain public officials from proceeding under the provisions of an unconstitutional act.

*State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 18 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *First State Bank v. Shallenberger*, 172 Fed. 999, 219 U. S. 119, 55 L. ed. 117, 31 Sup. Ct. Rep. 189; *American Surety*

*Co. v. Shallenberger*, 188 Fed. 636; *Jewett Bros. & Jewett v. Smail*, 20 S. D. 232, 105 N. W. 738; *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779; *Michigan Salt Works v. Baird*, 173 Mich. 655, 139 N. W. 1030; *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

**Messrs. A. M. Post and Albert & Wagner** for other appellants.

**Mr. Joseph T. Votava** for intervening plaintiffs.

**Mr. John J. Sullivan** for interveners on appeal.

**Messrs. Joseph Wurzburg and A. H. Byrum**, amici curiæ.

**Messrs. Clarence A. Davis**, Attorney General, and **George W. Ayres**, for appellees.

**Letton, J.**, delivered the opinion of the court:

This is an action to restrain the enforcement of chapter 249, Laws 1919, on the ground that it violates several of the provisions of the Constitution of this state, and of the 14th Amendment to the Constitution of the United States. Joining with the plaintiffs and asking for the same relief are certain local church corporations conducting parochial schools, certain private schools, and several foreign-language-speaking parents.

In substance, the complaints of the plaintiffs and interveners are that, since the officers and members of the respective churches are largely made up of foreign-speaking people, if the act is enforced their children will be unable to obtain instruction in religion and morals in accordance with the doctrines of the

religious denominations to which the parents belong, in the language of their parents; that many of the children cannot understand English, and cannot understand such instruction in that language; that in the parochial schools below the seventh grade the language of the parents is used in order to teach English, and that the children cannot learn English if they do not receive rudimentary education in the tongue the parents use; that property rights in the school buildings and grounds, and in the good will of the schools, will be destroyed; that the defendants, McKelvie as governor, Davis as attorney general, and Shotwell as county attorney of Douglas county, are severally threatening an enforcement of the act by causing the arrest and prosecution of the plaintiffs, officers and teachers.

The enrolled act complained of is as follows, the copy in the published laws being slightly inaccurate:

**An Act Relating to the Teaching of Foreign Languages in the State of Nebraska:**

Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five (\$25) dollars, nor more than one hundred (\$100) dollars or be confined in the county jail for any period not exceeding thirty days for each offense.

Sec. 4. Whereas an emergency exists, this act shall be in force

from and after its passage and approval.

Laws 1919, chap. 249.

A general demurrer to the petitions was sustained and the action dismissed. Plaintiffs and interveners appeal.

The appellants assert that the act is not regulatory; that it is an unwarranted interference with purely domestic affairs, and an invasion of the inherent discretion of parents in prescribing the course of instruction best adapted to the spiritual and material needs of children of their respective faiths; that the demurrer admits that many parents have reached an age where it is impossible for them to acquire a sufficient knowledge of English to enable them to counsel and admonish their children in matters of faith and morals in the English language, and that the teaching of foreign languages is largely to enable them to participate in the same religious services and exercises in the home and in the church; that the schools are private institutions, and, having discharged their duty to the state by providing instruction equal to that of the public schools, they may not be penalized for giving additional instruction, whether religious or secular; that the understanding of other languages and literature is not harmful to the individual or to the state itself; that, so far as the act imposes a penalty upon teachers for giving instruction in other languages, it is violative of their constitutional right to engage in the practice of their profession or calling. They complain that the act discriminates against teachers who teach foreign languages in schools, and leaves the teacher who gives such lessons in private free to pursue his calling; that, if any teacher should open a night school to instruct those who could not understand English in arts or sciences, he would violate the act, whereas another could form private classes and give instruction in a foreign language without offense.

They also maintain that the 1st

section of the act is not within the title; that the state has power to regulate the course of study in the public schools, and prevent the study of any subject not in the course, and can regulate private schools so as to require them to maintain a like course of study, but has no power to prevent pupils in private schools from studying branches in addition to the course of study prescribed by the state; that the state cannot claim a monopoly of teaching; and that the right to study any subject is a personal right which is protected by the Constitution.

Previous to 1919, there was no provision in the statute expressly specifying the branches of study to be taught in the common schools. The operation of the Selective Draft Law (Act May 18, 1917, chap. 15, 40 Stat. at L. 76, Comp. Stat. §§ 2044a-2044k, 9 Fed. Stat. Anno. 2d ed. p. 1136) disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended.

Evidence—  
judicial notice—  
illiteracy. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men, born in this country of foreign-language-speaking parents and educated in schools taught in a foreign language, were unable to read, write, or speak the language of their country, or understand words of command given in English. It was also demonstrated that there were local foci of alien enemy sentiment, and that where such instances occurred the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.

The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language.

In other states the same conditions existed, and steps have been taken to correct the evil. In 1919, the legislatures of Iowa, Kansas, Maine, Arkansas, Indiana, Washington, Wisconsin, and New Hampshire passed measures more or less drastic with regard to compulsory education in English, and the prohibition of the use of foreign languages in elementary schools.

It is a general rule that statutes pertaining to the same subject-matter should be construed together, and this is particularly so if the statutes were passed at the same session of the legislature. The general principle is that the legislature must be presumed to have in mind all previous legislation upon the subject, including statutes closely related, so that in the construction of this statute we must consider the pre-existing law, and any other acts relating to education or subjects of instruction, passed at the 1919 session, which may tend to elucidate the intention of the legislature.

The Compulsory Education Act of Nebraska, as amended in 1919, chapter 155, Laws 1919, requires that every child or youth, not less than seven nor more than sixteen years of age, shall, during each school year, attend public, private, denominational, or parochial day school for not less than twelve weeks, and, in the city and metropolitan city school districts, attend the full period of each public school year in which the public day schools are in session, with certain exceptions.

All private, denominational, and parochial schools, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of the school laws of the state as to the grades, qualifications, and certification of teachers. They are required to have adequate equipment and supplies, and shall have grades and courses of study substantially the same as

Statutes—  
construction—  
pari materia.

—pre-existing  
law.



the public schools where the children will attend in the absence of private, denominational, or parochial schools. Nothing in the act is to be construed as interfering with the religious instruction in such schools.

Instruction is required to be given in American history and in civil government, both state and national, such as will give the pupils a thorough knowledge of the history of our country, its Constitution, and our form of government, and such patriotic exercises shall be conducted as may be prescribed by the state superintendent. It is also provided that nothing in the act contained shall be so construed as to interfere with religious instruction in any private, denominational, or parochial school.

It is also settled law that where the general intent of the legislature may be readily discerned, and yet the language in which the law is expressed leaves the

—consideration  
of historical  
facts.

application of it in specific instances obscure, doubtful, ambiguous, or uncertain, the courts may have recourse to historical facts, or general public information, or the conditions of the country at and immediately prior to the passage of the law in order to aid them in interpreting its provisions. The language may be so indefinite that if construed in one way it may violate the Constitution, while, if construed in another equally permissible manner, its passage would not be inhibited. Since it ought never to be presumed

—construction  
to uphold  
validity.

that the legislature intended to violate the Constitution, the obvious and necessary construction to be given is that which will uphold the statute.

From a consideration of both of these statutes, as well as of chapters 248, 250, Laws 1919, it is clear that the purpose of the legislature was to abolish the teaching of foreign languages in elementary schools, when such schools are used for imparting the instruction re-

quired in the public schools, or using such languages as the medium of instruction; to provide that the standard of education prescribed for the elementary public schools should apply to all other schools; that the ordinary time and attention devoted to such instruction should not be diverted to other subjects, except as specified in the act; and that the same character of education should be had by all children, whether of foreign-born parents, or of native citizens. The ultimate object and end of the state in thus assuming control of the education of its pupils is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals, and to teach him love for his country and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men.

Philosophers long ago pointed out that the safety of a democracy or republic rests upon the intelligence and virtue of its citizens. "The safety of the people is the supreme law." The concept that the state is everything, and the individual merely one of its component parts, is repugnant to the ideals of democracy, individual independence, and liberty expressed in the Declaration of Rights, and afterwards established and carried out in the American Constitution. The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual.

The act as thus construed merely carries out the purpose of regulation to a greater extent than speci-

fied in the Compulsory Act. The term "school," as used therein, evidently means a school which presents a course of study such as those

**Definition—  
school.**

prescribed for the public schools, and attendance upon which would satisfy the requirements of the Compulsory Law. The intent evidently is that none of the time necessarily employed in teaching the elementary branches forming the public school curriculum shall be consumed in teaching the child a foreign language, since whatever time is devoted to such teaching in school hours must necessarily be taken away from the time which the state requires to be devoted to education carried on in the English language.

Furthermore, there is nothing in the act to prevent parents, teachers, or pastors from conveying religious or moral instruction in the language of the parents, or in any other language, or in teaching any other branch of learning or accomplishment, provided that such instruction is given at such time that it will not interfere with the required studies. The law only requires compulsory education for children not less than seven, nor more than sixteen years of age, for a period of not less than twelve weeks in certain districts, and a longer period in others. If a child has attended either the public or private school for the required time, it could not have been the intention of the legislature to bar its parents, either in person or through the medium of tutors or teachers employed, from teaching other studies as their wisdom might dictate. There can be no question of the cultural effect of the knowledge of a foreign language. There is nothing in this statute to interfere with teaching the Bohemian language on Saturday or Sunday, as is done by the intervening Bohemian schools of Omaha and South Omaha.

The assertion that it is necessary to teach Polish in order to teach English does not seem well founded. It is said several times in the briefs,

and it was said in the oral argument, that a number of statements in the petitions are admitted by the demurrer, and must be taken as true. In a general sense a demurrer admits the allegations of the petition, but it does not admit conclusions

**Pleading—  
demurrer—  
admission of  
conclusions.**

drawn from the facts stated. We think we are not bound to draw the conclusion that because children, when they first attend school, cannot understand or speak English, they must be taught the language of their parents, whether Polish or Bohemian, in order that they may learn English, otherwise no children of foreign-speaking parents attending the public schools, wherein no other language than English is spoken, could ever learn the language. It is common knowledge that the easiest way to learn a foreign language is to associate only with those who speak and use it. Of course, the occasional use of a few words of the language of the home in order to explain the meaning of English words would not, if good faith is used, violate the act, as seems to be feared.

The further objection is made by some of the interveners that, while they can understand and speak English to some extent, they are not sufficiently familiar with the language to give religious or moral instruction to their children in that language. There is no necessity that religious or moral teaching be given in English, and a parent who can speak and understand German, Polish, Bohemian, or any other language, can assuredly convey lessons of truth, morality, and righteousness in that language. So with respect to the complaint that the pastor, or the teachers in private or parochial schools, cannot give moral and religious instruction in English; it is not the medium through which such ideas are conveyed that is material; it is the lessons themselves which are essential to right conduct and good citizenship, and, as we construe it, there is

no prohibition in the act to interfere with such teaching in a foreign language. The contention made that, by virtue of § 2 of the act, no foreigner may be taught in any other language than English unless the pupil has successfully passed the eighth grade, as evidenced by a certificate issued by the county superintendent, must be taken as applying only to pupils attending public or private schools, and in the sense that a pupil in such schools may not there be taught any language other than English unless he has attained and passed the eighth grade. If the act should be construed to mean that no person could at any time be taught any other language than English unless possessed of a certificate of graduation issued by the county superintendent, it would be discriminatory as being an unreasonable exercise of the police power, and interfering with individual liberty.

If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminatory, and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity result, and no one can complain.

As to the allegations with respect to the invasion of property rights by depriving certain interveners of the value of the "good will" in their schools, no facts are alleged, but mere conclusions which are not admitted by the demurrer.

It has been said that this is a penal statute, and must be strictly construed. In a limited and restricted sense the statute may be penal, but in our opinion it is remedial in its nature. It is de-

signed to remove a condition seriously inimical to the public welfare. It must be reasonably construed, not alone by taking into account the words of the particular measure, but by considering the mischief which the legislature was endeavoring to remedy. If construed as plaintiffs and interveners contend, it could not be applied. If experience shows that the practical working of the act is harsh or inconvenient, even though valid and constitutional, the legislature will no doubt remedy its defects; and, if the legislation is unwise, those who are injured have an incentive to see that their views are represented in another legislature.

As to the contentions that the act is broader than its title, and that the subject of the 1st section is not embraced therein, it must be said that the title is exceedingly broad: "An Act Relating to the Teaching of Foreign Languages in the State of Nebraska." The prohibition of the teaching of any other language than English in the 1st section clearly has relation to the teaching of foreign languages, and is within the title. The other section also "relates" to such teaching.

It has also been urged that the statute is unreasonable, and is therefore void. An unreasonable law is not necessarily unconstitutional, and the remedy for such an enactment is with the legislature, by way of amendment or repeal.

It has been said by the United States Supreme Court in *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, in dealing with the court's interference with the operation of a regulative statute, that "unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unneces-

Constitutional law—prohibiting foreign language in school—validity.

Statute—sufficiency of title.

School—foreign language—discrimination.

—prohibiting foreign language.

Constitutional law—unreasonableness of statute—effect.

sarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law [they do not extend beyond the power of the state to pass, and they form no subject for Federal interference"]. *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

Neither the Constitution of the state nor the 14th Amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order. "If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks, if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer, nor become embittered towards society because, though an industry has crippled him, it has paid him nothing, if acts aiming to make better citizens by diminishing the chances of pauperism are sustained,

if it is competent for the state to protect the minor from impoverishing himself by contract, it surely is not an arbitrary exercise of the functions of the state to insist" that the fundamental basis of the education of its citizens shall be a knowledge of the language, history, and nature of the government of the United States, and to prohibit anything which may interfere with such an education. Laws, the purposes of which are, with respect to foreign-language-speaking children, to give them such training that they may know and understand their privileges, duties, powers, and responsibilities as American citizens, which seek to prevent a foreign language from being used as the medium of instruction in other branches, and as the basis of their education, are certainly conducive to the public welfare, and are not obnoxious to any provision of either the state or Federal Constitution.

Affirmed.

Cornish, J., dissents.

### ANNOTATION.

#### Validity of statute or other regulations as to the use, or teaching, of foreign languages in schools.

There is very little in the books on this subject.

It will be seen that it is held in the reported case (*NEBRASKA DIST. v. MCKELVIE*, ante, 1688) that the legislature might provide that foreign languages should not be taught in the public schools except to pupils who had passed a certain grade; but that the court states that if the statute in question should be construed to mean that no person could at any time, in or out of school, be taught any other language than English unless possessed of a certificate of graduation issued by the county superintendent, it would be discriminatory, as being an unreasonable exercise of the police power and interfering with individual liberty.

It may be said, in general, that the matter is in the control of the legis-

lature, and that the teaching of a foreign language does not transgress regulations that the medium of instruction shall be the English language.

Under constitutional provisions that "the general assembly shall provide a thorough and efficient system of free schools, whereby all the children of the state may receive a good common-school education," and statutory provisions that schools "shall be for the instruction in the branches of education prescribed in the qualifications for teachers, and in such other branches, including vocal music and drawing, as the directors, or the voters of the district, at the annual election of directors, may prescribe," in *Green v. Chicago* (1881) 97 Ill. 370, it was held that there could "be no valid objection to teaching German or other

modern language as a branch of study in common schools, 'as the directors, or the voters of the district at the annual election of directors, may prescribe,' where the medium of instruction in such schools is the English language." The court said: "We may take judicial notice of what is generally known,—that the German and other modern languages have been taught in the common schools in many localities in the state. For many years modern languages have constituted 'other branches' of study in the common schools, and the legislature has not seen fit to forbid the course adopted. The teaching of modern languages in our common schools has been too long acquiesced in to be now changed, except by legislative action, if done at all. It ought not to be done by judicial construction."

Where the Constitution provides that "the legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments," and it was provided by statute "that in each and every school district shall be taught orthography, reading, writing, English grammar, geography, and arithmetic, and such other branches as may be determined by the district board: Provided, that the instructions given in the several branches taught shall be in the English language," it was held, where a city board of education had power to establish high schools, that Latin and German were properly taught in such high school. The court said: "An education acquired through the medium of the English language is an English education. If the same branches were taught in the Latin or the German language, it would not be an English education; but the mere fact that the Latin and German languages are taught does not change the character of the school from an English one. The common-school medium of instruction is the English language, in accordance with the provisions of the statute." Board of Ed-

ucation v. Welch (1893) 51 Kan. 792, 33 Pac. 654.

In *Stuart v. School Dist.* (1874) 30 Mich. 69, the court sustained "the right of school authorities, in what are called union school districts of the state, to levy taxes upon the general public for the support of what in this state are known as high schools, and to make free by such taxation the instruction of children in other languages than the English." *Cooley, J.*, said, *inter alia*: "It now becomes important to see whether the constitutional convention and the people, in 1850, did anything to undo what previously had been accomplished towards furnishing high schools as a part of the primary school system. The convention certainly did nothing to that end. On the contrary, they demonstrated in the most unmistakable manner that they cherished no such desire or purpose. The article on education as originally reported, while providing for free schools to be kept in each district at least three months in every year, added that 'the English language and no other shall be taught in such schools.' Attention was called to this provision, and it was amended so as to read that instruction should be 'conducted in the English language.' The reason for the change was fully given; that, as it was reported, it might be understood to prohibit the teaching of other languages than the English in the primary schools, a result that was not desired. Judge Whipple stated in the convention that in the section from which he came French and German were taught, and 'it is a most valuable improvement of the common-school system.' The late Superintendent Pierce said that in some schools Latin was taught, and that he himself had taught Latin in a common school. He would not adopt any provision by which any knowledge would be excluded. 'All that we ought to do is this: we should say the legislature shall establish primary schools.' This, in his opinion, would give full power, and the details could be left to legislation."

In *Newman v. Thompson* (1887) 9 Ky. L. Rep. 199, 4 S. W. 341, the court

said: "That Latin and Greek are taught in the school is not in violation of the act under which this tax is collected, nor is the teaching of such branches of learning in violation of the common-school law of the state. If the ordinary branches of education are taught, and the school open to all, the fact that the teacher may have a class in Latin or Greek should not prevent the collection of the tax, or authorize an injunction against him or the trustees to prevent it. A system of education adopted in the particular district in aid of the common-school fund authorized by the legislature by which a tax is imposed that the school may be taught the entire year, or the higher branches of education brought within reach of all the children, is not in violation of the Constitution, state or Federal."

In *State ex rel. Thayer v. School Dist.* (1916) 99 Neb. 338, 156 N. W. 641, the court sustained a statute providing that "in every high school, city school or metropolitan school in this state the proper authorities of such school districts shall upon the written request, when made at least three months before the opening of the fall term of such school, by the parents or guardians of fifty pupils above the fourth grade, then attending such school, employ competent teachers and

provide for the teaching therein, above the fourth grade, as an elective course of study, of such modern European language as may be designated in such request: Provided, that not more than five hours each week and not less than one period each day shall be devoted to the teaching of any such modern European language in any elementary or grade school." It was held that the matter was one for the legislature.

The teaching of the German language as a branch of study in "any school of a township, town, or city," which is required by statute, on demand of the parents or guardians of twenty-five or more children, cannot be restricted by the board of school commissioners of a city to schools of certain grades, but may be compelled in any place in the city where a public school is taught with its complement of teachers and scholars." *School Comrs. v. State* (1891) 129 Ind. 14, 13 L.R.A. 147, 28 N. E. 61, where the statute further provided that "the common schools of the state shall be taught in the English language."

In *Roach v. St. Louis Public Schools* (1883) 77 Mo. 484, it was held that where the legislature has committed the control over the school fund to the city without conditions, the courts cannot restrict the languages taught.  
B. B. B.

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GEORGE A. LINCOLN, Appt.,

v.

APPALACHIAN CORPORATION OF LOUISIANA.

*Louisiana Supreme Court — November 3, 1919.*

(146 La. —, 83 So. 364.)

**Negligence — unsafe property — duty to employee of detective agency.**

1. The owner of a building owes the employees of a detective agency employed to watch the building the duty of exercising ordinary care to have the premises reasonably safe for the performance of their duties.

[See note on this question beginning on page 1701.]

**Master and servant — negligence with respect to fire door.**

2. An employer is negligent in permitting a heavy fire door, so hung as to close of its own weight, to be with-

out its counterbalance and to be left off the track, so as to be likely to fall upon one attempting to pass through it.

[See 18 R. C. L. 560, 593.]

**Damages — injury to spine.**

3. Three thousand dollars will be allowed as damages for injury to a watchman, sixty-eight years old, earning \$45 or \$50 per month, by the fall

upon him of a heavy door which dislocates or fractures his spine, keeps him in the hospital for three months, and prevents his earning anything up to time of trial six months later.

**APPEAL** by plaintiff from a judgment of the Civil District Court for the Parish of Orleans (Théard, J.) in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Walter S. Lewis, for appellant:

Defendant owed plaintiff the duty to keep the premises safe.

Cristadora v. Von Behren, 119 La. 1025, 17 L.R.A.(N.S.) 1161, 44 So. 852; Ciaccio v. Carbajal, 142 La. 126, 76 So. 583.

Ignorance of defect is no excuse, and does not relieve the owner from liability.

Tucker v. Illinois C. R. Co. 42 La. Ann. 114, 7 So. 124.

The owner is rendered liable from the policy of the law alone.

Camp v. Church of St. Louis, 7 La. Ann. 325; Lochbaum v. Southwestern Box & Lumber Mfg. Co. 121 La. 176, 46 So. 201.

The doctrine of *res ipsa loquitur* applies to the facts of this case.

Caldwell v. Vicksburg, S. & P. R. Co. 41 La. Ann. 624, 6 So. 217; Lawson v. Shreveport Waterworks Co. 111 La. 73, 35 So. 390; White v. Maison Blanche Co. 142 La. 266, 76 So. 708.

As to the quantum of damages, plaintiff is entitled to \$7,500.

Landix v. New Orleans R. & Light Co. 140 La. 530, 73 So. 667; Guidry v. Morgan's Louisiana & T. R. & S. S. Co. 140 La. 1007, L.R.A.1917D, 962, 74 So. 534; Francois v. Maison Blanche Realty Co. 134 La. 215, 63 So. 880, Ann. Cas. 1916B, 451.

Messrs. Hall, Monroe, & Lemann, for appellee:

The doctrine of *res ipsa loquitur* has no application where the thing causing the injury was, at the moment of the accident, being used by the plaintiff himself.

29 Cyc. 522; Midland Valley R. Co. v. Fulgham, L.R.A.1917E, 52, note; Stewart & Co. v. Harman, 108 Md. 446, 20 L.R.A.(N.S.) 228, 70 Atl. 333; Drum v. New England Cotton Yarn Co. 180 Mass. 113, 61 N. E. 812; Dingley v. Star Knitting Co. 184 N. Y. 552, 32 N. E. 35; McGinnis v. New York C. & H. R. R. Co. 144 App. Div. 835, 129 N. Y. Supp. 502; Henry v. Bracken-

ridge Lumber Co. 48 La. Ann. 950, 20 So. 221; O'Donnell v. American Mfg. Co. 112 La. 720, 36 So. 661; Patterson v. New Orleans G. N. R. Co. 127 La. 441, L.R.A.1917E, 210, 53 So. 406; Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136.

Plaintiff must not merely make his case probable; he must make it certain.

Giarruso v. New Orleans R. & Light Co. 131 La. 559, 59 So. 979; Adams v. Germaine & B. Lumber Co. 130 La. 920, 58 So. 815.

In cases involving issues of fact, the judgment of the trial court, who saw and heard the witnesses, will not be disturbed except for manifest error.

Harrison v. Goldberg, 133 La. 389, 63 So. 59; Schwartzberg v. Schwartzberg, 133 La. 294, 70 So. 230.

The injury to the plaintiff was due to the action of an employee of the Brooklyn Cooperage Company in closing the door under the directions of another employee of the company, and this defendant is not responsible for either.

Gallagher v. Southwestern Exposition Asso. 28 La. Ann. 943; 29 Cyc. 477; Manning v. Sherman, 110 Me. 332, 46 L.R.A.(N.S.) 126, 86 Atl. 245, Ann. Cas. 1914D, 89; Wright v. Big Rapids Door & Blind Mfg. Co. 124 Mich. 91, 50 L.R.A. 495, 82 N. W. 829; Leavitt v. Williams, 116 Me. 347, L.R.A.1918A, 610, 102 Atl. 39; 2 Thomp. Neg. p. 1089; Whart. Neg. § 134.

The judgment of \$3,000 is grossly excessive.

White v. Maison Blanche Co. 142 La. 265, 76 So. 708; Denby v. Hule Hodge Lumber Co. 142 La. 403, 76 So. 817; Miller v. Tall Timber Co. 143 La. 269, 78 So. 555; Lanier v. Hammond Lumber Co. 141 La. 829, 75 So. 738.

Dawkins, J., delivered the opinion of the court:

Plaintiff appeals from a judgment rejecting his demands for damages

on account of personal injuries alleged to have been received through the fault and negligence of defendant. The defense is a general denial, coupled with pleas of contributory negligence and assumed risk.

Plaintiff was employed by the Boylan Detective Agency, a private concern, which, up to July 23, 1917, had furnished the Brooklyn Cooperage Company with day and night watchmen for its building occupying the entire square bounded by Erato, Thalia, South Peters, and South Front streets in the city of New Orleans. About that date, the property was acquired by the defendant herein, who continued the arrangement for guarding the building with the Boylan Detective Agency.

Under his employment, plaintiff was required to report on the premises for duty at 5:30 P. M., and watch the same until 6 A. M., at which hour he was relieved by the day watchman employed by the same agency. His duties required that he pass through the building at regular intervals, and that he register his presence by sending in signals to a central station.

The building was divided into several rooms or compartments, with doors or openings from one to the other, which were kept closed when not in use by large metal fire doors weighing several hundred pounds each; the idea being that, if fire should break out in one compartment of the building, these doors would prevent its spreading to others. The doors were supported by wheels or rollers attached to the tops, which rested and moved upon a stationary rail or bar fastened to the wall above the opening. The rail or track was not constructed exactly on the horizontal plane, but dipped or inclined downward in the direction in which the door moved when closing, so that its weight might aid in closing; and there was or should have been attached to the outer edge or end a weight which was designed for the double purpose of facilitating the movement of the door, and for hold-

ing it open when the opening was being used. This weight was suspended on a cord or rope made of a substance which would melt at a given temperature. If fire broke out, the cord would break when that temperature was reached in the building, thus releasing the door and permitting it to close automatically and preventing the spread of the fire. There were some eighteen or twenty of these large doors which plaintiff was required to open and close in his rounds of the building during the night. However, the one by which plaintiff was injured was usually kept open.

On July 26, 1917, plaintiff reported for duty at the usual hour, received the keys from the day watchman, and started on his rounds. He went to the door which opened from the wareroom into the boiler room, and, contrary to custom, found it closed. Taking hold of the edge of the wall or facing with one hand, he endeavored to push the door up and open with the other, when its upper end, in some way, became disengaged from the track or rail, and began to fall forward and toward plaintiff. He attempted to brace or hold it up and off of himself, but, on account of its great weight—some 800 pounds—was unable to do so, and it fell, pinning plaintiff to the floor from above the waist down. There he remained, unable to extricate himself, for about half an hour. Eventually, his cries for help attracted the attention of a passer-by, and through the combined efforts of two or three men the door was removed and plaintiff was taken to the Charity Hospital, where he remained for some two weeks, later being removed to a private sanitarium, and from which he was discharged some time in October.

Plaintiff's injuries in the region of the lower part of his back were quite serious, the fifth lumbar vertebra having been dislocated or fractured, and other bruises and contusions were received from which he suffered severely. Up to the date



of the trial in the court below in April, 1918, he had been able to do very little work, and had earned practically nothing. Plaintiff was sixty-eight years of age and had followed the same or similar employment for a long number of years, and his salary at the time was between \$45 and \$50 per month.

There is evidence in the record tending to show that plaintiff was somewhat rough and careless in handling these doors, as occasionally one had been found off the rail or track early in the morning when no one else had been in the building or had any occasion for opening and shutting them during the previous night but plaintiff. Possibly on two or three occasions, doors had been found down and had been replaced. This method of hanging and operating the doors seems to have been in use in this particular building some twenty-five years, and, while it would seem to the uninitiated, at first glance, that a door of such great weight, in which there existed the possibility of its jumping off the track and falling to the floor, should have been protected by a guard rail or bar which would have held it up under such circumstances, that point is touched very meagerly in the record. However, the evidence shows conclusively that this particular door was kept open, and plaintiff had had no occasion to handle it before; that it had been closed by the engineer on the afternoon of the day that plaintiff was injured, under orders from the manager or superintendent, and was so found by plaintiff when he attempted to open it. It is also fairly established that the weight which should have been attached to the outer edge to facilitate its opening was not there, and that, instead, the door was probably tied to an iron pipe while open. The record further shows that the thing which caused this and the other doors to jump the tracks was rapid closing, which brought their inner edges in violent contact with the bumpers or facings of the doors, thereby causing them to bounce off

the rail. We can see no reason, and none has been shown, why the operation of pushing the door open should have thrown it off the track. The conclusion, therefore, seems irresistible that this particular door must have been thrown off the rail by the act of closing it during the afternoon of the day plaintiff was injured, and this is accentuated by the fact that there was no weight attached to the outer edge, and it probably closed more violently than it would have under the steadying effect of a weight. If this were true, the door simply stood in an upright position, in contact with but not on the rail, and, when the force of plaintiff's effort to push it open was applied, it was disengaged and fell upon him.

Plaintiff denied having been warned by the day watchman, under instructions from the manager, on the occasions when other doors had been found off the rails, against such rough handling; but we think the affirmative of this contention is fairly established. Still, we do not see how this can affect the matter in view of the circumstances under which he was injured by the particular door in question. We think defendant is convicted of negligence, both in its failure to have the door in question provided with a proper weight to permit closing normally, and in the act of the engineer, who was instructed to close the door by the manager, in closing it in such a manner as to leave it off the rail, thus forming a trap into which the plaintiff fell when he attempted to push it open.

Plaintiff was not the employee of the defendant, in the strict sense; he having been employed, as above indicated, by the Boylan Detective Agency, who held the watching of the building under contract. But its duty to him, in providing proper tools and appliances, and in furnishing a safe place to perform his duties, was, for all practical pur-

Master and  
servant—  
negligence  
with respect  
to fire door.

poses, the same as if he had been an employee; not because of any contractual relation, but because of the duty to use "ordinary care" towards those who worked on its premises for its benefit and with its knowledge and consent. See cases cited in note to Cleveland, C. C. & St. L. R. Co. v. Berry, 46 L.R.A. 52; 1 Thomp. Neg. p. 898, §§ 979, 980; Stevens v. United Gas & E. Co. 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 852; and authorities cited.

Negligence—  
unsafe property  
—duty to  
employee of de-  
tective agency.

Considering his age and earning capacity, we think a judgment of \$3,000 would reasonably compensate for his injuries under all the circumstances.

Damages—  
injury to spine.

The testimony of the X-ray experts conflicts as to the extent of plaintiff's injuries, but that of the one who made the examination about the time of the accident seems to be corroborated by the physical circumstances, the length of time which plaintiff was required to remain in hospital, and his inability to perform any work of consequence even up to the time of the trial.

It is true that defendant had only acquired the property a few days prior to the accident, but it is not disputed that its legal relation to the matter is the same as would have been that of the Brooklyn Cooperage Company, had the building not been sold.

For the reasons assigned, the judgment appealed from is annulled and reversed, and it is now ordered, adjudged, and decreed that the plaintiff have and recover of the defendant judgment in the full sum of \$3,000, with legal interest from judicial demand, and that the defendant pay costs of both courts.

Monroe, Ch. J., takes no part.

Petition for rehearing denied December 1, 1919.

## ANNOTATION.

### Duty of owner or occupant of building to watchman or caretaker furnished by detective agency.

Although the duty of the owner or occupant of a building to persons on the premises either by express or implied invitation has been considered by the courts in numerous instances, an exhaustive search of the authorities discloses no other cases considering the precise question involved in the reported case (LINCOLN v. APPALACHIAN CORP. ante, 1697). It is held in that case that although a person furnished by a detective agency to guard the interior of a building is

not an employee of the owner of the building in a strict sense, the owner's duty to him, in providing proper tools and appliances, and in furnishing a safe place in which to perform his duties, is, for all practical purposes, the same as if he was an employee, not because of any contractual relation, but because of the duty to use ordinary care towards those who work on the premises for the benefit and with the knowledge and consent of the owner.

W. F. F.



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